EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 65
P671/21

Lord Woolman
Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LORD DOHERTY

in the Petition to the *nobile officium*

by

SU

Petitioner

Petitioner: M Hughes; Campbell Smith LLP
First Respondent: M Ross QC, Findlater; Anderson Strathern LLP
Second Respondent: Kerrigan QC; Balfour + Manson LLP
Third Respondent: Allison; Drummond Miller LLP
Fourth Respondent: Guinnane; Rutherford Sheridan
Sixth Respondent: Stuart QC; Scottish Government Legal Directorate

7 December 2021

Introduction

[1] The petitioner is the mother of four children ("the children"), namely HA, the third respondent, who is aged 14; SS, the fourth respondent, who is aged 13; US, who is aged 4; and BA, who is aged 2. The first respondent is Anne-Marie McGinley, the Locality Reporter Manager for Glasgow within the Scottish Children's Reporter Administration. The second respondent is SA. He is the partner of the petitioner and the father of HA, SS, US and BA. The sixth respondent is the Lord Advocate.

[2] The Principal Reporter, acting on behalf of the first respondent, issued grounds of referral in terms of section 67 of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"). The supporting facts include allegations that the petitioner and the second respondent have repeatedly assaulted and wilfully ill-treated the children. Proceedings in relation to those grounds of referral are pending at Glasgow Sheriff Court. The petitioner and the second respondent are both "relevant persons" for the purposes of the referral proceedings. They do not accept the grounds of referral or the supporting facts. The children are subject to interim compulsory supervision orders. SS's case is the lead case.

[3] SS's evidence was taken on commission by way of interrogatories on 24 and 26 March 2021. The petitioner's and the second respondent's representatives prepared detailed interrogatories which were put to SS at the commission.

[4] The petitioner and the second respondent are both the subject of criminal proceedings in respect of conduct alleged in the grounds of referral. Initially, those proceedings were summary proceedings. However, following a review by the Crown Office and Procurator Fiscal Service ("the Service") the summary proceedings were discontinued and petition proceedings have now been commenced against them.

[5] In late July and early August 2021 the petitioner's agents sought clarification from the Service whether the summary criminal proceedings against her were to be proceeded with. By email of 11 August 2021 the agents enquired whether the Service had made any request of the Principal Reporter to make available to it information from the referral proceedings in terms of section 179 of the 2011 Act. On 13 and 18 August 2021 the Service advised that the criminal proceedings against the petitioner would now be on petition. It also advised that while no application in terms of section 179 had been made to date it could

not rule out the possibility that such an application might be made. It indicated that it saw no difficulty with the civil case being heard before the criminal proceedings.

[6] A proof was due to take place in the referral proceedings on 26 and 27 August, 16 and 17 September, and 3, 4, 5, 10, 11, and 12 November 2021. At the pre-proof hearing on 23 August 2021 the petitioner's counsel moved the sheriff to discharge the proof diet and to sist the proceedings pending completion of the criminal case against the petitioner. The sheriff refused the motion. Following that refusal the petitioner's agents emailed the Service asking for an undertaking that it would not exercise the section 179 power to request information from the Principal Reporter about the referral proceedings. The Service declined to provide any such undertaking.

[7] At the outset of the proof on 26 August 2021 counsel for the petitioner moved for leave to appeal the sheriff's decision to refuse the motion for a discharge and a sist. The sheriff refused leave to appeal. However, on being advised that this petition was to be brought he discharged *ex proprio motu* the hearings which were due to take place on 26 and 27 August. On 27 October 2021 he discharged the remaining proof dates and assigned a new proof diet commencing on 14 February 2022.

The petition and answers

[8] The petition seeks to invoke the *nobile officium*. It narrates the history of the referral proceedings and the criminal proceedings. The petitioner avers that the prospect of the Service exercising the section 179 power infringes her article 6 and article 8 ECHR rights. She avers that it precludes her effective participation in the referral proceedings, and that that is not in the best interests of the children. She avers that the sheriff's refusal to

discharge the proof and sist the proceedings is unjust and that application by her to the *nobile officium* is her only remedy. She also avers (Stat 23) that:

> "Section 179 … is contrary to Section 29 of the Scotland Act 1998 and is accordingly out-with (*sic*) the legislative competence of the Scottish Parliament."

However, the prayer of the petition does not mention legislative competence. It merely craves the court:

> "to ordain the sheriff at Glasgow to discharge and sist the Children's Referral Proof proceedings … until conclusion of the criminal matter involving the petitioner, or until intimation by the Crown of an undertaking not to request any information about the said Children's Referral proof proceedings under and in terms of Section 179 of the Children's Hearings (Scotland) Act 2011."

In Stat 24 and Stat 26 the petitioner avers:

> "Stat 24. In the circumstances … the Court having become apprised of the coincidence of the criminal charges with the statement of grounds, ought in the interests of justice to have granted discharge of the dates assigned to hear evidence and sist of the Children's Referral proof proceedings until determination of the criminal proceedings or until the Crown provided an undertaking that it will not invoke the terms of Section 179 in respect of the Petitioner…
>
> Stat 26 The decision by the Sheriff of 23rd August 2021 being not susceptible to leave to appeal standing the terms of Section 163 of the Act of 2011, despite it being manifestly contrary to the interests of justice and there being no other remedy available to the Petitioner, this application is necessary in the interests of justice…"

[9] In their answers the first, third, and sixth respondents aver that the petition is incompetent. The court fixed a hearing to determine the competency issue.

Relevant statutory provisions

[10] Sections 25, 101, 163, and 179 of the 2011 Act provide:

> "**25 Welfare of the child**
>
> (1) This section applies where by virtue of this Act a children's hearing, pre-hearing panel or court is coming to a decision about a matter relating to a child.

(2) The children's hearing, pre-hearing panel or court is to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration …

101 Hearing of application

(1) This section applies where an application is made to the sheriff by virtue of section 93(2)(a) or 94(2)(a).

(2) The application must be heard not later than 28 days after the day on which the application is lodged.

(3) The application must not be heard in open court …

163 Appeals to sheriff principal and Court of Session: children's hearings etc.

(1) A person mentioned in subsection (3) may appeal by stated case to the sheriff principal or the Court of Session against—

(a) a determination by the sheriff of—

(i) an application to determine whether a section 67 ground (other than the ground mentioned in section 67(2)(j) if the case was remitted to the Principal Reporter under section 49 of the Criminal Procedure (Scotland) Act 1995) is established,

(ii) an application under section 110(2) for review of a finding that a section 67 ground is established,

(iii) an appeal against a decision of a children's hearing,

(iv) an application under section 98 for an extension of an interim compulsory supervision order,

(v) an application under section 99 for a further extension of an interim compulsory supervision order,

(b) a decision of the sheriff under section 100 to—

(i) make an interim compulsory supervision order,
(ii) make an interim variation of a compulsory supervision order.

(2) A person mentioned in subsection (3) may, with leave of the sheriff principal, appeal by stated case to the Court of Session against the sheriff principal's decision in an appeal under subsection (1).

(3) The persons are—

(a) the child,

(b) a relevant person in relation to the child,

(c) a safeguarder appointed in relation to the child by virtue of section 30,

(d) two or more persons mentioned in paragraphs (a) to (c) acting jointly, and

(e) the Principal Reporter.

(4) Despite subsections (1) and (2), a safeguarder may not—

(a) appeal against a determination by the sheriff of a type mentioned in subsection (1)(a)(i) or (ii), or a decision of the sheriff of a type mentioned in subsection (1)(b),

(b) appeal to the Court of Session against the sheriff principal's decision in such an appeal.

(5) Despite subsection (1), the Principal Reporter may not appeal against a determination by the sheriff confirming a decision of a children's hearing.

(6) Subsection (7) applies in relation to—

(a) an appeal against a determination by the sheriff of an application under section 110(2) for review of a finding that a section 67 ground is established,

(b) an appeal to the Court of Session against the sheriff principal's decision in such an appeal.

(7) In subsection (3)(a) and (b)—

(a) the references to the child are to the person in relation to whom the section 67 ground was established (even if that person is no longer a child),

(b) the reference to a relevant person in relation to the child includes a person who was, at the time the section 67 ground was established, a relevant person in relation to the child.

(8) An appeal under this section must be made before the expiry of the period of 28 days beginning with the day on which the determination or decision appealed against was made.

(9) An appeal under this section may be made—

(a) on a point of law, or

(b) in respect of any procedural irregularity.

(10) On deciding an appeal under subsection (1), the sheriff principal or the Court of Session must remit the case to the sheriff for disposal in accordance with such directions as the court may give.

(11) A decision in an appeal under subsection (1) or (2) by the Court of Session is final.

(12) In subsection (1)(a)(ii), the reference to a determination by the sheriff of an application under section 110(2) for review of a finding that a section 67 ground is established includes a reference to a determination under section 117(2)(a) that a ground is established.

…

179 Sharing of information: prosecution

(1) This section applies where—

(a) by virtue of this Act, the Principal Reporter, a children's hearing or the sheriff has determined, is determining or is to determine any matter relating to a child,

(b) criminal proceedings have been commenced against an accused,

(c) the proceedings have not yet been concluded, and

(d) the child is connected in any way with the circumstances that gave rise to the proceedings, the accused or any other person connected in any way with those circumstances.

(2) The Principal Reporter must make available to the Crown Office and Procurator Fiscal Service any information held by the Principal Reporter relating to the prosecution which the Service requests for the purpose of—

(a) the prevention or detection of crime, or

(b) the apprehension or prosecution of offenders."

The parties' submissions

[11] Counsel for the petitioner submitted that on a proper construction of section 163 of the 2011 Act there is no right of appeal against interlocutory decisions such as the decision of 23 August 2021. Moreover, section 163 should be interpreted as expressly excluding all other means of challenging such decisions (whether by way of reduction, suspension or judicial review). Even if that is not so, reduction, suspension or judicial review are only available where a decision is one "on the merits" as opposed to an interlocutory decision. The referral proceedings are incipient - they have not been concluded. The sheriff's interlocutor was not a decision on the merits. Accordingly the remedy available to the petitioner is an application to the *nobile officium*. The circumstances of the present case are a *casus improvisus*. The circumstances are unusual and unforeseen in view of the gravity of the criminal charges which the petitioner faces. Unless the Service undertakes not to exercise the power the petitioner will be advised by her legal representatives that it may be exercised (*cf H(N)* v *HM Advocate* 2019 SLT 943), and she may well be counselled not to participate in the referral proceedings, or at least to limit her participation. The possibility of the Service exercising the power will prevent the petitioner from effectively participating in the referral proceedings. Those are highly unusual circumstances which were not foreseen by the Scottish Parliament when section 179 was enacted, and it is in the petitioner's interests and the children's interests that her participation in the referral proceedings is not affected by such a constraint. It has always been recognised that it is important that referral proceedings take place in a closed court and that the material in those proceedings is not made available to the Service (*Ferguson* v *P; Ferguson, Petitioner* 1989 SC 231, opinion of the court delivered by Lord Justice Clerk Ross at pages 237-8; section 101(3) of the 2011 Act). Moreover, given the non-availability of any other remedy it is necessary to have resort to the

parens patriae jurisdiction of the court in order to safeguard the welfare of the children (*Cumbria County Council* v *X* 2017 SC 451, opinion of the court delivered by Lord Drummond Young at paragraphs [14], [25] and [26]). Counsel also submitted that section 179 "is incompatible with articles 6 and 8 ECHR". She maintained that the issue of incompatibility could "be dealt with within the present petition".

[12] Senior counsel for the second respondent adopted counsel for the petitioner's submissions. He submitted that section 179 constrained the participation of the petitioner and the second respondent in the referral proceedings, and that that constraint breached their article 6 and article 8 ECHR rights. There was no indication in the Bill's Policy Memorandum or in the Explanatory Notes or in the reports of the Bill's proceedings in the Scottish Parliament that the Scottish Government or the Parliament gave any consideration to the problems which could arise in cases such as the present one. The situation here was unforeseen and extremely unusual. Resort to the *nobile officium* was competent.

[13] Counsel for the fourth respondent submitted that "it was open" to the court to find that the petition was competent, but she did not explain why that was so. She submitted that "in due course" the prayer of the petition "should be refused as unnecessary". The circumstances were neither highly special nor unforeseen. Proceeding with the referral proof which had been appointed by the sheriff would not breach the article 6 or article 8 rights of the petitioner or the second respondent. The fourth respondent had already given her evidence on commission by way of interrogatories, including interrogatories submitted on behalf of the petitioner and the second respondent. The fourth respondent wishes the referral proceedings to be concluded without further delay. That is what is in her best interests and in the best interests of the other children.

[14] Senior counsel for the first respondent submitted that the petition is incompetent, and that if it is competent the court should decline to entertain it. The petitioner has an alternative remedy in the Outer House, namely reduction of the sheriff's interlocutor which refused the motion for a discharge and a sist. On a proper construction of section 163 it does not exclude review by reduction. While it is unnecessary for the court to determine whether reduction should be sought in an ordinary action or in a petition for judicial review, it would be helpful if the court was prepared to express a view on the matter. *Prior* v *Scottish Ministers* 2020 SC 528 at paragraph [44] suggests that the appropriate procedure would be an ordinary action. However, in practice reduction of orders of inferior courts and tribunals is frequently sought in judicial review proceedings, and in *Prior* the court does not appear to have been referred to the opinion of Lord Menzies in *Glasgow City Council, Petitioners* 2004 SLT 61, at paragraph [24] or to the opinion of Lord Brodie in *D, Petitioner* 2011 SLT 101 at paragraphs [12]-[13]. There is nothing exceptional or unforeseen about the circumstances of the present case. It is an all too common situation that a relevant person in referral proceedings is also an accused in criminal proceedings, and there is no reason to suppose that the Scottish Parliament was unaware of that when it enacted section 179. This is not a case where the court's *parens patriae* jurisdiction may be invoked. The petitioner has another remedy. Moreover, she is not a child, and the primary purpose of the petition is to protect her interests rather than the interests of her children. The petitioner's interests and the children's best interests do not coincide. They are opposed.

[15] Counsel for the third respondent submitted that the petition is incompetent, for two reasons. First, this is not a case where there is a *casus improvisus* in section 163 of the 2011 Act. The omission of a right of appeal against interlocutory decisions was a deliberate feature of the scheme of the legislation. For the court to intervene in such a case would be to

trespass on the province of the legislature (*R* v *Kennedy* 1993 SC 417, opinion of the court delivered by Lord President Hope at p 421; *Cumbria County Council* v *X*, at para [25]). Second, this is not a case where the petitioner could invoke the court's *parens patriae* jurisdiction. She has an alternative remedy. Further, the critical objective of the present application is to protect the interests of the petitioner, not to ensure the welfare of the children (*cf Cumbria County Council* v *X* at para [26]).

[16] Counsel for the sixth respondent submitted that resort to the *nobile officium* is only competent in exceptional and unforeseen circumstances, and where no other remedy is available. The circumstances of this case are neither exceptional nor unforeseen, and the petitioner has an available remedy - a petition for suspension or an action for reduction. The concurrence of criminal proceedings and referral proceedings had been foreseeable, indeed it was and is commonplace. Section 179 contemplates such concurrence. Reduction or suspension of a sheriff's interlocutor may be obtained in exceptional circumstances to avoid a miscarriage of justice (*Man Hen Liu* v *Andersons Solicitors LLP* [2017] CSIH 45, opinion of the court delivered by Lord President Carloway at para [19]; *Lamb* v *Thompson* (1901) 4 F 88, at pages 91-92; *Principal Reporter* v *K* 2011 SC (UKSC) 91). Section 163 of the 2011 Act does not exclude resort to such remedies.

Decision and reasons

[17] **T**he hearing was appointed to determine the competency of the petition. Some of the submissions drifted into a consideration of its relevancy and merits. Those issues are not before us.

[18] Some of the petitioner's averments and submissions are poorly focused. The proposition that section 179 is outside the competence of the Scottish Parliament is an

audacious one. It raises a devolution issue. However, neither the petitioner's averments nor her submissions articulate, why, if the proposition is correct, the sheriff ought to have granted the motion for a discharge and sist. The real nub of the petitioner's Convention rights complaint so far as the sheriff's decision is concerned may be an argument that his refusal to grant the motion, when the prospect of a section 179 request being made hung over the petitioner like a sword of Damocles, was a breach of her article 6 and article 8 rights, and was therefore unlawful in terms of section 6 of the Human Rights Act 1998. We shall return shortly to the petitioner's Convention complaint.

[19] The petition is premised upon the proposition that an application to the *nobile officium* is competent because the petitioner has no other remedy. We are not persuaded that an application to the *nobile officium* is the petitioner's only remedy.

[20] The cornerstone of the petitioner's submissions is that section 163 of the 2011 Act expressly excludes not only any right of appeal against interlocutors such as the sheriff's interlocutor of 23 August 2021, but also any corrective remedies (eg reduction or suspension) which might otherwise have been available at common law. In our opinion, on a proper construction of section 163 it does no such thing. Nor in our view does section 163 impliedly exclude the availability of such possible remedies.

[21] We do not think it necessary or appropriate to consider all of the remedies which might be available to the petitioner if her complaints are well founded. It suffices to say that reduction would be competent if she could show that it is necessary to avoid a miscarriage of justice or to produce substantial justice (see eg *Man Hen Liu* v *Andersons Solicitors LLP*, at paras [19]-[20]). Thus, for example, if the petitioner is correct that the sheriff's decision contravened her Convention rights and is unlawful, reduction of that decision would be competent.

[22] We are not disposed to accept the invitation to opine at this stage whether the vehicle for seeking reduction could be an ordinary action or a petition for judicial review. We confine ourselves to observing that in a case like the present one the court would be unlikely to raise a competency point *ex proprio motu*; and that the parties should be mindful of their responsibility to do their utmost to enable the case to be resolved as speedily as possible.

[23] We reject the submission that only final decisions "on the merits" of a cause may be amenable to reduction. No authority was cited in support of the submission, and it is not difficult to find instances where the court has reduced or suspended interlocutors of inferior courts which were not final decisions determining the matter in controversy in the action or petition (eg *Man Hen Liu* v *Andersons Solicitors LLP*). We also reject the submission that the circumstances of the present case are exceptional and unforeseen, and that they disclose a *casus improvisus*. The concurrence of criminal proceedings and referral proceedings was foreseen by the legislature. It could hardly not have been, given that criminal proceedings against relevant persons were and are far from uncommon. Section 179 clearly contemplates the possibility of such concurrence.

[24] Since the petitioner is not devoid of a remedy, we are not persuaded that she may invoke any aspect of the court's *nobile officium*, the *parens patriae* jurisdiction or otherwise. So far as the former is concerned, we see force in the submission that the petition primarily advances the petitioner's interests rather than the interests of the children, but it is unnecessary to reach a concluded view on that matter.

Disposal

[25] We shall sustain the first respondent's first plea-in-law and dismiss the petition. We shall reserve meantime all questions of expenses.