SHERIFF APPEAL COURT

[2018] SAC (Civ) 20
PAI-B164-18

Sheriff Principal I R Abercrombie QC
Appeal Sheriff A L MacFadyen
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by APPEAL SHERIFF N McFADYEN

in appeal by stated case
in terms of section 163 of the Children's Hearings (Scotland) Act 2011

by

JULIE PATERSON, Locality Reporter Manager, Paisley, the Scottish Children's Reporter Administration, 10 Glen Lane, Paisley

Appellant

in respect of

The Child CO or W

Respondent

L W (Mother)

Relevant Person

Appellant: Flannigan; Anderson Strathern
Respondent: Inglis, advocate; Rutherford Sheridan Ltd
Relevant Person: Mason, advocate; Hunter and Robertson

16 August 2018

[1] This is an appeal by the Locality Reporter Manager (Paisley) by way of stated case in terms of section 163 of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"). The

appeal lies from the decision of the sheriff at Paisley to hold that the decision of the Children's Hearing to continue a compulsory supervision order (CSO) on 27 February 2018 in respect of the child 'CO or W', who was then and still is 15 years old, was not justified because it contained the (sole) measure that

> "the implementation authority will provide appropriate supervision and support to the child"

and, it was found by the sheriff, that measure was incompetent as not falling within the definition of "measure" in section 83(2) of the 2011 Act.

Background

[2] The child was accommodated by the local authority under a child protection order (CPO) granted by the sheriff and thereafter a series of Interim Compulsory Supervision Orders (ICSOs) was issued by Children's Hearings, prior to grounds being established on 8 February 2016. The ground established was that the child had or was likely to have a close connection with a person who had carried out domestic abuse (section 67(2)(f)), namely his mother's partner. A CSO (Compulsory Supervision Order) was made on 18 March 2016, which did not contain the measure at issue, although it had been included in earlier ICSOs made by the Children's Hearing and/or continued by the sheriff.

[3] Various further orders were made – including two further CPOs – and further grounds were established at Paisley Sheriff Court on 1 November 2016, again on the basis that the child had or was likely to have a close connection with a person who had carried out domestic abuse (section 67(2)(f)), namely his mother's partner. The 18 March 2016 CSO was continued with varied and specified measures, but not the measure at issue, although it was

included as the sole measure when the CSO was varied on 7 March 2017, at which time the child was legally represented. That decision was not appealed. On 26 September 2017 a review Children's Hearing, before which the child was again legally represented, continued the CSO with the same sole measure. Again there was no appeal.

[4] The review hearing on 27 February 2018 was convened at the request of the solicitor for the child, in order to review the continued CSO made on 26 September 2017. It continued the CSO with the same sole measure. That was the subject of the appeal to the sheriff.

[5] The sheriff upheld the submission by the solicitor for the child, with whom the mother and the solicitor for the step-father were in agreement, that the measure was not a competent measure as defined in section 83(1) and (2) of the 2011 Act. The CSO required to include at least one measure as mentioned in section 83(2) and the only measure under which the measure imposed could arguably fall was that specified in section 83(2)(i):

> "a requirement that the implementation authority carry out specified duties in relation to the child".

[6] The sheriff concluded that any measures included in a CSO were "over and above and entirely separate from" the general duties imposed on the local authority as implementation authority in respect of a child looked after by them by section 17 of the Children (Scotland) Act 1995 which included in subsection (1)(a), the duty to

> "safeguard and promote his welfare (which shall, in the exercise of their duty to him be their paramount concern)".

A child who is the subject of a compulsory supervision order in which the local authority is the implementation authority is looked after in terms of the 1995 Act: section 17(6)(b) (as amended).

[7] The sheriff accepted the position of the solicitor for the child that the measure specified in the CSO was insufficiently specific, did not impose a requirement to carry out "specified duties" and was in effect a re-statement of the duties otherwise incumbent on the implementation authority under section 17 of the 1995 Act. The sheriff took the view that the phrase "specified duties" was inserted by Parliament to differentiate and distinguish the measures specified from the general duties otherwise incumbent on a local authority by virtue of section 17 of the 1995 Act. He expressed the view that a specified duty should be clear and unambiguous and the measure imposed was neither. He concluded this was a material procedural irregularity. He did not, however, accede to the motion of the solicitor for the child to terminate the CSO under section 156(3)(b) of the 2011 Act, since he accepted the conclusions of the Children's Hearing that a CSO was necessary given the child's vulnerability and he accordingly required the Principal Reporter to arrange a Children's Hearing to review the CSO, under section 156(3)(a).

Submissions

Appellant

[8] The solicitor for the appellant submitted that the measure was prima facie sufficiently specified and should be read in context, including that of the reasons provided in support of the decision. The Children's Hearing had concluded that the child needed the support of a CSO and specifically the support which social work could offer; they could not be satisfied that he would cooperate voluntarily and indeed he and his mother had indicated they wanted social work out of his life. The solicitor distinguished section 17 of the 1995 Act: it did not require the child to accept any services offered and in any event the words

"provide appropriate supervision and support to the child" do not appear in section 17. The measure should be read in the context not only of the reasons given but also the background reports prepared for the Hearing which included the Social Work Child's Plan which set out 14 pages of specific outcomes for the child and the actions, including those allocated to social work, designed to achieve these outcomes. The sheriff had failed to read the measure in its proper context. Prescriptive specification may impede the workability and implementation of the order by the implementation authority.

[9] The measure had been included in previous CSOs with no practical difficulty and none raised by the child or his solicitor who had not suggested any alternative specification. Indeed, we were told that the measure is a standard one, which features in the Children's Hearing Practice and Procedure Manual and has been used since the 2011 Act came into force, without challenge.

[10] We were referred to *C* v *Miller* 2003 SLT 1379 generally on the question of irregularity and to *Locality Manager* v *AM* [2017] SAC (Civ) 36, 2018 Fam LR 14 at [26] where this court specifically noted that the Children's Hearing comprises lay persons who should not be overburdened with the requirement of strict and technical compliance with legislative requirements and a procedural irregularity must be of such seriousness that it was "damaging to proceedings" (referring to *C* v *Miller* at [71]).

Respondent

[11] Counsel for the respondent invited us to refuse the appeal. He submitted that the Hearing had given no reasons for its decision to specify the measure in question, leaving the relevant part of the form blank, but having stated reasons for continuing the CSO. We were

referred to *Kennedy* v *M* 1995 SLT 717 at 723G which made it clear that the statement of reasons (under the predecessor provisions) should be a clear statement of the material considerations to which the Hearing had regard in their decision and "must be intelligible to the persons to whom it is addressed and deal with all the substantial questions which were the subject of the decision". The Reporter was incorrect in submitting that the court could look at the reasons stated for continuing the CSO.

[12] It was necessary to look at the wording of the statute and determine what that means. He accepted that Children's Hearing proceedings should not be obstructed by unnecessary technicality, but the court was concerned with substantive law – *Locality Manager* v *AM* at [21]: while the procedure may be informal, the substantive law to be applied was not open to flexible interpretation.

[13] He submitted that the word "specified" in section 83(2)(i) was an ordinary English word derived from the word "specific" and carried with it an obligation of particularity. The child's solicitor maintained that he had asked the Hearing to identify the factors in the Child's Plan Review which the hearing was authorising in making the order it did. He had not done so on previous occasions when such a measure was specified.

[14] The measure specified was free-standing and did not refer to the Child's Plan. It should have been made clear what the local authority could require of the child and in any event he must know to what extent the local authority was entitled to implement the plan. The measure should have specified which particular duties the local authority should carry out, perhaps using the plan as a menu. Counsel did, however, concede that it would have been sufficient for the measure to relate generally to the Plan, eg by adding the qualification "in accordance with the Child's Plan".

[15] He submitted that the Hearing was not entitled to make any decision which conflicted with a proper construction of the statute. He observed that the other measures described in section 83(2) were highly specific and it would be inconsistent with legislative clarity if a measure specified under section 83(2)(i) lacked specification.

Relevant Person

[16] Counsel for the mother also conceded that the measure would be competently specified if it referred to the Plan, but submitted that as things stood the order was wider than the Plan. He adopted the respondent's arguments.

Further submissions

[17] In brief further submissions the solicitor for the appellant submitted that the failure to specify reasons for the measure specified was simply down to unfortunate expression on the form – the detailed reasons given with regard to the decision to continue the CSO were clearly also referable to the measure. The child was well aware of what was required by the Child's Plan and indeed had expressed his agreement with the Plan when it was discussed with him – he had simply changed his mind since then about social work involvement. It would impede flexibility if the measure specifically referred to and was constrained by the Plan. An example of potential difficulty would be if the child became homeless – the implementation authority would wish and need to react swiftly to such a problem.

Discussion and Decision

[18] We do not consider it is helpful to get bogged down in issues of competence or otherwise of measures. The test for appeal to the sheriff – and indeed this court – is whether the decision was justified (2011 Act, section 156). If the decision is one which the Hearing was not entitled to make it cannot be justified.

[19] A CSO is an order which includes any of the measures mentioned in section 83(2) of the 2011 Act (Section 83(1)). Thus a CSO must contain one or more measures. Among the measures which the Children's Hearing can include in a CSO is that set out in section 83(2)(i), which reads:

> "a requirement that the implementation authority carry out specified duties in relation to the child."

It was accepted by all parties that the measure complained of in the appeal to the sheriff was made under section 83(2)(i).

[20] We were told that this measure is a standard one, routinely specified since the 2011 Act came into force and featuring in the relevant Manual for Hearings. It is not clear that the sheriff was told that and it is in any event unfortunate that neither in the sheriff court nor in this court was it thought fit to produce the relevant passage from the Manual (although it was offered to us in the course of the hearing of the appeal). Of course, it does not follow from the fact that something has been done for years, without apparent objection, that it is necessarily justified, but any court faced with a challenge to what has become a standard measure should examine with particular care any challenge which is brought, especially where it is a measure which has featured repeatedly in the same case and without any previous objection being raised on behalf of the legally represented child.

[21] We do not consider that a plain reading of words requires "specified" to be read as demanding that the content is particularly "specific". The words plainly have a common root, but we were presented with nothing other than bare argument to support the dubious contention that the word specified in some way derives from the word specific.

[22] Nor do we think that the existence of a general duty upon the implementation authority in terms of section 17 of the 1995 Act somehow impacts on what is required in a measure specified under section 83(2)(i) of the 2011 Act. As the solicitor for the appellant observed, the wording of the measure and the duty in section 17 are different and there is nothing in section 17 requiring the child to accept any services offered. It is, of course, only because the CSO was made and continued that section 17 comes into play at all.

[23] It is not for us to say that the measure which was specified by the Hearing in this case will always be appropriate where a CSO is required and no other measure specified in section 83(2) is necessary. Whether any measure is justified will depend on the facts of the case. But in this case it was ultimately conceded for the respondent and the relevant person that it would have been sufficient if the measure had referred expressly to the Child's Plan, without further specification.

[24] In our view the continued CSO is not a stand-alone document to be considered in isolation. It has to be read along with the record of proceedings, which in this case included the Child's Multi Agency Assessment and Plan (CMAP assessment) and the Child's Plan Review.

[25] The respondent was unable to identify anything in the Plan Review which was contentious. Nor did he suggest that it was unreasonable to infer that the hearing had

accepted all of the Plan Review recommendations in respect of the duties to be carried out by the appellant. His complaint ultimately came to be that the hearing should have said so.

[26] The Plan Review clearly specifies duties on the appellant particularly, for example, when the child is out in the community, at home, riding dirt/motorbikes and providing a safe place to stay.

[27] We consider therefore that there is no substance to the respondent's submission that the child was not clear about the specified duties which the implementation authority would carry out in relation to him.

[28] As we have said it is always necessary in such cases to consider the decision and the stated reasons. There is nothing in the respondent's argument that no reasons are stated for the decision to specify the offending measure, because it is crystal clear from reading the very extensive reasons for continuing the CSO – running to a full page of closely typed text – that the Hearing specifically addressed the reasons for the measure as well as generally for continuing the CSO (including, for example, direct reference to supporting the child with courses and finances to pursue specific possible employment). It is clear to us that the simply worded measure is properly read in the context both of the detailed reasons stated by the Hearing and the Child's Plan which formed the basis of the discussion before the Hearing.

[29] Given that context and the concession made by the respondent and the relevant person it seems to us that the general ambit of the measure in this case is clear and that the Hearing was justified in continuing the CSO with the single measure specified, accepting as we do that the measure as thus specified would and should allow some reasonable flexibility to deal with unanticipated developments. We note in any event that it was and is

open to the child to request that the Hearing review the CSO and measure after three months.

[30] Accordingly, we shall allow the appeal, answer the question in the stated case in the affirmative, and remit to the sheriff with a direction that he should confirm the decision of the Children's Hearing dated 27 February 2018.