SHERIFF APPEAL COURT

[2016] SAC (Civ) 14
[PAI-B226-16]

Sheriff Principal M Lewis
Sheriff A S Stewart
Sheriff Principal B Lockhart

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M LEWIS

in appeal by

EAST RENFREWSHIRE COUNCIL

Applicant and Appellant

against

the decision of the sheriff at Paisley dated 18 May 2016 in respect of an application under section 166(2) of the Children's Hearings (Scotland) Act 2011

Applicant and Appellant: [McKinlay, advocate; East Renfrewshire Council]
1st Respondent: [Davey; Highland Council]
2nd Respondent: [Bell, advocate; Principal Reporter]
Relevant Person: [Lynch; Mackinlay & Suttie]

25 November 2016

Introduction

[1] This appeal relates to a child in care, D, who is the subject of a compulsory supervision order. The parties seek resolution of the ongoing vexed question of who has to pay for the care that has been and will continue to be provided for him.

Background

[2] The facts have been recorded in some detail by Sheriff Principal Pyle in his

decision of 14 September 2015 and much of this was replicated by Sheriff McCartney in his Stated Case dated 13 July 2016. Put shortly, D was born in Inverness in 2001. He is now 15 years of age. He was initially brought up by his maternal grandmother on the Isle of Skye and was returned to the care of his mother in 2008.

[3] D is a vulnerable child. In February 2012 he was accommodated by Highland Council on an emergency basis under section 25 of the Children (Scotland) Act 1995 ("the 1995 Act") and was moved to a residential unit in Inverness. In April 2012 he was moved to a residential unit in Lancashire where he remains. On 19 August 2012 D was the subject of a compulsory supervision order ("CSO") granted under section 83 of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"). In terms of section 83(1)(b) that order specified Highland Counsel as the implementation authority. As the implementation authority Highland Council must give effect to the CSO and comply with any requirements in it in relation to D (s144(1) & (2) of the 2011 Act). The requirements include securing or facilitating the provision of services for the child which that authority does not provide (s144(3) of the 2011 Act).

[4] D's mother and sibling moved in April 2013 to Barrhead in East Renfrewshire where they continue to reside. On 20 August 2013 a children's hearing in Inverness decided to vary the CSO by changing the implementation authority to East Renfrewshire Council, in part to facilitate contact between D and his mother and brother and also to work towards the aim of rehabilitating D into the care of his mother. East Renfrewshire Council applied to the sheriff in Inverness for a review of that decision under section 166 of the 2011 Act. The sheriff found that East Renfrewshire was the relevant authority on whom duties were imposed under the CSO. An appeal was taken to Sheriff Principal Pyle who, by interlocutor of

15 September 2015, allowed the appeal and determined that the relevant local authority is Highland Council.

[5] D has direct contact with his mother once a quarter and has telephone contact with his mother and brother every 6 weeks or so. The rehabilitation plans have long vanished. As at September 2015 the cost of D's placement and schooling were in the order of £3,650.00 per week. This substantial cost is the root of the dispute between the two local authorities.

[6] Notwithstanding the decision of Sheriff Principal Pyle, the matter has come full circle for at a children's hearing on 01 March 2016 the CSO was continued and varied, specifying East Renfrewshire Council as the implementation authority. East Renfrewshire Council applied to the sheriff in Paisley for a review of that order. The sheriff, disagreeing with the conclusion reached by Sheriff Principal Pyle in the appeal in respect of the earlier order, upheld the decision of the children's hearing and his decision has now been appealed to this court.

The stated case

[7] The sheriff posed four questions in his stated case which are these:

1. Did I err in law in interpreting s201(3) as excluding account being taken of any connection with an area as opposed to a period of time?
2. Did I err in law in deciding that the "welfare principle" does not apply to a decision as to the relevant local authority and the application thereof?
3. Did I err in law in determining that East Renfrewshire Council is the relevant local authority for the child?

4. Did I err in ordering East Renfrewshire Council to reimburse Highland Council for such costs as may be determined in relation to the duties imposed by the compulsory supervision order dated 1 March 2016?

[8] The intention of the stated case procedure is to ensure that all issues of relevance to the appeal are finalised by the time the sheriff signs the stated case. Accordingly the appeal court is limited to answering the questions posed by the sheriff and should not be invited to look behind the stated case. Despite that limitation, we were presented with a supplementary argument in relation to the interpretation of section 201 of the 2011 Act by Ms McKinlay. Although Ms Davey seemed unperturbed at this development, she did explain that this particular issue was not fully developed before the sheriff. As this matter goes to the heart of this appeal, we feel bound now to consider it.

Decision

[9] Questions 1 and 3 are linked for both are concerned with the methodology and test for determining which local authority is to be responsible for the care plan and the implementation of it. Section 201, insofar as relevant to the current appeal, provides:

> "(1) In this Act, "relevant local authority", in relation to a child, means –
> (a) the local authority in whose area the child predominately resides, or
> (b) where the child does not predominantly reside in the area of a particular local authority, the local authority with whose area the child has the closest connection."

D does not predominantly reside in the area of either Highland Council or East Renfrewshire Council. All parties agreed that s210(1)(a) had no application and that the relevant local authority is one with whose area D has the closest connection.

[10] "Closest connection" is not defined although an exception has been built in to subsection (3) which provides -

> "(3) For the purposes of subsection (1)(b), no account is to be taken of –
> (a) any connection with an area that relates to a period or residence in a residential establishment, ….."

It is accepted by the parties that D has been residing in Lancashire in a residential establishment since 2012. A residential establishment is defined in section 202(1) of the 2011 Act as –

> "(a) an establishment in Scotland (whether managed by a local authority, a voluntary organization or any other person) which provides residential accommodation for children for the purposes of this Act, the 1995 Act or the Social work (Scotland) Act 1968….
> (b) A home in England …. that is
> (iii) a private children's home …"

An "area" in relation to a local authority is defined as "the local government area for which the authority is constituted" (section 25, schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010) ("the 2010 Act").

[11] All parties accepted that the English authorities are not in point as the statutory provisions are quite different. However, we do agree with Ms McKinlay that they contain useful illustrations of complications and potential absurdities that can arise when interpreting the statutory provisions too rigidly. Equally, in our view, the court has to be wary of stretching the elasticity of interpretation to snapping point – and that is exactly what we are being invited to do.

[12] We adopt the point made by Sheriff Principal Pyle (para [19]) that "sub-section 201(1)(b) is in the present tense; in other words, it is the area to which the child has the closest connection as at the date of the children's hearing making its determination or as at the date of the sheriff conducting his review.." The date of the children's hearing in respect of D was 01 March 2016 and the date of the review hearing before the sheriff was 29 April 2016. In our view, Sheriff McCartney correctly identified that as at 29 April 2016 D had an on-going connection with his mother and sibling. They reside in East Renfrewshire and have done since August 2013. That location, we understand, was selected to facilitate on going contact with D, to assist in the implementation of his care plan and to lead to his eventual rehabilitation there. It is abundantly clear that by 29 April 2016 D had no connection at all with the Isle of Skye or Inverness or any other part of the Highland Council area. Reading section 201(1)(b) in isolation leads to an inevitable conclusion that East Renfrewshire Council is "the local authority with whose area the child has the closest connection". None of the parties disagree with that assessment.

[13] However, this appeal was essentially concerned with the proper interpretation of section 201(3) which contains what came to be termed "a disregard provision". The interpretation of that provision by the appellant appears to have shifted recently. Before the sheriff, Ms McKinlay argued that the disregard or what requires "to be excluded from consideration of the question of the closest connection" is "any period of time during which the child is resident in a residential establishment". Thus the period from April 2012 during which D resided in Lancashire, which covers the period of involvement of East Renfrewshire Council, should be excluded. Immediately prior to April 2012 D had a connection with the

Highland area and Highland Council therefore is the relevant local authority. In support of that proposition, Ms McKinlay relied upon the views of Sheriff Principal Pyle who said (para (19) "The connection relates to a period of time, namely when the child was and is in the residential unit. That means where the child's closest connection to an area changes from the Highland area to an area of another local authority, such as East Renfrewshire, **during** the period of his residence in the unit such a change is ignored for the purposes of this section. Thus one is left to examine the connection immediately before the child went into the residential unit." (our emphasis) That was the basis of his decision.

[14] The alternative interpretation now promoted by Ms McKinlay, doubtless because of the decision of Sheriff McCartney, is that the disregard provision should be read to mean that for the whole of the period from April 2012 to date, being the period in which D has resided in the residential accommodation, no account should be taken of his connection with either Lancashire or Barrhead. "Area" is not limited, she said, to the location of the residential accommodation, but extends to D's connection with Barrhead where his mother and sibling currently reside, as that connection arose during his period of residence in the residential accommodation. She reached this conclusion by applying what she claimed were the plain and ordinary meaning of the words in sections 201(3)(a) and 202(1) of the 2011 Act and schedule 1 of the 2010 Act. This is the extended argument to which we referred in paragraph [8] above.

[15] Ms Davey argued that such an interpretation was ill-conceived. If "area" in s201(3)(a) means a local authority area constituted in Scotland then the disregard provision does not apply and the relevant local authority is to be determined under

s203(1)(b) – which is East Renfrewshire Council. The Scottish disregard provision, she submitted, is designed to ensure that the relevant local authority is the authority which is best placed to implement the compulsory supervision order from time to time even if that means that the implementation authority may change once the child is accommodated. She contrasted that to the English approach which seemed to be designed to ensure that once a child is accommodated the same authority remains responsible – in other words "the clock stops".

[16] The Principal Reporter reminded us that the restriction operates to prevent a local authority in whose area the residential establishment is situated (Lancashire) becoming responsible for the costs of all children placed there by other local authorities. In his commendably succinct and clear assessment of the statutory provision he submitted that the plain, purposive and common-sense interpretation restricts only a connection which arises directly from residence in a residential establishment and does not exclude a connection that arises for other reasons.

[17] Mr Lynch for the mother adopted his written submission and supported the stance taken by Highland Council and the Principal Reporter in relation to the foregoing.

[18] It concerns us greatly that the subtlety of Ms McKinley's argument was not fully canvased before the Sheriff. However, we do not consider that this omission is fatal. Questions 1 and 3 are wide enough in scope to permit us, with the consent of the other parties, to deal with that matter. We answer both questions 1 and 3 in the negative and do so for the following reasons.

[19] We agree with the submissions of Highland Council and the Principal Reporter recorded in paragraphs [15] and [16] hereof that the purpose of the

disregard provision in s203(3) is to ensure that a receiving authority, which has the facilities and skills to deal with vulnerable children such as D sent there from other parts of the country, is not unfairly burdened financially. The literal interpretation (in the supplementary argument) put on section 201(3) by Ms McKinlay has a certain attraction but it defeats that purpose, leads to an absurd result and is dependent on linking the word "area" directly with the time period which is a roundabout way of replacing words in subsection (3).

[20] Ms McKinlay suggested that as the area of the local authority changed from Highland Council to East Renfrewshire Council during the period 2012 to date, that change is to be ignored, and one then reverts to examining the connection prior to the period in residential care. Such an approach requires reading into section 201(3) the word "during" in place of "that relates to" – and that is quite a departure from the literal construction that Ms McKinlay canvassed.

[21] We conclude, with the greatest respect to Sheriff Principal Pyle, that Sheriff McCartney is correct to find that what requires to be disregarded is not the 3 year+ period spent in the residential establishment in Lancashire but rather "any connection with an area" and the area is one that "relates to the period of residence in a residential establishment". In this appeal that area is in Lancashire. We adopt his view that had it been intended to exclude the time frame rather than the connection with an area, "that could have been stated explicitly and plainly by replacing the words *"that relates to a period of residence"* with "*during a period of residence…."*. The sheriff was entitled to conclude (para 40 of his stated case) "As at the date of the children's hearing on 01 March 2016 and as at the date of the review hearing before me on 29 April 2016 the child had no connection with the Highland area. His closest

connection is with the area of East Renfrewshire Council, that being where his immediate family, his mother and his brother, live."

[22] What exercised Sheriff Principal Pyle was the potential for another absurd result "if a child in a residential establishment had developed no other connection to an area during his period of residence" for in his view that would lead to "the very real possibility that he would not be connected to any local authority area at all." That difficulty does not arise here for D had a connection with Highland Council up to 2013 and thereafter developed a connection with East Renfrewshire Council – we note that once again the word "during" has been utlised in place of "that relates to".

[23] Both Ms McKinlay and Ms Davey provided a number of examples of absurdities depending on the interpretation placed on section 210(3). We agree that peculiar consequences may arise if one takes a rigid literal construction, reads each subsection in isolation and ignores the purposive approach. Section 201 as a whole provides what ought to be a straightforward method of identifying which local authority is best placed to serve the child. We accept that complications and inconvenience may arise if the family were to move around the country thus resulting in the involvement of a series of local authorities – but mobility is a fact of modern life and section 201 is wide enough to accommodate that without unduly burdening a particular local authority.

[24] The application of the "welfare principle" was considered by both Sheriff Principal Pyle (paragraph 18 of his judgment) and Sheriff McCartney (paragraphs 28-30 of the stated case). We are surprised that this matter is being ventilated yet again. The appellant, in its written submission (paragraph 5.3), argued that the welfare principle had application and indeed Highland Council and the

mother supported that stance. However, at the hearing before us, Ms McKinlay departed from that position and invited us to answer the question in the affirmative – as did the Principal Reporter.

[25] We fully agree with Sheriff Principal Pyle's observation that "the welfare of the child is an irrelevant consideration in determining the relevant local authority". We support the analysis undertaken by Sheriff McCartney of *T* v *Locality Reporter,* Kearney, Children's Hearings in the Sheriff Court (para 25.09) and Norrie, Children's Hearings in Scotland 3rd ed (para 9-16) and the conclusions that he draws. The children's hearing on 1 March 2016 was clearly concerned overall with the welfare of D but that does not mean that every decision it made that day was related to his welfare in the context of his upbringing, where he is to be looked after, by whom and for how long or where he is to be schooled *(MT* v *Gerry* (2015) SC 359*)*. One of the decisions was the designation of the relevant local authority upon whom will fall the administrative and financial responsibility for implementing the provisions of the CSO.). In reality this is a dispute over who pays the bills for D's care and schooling. Accordingly we answer question 2 in the negative.

[26] Having answered questions 1 and 3 in the negative, and thus confirmed the sheriff's decision that East Renfrewshire Council is the relevant authority, we feel bound to answer question 4 in the negative.

[27] Accordingly this appeal fails. We remit this matter back to the Sheriff in Paisley for disposal in terms of s167(6) of the 2011 Act, direct the Sheriff to determine that the relevant local authority is East Renfrewshire Council, and order East Renfrewshire Council to reimburse Highland Council for such costs as may be determined in relation to the duties imposed by the compulsory supervision order

dated 1 March 2016. Parties were agreed that there should be no award of expenses due to or by any party arising from this appeal.