SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES AND GALLOWAY AT DUMFRIES

[2020] SC DUM 39

DUM B103-20 & DUM B104-20

NOTE OF REASONS BY SHERIFF B A MOHAN

in appeals by

TJL

Appellant

AGAINST A DECISION OF THE CHILDREN'S HEARING FOR DUMFRIES OF 17 JULY 2020 IN RESPECT OF M (31/12/2018) AND T (4/1/2020)

Act: Aitken, advocate: McCann, McIntosh McCann, Glasgow
Alt: Clark, Reporter
Relevant Person (Mother): Corrigan, Corrigan Law, Glasgow

Dumfries, 19 August 2020

[1] These appeals challenged the decisions by a children's hearing to renew Interim Compulsory Supervision Orders (ICSOs) in respect of the appellant's two children.

[2] The appellant is the father of M (born 31/12/2018, aged 19 months) and T (born 4/1/2020, aged seven months). On 17 July 2020 a children's hearing at Dumfries renewed Interim Compulsory Supervision Orders for M and T. The orders contained a condition of "no contact" between the appellant and the children. His appeal against that decision was brought under Section 154 of the Children's Hearings (Scotland) Act 2011.

[3] There were two hearing decisions, one in respect of each child. The hearings were conjoined, and the decisions and reasons given by the hearing were the same for both children. The appeals in respect of the two children were heard together. This note, which

is a written version of the decision which I gave *ex tempore* on 5 August 2020, covers both appeals (B-103/20 and B-104/20).

Background

[4] The children live with their mother in Annan, together with her three older children (not related to the appellant). The appellant lives in separate accommodation in the same town. The substantive case before the hearing in respect of both M and T involved grounds of referral which came before a children's hearing on 3 June 2020. The grounds involved allegations of domestic abuse by the appellant towards the children's mother, his partner or ex-partner, and were brought under Section 67 (2)(f) of the Children's Hearings (Scotland) Act 2011. The grounds were not accepted by either parent and were sent to Dumfries Sheriff Court for proof. At the time of this appeal the grounds had yet to call for proof before a sheriff.

[5] The referral proceedings began without any interim orders being sought from the hearing. Social workers involved with the parents at that stage were optimistic that they could work with the family and provide relevant input and protection without the need for formal orders. Part of the reason for that view was that, in May 2020, the appellant was undergoing alcohol treatment in a residential rehabilitation facility. The position of social work was expressed in a report dated 4 May 2020 and confirmed at the short hearing on 3 June (the "grounds hearing"). The grounds hearing was continued for three weeks to allow the children's mother to receive and consider all of the relevant papers.

[6] At some point after the hearing on 3 June and before the continued hearing took place on 24 June, Dumfries and Galloway Council's Social Work Department informed the Reporter that they would be asking the hearing to make Interim Compulsory Supervision

Orders in respect of the children. The position of the department had changed after the first grounds hearing. The department suggested (in a report and letter to the Reporter, both dated 15 June) that the test of "urgent necessity" justifying the making of ICSOs had been met because of deterioration in the behaviour of the appellant. The social work department considered then that it would be appropriate to seek an order regulating the appellant's contact to the children by ensuring that it was supervised by social workers.

[7] On 23 June, the day before the scheduled hearing, a multi-agency meeting took place and recommended that there should be no contact between the appellant and the children until he demonstrated some stability. That opposition to contact was communicated by a social worker who participated in the children's hearing on 24 June. Due to Covid-19 the hearing took place by telephone conference. That hearing sent the grounds of referral to the sheriff court for proof. The panel members decided that the relevant test for interim measures had been met and put in place Interim Compulsory Supervision Orders in respect of the two children. These ICSOs included conditions that the children would continue to live with their mother in Annan, and that Dumfries and Galloway Council would be the implementation authority. The hearing acknowledged the altered position of the social work department in relation to contact. The decision of the hearing was that, despite social work opposition, contact between the appellant and the children should take place on two occasions per week for two hours, under the supervision of social workers or persons deemed appropriate by them. The ICSOs were to remain in force for up to 44 days (such orders ordinarily last for up to 22 days under Section 86 (3) of the 2011 Act, but their maximum duration was extended to 44 days by the Coronavirus (Scotland) Act, Schedule 3).

[8] No contact in fact took place between the appellant and the children in terms of the ICSOs made on 24 June. On 26 June the social work locality manager of the local authority

wrote to the Children's Reporter reiterating the processes which had led to the social work department's opposition to contact, and stating that the department were "unable to safely implement the condition of contact". This was followed on 3 July by a letter from the Chief Social Work Officer for Dumfries and Galloway Council to the Reporter's office stating that the local authority was unable to implement the order so far as supervised contact had been ordered.

[9] On receipt of that correspondence the Children's Reporter convened a further children's hearing. This hearing was called under Section 96 of the 2011 Act to allow the hearing to consider renewal of the ICSOs. This took place on 17 July, again by telephone conference. There were a number of social work reports before the hearing, including an updated report dated 3 July 2020. The hearing was made up of different panel members than had made the ICSOs on 24 June. The parties participated in the hearing and were legally represented. The hearing lasted for approximately 90 minutes, although the appellant removed himself from the hearing around half way through [Though the hearing's record does not document the reasons for this, it was explained at the appeal that he withdrew from the meeting because he was upset at some of the comments being made. His solicitor continued her involvement for the whole hearing].

[10] The decision of the hearing on 17 July was to renew the ICSOs in respect of the two children. The renewed ICSOs altered the earlier contact condition, and ordered that the appellant should have no contact with the two children. A minority view of the hearing was that the appellant should have some indirect contact with the children. The renewed ICSOs could remain in force for up to 44 days.

The disputed decision

[11] In their written reasons (identical for both of the children) the hearing noted the following:

> "**Decision 4**: To include in the order a direction that the child shall have no contact with [TL] father.
>
> **Reasons for Decision 4**: The Social Worker reported concerns about [the appellant's] 'obsessive and aggressive' behaviour towards the child's mother (domestic abuse), the child's grandparent , the police and Social Work staff. It was reported the Multi-Agency Risk Assessment, which is made up of Police, Education, Criminal Justice Social Work and others, considered [the appellant] to be a 'violent and physical danger'.
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> Despite the ICSO of 24/06/20 stating the child shall have 'supervised contact with [the appellant] ….to be supervised by Social Work or persons deemed appropriate by Social Work' it came to light [the appellant] had been having Face Time contact with the child and had attended the child's home to collect a 'hoover'. This was accepted by the child's mother and father as an honest mistake through not fully understanding the wording in the measure of contact. It was reported that the child's step-siblings are subject to a CSO which states they should not have any contact with [the appellant]. As [the appellant] was present at the family home, and was seen by the other children, this was a breach of their Order.
>
> The Grounds, while still with the Sheriff, relate to domestic abuse.
>
> The father's representative suggested contact between him and the child could take place at a location which had CCTV.
>
> Taking all of the above factors into consideration Panel Members decided, based on the child's age and their physical and emotional safety being paramount, they should not have any contact with their father.
>
> During the hearing it became clear the child's mother was uncertain as to what constitutes contact. As a result of Panel Members (by majority) making a no contact measure both parents should be under no doubt as to what can and cannot take place; the child is to have no contact with their father in person through social media, telephone etc.
>
> The minority decision was some indirect contact would enable a relationship to be maintained with their father until a decision has been made by the Sheriff."

Appellant's position

[12] The appellant challenged the decision of the children's hearing of 17 July. He did not dispute the appropriateness of the hearing making Interim Compulsory Supervision Orders in respect of the children: it was accepted that the necessary test was met. However, there were a number of procedural and substantive challenges to the decision of the hearing.

[13] Firstly, it was submitted, it was inappropriate for the Reporter to have arranged a children's hearing at all for 17 July. The ICSOs made on 24 June could remain in place until 6 August. The only change in circumstances which had been brought to the attention of the Reporter since the ICSOs were made was the failure by the social work department of the implementation authority to facilitate the contact ordered by the hearing. Social workers had told the appellant immediately after the hearing that they would not be complying with the order to supervise contact. The department was therefore acting in breach of its obligations under the ICSOs. The appellant's solicitor had written to the social work department about this on 25 June to remind the department of their legal obligations under the ICSOs. The department's failure to comply was not of itself an appropriate basis for the Reporter to convene another hearing. While it was not incompetent to arrange a children's hearing well before the orders expired, it was wrong to do so merely to invite the hearing to review or reconsider the contact condition on the same facts. This amounted to a procedural irregularity. The hearing was arranged for the wrong reasons.

[14] The letter sent by the social work department manager on 26 June to the Reporter was instructive. That letter stated that the department were "unable to safely implement the condition of contact". However, the substance of the letter did not match that conclusion. The main body of the letter contained a repeat of the reasons which the social worker had given at the hearing on 24 June as to why contact should not be granted. In other words, it

was suggested, the true position was not that the department *could* not implement contact, but that they *would* not. They were refusing to comply with the hearing's order. The Reporter and/or the hearing should have been more concerned with securing the enforcement of their earlier contact order, and not allow the social work department to refuse to apply an order legitimately made by a statutory body after due consideration of all of the circumstances. The system did not allow social workers a veto.

[15] Turning to the substance of the decisions of 17 July, the appellant submitted that the hearing failed to give proper consideration to the matter of supervised contact. The hearing failed to give due weight to the "positive duty" on a public authority to maintain the parental link with the child, and failed to apply the appropriate balancing exercise. Accordingly, the hearing's decision was not proportionate. A number of cases were cited in support of that proposition.

[16] It was also submitted that various facts or events about the family's and appellant's circumstances, detailed to the hearing on 17 July by way of an update, were not themselves material. Instead, the hearing was being asked to rely on old information in revisiting the decision of the earlier hearing. The hearing on 17 July, it was argued, second-guessed the decision of 24 June, and ultimately refused contact on the same facts which were before the earlier hearing.

[17] In summary, the concerns raised by social workers at the children's hearing of 17 July were a red herring, because they were the same concerns and facts which were before the hearing of 24 June. The panel members at that earlier hearing had listened to the arguments and made an order for contact between the appellant and the children. In the circumstances, it was inappropriate for the panel members on 17 July to give the objections made by social work the priority which they did.

Mother's position

[18] The children's mother was not an appellant in these proceedings. She was, however, represented at the appeal as a relevant person. She was supportive of the appellant's wish to exercise contact. She maintained that position at both of the ICSO hearings, and had fully participated in them. Her position had been consistent, though she herself did not want to be the "gatekeeper" in deciding how, when and where contact took place between the appellant and their two young children.

[19] The children's mother supported the appeal. Some of the comments made at the hearing on 17 July led her to the conclusion that the social workers involved had developed a personal dislike of the appellant, and this had affected their recommendations. Social workers had used emotive language in stating their opposition to contact. One example was the comment that contact could put the children's lives in danger, and another was the observation offered by the social worker at the hearing on 17 July that she herself would feel uncomfortable in supervising contact. It was submitted, therefore, that these were inappropriate comments from professionals who had been supportive of contact only a few weeks before the hearing took place.

Reporter's position

[20] The position of the Reporter was that there was no procedural irregularity involved in this case. She maintained that the only step which the Reporter could take when presented with the information about contact not taking place was to arrange another children's hearing. This was not a situation where, for example, the implementation provisions set out in Sections 144 – 148 of the 2011 Act were available. Those enforcement terms applied only to Compulsory Supervision Orders (CSOs). These were the longer-term

orders made by a children's hearing after grounds of referral were accepted or established at court.

[21] At an early stage of referral proceedings, as was the case here, a children's hearing could consider only Interim Compulsory Supervision Orders, which the Parliament deliberately had arranged for the short-term. Accordingly, there was no other competent procedure for the Reporter to take under the 2011 Act when confronted with the difficulties concerning the contact order of 24 June. The choice was either to leave the order to run for its full duration, or to convene another hearing under Section 96 to consider renewal of the ICSOs. By arranging the children's hearing of 17 July the Reporter had enabled children's panel members – the body with the responsibility of making such decisions - to consider the renewal of the ICSOs with all available and up to date information. The hearing was able to consider the comments made by all parties about the earlier contact order, could decide what to make of the circumstances regarding contact not taking place, and could decide what to do about it.

[22] The Reporter's position was that the hearing of 17 July had full information and reports before it, including the comments made by and on behalf of the appellant about the perceived failures of social work to implement the earlier order. The hearing did not merely reverse the earlier decision about contact on the same grounds. The panel members made their decision on 17 July based on the up to date position after full arguments were heard, and stated their decision clearly in their written reasons.

[23] The Reporter stressed that hearings which were arranged to consider short-term orders such as an ICSO often faced a fluid situation. The system established in the 2011 Act was designed to deal with changing circumstances as they emerged; that was what the hearing faced here. It was clear that the views of the social work department had changed

regarding the appropriateness of the appellant having contact. Social workers were not being inconsistent, as the appellant appeared to be suggesting. The change in recommendation came about because of escalating concerns about the appellant's deteriorating behaviour, and the risks that such behaviour could cause to the children and social work staff. It was clear from the reports and oral contributions made to the hearing that the situation had worsened over a period of weeks. The information before the hearing was that stability from the appellant was lacking. The children's hearing on 17 July had decided that such stability was needed before contact could resume. This was recognised by the decision to stop contact for the duration of the order made on that date. The terms of the ICSOs were therefore justified, and the appeals should be refused.

Relevant legislative provisions

[24] An Interim Compulsory Supervision Order is defined in Section 86 of the Children's Hearings (Scotland) Act 2011. It is a temporary order which lasts ordinarily for no more than 22 days (Section 86 (3) (d), though that period has been increased to 44 days under the emergency provisions of the Coronavirus (Scotland) Act, Schedule 3). An ICSO may include any of the measures which apply to a Compulsory Supervision Order. It may therefore include "a direction regulating contact between the child and a specified person or class of person" (Section 83 (2) (g)).

[25] When grounds of referral are presented to a children's hearing and are not accepted by a parent or relevant person, the hearing has the power to make an ICSO. Under Section 93 (5):

> "If the grounds hearing considers that the nature of the child's circumstances is such that for the protection, guidance, treatment or control of the child it is necessary as a matter of urgency that an interim compulsory supervision order be made, the

> grounds hearing may make an interim compulsory supervision order in relation to the child."

[26] Section 96 allows the renewal of an ICSO by a children's hearing. The "necessary as a matter of urgency" test for making the first ICSO in the provision cited above gives way to a lesser test under 96 (5), where the hearing must decide only if renewal is "necessary". A renewed ICSO lasts for up to 22 days (also temporarily extended to 44 days because of Covid-19, by Schedule 3 of the Coronavirus (Scotland) Act).

[27] An appeal against any children's hearing decision to the sheriff is competent under Section 154 of the 2011 Act. In terms of Section 156 the only ground of appeal is that the decision was not "justified".

[28] The appeal before me was further governed by the terms of Section 157 whereby the appeal must be heard and a decision given within three days of the lodging of the appeal. That time limit (like the provisions covering the duration of ICSOs) has been extended by the Coronavirus (Scotland) Act Schedule 3, and an appeal must now be heard and decided within seven days of being lodged.

Analysis

[29] The core of the argument made before me on the appellant's behalf was that there was no reason for a children's hearing to take place on 17 July, and no justification for the removal of contact, as the only real change in circumstances since the earlier ICSOs was the social work department's refusal to implement the supervised contact ordered by the hearing on 24 June.

[30] There are a number of authorities which make clear the task of a sheriff in an appeal which challenges a children's hearing decision. *W* v *Schaffer* 2001 SLT (Sh Ct) 86 was

referred to in submissions. A well-known extract from Sheriff Principal Nicholson's judgment in that case reads as follows:

> "The task facing a sheriff to whom an appeal has been taken is not to reconsider the evidence before the hearing with a view to making his own decision on that evidence. Instead the sheriff's task is to see if there is some procedural irregularity in the conduct of the case, to see whether the hearing has failed to give proper or any consideration to a relevant factor in the case, and in general to consider whether the decision reached by the hearing can be characterised as one which cannot upon any reasonable view be regarded as being justified in all the circumstances of the case."

[31] The phrase "justified in all the circumstances of the case" was the test for appeals under Section 51 (5) of the Children (Scotland) Act 1995. That legislation regulated children's hearings prior to the enactment of the Children's Hearings (Scotland) Act 2011. The 2011 Act appears to establish a narrower test for appeals, as Section 156 requires the court to determine only whether the hearing's decision was "justified" without the reference to other circumstances. Professor Norrie's analysis of the 2011 Act suggests, however, that the test remains the same. He concludes that, when determining whether a decision is "justified", courts should read in the words "in all the circumstances of the case": see para 14-13 of *Children's Hearings in Scotland*, Kenneth McK Norrie (W Green, 3rd edn, 2013). That approach has been endorsed by reported decisions since the passing of the 2011 Act (see, for example, *CF* v *MF* 2017 SLT 945). Accordingly, *Schaffer* remains an important authority for a sheriff identifying the approach to be taken to any children's hearing appeal.

[32] Another line of authority makes clear what background is relevant to the decision-making of a hearing, and what is required from their written reasons. In a decision of the Inner House in 2014 Lord Brodie noted the following:

> "[21] … [W]hat will amount to proper and adequate reasons depends on context and circumstances. We agree with Lord Mayfield [in *H* v *Kennedy*] that the context for a particular decision by a children's hearing includes what has been decided and documented as decided at the previous hearings attended by the appellant and the children, and the contents of the various reports with which the children and the

> relevant persons will have been provided. It is not as if the participants at the hearing on 23 July 2013 were coming to matters afresh. The hearing was part of what Lord Mayfield characterised as "a continuous and ongoing process". (*M* v *Locality Reporter Manager* 2015 SC 71; 2015 SCLR 143; 2014 Fam L.R. 102; 2014 GWD 24-253)

[33] The appellant lodged two other cases for my consideration in support of his appeal. The first was *J* v *M* 2016 CSIH 835; 2016 SC 835. That decision concerned a private action raised by a father for contact to his young daughter. After a proof, contact was refused by the sheriff. The father's appeal to the Inner House was unsuccessful. In the appeal decision Their Lordships noted:

> "Before refusing an application for parental contact, a careful balancing exercise must be carried out with a view to identifying whether there are weighty factors which make such a serious step necessary and justified in the paramount interests of the child…." (Lord Malcolm, para [11].

[34] A more lengthy authority lodged by the appellant was a recent European Court of Human Rights decision: *Strand-Lobben* v *Norway* (2020) 70 EHRR 14. The factual and legal circumstances of that case were complicated. They concerned the foster care and then proposed adoption of the three year old son of the applicant (his mother). Limited contact had taken place over the early years of the child's life. In addressing ECHR Article 8 rights to private and family life, the Court noted:

> "[202] The first paragraph of art.8 of the Convention guarantees to everyone the right to respect for his or her private life. As is well established in the Court's case-law, the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by this provision. Any such interference constitutes a violation of this article unless it is 'in accordance with the law'……
>
> [204] In so far as the family life of a child is concerned, the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance. Indeed, the Court has emphasised that in cases involving the care of children and contact restrictions, the child's interests must come before all other considerations."

[35] There appear to be few reported decisions which address specifically an appeal against an ICSO, and whether such a decision was "justified". However, one further reported case which was relevant to this appeal concerned a hearing decision made at a similarly early stage in proceedings under the provisions in force prior to the 2011 Act. *J, Appellant* 2013 SLT (Sh Ct) 18; 2013 Fam. L.R. 12; 2013 GWD 1-31 was a decision from Glasgow Sheriff Court by Sheriff Alan Miller. The appeal concerned a place of safety warrant granted under the Children (Scotland) Act 1995. This was a short-term order issued by the children's hearing pending receipt of a safeguarder's report. The order contained a "no contact" condition in relation to the child's grandmother. The sheriff found that the decision denying contact between the grandparent and the child was not justified in all the circumstances of the case because there was no reasoning given by the hearing for its decision.

[36] Under Section 25 of the 2011 Act the paramount consideration for a hearing is "the welfare of the child". That is also the paramount consideration for a court dealing with an appeal from a children's hearing. However, it is clear from the authorities that the question of whether an individual decision by a hearing is "justified" has to be assessed on a case by case basis. When assessing an appeal against a hearing's decision it is therefore appropriate to take account of the nature of the measure under consideration, its duration, the stage which proceedings had reached, the decisions of earlier relevant hearings, the history of the relationship which the appellant had with his children and their mother, the various reports which were within the panel papers, any up to date information before the hearing whose decision is challenged and the reasons given by the hearing for its decision. This is what I understand to be the "continuous and ongoing process" referred to by Lord Brodie in the *M* case cited above.

[37] The appeal before me was not one to which the implementation provisions of the 2011 Act applied. Sections 144 – 148 provide a variety of methods by which a hearing can deal with breaches of its orders and seek their enforcement. However, the procedures set out in that part of the Act cover a compulsory supervision order (CSO), which itself can only be made after grounds of referral are accepted or established. The Act makes a distinction between a compulsory supervision order (defined in Section 83, which can last for up to one year) and an interim compulsory supervision order (defined in Section 86, which can last for up to 22 days, albeit that period has been extended to 44 days temporarily). Sections 144 - 148 are grouped under the sub-heading "Implementation of compulsory supervision order", and do not extend to the more temporary ICSOs.

[38] I did not accept that there was a procedural irregularity in the Reporter assigning the hearing of 17 July. Since the formal enforcement measures permitted under Sections 144 - 148 were not available, the Reporter had limited options. She could have allowed the earlier ICSO to continue until the point when a renewal more usually would have been considered (within the week before its expiry). Had she done so, however, she would have been open to the criticism that she had not allowed the decision-making body – the children's hearing – to be informed of and to address at an earlier stage the reasons why the contact which it had previously ordered was not taking place. The other course of action open to the Reporter was to arrange another children's hearing under Section 96 (2). The hearing so convened would enable the panel members to hear the positions of the parties, consider the renewal of the ICSO and to take account of the up to date circumstances. This was the step taken in this case. I did not agree that taking that approach amounted to a procedural irregularity.

[39] I was unable to accept the proposition advanced on behalf of the children's mother that there was an element of personal dislike of the appellant which affected the view of

social work in relation to his contact, or that this informed their "no contact" recommendation to the hearing. The appellant had contact to the children when social work were involved, notwithstanding his history of domestic convictions, the outstanding allegations of domestic violence, and other children's hearing orders which prevented any contact between the appellant and his partner or ex-partner's three older children.

[40] The various reports prepared by social work – all of which were before the hearing – detailed the department's escalating concerns. The report dated 4 May 2020 contained the following comments:

> "[The mother] has removed herself and her children from risky situations in the past, including when she moved her children with her to a hotel when she was worried about [the appellant's] behaviours……[the appellant] is in rehab currently so any risks to the children being directly or indirectly exposed to domestic abuse is reduced." (page 6)
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> "There are clear patterns of domestically aggravated behaviours evident from [the appellant], and this is historical and recurring……these behaviours continue to be repeated and more frequent and severe when he has misused alcohol and has additional stressors in his life……[The appellant] is of the opinion that when he returns from …… Rehab he intends to re-establish his relationship with [the children's mother]. [She] has informed me on separate occasions that she does not plan to reconcile with [the appellant]. I am worried that parents may be misleading either professionals or themselves based on their differing views, and the impact this lack of honesty could have on the likelihood of further incidents occurring." (page 8)
>
> "I recommend that within their order there is a measure that states [the appellant's] contact with the children will be supervised by social work or someone deemed suitable by social work." (page 12)

[41] Despite those concerns, the view of social work at the grounds hearing on 3 June was that no formal orders were necessary at that stage. A report produced two weeks later, on 15 June, noted the following:

> "[On 3 June 2020]….my manager had two separate phone calls with [the parents] where he explained in simple language the concerns we had regarding their intentions to have contact outwith the agreed time with social work…..[The appellant] stated…that he had been recording all calls and visits from social workers.

> Due to this…..all means of contact between ourselves [and the parents] were to be suspended until we had a risk assessment in place to manage this…." (page 12)
>
> "On Monday 1 June [the appellant] told us because a timeline was not produced he would not be allowing us to supervise his contacts. [He] does not see his behaviours as being controlling towards [the children's mother]. He feels that [she] can wind him up and can be irrational at times….." (page 27)
>
> "the risk of significant harm remains within the adversities from [the appellant's] behaviours, and [the mother's] to some extent, and their difficulties manging these because of the additional complicating factors: [the appellant's] alcohol misuse and mental health, and [the mother's] mental health. Situations become exacerbated and heightened very quickly, sometimes without warning, and this is when we see the increased risk. (page 29)
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> "I believe the children are all at high risk of emotional harm and physical injury based on the current situation…..I am not confident that I trust the family at this point based on the difficulties we have had with information being mis-shared, our calls being recorded and the constant back and forth of phone calls between parents." (page 31)

[42] Notwithstanding these comments, the conclusion in that report was that social work supported the appellant having contact supervised by them. A multi-agency meeting then took place on 23 June and the recommendation changed at that point to "no contact". The record of the hearing on 24 June reveals that social work expressed concerns about the appellant's alcohol intake, his increasingly erratic and dangerous behaviour "over the past couple of days", and their belief that the parents were providing misleading information about whether or not they were still in a relationship. The social worker at that hearing gave the department's view that they were by then against contact operating for the duration of the ICSOs then being made.

[43] Against this background, I did not accept the proposition that social workers' opposition to contact had arisen from any personal dislike of the appellant. It was clear from the reports and contributions to the hearings that – whether the appellant agreed with it or not - the social workers were describing a situation which had deteriorated after the

appellant returned home from his residential rehabilitation treatment for his alcohol difficulties. The social workers' professional assessment was that they faced increasing hostility from the appellant, and this informed the view taken by them about the risks in contact taking place.

[44] Nevertheless, despite the objections by social work, the hearing on 24 June decided that an order for supervised contact between the appellant and the two children was appropriate, and this condition was included in the ICSOs then made. This brings into sharp focus the appellant's remaining argument that – after the children's panel of 24 June - there was a blatant disregard by the social work department of the hearing's decisions. Since the more formal enforcement measures set out in the 2011 Act for the implementation of hearing decisions were not available, I was invited to find that the failure by the children's hearing of 17 July to call the social work department to account, and its acceptance of the department's objections to contact at the second time of asking, resulted in a decision which was not justified.

[45] By the nature of cases where there is social work intervention, the family circumstances and events being considered by a hearing can change at very short notice. The situation is often fluid, unsettled, and sometimes chaotic. The children's hearing on 17 July was considering the renewal of short-term Interim Compulsory Supervision Orders, decisions which have limited duration. The references in the appellant's submissions to the principles detailed in *J* v *M* and *Strand-Lobben* v *Norway* have to be seen in that context. A careful balancing exercise required to be carried out when the hearing considered a decision which affected contact between the parent and child. As with any hearing decision, the welfare of the child had to be the paramount consideration. The hearing required to have a sound basis for their decision and give clear written reasons. The question before me was:

did the hearing of 17 July simply revisit the objections previously stated by social work, or did the panel members have before them any material change in circumstances which justified their removal of the contact which was part of the earlier order?

[46] It is clear that, very shortly after the ICSOs were made on 24 June, social work expressed their disagreement with the contact decisions, and stated in correspondence that they were "unable to manage the risks" to provide safe supervision. I was invited to conclude that this explanation was a cloak to cover the fact that the social work department was flagrantly disregarding the hearing's decision to allow contact. I was therefore invited to conclude that this inappropriate and contemptuous position by social work had a disproportionate influence on the decision of 17 July; in other words, that the hearing merely legitimised the social work department's failure to obtemper the earlier hearing's order.

[47] The hearing of 17 July had before it the following information about developments which had taken place since the 24 June hearing:

1) The letters from the social work department to SCRA dated 26 June and 3 July, in which the department indicated that they were not able to manage contact safely (these were the letters which Mr Aitken, on behalf of the appellant, invited me to view as a refusal to comply).

2) An updated report from social work dated 3 July 2020. That report contained the following observations:

> "As a professional I have been significantly concerned about the behaviours [the appellant] has displayed towards myself and my colleague……I felt [he] was angry and his actions alarmed me. When workers feel this way when around [the appellant], the levels of anxiety this can have upon them can make it very difficult for them to focus on situations when fear and anxiety are at the forefront for them." (page 16)

> "The current risk assessment tells us that it is not safe for [M] and [T] to have contact with their father. Whilst it is acknowledged that over the last week [the appellant] has shown some insight has attended appointments and the constant phone calls and emails have reduced, we need to see his behaviours stabilise over a period of weeks before we can be confident that we can reinstate this." (page 23)

3) There had been "Facetime" contact between the appellant and the children M and T after 24 June which was not supervised. The hearing was told that this was based on the parents' misunderstanding about what constituted contact, since it took place by video link, and did not involve them in the same physical space.

4) The hearing was informed that – after the decision of 24 June – the appellant had attended at the home of the children's mother for an unauthorised visit. This was not supervised by social workers, and was in breach of other hearing orders in force regarding the mother's older three children (he was prevented from any contact with them). It was submitted to the hearing that the contact with the older children was very limited and inadvertent, the explanation offered being that this occurred when the appellant called at the home to collect a vacuum cleaner.

5) The hearing was aware of the robust position taken by the appellant's agents stating that the social work department was refusing to implement contact. This was expressed in four letters (one to Dumfries and Galloway Council's Legal Department dated 25 June, two letters to the social work department dated 6 July and 14 July, and one addressed to the Children's Hearing Reporter on 15 July). Copies of these letters were within the panel papers.

> From this correspondence the panel members could have been left in no doubt about the appellant's complaint that contact was not taking place.

[48] It was submitted by the appellant's counsel that two of the developments noted at the hearing - the appellant's unscheduled visit to the house of the children's mother and his Facetime contact with the children - were not material considerations for the hearing. I did not accept that submission. The panel members were entitled to consider those events as relevant and significant, and to give them the attention which they did. Just as the actions of the social work department in not implementing the contact ordered on 24 June were a relevant area for discussion by the hearing, so was the appellant's failure to adhere to hearing orders. It was open to the hearing to consider that behaviour. The earlier hearing of 24 June noted in its written reasons that the children's mother did not feel in a position to manage contact on her own. The panel members at the children's hearing of 17 July were able to consider that background when assessing the explanations given about the appellant's subsequent visit to her home and his Facetime contact with M and T.

Decision

[49] In the circumstances I did not accept the contention that the hearing on 17 July merely reversed the contact condition of 24 June because of social work intransigence. There was much up to date, relevant information before the hearing: panel members' discussions did not focus only on the material which was before the earlier hearing. Furthermore, the written reasons given by the hearing make clear that there was a division of opinion between the panel members about whether the appellant should be allowed some indirect contact, with the minority view favouring that, and the majority decision being that no contact at all should take place.

[50] This was a case in which Dumfries and Galloway Council's Social Work Department had expressed reservations about the appellant's behaviour over several months, even at those points where social workers concluded that they were able to provide appropriate supervision for contact. This was apparent from all of the reports, extracts of which I have noted above, and all of which were provided to the panel members. There were ongoing concerns expressed by social work about the appellant's alcohol problem and his increasingly unpredictable and hostile behaviour. The appellant had previous convictions for domestic abuse. There were serious grounds of referral outstanding which alleged further episodes of domestic abuse by the appellant and coercive control of the children's mother.

[51] I have noted above that a number of letters were sent by the appellant's solicitors to the local authority and the Reporter about the social work department's failure to provide supervised contact after 24 June. However, none of those letters sought to address the substance of the concerns which social workers had raised about the appellant's behaviour, and which were elaborated upon in the three social work reports before the hearing, including the up to date report of 3 July. Furthermore, the appellant limited his own ability to provide up to date information or reassurance to the children's hearing of 17 July by withdrawing his participation part of the way through.

[52] The decision makers at the hearing had all of that background before them, and were entitled to take that into account when assessing any new information. The new information included breaches by the appellant of different children's hearing orders, including an unauthorised visit to the mother's home, and unsupervised virtual contact with the children. It was clear from the written reasons that the events which had occurred since the ICSOs were first made on 24 June had a significant bearing on the hearing's decision. My

conclusion is that, in all the circumstances, one of the decisions available to the hearing on 17 July was to refuse the appellant's contact to M and T for the duration of the ICSOs. In all the circumstances, therefore, I consider that the hearing's decisions of 17 July 2020 were justified. Accordingly I refuse the appeals lodged in this case.

Postscript

[53] Unfortunately, it is necessary for me to comment on the excessive number of documents, productions and authorities lodged in connection with these appeals. An appeal against an ICSO requires to be heard and decided within a very short time frame (Section 157 of the 2011 Act requires a decision within three days of the appeal being lodged, though that period has been extended temporarily to seven days to allow for the practicalities of lockdown). Such appeals - by their urgent nature - have to be arranged to call around court business already scheduled. Due to the restricted timescales, there is little scope for judicial case management. During the current period, as wider society emerges from lockdown, physical hearings in court are not yet practical, so arrangements have been made for telephone conference hearings to allow appeals to proceed. Documents and supporting papers are lodged by email, so that hard copies do not have to be delivered to the court buildings, where access remains limited.

[54] In this case a total of 483 pages were emailed to the sheriff clerk's office by parties between 2.30 pm on Thursday 30 July – when the appeal was lodged - and 11 am on Friday 31 July when the appeal hearing began. All of those papers had to be printed, collated by court staff and given to me for consideration before the oral hearing commenced.

[55] For post-lockdown court hearings in this sheriffdom and throughout Scotland there are several Practice Notes and Guidance Notes relating to the calling of civil, family and

children's hearing cases. These have been the result of careful and detailed discussions nationally to allow court business to function as safely and efficiently as possible while the Covid-19 pandemic remains such a threat to public health. The Notes make clear that parties have a duty to ensure that only relevant documents, succinct written submissions and a joint bundle of relevant authorities are lodged (see, for example, SSDG Practice Note no. 14 of 2020 – *Children's Referrals and Related Applications* (19 June 2020); *Guidance for Practitioners and Litigants: Management of Civil Business* (10 June 2020); *Guidance for Practitioners and Litigants: Electronic Submission of Documents* (10 June 2020)). These appeals took place under those arrangements. Unfortunately, neither the spirit nor the detailed directions of the Notes were followed here. The lodging of almost 500 pages of documents by email in the few hours before the hearing suggested little advance co-operation between the parties, attempt to agree common ground, or to submit only items which focussed the appeal. Such a high volume of documentation as was lodged in this case for an emergency appeal hearing is simply unmanageable and wasteful. I hope that the parties involved in this case will take note of that to avoid similar problems in the future.