FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 37
XA14/19 and XA15/19

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Stated Cases

by

JLM

Appellant

against

SCOTTISH CHILDREN'S REPORTER ADMINISTRATION

Respondent

Appellant: JM Scott QC, Aitken; TC Young (for Hunter and Robertson, Paisley)
Respondent: Brabender QC, J Guy (sol adv); Anderson Strathern LLP

11 July 2019

Introduction

[1] These are two appeals by stated case against the sheriff's refusal of appeals by a mother against Children's Hearing's decisions to continue and vary Compulsory Supervision Orders which had the effect of reducing her level of contact with her daughter T (aged 8) and her son C (aged 7).

[2] There are six questions in the stated case, although a seventh, which queried whether the applicable legislation was compatible with Article 8 of the European Convention, was proposed in an adjustment but not ultimately argued. The remaining questions address: the implications of founding upon evidence of statements admittedly made by T and C to one of their foster carers and their social worker (questions 1-3); the facts identified by the sheriff as forming the basis of the Children's Hearing decisions (question 4); whether, in reviewing a CSO, the Hearing can only rely on facts which are either admitted or proved (question 5); and whether evidence ought to have been heard in the appeal to the sheriff (question 6).

Child protection history

[3] According to the report, which was compiled by the allocated social worker, namely Michelle Fair, the appellant and her husband, namely HS, had unsettled childhoods before they met in homeless accommodation in 2009. In 2010, the local Special Needs in Pregnancy Service raised concerns about the appellant when she was pregnant with T. Offers of support were made but, after T's birth, the couple's engagement with this support became "sporadic". There were concerns over T's health needs (eg immunisation). On one occasion it was discovered that the family home was full of intoxicated young men and the couple were unable to explain where T was. Home visits highlighted poor conditions, with T's bedding being dirty and unhygienic. After C was born, the police contacted social services because both children were in the care of MK, whose brother EK was present. He was a registered sex offender. Reports of domestic abuse were made, but not pursued. The couple separated in mid 2012. The appellant was thought to be associating with EK, but she denied this.

[4] A Child Protection Report was compiled, partly because of the appellant's "poor life choices, risk taking behaviour and the couple's strained relationship". T and C were placed on the Child Protection Register. At this time, the children were living with HS. Because the appellant was "presenting under the influence of substances", all contact between her and the children was being supervised. Concerns about T arriving at nursery with a full nappy and smelling of urine were raised. There was a significant delay in C's motor skills development, possibly due to inactivity and lack of appropriate stimulation. An injury to T's leg, while she was in HS's care, was attributed to "poor levels of supervision". The parents were not abiding by the child protection plan. The appellant had acquired a conviction for shoplifting and HS had one for possession of cannabis. Because of the risks of harm to both children, they were placed in foster care. Matters improved and the children returned to the care of HS in November 2012. Contact between the appellant and the children was to continue to be supervised. In February 2013 the children's names were removed from the Register. The appellant returned to the family home. By April 2014 there were no immediate concerns about the couple's relationship. The case was closed, although support was to continue to be offered.

[5] On 19 November 2015, the police searched the family home, following information from the police in New Zealand that indecent images of children were being sent from HS's phone. HS and the appellant were both detained and charged with possession of the images. These included category B and C images of T. In some of these photographs, HS's genitals were exposed in the proximity of T's vagina.

[6] HS alone was prosecuted. He was released on bail with a condition that he would have no contact with the children. T and C were placed with their maternal great-grandparents. The grandparents were unable to cope as a result of their own health

difficulties and their concerns about being able to deal with the children's behaviour. On 24 December 2015, Ms Fair supervised contact between T and the appellant, but this was ended when T became "extremely upset". The appellant agreed that there would be no further contact pending assessment. The children were placed with foster carers, namely Mr and Mrs H, in February 2016.

[7] On 19 May 2016, the Children's Hearing made T and C subject to an interim Compulsory Supervision Order. At this Hearing, HS and the appellant had denied the grounds of referral. The grounds were sent for proof before the sheriff. There was no order made concerning contact by the appellant with T. On 8 and 29 June 2016, the interim CSO was continued. The appellant had requested unsupervised contact once every week. This was discussed "at great length", but rejected in favour of contact at the discretion of the social work department, to be assessed in accordance with T's needs.

[8] Over the next few months, 3 disclosures by T were recorded as having been made to the foster carer, Mrs H, or the social worker, Ms Fair. The first was on 19 September 2016, when T said that the appellant had been "there" when HS had touched her private parts. The second was on 3 October 2016, when she said that HS had touched her private parts with a "hard flower and it was really sore". The appellant had been "there". The third was on 9 November 2016, when, at dinner, T had said that HS was pretending that a cucumber was his "willy". [redacted] The appellant and C had been there. The appellant had asked HS to stop or she would call the police. This account was repeated to Ms Fair, when T also described HS [redacted]

[9] The grounds of referral were eventually accepted by the appellant, who gave evidence before the sheriff. The grounds were held established on 13 December 2016. They

included multiple instances of sexual abuse of T by HS, involving the taking of indecent photographs of T, HS using his mobile phone to view indecent images of other children, all during T's and C's residence with HS and the appellant (see details of the conviction, *infra*). The sheriff set the contact between the children and the appellant at once every 3 weeks, for 2 hours. The grounds had not alleged that the appellant had been present during T's sexual abuse by HS.

The reduction in contact

[10] An Integrated Assessment Report, dated 28 December 2016, was compiled by Ms Fair. It contained information regarding the statements, which had been made by T, that the appellant had been present when HS had abused her. The appellant's law agent wrote to the respondents on 12 January 2017, expressing concern. The appellant's presence during the abuse was denied. The letter continued:

> "The accretion (*sic*) that my client was present during periods of abuse was a matter known prior to the Grounds of Referral proceedings (*sic*) to proof. The assertion did not form part of the Grounds and as such no evidence was led."

[11] A Children's Hearing was scheduled to take place on 30 December 2016. It was continued to 16 January 2017, because neither HS's nor the appellant's law agents were present. The interim CSO remained in place. Contact with the appellant was to stop meantime, because it was not in T's best interests to subject her to contact:

> "where she will perhaps be revisiting the trauma of what has already happened to her of which there is an unassessed risk. [T] continues to make disclosures about inappropriate activities that took place in the family home and asks questions about her parents".

[12] At the hearing on 16 January 2017, the appellant's solicitor moved that the proceedings should be stopped. The statements should be discounted or new grounds of

referral should be raised to enable the facts to be established. The Hearing noted that the grounds of referral had only related to HS's behaviour. It decided that:

> "within the system panel members have often to consider conflicting information on the balance of probabilities and that it would be in the best interests of both children to continue today with a full hearing."

The outcome of the Hearing was that the children remained under a CSO. There would be no contact with HS, but that with the appellant would remain at 2 hours every three weeks, supervised by the Social Work Department. The reason given was that:

> "Contact with mum was previously set by The Sheriff to 2 hours every three weeks, supervised by the SW Department. At this stage it has not been possible to assess the impact of the contact on [C and T]. The panel were keen to know the professional view of what would be in the childrens (*sic*) best interests with regard to contact. This is still subject to ongoing assessment…".

[13] An appeal to the sheriff, under section 154 of the Children's Hearings (Scotland) Act 2011 in respect of this decision of the Children's Hearing on 16 January 2017, was taken on the grounds that the hearing had not been fair. On 7 April, the sheriff at Paisley refused the appeal. In a stated case, which was not ultimately pursued, the sheriff agreed with *Norrie: Children's Hearings* (2nd ed at 117) "that a Children's Hearing might make a decision on the basis of alleged facts which are disputed and never established by proof in a court of law." Following *M* v *Authority Reporter* 2014 SLT (Sh Ct) 57, a Hearing could have regard to material beyond the grounds of referral. Disputed facts might form new grounds, but whether to present these was a matter for the reporter and not the court. The resolution of disputed fact was less important than identifying a child's needs. The Hearing was not an inappropriate forum for the exploration and consideration of disputed fact. A decision of a Hearing "could be supported even if it had proceeded to determine the veracity of the facts disputed." However, a Hearing may be able to make a decision about the welfare of

children "without having to come to a specific view on all disputed facts" (*AM* v *Locality Reporter Manager* [2015] Fam LR 106, at para [33]). The sheriff found that the Hearing had not made a determination about the truth of the content of the disclosures. It had not been necessary to do so. It was enough for the Hearing to have considered that the disclosures had been made.

[14] At a review on 2 November 2017, the Children's Hearing had an updated IAR from Ms Fair. This noted that, following HS's conviction, the appellant had made comments on social media which had defended him. She had said that HS had not been capable of committing the abuse. She had visited him in custody. These matters raised "significant child care issues" as did the appellant's attempts to explain what she had said to HS. When Ms Fair had visited the children in May 2017 to inform them that HS was in prison and to provide the reasons for this, T had said "my mum did not touch my [private parts] like my dad did but my mum was there". She had then asked "why do I see my mum when she did not keep me safe but I do not see my dad?" The children continued to be re-assured that the role of their foster carers and the social worker was "to keep them safe". However, there were concerns about the "confusion and mixed messages this may be having on the children if they are taking (sic) to contact with their mum once every 3 weeks after the serious disclosures [T] has made." A recommendation to reduce contact to a minimum of 8 weeks, which would be regularly reviewed, was made. By August 2017 it was thought that there were grounds for permanence orders. The appellant had moved into homeless accommodation, but was evasive when asked about her current circumstances.

[15] The IAR concluded that there were significant risks of harm should the children return to the care of either parent, given the background outlined above, including the appellant's and HS's interdependency. Concerns were expressed about whether contact

was having a "detrimental impact" on the children's emotional well-being. The Children's Hearing decided that T and C should continue to live with their foster parents. HS should have no contact with them. The appellant should have substantially reduced contact; *viz.* a minimum of once every eight weeks

[16] The reasons for continuing the CSO included the reference to HS's offences, which involved the sexual abuse of T and a finding that the behaviour of T had recently seriously deteriorated. She was prone to regular outbursts and had taken to hitting C. She had made detailed disclosures with regard to the abuse which she had suffered, stating that her mother and C had been present. She had recently asked why she was still having contact with her mother. It was specifically noted that:

> "Thorugh (*sic*) her solicitor, mother disputed the factual accuracy of being in attendance during the episodes of sexual abuse."

It was recorded that the children had a "long road in front of them in addressing their complex needs as a result of these incidents". The Social Work Department emphasised the serious concerns which they had relative to the appellant's ability to safeguard and protect the children appropriately.

[17] The reasons for reducing contact between the appellant and the children were that:

> "… there had been a number of missed contacts by mother. Social work advised that the complex nature of the needs of both children meant in their professional view there had to be a longer period of no contact with Mother in order to seek to get to the bottom of the reasons for the children's behaviour and to address their longer term needs through ongoing engagement with services.
>
> The panel expressed concerns as to mother's visits to father in prison and the ongoing contact with father. Mother had advised on several occasions that the relationship had ended.
>
> The panel heard that the quality of existing contact with mother was ok, but in social work's opinion, is not of any material benefit to the children and is not requested by the children. After contact, children give a cursory goodbye to mother and show more attachment to the foster carers.

> … [reduction of] contact with mother for both children to a minimum of once every 8 weeks, managed and supervised by social work … would assist in the more effective assessment of the children's complex needs."

[18] A review in October 2018 saw the level of contact maintained, although there had been further missed contacts. T had since moved from foster care to a residential school for children with special needs. Contact between T (but not C) and the appellant had ceased. On 15 April 2019 a decision to proceed with permanence orders had been made.

The trial and the appellant's relationship with HS

[19] Meantime, on 10 May 2017, after a trial at the High Court in Glasgow, HS had been convicted of charges that, between September 2013 and 23 October 2015, he: (1) took and distributed indecent photographs of children; (2) sexually assaulted T on various occasions; (3) caused T to participate in sexual activity again on various occasions; and (4) engaged in sexual activity in the presence of T, once more on various occasions. He was made the subject of an extended sentence of ten years, with an eight year custodial element (see *HDJS* v *HM Advocate* 2018 SCCR 98).

[20] T had not been called as a witness at the trial for reasons outlined in a report by Dr Gary MacPherson, a consultant forensic clinical psychologist, which had been prepared when T was aged 6 years and 3 months. This analysed her ability to give evidence and the possible psychological harm which could be caused to her by doing so. The report observed that T had refused to speak at a recorded police interview. In her interview with Dr MacPherson, T had functioned at a far less developed intellectual level, probably being in the bottom 5-10% of her age group. She had given one-word answers and had not expressed herself spontaneously. Dr MacPherson sought to assess T's "episodic memory" by asking her to recall recent events which were not associated with the offending

behaviour. She had again given one word answers rather than any narrative of events which had happened either at home or at school. T had no real understanding of court; stating only that "court keeps me safe".

[21] Dr MacPherson could not:

> "envisage circumstances where [T] would be in a position to provide a spontaneous account in relation to the ... allegations … [It was] highly likely that she would ... struggle to provide any meaningful details."

He said that, in general terms, young children were prone to change answers and to display compliance, acquiescence and reticence in response to repeated or leading questions. They were reluctant to say "I don't know" and were more suggestible than older children, adolescents and adults. In view of T's age and immaturity, he did not recommend any additional interviews with T. He was:

> "concerned over the emotional impact of any disclosures as ... she had been reactive to previous disclosures and also in view of the nature and severity of the alleged behaviours."

Dr MacPherson's report formed the basis of the agreement between the parties that T would not be called as a witness in the appeal to the sheriff (*infra)*.

[22] When the appellant was interviewed under caution after the search of the family home in November 2015, she had been given detailed and explicit information about the indecent photographs of T which had been found on HS's mobile. On 21 January 2016 the appellant and HS had attended Renfrew Social Work Department together to collect social work reports. On 9 March 2017, at the preliminary hearing in the proceedings against HS, the appellant had left the same vehicle as HS and walked up the street with him to Edinburgh High Court. In May 2017, during HS's trial, the appellant had to be detained and remanded in custody for two days for failing to obtemper her witness citation. The trial had to be adjourned as a result. HS had phoned the appellant from prison on 40 occasions

between 15 June and 7 November 2017, two of which lasted 33 minutes and 24 minutes. The appellant had visited HS in HMP Barlinnie on 31 May 2017.

The proof before the sheriff

[23] The appellant appealed the Children's Hearing decision of 2 November 2017. The sheriff heard submissions on 7 December 2017 and 10 January 2018. It had been submitted on behalf of the appellant that the Hearing's decision had been predicated on the appellant having been present during the abuse of T by HS and maintaining her relationship with him. The sheriff stated that the reasons for the decision:

> "(insofar as they affected the Appellant) were that '[T] had made detailed disclosures with regard to the abuse that she had suffered, stating that her mother (the Appellant) and [C] had been present during the episodes'. It was also stated 'The Panel expressed concerns as to mother's visits to father in prison and the ongoing contact with father. Mother had advised on several occasions that the relationship had ended'."

The sheriff accepted that there was a "golden rule" that the prediction of future harm had to be based on facts which had been proved on a balance of probabilities (*Re J (Children) (Care Proceedings: Threshold Criteria* [2013] 1 AC 680 at para 84). On this basis the sheriff decided that the appeal could not be determined without hearing evidence in terms of subsections 155(4) and (5) of the Children's Hearings (Scotland) Act 2011. Case management hearings took place on 16 February, 15 March and 10 May 2018.

[24] At the 15 March 2018 hearing, there was a discussion between the sheriff, the reporter, the appellant's counsel and HS's law agent about whether it was appropriate for T to give evidence. The reporter did not intend to call T. She planned to rely on the testimony of the adults, namely Mrs H and Ms Fair, about the disclosures made to them by T. In view of Dr MacPherson's report, the contents of which had been agreed by joint minute, the

appellant's counsel agreed that T should not be a witness. Under reference to Article 6 of the European Convention and *JS* v *Children's Reporter* 2017 SC 31, he submitted that reliance on hearsay evidence would nevertheless require that the fairness of the proceedings be assessed at the end of the proof. The sheriff commented that:

> "From a moral standpoint, there can be no criticism made of the decision not to call [T] … She has clearly suffered a great deal and still displays major behavioural difficulties."

[25] The sheriff heard testimony from Mrs H, Ms Fair and the appellant over a period of 3 days. At the end of that process, he issued an interlocutor dated 23 July 2018 determining that the decision of the Children's Hearing of 2 November 2017 had been justified and refusing the appeal. In his Note appended to the interlocutor, the sheriff stated that he found in fact that, during T's residence with Mrs H, T had made various disclosures about the sexual abuse that she had suffered at the instance of HS. She had given details about those whom she "claimed" had been present during it. The appellant did not dispute that T had made the disclosures, but had challenged the truth of T's statements that the appellant had been present during the abuse. Thereafter, the sheriff recorded the details of an extensive joint minute which agreed a number of matters, most of which had already been documented elsewhere, notably in Ms Fair's reports.

[26] The sheriff then stated that he found "the following additional facts admitted or proved". What follows is a narration not of fact but of the testimony of not only Mrs H and Ms Fair but also the appellant. At the end of this exercise the sheriff did find that:

> "80 The Appellant was present on occasions when [T] was being abused by [HS].
>
> 81 On at least one occasion [C] was present when [T] was abused by [HS].
>
> 82 The Appellant maintained a relationship with [HS] after he was convicted by visiting him in prison on one occasion and by telephone communication on many occasions until shortly after the Children's Hearing of 2nd November 2017."

It is clear from this that the sheriff rejected the appellant's evidence about never being present during the abuse. He rejected her proffered reasons for continued contact with HS. The sheriff must have accepted the testimony of Mrs H and Ms Fair which is summarised as follows:

Mrs H

[27] Mrs H said that it was her practice to note at the time, or as soon as possible thereafter, anything of significance said to her by a child in her care. Her notes disclosed that T had been off school sick on 1 June 2016. After she had gone to bed at 6pm, T had had a disturbed night. Mrs H had, as recorded by the sheriff, heard her say:

> "
>
> | | | |
> |---|---|---|
> | | | at 8.45 pm |
> | Mum, | - Oh no, no please don't | |
> | Mum, please | - No, no | |
> | NO, NO, NO, NO | - I want mum | |
> | This is really ridiculous | - I can't even do it | |
> | I just can' help mum, | - No, | |
> | mum, mum | - No, no awoh | |
> | Please help me, mum | - | |
> | Mum | - I can't | |
> | | | at 9.30 pm |
> | | No, mummy, mum | |
> | | NO | |
> | | Mum | |
> | | please, please, please". | |

It is not clear what the sheriff made of this.

[28] On 9 November, Mrs H, her husband and their three children (aged 20, 18 and 15), T and C had been having an evening meal together. This included cucumber. T spoke of HS pretending that a cucumber was a "willy" and putting it between her legs when he had no clothes on. When alone with Mrs H after dinner, T had told her that, during this episode, [redacted] She had asked him to stop but he had not. He had

eaten the cucumber. T said that the appellant had been present during this. The appellant had asked HS to stop or she would phone the police. T asked Mrs H to record the conversation in her diary so that Mrs H could tell Ms Fair about it.

[29] On 2 December 2016, T had not been in a good mood after school. She had hit out at C and Mrs H's eldest child. On 3 December, T had again spoken about HS and the cucumber. HS had put the cucumber near her private parts when C and the appellant had been present. On 19 January 2017, Mrs H had been driving T and C past Kilmarnock Sheriff Court. T had said to Mrs H that the court was where people, who had done bad things, went. She had asked if HS would go there. Mrs H had answered in the affirmative. C told Mrs H that this was because HS had thrown a television at T and C. T had said that it was because HS had touched "our private parts", but C had said "not me; it was just [T]". Later that day, when she was visiting, Ms Fair had asked T if anyone had touched her private parts. T had said "my dad". Mrs H asked her to repeat that. T added that HS had told her that it was a treat. The appellant had been there at the time, and had told HS to go outside for a "time out".

[30] In January 2018, T had asked Mrs H why the appellant had not kept her safe. In the following month she had asked Ms Fair why the appellant had not done something when HS had been abusing her. Around this time, T's behaviour had continued to be a concern. She had been shouting, screaming and hitting out on a daily basis. She was regularly commenting on her past experiences. During one violent episode, Mrs H had taken T out for a walk. T referred to there being "not nice" photographs on the appellant's phone; photos of "when my dad was hurting me".

Ms Fair

[31] Ms Fair had become involved with T and C after their parents had been charged with possession of indecent images. She had met the parents on numerous occasions. They had told her that their relationship had ended. This did not appear to be correct. In the first supervised contact between the appellant and T, T had tried to take her clothes off and had displayed sexualised behaviour. Ms Fair had been in Mrs H's home in May 2016. She had asked T if something bad had happened to her. T had said "Yes. When I was with my mum and dad". She had said that "something scary had happened". In August 2016, T had referred to her private parts being sore "for ages" before she had gone to live with her foster carers. In October 2016, T had told Ms Fair that HS had told her that she was being given "a treat". He had touched her private parts with a "hard flower" and it was "really sore". The appellant had been there. In November 2016, T had told Ms Fair that on one occasion HS had been naked and had pretended that a cucumber was his private member. The appellant and C had been present. She had said later that HS had [redacted]

[32] After HS's conviction, the appellant had defended HS in her comments on Facebook. She claimed that he was not capable of sexually abusing T. In May 2017, when Ms Fair took the children to the park, T had said "My mum did not touch my private parts like my dad but my mum was there". She questioned why she saw the appellant when "she could not keep me safe".

[33] The perception of both Mrs H and Ms Fair was that, when the children were taken away from their parents, they were presenting with concerning sexualised behaviour. T was often trying to take her clothes off, trying to sit next to adults and lifting up her skirt. C was

asking to see T's private parts and trying to put his finger in her bottom. T's behaviour was that of a very traumatised child.

The sheriff's reasoning

[34] The sheriff considered the three step approach to hearsay in *Al-Khawaja* v *United Kingdom* (2012) 54 EHRR 23. On the first step, there had been a good reason for the non-attendance of T and thus to admit evidence of her statements. On the second, the sheriff did not consider that the statements of T were the sole or decisive basis for the determination of the facts. The spontaneous context of the statements had been explained. Looking at the counterbalancing factors on the third step, the hearing as a whole had been fair. Although, when dealing with untested hearsay, the sheriff accepted that he had to "proceed with caution" and give the statements less weight than if they had been made in court and the maker had been cross-examined, he was able to take into account the spontaneity of the statements and the general sexualised and other behaviour. The most important factor was the fact that it had been accepted that T had made all the statements. The only part of any statement which had not been accepted as being true was that describing the appellant's presence at the time of the abuse. If the appellant accepted that the rest of the statements were true, it "seems extraordinary" that T would add another detail, that the appellant had been present, if that were not also true. The sheriff held that the statements showed "a clear consistency in what [T] said". He was satisfied on the balance of probabilities that the appellant had been present on occasions when HS had abused T.

[35] The basis for the sheriff's finding on the appellant's continuing relationship with HS had regard to the evidence of the Facebook comments, the appellant continuing to be in the company of HS prior to sentence, and the prison visits and phone calls. This was all after

she had been given detailed information on the indecent images of T on HS's phone. It persisted up to the date of the Children's Hearing on 2 November 2017.

[36] The sheriff posed the following three questions:

> "1. Did I act in a way which was incompatible with the Appellant's Article 6 ECHR rights, and thus unlawfully, in relying upon the untested hearsay evidence of statements made by [T] when coming to the conclusion that the Appellant was present on occasions when [T] was abused by [HS]?
>
> 2. In the event that I did act unlawfully …, did I err by finding the decision of the Children's Hearing's of 2 November 2017 was justified?
>
> 3. Having agreed that [T] should not be called as a witness in the Appeal Hearing under section 154 of the 2011 Act, is the Appellant entitled to challenge my decision to rely on the hearsay evidence of statements made by [T]?"

In addition the court required the sheriff to include three more questions.

> "4. Did I err in determining that the decision of the Children's Hearing of 2 November 2017 was predicated on (1) the fact that the Appellant had been present during the abuse of [T] by her father (or that she was aware that it was occurring and did nothing to stop it); and (2) that the Appellant was maintaining her relationship with [HS]?
>
> 5. Did I err in finding that the Children's Hearing of 2 November 2017, in reviewing a Compulsory Supervision Order and the measures included thereon, could only rely on facts admitted or proved on the balance of probabilities?
>
> 6. Did I err in finding that the Appeal before me could not be determined without my hearing evidence?"

Submissions

Appellant

[37] The appellant maintained that the Children's Hearing had proceeded on the basis that the content of T's disclosures had been true. It had accepted the material contained in the Integrated Assessment Report (see *JM* v *Taylor* 2015 SC 71 at para [21]). Whether the Hearing's decision was justified depended on whether the content of the disclosures was true. A "stricter scrutiny" was required in respect of limitations on a parent's contact with a

child in care (*L* v *Finland* (2001) 31 EHRR 30 at para 118). Taking a child into care should normally be regarded as a temporary measure; the ultimate aim being to reunite parent and child (*ibid* para 122).

[38] The Children's Hearing had not been fair. It was unlawful for a Children's Hearing to make a decision about a CSO that was materially dependent upon unsubstantiated suspicions or allegations. *JS* v *Children's Reporter* 2017 SC 31 established that children's referrals were civil proceedings to which Article 6 applied. The reporter and the court were public authorities and required to act compatibly with Convention rights. The three-steps in *Al-Khawaja* had to be taken (see *NM* v *Children's Reporter* [2018] Fam LR 19; *SCRA* v *B*, unreported, Sheriff Holligan, 16 February 2018). The sheriff's approach to *Al-Khawaja* was flawed. It had been for the reporter to present a justification for the use of hearsay. The sheriff was confused about the second step. There was no other evidence about the allegation concerning the appellant's presence. The child's statements were the only basis for determining the facts in issue. They were chance remarks. The circumstances to which they applied were unknown. There was no supporting circumstantial evidence.

[39] On the third step, the sheriff's approach, to the appellant's acceptance that the child had made the statements, was illogical. The appellant had not been in a position to dispute that the statements had been made. A proper consideration of the third step should have involved taking account of the absence of corroboration and the lack of any opportunity for the child to be precognosced. The child's reliability in light of her lack of maturity should have been considered. There were ambiguities in what the child was saying and scope for misunderstanding. It was not known, when she said that the appellant had been there, whether she meant in the house or the same room. The child had struggled to describe events and used language which did not permit a confident understanding of what was

being said. Some of the language reported was of a type which a child was not likely to have used. There were discrepancies between the reports of Mrs H and Ms Fair. Some of the things that the child had said were clearly not true.

[40] On the unsubstantiated nature of the allegations, the sheriff was correct in determining that the decision of the Children's Hearing was based upon the appellant having been present during the abuse of T and the appellant maintaining a relationship with HS. At the time of the hearing on 2 November 2017, there were agreed grounds of referral, which had made no mention of the appellant's involvement in the offences. The report from Ms Fair, which had recommended a reduction in contact as a result of the child's disclosures, had not been translated into findings-of-fact by the Hearing. It had not made any determination on the truthfulness of the statements. It had assumed them to be true. There was a distinction between proceeding on the basis of reasonable grounds for suspicion, which would justify a Child Protection Order, and being satisfied of the necessity of continuing a CSO (*West Lothian Council* v *B* 2017 SC (UKSC) 67, para [26]). There had been a need therefore for the court to hear evidence (cf *O* v *Rae* 1993 SLT 570; *C* v *Kennedy* 1987 SLT 737). There was now express provision (2011 Act, s 155(5)(f)) for the sheriff to hear evidence. Where there were disputed facts, fairness would generally require an oral hearing (*R (Osborn)* v *Parole Board* [2014] AC 1115 at paras 2, 55, 65-70, 78-81; *Yussouf* v *SRA* [2018] ACD 34). The appeal should be remitted to a different sheriff to hear the proof anew.

Respondent

[41] The questions in the appeal raised issues which struck at the heart of the Children's Hearing system and the extent to which it was able to fulfil its statutory purpose of promoting the welfare of children. The appellant's argument was a root and branch attack

on a system which was inherently fair. The sheriff could, but need not, hear evidence before determining the appeal. In terms of section 156 of the 2011 Act, the sheriff's task was to determine whether the decision of the Children's Hearing had been justified. This was a reversal of the old test (*W* v *Schaffer* 2001 SLT (Sh Ct) 86; *CF* v *MF* 2017 SLT 945). This appeal was not a general review of the decisions of fact made by the sheriff.

[42] The reasons of the Children's Hearing had to be read as a whole (*JM* v *Taylor* 2015 SC 71). The decisions related to the children and not to the appellant. The Hearing could only vary or continue a CSO if it was satisfied that it was necessary to do so for the protection, guidance, treatment or control of the child. The decision focused on the welfare of the child. The decisions had not been predicated on the fact that the appellant had been present during the abuse of T and that the appellant was maintaining a relationship with HS. In so far as the sheriff considered that he was concerned only with the truth of the disclosures, he was in error. There were six paragraphs of reasons. The reasons specifically in relation to the reduction in contact were broader than those narrated by the sheriff. There were four paragraphs, including references to a number of missed contacts by the appellant, the complex nature of the children's needs and the view that the children needed a longer period of no contact.

[43] The Children's Hearing was a decision-making body which considered all available information regarding a child's welfare. The functions of the sheriff and the Children's Hearing were different. The sheriff was required to determine whether any ground was established on the balance of probabilities as a threshold test. The sheriff acted as the gatekeeper. In contrast, the Hearing was a lay panel, whose task was to make decisions about the practical arrangements for the care of the child. It did not normally determine facts on a balance of probabilities (*AM* v *Locality Reporter Manager* [2015] Fam LR 106 at

para 33). It made decisions on the welfare of children once the grounds of referral had been established by the sheriff on the basis of the "golden rule".

[44] The making of a CSO was not a permanent intervention in the legal relationship between parent and child. It was a temporary one with a maximum duration of one year. The establishment of grounds of referral did not necessarily lead to a CSO. In reviewing a CSO, a Hearing was not restricted to relying on facts admitted or proved on the balance of probabilities. It could make decisions based on reports or submissions. It was entitled to take into account all of the relevant material before it. There was plenty of material before the Hearing to enable it to make an assessment of need, having regard to the nature of the information available, including disputed fact. The Hearing had recorded and considered that the appellant disputed that she had been present during the abuse.

[45] There was no necessity for the sheriff to hear evidence to enable him to be satisfied on whether the decision was justified. The reasons for the Children's Hearing's decision disclosed that the children needed protection, guidance, treatment or control as a result of the abuse suffered by T. The Hearing did not rely on knowing whether or not the appellant had been present during the abuse. There was sufficient other information to justify the decision. The sheriff had failed to consider that the reasons, when viewed as a whole, clearly justified the continuation of the CSO. There were circumstances in which the appeal mechanism could result in the hearing of evidence and/or the sheriff requiring a report. That was a safeguard built into the system.

[46] The application of the *Al-Khawaja* test should ordinarily result in hearsay statements of children being capable of being relied upon. The facts in these appeals were materially different from those in *JS* v *Children's Reporter* 2017 SC 31, because the appellant took the view that there was good reason for direct evidence of the child not being led. The

appellant's approach would result in the most vulnerable children being left unprotected by a system whose very purpose was to safeguard them. When proper regard was had to the nature of the proceedings and the rights of the children, hearsay evidence ought ordinarily to be relied upon. The first step in *Al-Khawaja* was met in such circumstances. The rights of the parents should not be given a higher status than the rights of the child. The sheriff still required to decide whether the evidence was sole or decisive and what counterbalancing measure might exist. It was clear from *Al-Khawaja* that the existence of corroborative evidence was a significant factor. The sheriff had correctly concluded that he was entitled to rely on the hearsay of T. Another counterbalancing factor was that the appellant was able to give evidence in relation to the matters that were in dispute. She was able to examine the persons to whom T had made the statements in order to ascertain the circumstances.

Decision

Question 4 – Did the sheriff err in determining that the Children's Hearing's decision had been predicated on the truth of the disclosures etc?

[47] It is convenient first to address questions 4 to 6. The sheriff's phrasing of Question 4 presupposes that he did determine that the Children's Hearing's decision was that the appellant had been present during the abuse and had maintained a relationship with HS. That is not what the sheriff said about the reasons "(insofar as they affected the Appellant)" (*supra*). He correctly recorded both in the stated case and (twice) in his incorporated note that the reasoning was that T had made detailed disclosures and that the Hearing was concerned about "ongoing conduct" with HS. That is to a degree accurate, but the description in the question that the Hearing had decided that the appellant had been present during the abuse, and that this was a decisive factor in the decision making process, is

inaccurate. As Sheriff Spy had also held in relation to the previous decision in the appeal from the Hearing of 16 January 2017, the Hearing had made no finding in relation to the truth of what T had "disclosed". This question falls to be answered in the affirmative.

[48] The Children's Hearing's reasoning for the decision of 2 November 2017 is quite clear from the written material. It is relatively detailed and goes far beyond any consideration of the appellant's conduct; focusing instead upon T and C and whether they required continuing measures of compulsory care. In relation to T, the established grounds for referral had included HS's sexual abuse of T and her deteriorating behaviour. The fact that she had made the disclosures about the appellant's presence was noted in the reasoning, but it was specifically recorded that the appellant had denied this.

[49] As was said in *AM* v *Locality Reporter Manager* [2015] Fam LR 106 (Lord McGhie at para [33]):

> "… decision making by a children's hearing is done in the context of a system which has been considered by this court and found to be compliant with the [European Convention on Human Rights]. The focus of a hearing is on the practical arrangements for the care of the children. A hearing may have to make a decision on disputed questions of fact. But it may well be able to make a proper decision about the welfare of the children without having to come to a specific view on all disputed facts… [A] hearing need not determine any issues unless they consider it essential to do so to allow them to make their decision about the best interests of the children".

In this case, it was sufficient to take account of the fact that T had said certain things about her mother, which may or may not have been true. That is what the Children's Hearing did. They were fully entitled to do so in the context of grounds of referral having been established and the decision for the Hearing being focused on the practical arrangements for the care of the children.

Question 5 - Did the sheriff err in finding that the Children's Hearing had been entitled to rely only on facts admitted or proved on the balance of probability etc?

[50] A determination that a child requires compulsory measures of care is almost certainly going to involve an interference with the Article 8 rights of the parents and the child. The route to that determination requires to comply with the procedural safeguards implicit in Article 8 and expressed in Article 6; both of which apply to the process. The manner in which these rights are secured is by the system of requiring grounds for referral to be accepted by the parents (2011 Act, s 91(1)) or determined by the sheriff on a reference from the reporter (*ibid,* s 93(2)). The sheriff will normally require to determine disputed fact in the traditional manner by listening to parole testimony, which may be tested by cross-examination (*JS* v *Children's Reporter* 2017 SC 31, Lord Brodie, delivering the opinion of the court, at para [30]) and assessing the veracity of the critical facts to the appropriate standard of proof, usually the balance of probabilities (cf the 2011 Act, s 102(3)).

[51] Once the grounds for referral have been accepted or established, it is for the Children's Hearing to determine the nature of any Compulsory Supervision Order based upon its view of what "is necessary… for the protection, guidance, treatment or control of the child" (*ibid*, ss 91(3), 108(2)). In making that decision, it is for the Hearing to take into account all information which is relevant to the issue. Only in rare situations will it be necessary for the Hearing to listen to testimony. The Hearing involves a panel of lay persons who are not generally tasked with, or skilled in, the assessment of parole evidence. The information before the Hearing will be in the form of written reports from the relevant social worker and others, supplemented with submissions from the reporter and any relevant person, including a parent, who is entitled to attend and make representations at what is an oral hearing. The panel may have to resolve disputed fact, but only if it is

essential to the making of their decision (*AM* v *Locality Reporter Manager* (*supra*)). No doubt, any fact would have to be accepted as probably having occurred, but there is no need for it to be proved to that standard on the basis of testimony. The decision can be made on the basis of the information and any oral argument presented by the reporter and any other party. It may be reviewed by the sheriff on appeal; in which case the sheriff may hear testimony (2011 Act, s 155(5)) if that is desirable in order to secure fairness in the overall process. That is what occurred in this case. The question nevertheless falls to be answered in the affirmative.

Question 6 – Did the sheriff err in finding that the appeal could not be determined without hearing evidence?

[52] The sheriff had the decision of the Children's Hearing and the updated Integrated Assessment Report before him. The IAR provided the sheriff with a detailed background report on the children, from before birth. It contained information on the abuse which T, in particular, but also C, had been subjected to while in the care of the appellant and HS. Both children had been behaving in a sexualised manner. This background made it clear that the children required compulsory measures of care in the form of a CSO. Amongst other things, HS was in prison and the appellant was thought to be in homeless accommodation. In relation to contact between the appellant and the children, the sheriff's task was to determine whether the Hearing's decision was "justified" (2011 Act, s 156(1)). This is a supervisory role, which should not involve the sheriff substituting his own views for those of the Hearing, to whom the task of deciding upon compulsory measures of care has been statutorily delegated.

[53] The reasoning on the issue of contact was that it should, on the recommendation of Ms Fair, be reduced because, amongst other things, "there had to be a longer period of no contact … in order to get to the bottom of the reasons for the children's behaviour and to address their longer term needs". Some contacts had been missed by the appellant. The contact which had taken place had not been of benefit to the children. Reduced contact would "assist in the more effective assessment of the children's complex needs". The question for the sheriff was whether, on the bases stated, reducing (not ending) contact was justified. In determining that issue, there was no need to hear evidence in the form of the testimony of the foster carer, the social worker or the appellant. All the information necessary for the decision was available in the written material supplemented by oral submission. In particular, it was not necessary to determine the veracity of the disclosures since that was not something upon which the decision rested. The Hearing had not decided whether the disclosures were true and there was no need for the sheriff to do so either. This question also requires to be answered in the affirmative.

[54] As a postscript to this issue, it is worth observing that the right to an oral hearing which is implied in Article 6 does not necessarily carry with it a right to adduce oral testimony. The requirement for an oral hearing is primarily to meet the need for transparency (ie a public hearing) and not because of any perceived advantages in hearing testimony or testing it by cross-examination, which are commonly thought to exist as a generality.

Question 1 – Did the sheriff act incompatibly with the appellant's Article 6 rights in relying on the untested hearsay evidence of statements made by T in concluding that the appellant had been present when T had been abused by HS?

[55] *Al-Khawaja* v *United Kingdom* (2012) 54 EHRR 23 involved two criminal prosecutions to which Article 6(3)(d) (right to require the attendance of, and to examine or have examined, witnesses) applied. Although Article 6(3)(d) is not applicable to cases such as the present one, it is accepted that the three steps in *Al-Khawaja* (at para 120 *et seq* and in *Schatschaschwili* v *Germany* (2016) 63 EHRR 14 at paras 100-131) are relevant considerations to be taken into account when assessing hearsay evidence in this area. This does not involve the application of a three part test of fairness. The question is whether the appellant has had a fair hearing. In determining this, the court has to:

> "... look at the proceedings as a whole … having regard to the rights of the defence but also the interest of the public and the victims … and, where necessary, the rights of witnesses" (*Schatschaschwili* v *Germany* (*supra*) at para 101, cited in *JS* v *Children's Reporter* (*supra*), Lord Brodie at para [33]).

[56] It is of particular significance that the hearsay which has been taken into account relates to the reports of young children. It has long been recognised in Europe that the admission of such evidence requires special consideration, having regard to the need to protect the children from further trauma (*SN* v *Sweden* (2004) 39 EHRR 13 at para 47, cited in *Maclennan* v *HM Advocate* 2016 JC 117, LJC (Carloway), delivering the opinion of the court, at para [24]). In such cases there is almost always a good reason for not requiring the child to give "live" evidence in court or at a commission. There may be, as there was in T's case, good reason for not re-visiting what the child has said at all. The fact that the defence, or here the appellant, is not able to ask questions of the child is not, as *Al-Khawaja* itself

demonstrates (at para 158), determinative of unfairness, even where the statement relied upon is decisive and the person making the statement is an adult.

[57] In the case of young children, the notion that there would be some advantage in the decision making tribunal hearing them recount what had occurred many months, if not years, previously and subjecting them to cross-examination, has long since been dispelled. As was said in the Scottish Courts Service's *Evidence and Procedure Review* (2015, cited in *JS* v *Children's Reporter* (*supra*) at para [28]):

> "2.1 It is now widely accepted that taking the evidence of young and vulnerable witnesses requires special care, and that subjecting them to the traditional adversarial form of examination and cross-examination is no longer acceptable. This is for two main reasons. The first is that, as has been known for some time, the experience of going to court and recounting traumatic events is especially distressing for children, and can cause long-term damage ...
>
> ...
>
> 2.3 The second reason is that, particularly for young and vulnerable witnesses, traditional examination and cross-examination techniques in court are a poor way of eliciting comprehensive, reliable and accurate accounts of their experience.
>
> ...
>
> 2.6 There is a compelling case that the evidence of a child ... should be captured in advance of any trial, in the form of a forensic interview preferably as soon as possible after the initial complaint. Properly conducted, and often taking place within hours or days of the reported incident, such interviews are the best way to elicit a reliable and comprehensive account of the reported incident. With this measure alone, a considerable burden is lifted off the witness, as their substantive account is made only once, very early on in the process. It also benefits the trial process, as the principal evidence is available for all the parties at the start of process, without the risk that the account may change."

[58] Following this line, the idea that the hearsay evidence of what young children have reported should be treated with caution simply because it is not repeated in open court and the child has not been cross-examined is hardly tenable. In the particular case of T, the report from Dr MacPherson had made it clear that T was not capable of providing a spontaneous account in a court (or even police interview) setting. As he correctly stated as a

generality, young children are prone to change answers and to display compliance, acquiescence and reticence in response to repeated or leading questions. There would have been no advantage, in terms of a fair trial, in examining or cross-examining T.

[59] For the reasons already explained, the truth of the content of T's statements was not decisive in the decision made by the Children's Hearing. It may have been important in the sheriff's decision to find that the Hearing's decision was justified, but that is another matter. The decision by the sheriff, that he could have regard to the hearsay on the basis that the appeal hearing had been fair to all persons concerned, including the appellant, was one that he would have been almost bound to take. Looking at the "counterbalancing factors" the appellant was able to challenge the veracity of the statements, first, by cross-examining the two witnesses who had reported them. The appellant could, and did, compare and contrast the statements given to each witness. Secondly, the appellant was able to, and did, testify on her own behalf. The sheriff was in a position to assess the evidence as a whole. He heard about the context in which the statements had been made; notably their spontaneity over dinner and when passing the local sheriff court. Notes about what had been said had been made by Mrs H at the time. There was considerable surrounding evidence supporting the occurrence of abuse from the photographs on HS's phone. Specifically in relation to the appellant's presence during episodes of abuse, there was evidence from Ms Fair that, during supervised contact with the appellant, T had tried to take her clothes off and displayed sexualised behaviour.

[60] The sheriff had the remarks not only of T but also of C to consider in the context of deciding whether to accept them all as essentially truthful. He was able to take account, as he did, of the fact that the appellant had accepted that T had made the disclosures. This was important. It was known that most of what T was saying about her having been abused was

undoubtedly true given what had been found on HS's mobile. The appellant was able to make submissions about whether the truth of the statements should have been accepted as fact having regard to the maturity of T and C, the language used and other matters. The sheriff was nevertheless entitled to reject these submissions for the reasons which he has provided. When considering, for example, whether T had meant the appellant had been present in the room, and not just the house, at the time of the abuse, there were the comments by T that her mother had, on one occasion, told HS to stop or she would call the police. T also referred to the appellant having images of T on her mobile. She also commented on her mother failing to keep her safe.

[61] Having regard to all these circumstances, the proceedings looked at as a whole were fair. This question requires to be answered in the negative.

Question 2 - Did the sheriff err by finding the decision of the Children's Hearing to be justified?

[62] For the reasons already given, this question is answered in the negative. The sheriff's findings in fact, which went beyond those of the Children's Hearing in relation to the presence of the appellant during some episodes of abuse and her continued support for HS, added weight to that justification. Such findings made a continuing CSO inevitable and a reduction (if not a cessation) of contact entirely reasonable in the circumstances.

Question 3 – Having agreed that T should not be called as a witness, is the Appellant entitled to challenge the sheriff's decision to rely on T's statements?

[63] It was entirely appropriate for the appellant not to call T as a witness in the appeal. It was nevertheless equally appropriate for the appellant then to ask the sheriff to disregard the statements as carrying no weight for the reasons concerning the reliability of hearsay

which were argued. There is no inconsistency involved. This question is answered in the affirmative.

[64] The court will refuse the appeal.