SHERIFF APPEAL COURT

[2018] SAC (Civ) 3
GLW-AD39-17

Sheriff Principal MW Lewis
Sheriff Principal DL Murray
Appeal Sheriff W Holligan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL MW LEWIS

in appeal by

CE

First Respondent and Appellant

and

EE

Second Respondent and Appellant

against

GLASGOW CITY COUNCIL

Petitioner and Respondent

First Respondent and Appellant: M Hughes; Livingstone Brown
Second Respondent and Appellant: Wild; Browns Solicitors
Petitioner and Respondent: Dowdalls QC; JK Cameron

Edinburgh, 9 February 2018

[1] Glasgow City Council applied to the sheriff at Glasgow for a permanence order under section 80 of the Adoption and Children (Scotland) Act 2007. The application relates to D, who is now aged 11 years and has been in the Scottish care system since 2009. The

application is opposed by the child's parents, CE and EE. After proof the sheriff granted the permanence order. The parents challenge that decision.

Background

[2] The appellants are Nigerian citizens. They were married in Nigeria in 1994. They have four children. C (aged 21 years), J (aged 19) and S (aged 16) were born in Nigeria. In Easter 2005 the family came to London on holiday. The second appellant became ill and a decision was made by the appellants to remain in the United Kingdom with their children. D was born in London on 19 June 2006. For financial reasons the family moved to Glasgow in 2007. By December 2007 the family came to the attention of social work services, and thereafter remained under its gaze.

[3] On 6 March 2009, S reported to the school staff that she had been beaten at home by her parents. As a result of the information provided by S during a joint interview by police and social workers, a child protection investigation was initiated and the children were accommodated on a voluntary basis. During the investigation, S was examined by a consultant paediatrician at the Royal Hospital for Sick Children in Glasgow and was found to have numerous non-accidental injuries. During interview by police and social workers, C and J alleged that they had been beaten by the appellants with various objects including sticks, spoons and belts.

[4] Child protection orders were obtained on 9 March 2009 and place of safety warrants were granted on 11 March 2009.

[5] Two separate applications in respect of each child, one dated 12 March 2009 and the other dated 15 April 2009, were brought by the local authority to the Children's Hearing under section 52(2)(d) and 52(2)(e) of the Children (Scotland) Act 1995. The applications

collectively asserted that the appellants had beaten C, J and S to their injury and that the appellants struck S with objects resulting in cuts, bruises, abrasions, and a fracture and dislocation to her left thumb, as well as burns resulting from being wedged against a hot radiator. On 5 August 2009 the grounds of referral were accepted by the appellants.

[6] On 26 August the Children's Hearing made a supervision requirement in respect of the four children. A condition of no contact was attached to the supervision requirements. On 30 September 2009 a Permanence Review Panel decided to seek Permanence Orders for each child because the social workers believed that there was a serious risk of recurrence of physical assaults on the children by the parents.

[7] D's name was placed on the National Adoption Register. A UK wide search was conducted for suitable adoptive parents, but none could be found.

[8] On 21 May 2010 at Glasgow Sheriff Court the appellants pleaded guilty on indictment to amended charges of assault in respect of C, J and S. On 18 June 2010 the appellants were each made the subject of a probation order of 12 months duration.

[9] The appellants practice the Jehovah's Witness faith. They maintained to the social workers that their methods of discipline were cultural and consistent with the teachings of their church. Throughout the entire process, the appellants minimised the extent of their abusive behaviour towards C, J and S, repeatedly justified the abuse and consistently refused to recognise the impact of this behaviour on the children despite the admissions made to social workers, the accepted grounds of referral and the pleas of guilty to the amended indictment.

[10] Each of D's early placements broke down. In May 2013 she was placed with Mr and Mrs B. They are her current foster carers and have provided D with a much needed sense of constancy. D is well looked after and is thriving in their care.

[11] D has had no direct contact with her parents since being accommodated in March 2007. In May 2011 the Children's Hearing, having considered a report prepared by Professor Thomas MacKay, psychologist, varied C's supervision requirement to allow indirect letterbox contact with the respondents. Since then she has received letters and cards from her parents and in 2016 some gifts, which she returned. She continues to receive cards and letters from her parents, but does not communicate with them. D has no desire to return to the care of her parents.

[12] In 2014 the Children's Hearing instructed an assessment of the appellants. The assessment was carried out by Dr Christine Puckering, consultant clinical psychologist. She recommended that D should not be returned to the care of the appellants. The first appellant instructed a report from Dr John Marshall, consultant clinical psychologist. Dr Marshall concluded that D should not be returned to the care of her parents.

[13] In August 2016 the mother shared a piece of video footage on her Facebook page. The footage promotes physical chastisement involving the use of a belt as an appropriate form of child discipline.

[14] During their placements, C, J and S made additional allegations to social workers and to their respective foster carers about abuse inflicted on them by their parents. (These allegations go beyond the terms of the established grounds of referral and the amended charges on the indictment to which the appellants pled guilty).

[15] At the proof the appellants continued to minimise their behaviour and the impact of it on the children. The first appellant maintained that she had changed her view of physical chastisement of children and recognised that it is inappropriate. The appellants sought to have D returned to their care, which failing to have direct contact with her.

[16] The appellants have applications pending for leave to remain in the United Kingdom while the current proceedings are ongoing.

The Order

[17] The sheriff granted a permanence order under section 80 of the 2007 Act on the ground that D's residence with either of the parents is likely to be seriously detrimental to her welfare. The order consists of the mandatory provision set out in section 81 and such of the ancillary provisions in section 82(1) as the sheriff thought fit. By virtue of the mandatory provision the sheriff vested in Glasgow City Council (1) the parental rights to have D living with them or otherwise regulate D's residence, to control, direct or guide D's upbringing and to act as D's legal representative (sections 2(1)(a), (b) and (d) of the 1995 Act) and (2) the parental responsibilities to safeguard and promote D's health, development and welfare, to provide direction and guidance and to act as her legal representative (sections 1(1)(a), 1(1)(b)(i), 1(1)(b)(ii), and 1(1)(d)). By virtue of the ancillary provisions, the sheriff vested in the foster carers the parental responsibilities in sections 1(1)(a), (b), (c) and (d) and the corresponding parental rights in section 2(1)(b), (c), (d) of the 1995 Act, and extinguished the parental rights and responsibilities which were vested in the parents immediately before the making of the order.

The submissions for the first appellant

[18] Although in the note of appeal, the first appellant raised many issues, at appeal she limited her argument to the sheriff's approach to the evidence: the sheriff's application of the law to the facts; the sheriff's refusal to make provision for contact; and the failure of the sheriff to provide any reason for the imposition of the ancillary provisions.

[19] In relation to the sheriff's evaluation of the evidence, Counsel's simple proposition was that the sheriff had not given sufficient reasoning for his conclusions, and such reasons as he did give were misconceived because he attached too much weight to the Facebook post, to the additional disclosures and to the views of D. In particular, the sheriff failed to give any reasons for preferring the evidence contained within a solitary Facebook post by the mother which supports chastisement of children as opposed to her oral evidence, supported by C, the adult sibling of D, that she now strongly opposes the abuse of children. His treatment of the evidence of C (paragraph [82] of his note) was inconsistent and contradictory in that the sheriff accepted C as credible and reliable in the main and yet rejected aspects of his evidence because of C's age at the time of the critical events and the passage of time. The sheriff erred in relying upon the additional disclosures made by the older children to their foster carers and social workers, which had not been tested or proved in any forum *(West Lothian Council v B* 2017 UKSC 15). He failed to recognise that the views of D were influenced by (a) incorrect unsubstantiated information given to her by the social workers who held an entrenched opinion that the parents were "irredeemable abusers of children" and (b) information supplied by her siblings who exaggerated the extent of the abuse. The sheriff was obliged under ECHR article 6 to determine the truth or otherwise of these allegations and failed to undertake that exercise (*In Re B (Children)* 2008 UKHL 35 and *West Lothian Council* v *B)*.

[20] Counsel argued that the sheriff erred in determining that the threshold test was met because his assessment of the evidence was flawed in the manner set out in the preceding paragraph. In addition she submitted that in stating (paragraph [88] of his note) that "there was no credible or reliable evidence that either respondent had altered their views on parental discipline" the sheriff incorrectly applied a reverse onus of proof. It is for the

petitioners to establish their case: the sheriff's approach proceeds upon an assumption that the past events represent the present and the future, unless the contrary is proved. The sheriff's reliance on the additional disclosures amounts to a breach of the mother's ECHR article 6 rights.

[21] She submitted that the sheriff's approach to the refusal to make provision for contact was fundamentally flawed and violated the first appellant's article 8 rights. The lack of any such provision was not proportionate and was not necessary because the effect was to preclude direct and indirect contact without limit of time with no identifiable prospect of resumption (*M* v *K* 2015 SLT 469). The order, being akin to the severance of all family ties and being the most invasive interference to established family life, can only be justified in exceptional circumstances (*YC* v *United Kingdom* (2012) 55 EHRR 33). *T*he sheriff ought to have provided reasons to justify his decision (*Elsholz* v *Germany* (2002) 34 EHRR 58*)* and did not do so. On an *esto* basis, Counsel submitted that the sheriff had, by making his order, removed indirect contact which had been operating effectively, without any rational explanation or justification.

[22] Her final point was that the sheriff had erred in failing to give any reason for the imposition of the ancillary provisions.

The submission for the second appellant

[23] Counsel adopted the submissions of the first appellant insofar as aligned with her own position. She too withdrew grounds of appeal and limited her arguments to the impact of delay, the failure to obtain a parenting assessment and the weight attached to the views of the child.

[24] She argued that the sheriff erred in finding that the delay in submitting the application for the permanence order was not a breach of the appellant's article 6 rights. The delay was a deliberate act on the part of Glasgow City Council as a result of a policy which did not encourage the making of applications for permanence orders with authority to adopt. Further, the delay of 7 years led to the views of D becoming entrenched. Counsel accepted that the delay was not a bar to the pursuing of the permanence order; that the process in court had not been protracted in any respect; that D had not suffered any prejudice as a result of the 7 year hiatus; and that none of the foregoing had been argued before the sheriff.

[25] She criticised the sheriff for determining that the threshold test had been met because his assessment of the future likelihood of harm was based on untested allegations and suspicions. The sheriff was presented with evidence from social workers who were clearly influenced in their decision making by the additional disclosures. No parenting assessment was ever commissioned. The social workers considered it unnecessary due to the additional disclosures and also because D had not been the subject of physical abuse at the hands of the appellants. The sheriff accepted that evidence and in doing so failed to fully analyse the arguments for and against the making of the Permanence Order.

[26] The final issue was brief. Counsel submitted that the sheriff attached too much weight to the views of the child which were driven by her desire to obtain a UK passport at all costs and had been tainted by misrepresentations made by her siblings and others to the extent that she did not have an accurate account of her family history.

Submissions for the respondent

[27] Senior Counsel reminded us that in the absence of some identifiable error such as a

material error of law or the making of a critical finding of fact which has no basis on the evidence or a demonstrable failure to consider relevant evidence, the appellate court will interfere with the findings in fact made by a trial judge only if satisfied that his decision cannot reasonably be explained or justified (*McGraddie* v *McGraddie* [2013] (UKSC) 58 and *Henderson* v *Foxworth Investments* [2014] UKSC 41). The appellate court has to be satisfied that "the judge could not reasonably have reached the decision under appeal" (*Royal Bank of Scotland* v *Carlyle* 2015 SC (UKSC) 93 at paragraph 21). The appeal must fail because the sheriff had set out ample reasons for the conclusions reached by him. The sheriff was entitled, having heard proof, to conclude that the requirements of section 84 of the 2007 Act were met and that a permanence order in terms of section 80 of the Act should be made. He applied the correct tests by reference to the legislation and authorities to the facts of the case as established after proof. He cannot be said to have erred, and accordingly the appellate court is not entitled to interfere with his decision.

[28] Counsel contended that the criticisms of the sheriff's treatment of the evidence are unwarranted. The sheriff had given clear and ample explanation for findings in fact (67) and (68) relating to the Facebook video post; for finding in fact (69) relating to the impact of the abusive conduct on the children; for finding in fact (70) relating to the lack of insight on the part of the appellants; and for finding in fact (77) which relates to the risk of physical harm and the significant risk of emotional harm to D were she to be returned to the appellants. He was entitled, on his assessment of the evidence, to reach the conclusions that formed the basis for those findings. Further the sheriff was not satisfied that the assessments of risk and care planning carried out by the social work team were influenced by the additional disclosures (finding in fact (24) and paragraph [87] of his note). The sheriff made no findings in fact in relation to the substance of additional disclosures because no evidence had been

offered for proof. In *West Lothian Council* v *B* the Lord Ordinary relied on unproved suspicions held by the local authority whereas in the present case the sheriff expressly did not do so.

[29] She refuted the contention that the sheriff applied a reverse onus of proof. It is for the mother, who asserts that her views on certain matters and in particular chastisement of children have changed, to provide evidence to persuade the court that such a change has occurred. It is for the natural parents to lead evidence as to their current circumstances, abilities and likely future abilities and circumstances (*City of Edinburgh Council* v *RO and RD* [2016] SAC (Civ) 15). The sheriff concluded that the first appellant failed to do so and accordingly was entitled to rely on the available reliable evidence as to her past and present views, position and conduct and to draw such reasonable inferences therefrom as he is able to do (*S* v *City of Edinburgh Council* 2013 Fam LR 2).

[30] The views of the child and her ability to express them were spoken to by several witnesses and were also reported to the court by an independent child welfare reporter. The sheriff had regard to the question of the weight that ought to be attached to those views and was particularly mindful of a submission made to him by the appellants that those views may have been corrupted or influenced by information given to her by others.

[31] In relation to the threshold test, Counsel submitted that there was no error on the part of the sheriff such as would render his judgement susceptible to interference. He set out clearly the basis on which he arrived at his decision. Consistent with the requirements set out in *West Lothian Council v B* the sheriff identified (1) the nature of the detriment which the court is satisfied is likely if the child resided with the parent, (2) why the court is satisfied that it is likely and (3) why the court is satisfied that it is serious. He was mindful of the guidance deriving from *West Lothian Council v B* and applied it assiduously.

[32] On the matter of contact, Counsel submitted that based on the facts of the present case as analysed and assessed by the sheriff, the refusal to make provision for contact both direct and indirect was both necessary and proportionate, having regard to the paramount consideration of the welfare of the child which outweighed the interests of the parents in insisting upon maintaining family ties (*YC* v *UK*). There has been no contravention of article 8 because the reasons given by the sheriff are relevant and sufficient and the decision making process was fair and gave necessary respect to the parents' rights.

[33] When considering which of the ancillary provisions to incorporate into the order, the sheriff had regard to what is necessary and proportionate to meet the child's needs and gave clear reasons for his decision.

Decision

[34] In this appeal, we are primarily being invited to re-open questions of fact, to re-evaluate the sheriff's assessment of the evidence, and to reconsider the sheriff's consideration of the threshold test based on flawed findings in fact. That being so, the appellants face an immediate difficulty in relation to the restricted role of the appeal court in interfering with a sheriff's findings in fact in light of *McGraddie*, *Henderson* and *Royal Bank of Scotland*. Additionally, this court has already commented upon the test in appeals against decisions in applications for permanence and made it clear that the court will interfere with the decision of the fact finder at first instance in his or her consideration of the threshold test only if that judge has gone plainly wrong (*The City of Edinburgh Council* v *RO and RD).*

[35] The sheriff was the fact finder at first instance. He heard 15 days of evidence. He had the opportunity to see and hear from the witnesses including the mother. The father did not give evidence.

[36] The sheriff issued a lengthy and measured judgment. He set out the evidence of each witness in detail. He assessed the credibility and reliability of each witness with meticulous care. He tested the evidence of each witness against other sources of evidence, accepting some of the evidence and rejecting elements and explaining why he did so. In our view he cannot be faulted in his evaluation of the evidence.

[37] The contention that the findings are not supported by the evidence is without merit. Many of the sheriff's findings in fact [(1)-(5) , (7)-(22), (25), (27), (29)-(31), (33)-(35), (37), (39), (42)-(47), (49)-(50), (52)-(54), (57) and (60)] are based on the terms of an extensive joint minute. These findings reveal a pattern of appalling sustained physical abuse of C, J and S which led to the children being taken into the care system. Findings in fact (29), (34) and (35) are the allegations contained within the two referrals to the Children's Hearings which were accepted by the appellants without the need for proof and the terms of the Indictment to which the appellants pled guilty.

[38] We were supplied with extensive material at the appeal including the transcripts to demonstrate that findings (23), (24), (67)-(72), and (77) were not supported by the evidence. Although we were not taken to the transcripts during the hearing, the written notes of arguments for the parties provide the appropriate references.

[39] Counsel for the first appellant sought to persuade us that there was no evidence to support finding in fact (69) which refers to the significant emotional consequences of the parental conduct on C, S and J. She submitted that the sheriff was wrong to attribute the inconsistencies in the evidence of C about the conduct of his parents to (a) his young age when the events took place and (b) that now, as a young adult, C has resumed a relationship with his parents, adopting a more conciliatory role in endeavouring to reconstitute the family bonds. We disagree. The sheriff compared the evidence of C with that of other

witnesses including his mother and compared it against the agreed evidence. In carrying out that exercise he accepted "a number of aspects of C's evidence as credible and reliable" but rejected elements which diverged with proved allegations. It cannot possibly be said that the sheriff has gone plainly wrong in his assessment of the evidence of this witness.

[40] The sheriff formed an adverse view of the first appellant in relation to matters of credibility and reliability. He rejected her claim to be a reformed character who no longer condones the use of physical chastisement of children [findings in fact (67) and (68)]. It is clear that the sheriff reached his conclusion having regard to the totality of the first appellant's oral evidence, assessing her evidence against the evidence of other witnesses, the admissions in the joint minute and the content of the Facebook post. The sheriff described the content of the footage in detail (paragraph [75]) and concluded that it was a "distasteful episode of abuse of power, dereliction of duty and gross betrayal of the interest of the child complainer by the police officers the child thought had come to help him." (paragraph [77]). The sheriff regarded the evidence of the first appellant that she was sharing the footage in condemnation of the officers' conduct as "patently unconvincing and an affront to common sense" (paragraph [77]). He drew the inference from the post and footage that the first appellant continues to support physical chastisement of children through the use of a belt. In the context of the other adminicles of evidence, which the sheriff found to be proved, in our view he was correct to draw such an inference.

[41] Much was made by the appellants of the "additional disclosures" made by C, J and S to social workers and others during the placements and the extent to which this material may have influenced social workers in their handling of D's care. The sheriff records (paragraph [87]) that he made no findings in relation to the additional disclosures and left them out of account in reaching his decision because none of "these matters were offered for

proof" and the petitioners "sought no findings in relation to them". Counsel for the first appellant was determined to demonstrate that the sheriff had in fact been swayed by the additional disclosures. She founded upon the following passage in paragraph [88] –

> "It was submitted for the respondents that the proven allegations did not provide sufficient foundation for the threshold test to be met. That submission, in my opinion, fails to take sufficient account (a) of the fact the petitioners' case does not rest only on the proven allegations, a point on which there was consistency among the social work witnesses and (b) of the additional considerations previously mentioned."

The flaw in such a narrow approach is exposed in the following paragraph [89] which makes it abundantly clear to any reader that the sheriff was not influenced by the additional disclosures –

> "The cumulative effect of: the nature and character of the previous proven allegations; the assessments of risk; the evidence of minimisation and lack of insight; the fact of the recent sharing of the footage and the inferences I have drawn from that; the nature and character of the footage and its contents, including the sentiment conveyed in its captions, allied to the absence of credible and reliable evidence of change, caused me to conclude that the petitioners had established that D would be at risk of physical harm, and at significant risk of emotional harm, were she to reside with the respondents, such as would render her residence with them likely to be seriously detrimental to her welfare,".

[42] Nor do we accept that the evidence of the social workers or for that matter the views of the child were in any respect tainted, coloured or influenced in the manner contended. At the point that the children made the comments to the social workers, the investigation was well under way, S had been examined by a consultant paediatrician, referrals had already been made to the Children's Hearing and a petition served on the appellants. For completeness we agree with Counsel for the respondents that the case of *West Lothian Council* v *B* is distinguishable on its facts and of no assistance to the appellants. In the present case, in contrast to the position in *West Lothian Council* v *B*, there was "fleeting references in evidence" to the additional disclosures. The respondents did not lead evidence

that additional statements had been made by the children, nor did they rely upon the additional disclosures to justifying the granting of the order.

[43] Although D did not give evidence at the proof, her views were conveyed to the sheriff in a report prepared by Ms Lorna Anderson, solicitor. The views of D are not in dispute. She wishes the permanence application to be granted. She believes that would make her happier and make her life easier and more normal. She is clear that she does not wish to see either of her parents (paragraphs [95]-[103]). The sheriff discounted the proposition that "D's views may have been corrupted or influenced by a combination of information given to her by her siblings while the children were accommodated, which it was feared may have been inaccurate and may not have been shared in an age appropriate way, and, inaccurate information from social workers and carers." (paragraph [98]) commenting that "there was no credible and reliable evidence that anything had been discussed with D in inappropriate terms". Further he was satisfied that D's views were based on a wide range of factors "and are not simply anchored by her desire to get a passport."

[44] Having reflected upon the relevant passages in the transcripts in relation to the evidence of the mother, C, D and the social workers, we can detect no error on the part of the sheriff in his treatment of the evidence and his assessment of it. There is no basis for suggesting that the evidence does not justify the outcome or that the decision of the sheriff cannot reasonably be explained or justified. There is nothing in the written material nor was there anything said in oral submission to persuade us that the sheriff had erred in his approach to the evidence such that it could be said that his assessment of the evidence was irrational, perverse or plainly wrong or that his findings were not supported by the evidence. The findings in fact which were not contentious combined with the sheriff's

detailed reasoning are more than sufficient, in any event, to justify the conclusions that the sheriff reached.

[45] In our view the sheriff adopted the correct approach to the decision on whether to make a permanence order. He required first of all to address the threshold test – and he did so. He was mindful of the statutory regime and in particular the guidance in the recently published case *West Lothian Council* v *B.* In the interest of fairness to the parties, the sheriff gave them the opportunity to make further representations following upon the decision in *West Lothian Council* v *B*. His conclusions are set out in finding in fact and law (1)-(3) and his reasoning appears in paragraphs [88]-[93] of his note. To be clear, there was no criticism of the sheriff's interpretation of section 84, rather the complaints about the sheriff's reasoning are repetitious concerns about the weight he attached to elements of the evidence. We do not propose to indulge in repetitive discourse other than to emphasise that the sheriff has not misunderstood the evidence or failed to consider relevant evidence.

[46] On the matter of inversion of the onus of proof, the argument is devoid of merit. The sheriff did not believe the evidence of the first appellant demonstrating a change in her behaviour or that of her husband (finding in fact (24) and paragraphs [71]-[74] of his note). In the absence of any such credible evidence, the sheriff is entitled "to base his or her assessment of the future on the evidence relating to the past and present" (*S* v *City of Edinburgh Council; City of Edinburgh Council* v *RO and RD*). The sheriff in the current proceedings based his assessment of the future on proven allegations, not unsubstantial suspicions (*West Lothian Council* v *B* at para [25]).

[47] We are not persuaded that the sheriff made any error in relation to the issue of delay. It was accepted by Counsel for the second appellant that the delay was not a bar to the pursuing of the permanence order; the process in court had not been protracted in any

respect; and there was no prejudice to D as a result of delay in bringing the current proceedings. We note and accept the categorical assurance of senior Counsel that the Council does not have or operate a policy of deliberately engineering delays to the bringing of applications of this type to defeat the rights of natural parents. The argument before the sheriff was that "the permanence plans had been predicated upon the assumed veracity of the children's additional disclosures, that they had never had an opportunity to test these, and, that the consequent delay in that respect had infringed their article 6 rights…." (paragraph [104]. We do not accept that the article 6 rights of the appellants have been so breached. The sheriff rejected the factual basis of the underlying premise of that submission. At the risk of repetition there was quite simply no evidence before the sheriff supportive of the appellants' arguments.

[48] The "parenting assessment" or lack thereof, is nothing to the point. The parents have been continuously assessed by social workers. An assessment was carried out by Dr Christine Puckering, consultant clinical psychologist, who was instructed by the Children's Hearing. She recommended that D should not be returned to the care of the appellants. The first appellant's own expert, Dr John Marshall, consultant clinical psychologist, opined that the children ought not to be returned to the care of the appellants. Nothing said on appeal has caused us to regard the sheriff's approach to this aspect of the case as being worthy of criticism in any way, particularly in light of the many damning proven allegations.

[49] Article 8 of the ECHR ("the Convention") was invoked by all Counsel; reference was made to *YC* v *UK*. The Convention was relied upon both in relation to the making of the permanence order and also as to the issue of contact between D and her parents. We have to say that, at times, it was not entirely clear how parties considered the Convention fell to be

applied and the precise substance of the rights relied upon. Assuming, as we do, that the Convention was being invoked pursuant to the Human Rights Act 1998 it is important to recall that, read short, the 1998 Act provides that primary legislation requires to be read and given effect to in a way which is compatible with Convention rights (section 3). The question becomes "Which statutory provision is involved?" On the authority of *West Lothian Council* v *B* section 84(5)(c)(ii) ("the seriously detrimental test") is a factual enquiry: we do not see that Convention rights, as such, are involved in such a process. Consideration of section 84(5)(c)(ii), notwithstanding its location in the statutory provisions, is the first step in consideration of whether a permanence order should be granted. It may be that Convention issues apply in the interpretation and application of section 84(3) and (4) but as that issue was not developed we reserve our opinion.

[50] The content of Convention rights was an issue. The terminology involved in argument included *dicta* such as "severance of all family ties can only be justified in exceptional circumstances" and "everything must be done to preserve personal relationships and where appropriate to rebuild the family"; orders should be made only on the grounds of "necessity". Taken in isolation these *dicta* do exist but it is important to have regard to the context in which they were expressed. The case of *YC v UK* provides a useful illustration of this point. The case involved proceedings in England concerning the compulsory care of a child. In its judgment the European Court said:

> "134. The court reiterates that in cases concerning the placing of a child for adoption which entails the permanent severance of family ties, the best interests of the child are paramount. In identifying the child's best interests in a particular case, two considerations must be borne in mind: first it is the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and secondly, it is in the child's best interests to ensure his development in a safe and secure environment. It is clear from the foregoing that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to "rebuild" the family. It is not

> enough to show that a child could be placed in a more beneficial environment for his upbringing. However, where the maintenance of family ties would harm the child's health and development, a parent is not entitled under art. 8 to insist that such ties be maintained.
>
> 141…. In particular, once K was placed with a prospective adopter, he began to establish with her new bonds and his interest not to have his *de facto* family situation changed again became a significant factor to be weighed in the balance against his return to the applicant's care".

[51] The passages quoted disclose a balanced and nuanced position. The starting point is the interests of the child. Interference by the state in an existing family unit will be exceptional, assuming that there is a family unit in the first place. The child has, as the European Court puts it, the right to a safe and secure environment. The rights of the parents to have their child living with them are not absolute, especially where they have proved unfit. Paragraph 141 of *YC* acknowledges the importance to a child of not having his *de facto* family situation changed should he be settled and have established new bonds. A child has a right to a family life. Cases involving families are necessarily fact specific. The factual matrix will vary from one case to another and the weight to be attached to various factors in play will also vary from case to case.

[52] It should be remembered that this case involves a permanence order. Authority to adopt was not sought. There are a number of recent authorities as to the making of adoption orders and the high test which that involves. We were not addressed in detail as to the application of the Convention to permanence orders such as this. Whereas the grant of a permanence order does involve the severance of a parental link it is of a different quality to that of adoption. In giving the opinion of the court, in *R* v *Stirling Council* 2016 SLT 689 (a case involving a permanence order) Lord Drummond Young held that, at common law, depriving parents of their parental authority was "a most serious matter, and it should only be done if strict criteria are satisfied" (paragraph [14]). He went on to hold that, if the criteria

are satisfied (we take "the criteria" to be a reference to the statutory provisions), it is unnecessary to consider article 8 at all. It is clear that the foregoing formulations of seriousness and the exceptional nature of an order are direct injunctions to the decision maker to have regard to the significance of the decision he or she is making. Whatever formulation applies, on the facts of this case they are more than amply satisfied. The sheriff did not simply pay lip service to the need to safeguard and promote the welfare of D throughout her childhood – he carefully analysed the evidence and considered a series of alternatives to the making of the permanence order including returning D to the care of her parents. He rejected that possibility based on the evidence that the parents cannot provide adequately for the needs of D. The sheriff concluded that D required certainty, stability and security for the rest of her childhood and that could be best provided by the present foster carers as opposed to the parents or remaining subject to compulsory measures of care. We do not agree that the sheriff failed to provide reasons to justify his decision (*Elsholz* v *Germany*) and in that regard we refer to findings in fact (58)-(61), (73)-(75) and (77), findings in fact and law (2), (5) and (6) and paragraphs [102] and [103] of his note.

[53] In relation to contact between D and the parent it was submitted to us that contact should not be terminated unless it was necessary do so. Reliance was placed upon *M* v *K* 2015 SLT 469. The proposition as to necessity was clarified and explained in the later case of *J* v *M* 2016 SC 835 at paragraph [12]. In short, there is no separate test of necessity. In *R* v *Stirling Council* (at paragraph [31]) the Inner House considered post order contact in the context of welfare. The sheriff, in his order, extinguished, inter alia, the rights of contact between the respondents and made no order pursuant to section 82(1)(e) specifying arrangements for contact with any person. At paragraph [104] the sheriff sets out at considerable length his careful reasoning for doing so. We are unable to detect any error on

his part. Further, and in any event, we note that senior Counsel for the respondent informed us that the foster carers were not averse to facilitating indirect contact.

[54] Accordingly we refuse both appeals. Expenses were not sought and therefore we make no order.