**SHERIFF APPEAL COURT**

**2021 SAC (Civ) 25**
**DNN-AW15-19**

Sheriff Principal M W Lewis
Appeal Sheriff A MacFadyen
Appeal Sheriff N McFadyen

NOTE

delivered by SHERIFF PRINCIPAL M W LEWIS

in the application for leave to appeal to the Court of Session by

JK

Appellant

in respect of the application by

ARGYLL AND BUTE COUNCIL

Respondent

**Appellant: Murphy; Civil Legal Assistance Office**
**Respondent: Blair, advocate; Argyll & Bute Council**

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24 June 2021

[1] The appellant sought permission under section 113(1) of the Courts Reform (Scotland) Act 2014 to appeal to the Court of Session against the decision of the Sheriff Appeal Court of 13 May 2021 to refuse the appellant's appeal against the decision of the Sheriff to grant powers to a welfare guardian which have the effect of depriving the adult of her liberty. The Clerk of Court, on our instruction, drew to the attention of the appellant's agent the unreported case of *KM* v *AKG* (January 2021) where this court had treated its

earlier refusal of permission to appeal as *pro non scripto* on the basis that the application was incompetent and should have been one for leave under section 2(3) of the Adults with Incapacity (Scotland) Act 2000 (as read with section 113(4) of the 2014 Act) and consequently the appellant lodged an application seeking leave to appeal the decision of 13 May 2021.

[2] The application, which was accompanied by a motion seeking a reduced period of notice, is opposed. We instructed parties to lodge written submissions in support of their respective positions. They did so most promptly.

**Decision**

[3] The test for granting leave is different to the second appeals test introduced by section 113(2) of the 2014 Act. The distinction is made clear in *KM* v *AKG (*paragraphs [23] and [24]) -

> "[23] …….We note that it is observed in *Macphail Sheriff Court Practice 3rd edition* at paragraph 18.52:
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> " …the sheriff should grant leave to appeal if he is satisfied that there is a substantial and arguable point of law on which the sheriff principal might reasonably and on identifiable grounds take a different view to his own, or if there is a conflict of judicial opinion on some important matter of principle. On the other hand, he should refuse leave if he considers that in the event of a further appeal to the Court of Session his own view might be as likely to be affirmed as any different view taken by the sheriff principal.……
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> [24] While the context of leave to appeal to the Court of Session is not identical to that for leave to appeal to this court, the logic of the observation in *Macphail* would seem to apply to the consideration of leave to appeal to the Court of Session."

[4] We are not persuaded that leave ought to be granted. We say that for the following reasons.

[5] Counsel for the respondent urged upon us some additional information about a material and deleterious change in the circumstances of the appellant. In short her mental

health has deteriorated to such an extent that she has been detained in hospital under section 36 of the Mental Health (Care and Treatment) (Scotland) Act 2003 and made subject to a Short Term Detention Certificate. While we are grateful to counsel for advising us of the status of the appellant, that has limited bearing on the outcome of the present application (see paragraph 12 below).

[6] Counsel for the respondent raised a series of procedural issue relation to the motion to reduce the period of intimation, namely a failure to intimate a copy of Form 13.2, a failure to provide the required period of intimation, and also submitted that the motion had been lodged late. We find no favour with these complaints. The haste which has occurred contributed to these errors, in our view, due to the lodging of the incorrect form of application. There is nothing sinister in the actions of those advising the appellant. For what it is worth we are content to deal with the application despite these omissions and to exercise our dispensing power to cure any deficiencies, In any event there is no statutory time limits for an application for leave under the 2000 Act. These matters are distractions from the real and serious issues in this case concerning the care arrangements for a vulnerable adult.

[7] Turning now to the merits, the grounds of appeal which the appellant seeks to argue are identical to those arguments advanced by her before, and rejected by, the Sheriff at first instance and this Court. The appellant has singularly failed to set out why or how the sheriff and this Court erred in law in reaching their respective decisions.

[8] In Ground one the appellant criticises this court for concluding that no assistance can be derived from considering different legislation enacted for different purposes. The appellant does not provide any rational for submitting that the reasoning of this Court is

materially wrong in law. She has failed to demonstrate why the 2000 Act does not afford a relevant power, standing the express finding of this Court at paragraph [28] that the 2000 Act, and in particular section 64, is capable of affording the necessary power underpinning powers (a) and (j) in the Order.

[9] Ground two, which relates to section 70 of the 2000 Act, is simply a restatement of the argument which this Court expressly considered and rejected. The appellant has failed to identify a basis for the view that our analysis of section 70 contains any material error in law. Section 70 of the 2000 Act is an additional safeguard for the Adult. The adult is not without remedy by opposing any non-compliance application under section 70. She can contest the application. She has a right of appeal. A section 70 decision is itself appealable to this Court and beyond.

[10] We agree with counsel for the respondent that this case is about the "application of existing legal principle, well established under existing authority both domestic and ECHR. The Inner House is not being asked to determine a matter where there is no authority or the law is plainly unclear or the decision is plainly wrong."

[11] The body of existing Shrieval authority was thoroughly examined at the appeal (*Muldoon, Applicant* 2005 SLT (Sh Ct) 52; *M, Applicant* 2009 SLT (Sh Ct) 185; *Scottish Borders Council* v *AB* 2020 SLT (Sh Ct) 41) as were the section 1 principles as set out in the 2000 Act and the applicability of Article 5. The appellant has not, in her application, identified any substantial and arguable point of law on which the Inner House may take a different view. There is no conflict of judicial opinion in the authorities explored.

[12] In light of the recent events concerning the welfare and health of the adult, we consider it important that she be given finality in this litigation. She requires protection.

[13] Accordingly, we conclude that the appellant has failed to establish a substantial and arguable point of law, or conflict in judicial opinion. The application is refused.

[14] We are invited by the appellant in her written application to refuse the original application for permission as incompetent so, it is candidly stated, as to leave open the possibility of application to the Court of Session for permission under section 113 of the 2014 Act. We do not consider that the appellant can ride two horses with regard to appeal. The motion before us is the application for leave, which we have refused.

[15] Having regard to the agreement of parties on the matter of the expenses of the appeal (none due or by), we adopt the same approach here.