FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 4
P918/20

Lord President
Lord Malcolm
Lord Woolman

OPINION OF THE COURT

delivered by LORD MALCOLM

in the Reclaiming Motion by

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Petitioner and Reclaimer

against

(1.) The Principal Reporter of the Scottish Children's Reporter Administration; and

(3.) The Chief Social Work Officer of Renfrewshire Council

Respondent

Petitioner and Reclaimer: Scott, QC, Aitken; Drummond Miller LLP
First Respondent: M Ross, QC; Anderson Strathern LLP
Third Respondent: Byrne; Ledingham Chalmers LLP

17 December 2020

[1] This petition for judicial review raises the issue of whether a 17 year-old who is being accommodated by a local authority as a looked after child, but who has not been involved with the children's hearings system, may be placed in secure accommodation. A related question is whether the children's hearing has any jurisdiction in respect of that person.

Background and applicable legislation

[2] From an early age, the petitioner was in the kinship care of her grandmother. When 16 years of age she was provided with accommodation by a local authority for the purposes of section 25 of the Children (Scotland) Act 1995. So far as relevant for present purposes, section 25 is in these terms:

> "25.— Provision of accommodation for children, etc.
> (1) A local authority shall provide accommodation for any child who, residing or having been found within their area, appears to them to require such provision because—
>
> (a) no-one has parental responsibility for him;
>
> (b) he is lost or abandoned; or
>
> (c) the person who has been caring for him is prevented, whether or not permanently and for whatever reason, from providing him with suitable accommodation or care.
>
> (2) Without prejudice to subsection (1) above, a local authority may provide accommodation for any child within their area if they consider that to do so would safeguard or promote his welfare."

[3] The petitioner was first placed in foster care and then in two successive children's homes. This meant that she was a looked after child for the purposes of the 1995 Act. In terms of section 17(6) a "child" who is "looked after" is "a child … for whom [a local authority is] providing accommodation under section 25…".

[4] Section 75 of the 1995 Act enables the Secretary of State (now Scottish Ministers) to promulgate regulations making provision for placing in secure accommodation looked after children who have not been involved in the children's hearing system. So far as relevant it provides as follows:

> "Powers of Secretary of State with respect to secure accommodation.

(1) The Secretary of State may by regulations make provision with respect to the placing in secure accommodation of any child—

(b) who is not subject to a compulsory supervision order, interim compulsory supervision order, medical examination order or warrant to secure attendance (all within the meaning of the Children's Hearings (Scotland) Act 2011) but who is being looked after by a local authority in pursuance of such enactments as may be specified in the regulations.

(2) Regulations under subsection (1) above may—

(a) specify the circumstances in which a child may be so placed under the regulations;

(b) make provision to enable a child who has been so placed or any relevant person to require that the child's case be brought before a children's hearing within a shorter period than would apply under regulations made under subsection (3) below; and

(c) specify different circumstances for different cases or classes of case. …

(6) The Secretary of State may by regulations make provision for the procedures to be applied in placing children in secure accommodation; and without prejudice to the generality of this subsection, such regulations may—

(a) specify the duties of the Principal Reporter in relation to the placing of children in secure accommodation;

(b) make provision for the referral of cases to a children's hearing for review; and

(c) make provision for any person with parental responsibilities in relation to the child to be informed of the placing of the child in secure accommodation."

[5] A child in terms of section 75 is "a person under the age of 18 years" (s 93(2)(b)(i)).

The petitioner is therefore a child for the purposes of regulations made under section 75.

Section 75 is one of the enabling provisions cited in the preamble to the Secure Accommodation (Scotland) Regulations 2013 ("SA Regulations"), but there are others, including sections 152 and 153 of the Children's Hearing (Scotland) Act 2011. There is no intrinsic definition of "child" in the SA Regulations. So far as relevant regulation 9 is in these terms:

> "9.— Placement in secure accommodation of looked after children
>
> (1) A child who falls within paragraph (2) may only be placed and kept in secure accommodation where the circumstances in paragraph (3) are satisfied.
>
> (2) A child falls within this paragraph if the child is—
>
> > (a) being provided with accommodation by a local authority under section 25 of the Children (Scotland) Act 1995; …
> >
> > …
>
> (3) The circumstances are—
>
> > (a) that the chief social work officer and the head of unit are satisfied with respect to the child that one or more of the conditions referred to in paragraph (4) is satisfied and that placement in secure accommodation is in the best interests of the child;
> >
> > (b) that the chief social work officer is satisfied in relation to the placing of the child in the residential establishment providing the secure accommodation that the placement in that establishment is appropriate to the child's needs having regard to the residential establishment's statement of functions and objectives.
>
> (4) The conditions are—
>
> > (a) that the child has previously absconded and is likely to abscond again and, if the child were to abscond, it is likely that the child's physical, mental or moral welfare would be at risk;

(b) that the child is likely to engage in self-harming conduct;

(c) that the child is likely to cause injury to another person.

(5) On a child being placed in secure accommodation under paragraph (1) the chief social work officer must—

(a) immediately notify—

(i) the child's parents;

(ii) each relevant person in respect of the child;

(iii) any person other than a relevant person who appears to the chief social work officer to have (or to recently have had) a significant involvement in the upbringing of the child;

(iv) the Principal Reporter;

(b) immediately, and in any event not later than 24 hours from the time of the placement, refer the child's case to the Principal Reporter and provide the Principal Reporter with the information mentioned in paragraph (6).

(6) The information is—

(a) details of the placement in secure accommodation including details of any subsequent placement in secure accommodation and release;

(b) details of any previous placement in secure accommodation;

(c) the reasons why the chief social work officer believes that the child may be in need of compulsory measures of supervision;

(d) the reasons why at the time of the placement in secure accommodation the chief social work officer was satisfied that one of the conditions in paragraph (4) was met and the reasons why, at the time of writing, the chief social work officer continues to be so satisfied or otherwise;

(e) the views of the chief social work officer and head of unit on whether or not the child should continue to be detained in secure accommodation.”

[6] Various events giving rise to concern on the part of the chief social work officer (CSWO) for the petitioner's welfare occurred in early October 2020. She was hospitalised and subsequently discharged. The CSWO decided that the petitioner required to be placed in secure accommodation. The head of unit authorised this. Until this time the petitioner had not been involved in the children's hearing system. After a referral to the Principal Reporter, which is required by regulation 9(5)(b), regulation 10 applied. Regulation 10 engages the children's hearing system provided for by the Children's Hearing (Scotland) Act 2011:

> "10.— Looked after child placed in secure accommodation: duties of the Principal Reporter and local authority
>
> (1) This regulation applies where the Principal Reporter receives the referral and information from the chief social work officer under regulation 9(5)(b) and (6).
>
> (2) Subject to paragraphs (3) and (4) the Principal Reporter must, within 72 hours of the child's placement in secure accommodation under regulation 9, consider and proceed with the child's case in accordance with sections 66 to 69 of the 2011 Act.
>
> (3) Where the Principal Reporter determines under section 66(2) of the 2011 Act that a children's hearing does not require to be arranged, the Principal Reporter must, within 72 hours of the child's placement in secure accommodation—
>
> > (a) notify the chief social work officer of the determination;
> >
> > (b) if the Principal Reporter considers that the child's case should be referred to the local authority with a view to arrangements for advice, guidance and assistance under Chapter 1 of Part II of the Children (Scotland) Act 1995, inform the local authority accordingly.
>
> (4) Where the chief social work officer receives notification under paragraph (3)(a) the chief social work officer must remove the child from the secure accommodation immediately and notify the persons mentioned in regulation 9(5)(a).

(5) Subject to paragraph (6) where the Principal Reporter determines under section 66(2) of the 2011 Act that it is necessary for a compulsory supervision order to be made in respect of the child, the Principal Reporter must, within 72 hours of the child's placement under regulation 9, arrange a children's hearing for the purpose of deciding whether a compulsory supervision order should be made in respect of the child.

(6) Where paragraph (5) applies and the Principal Reporter considers that it would not be reasonably practicable to arrange the children's hearing within 72 hours the Principal Reporter will have a further period of 24 hours from the end of the period of 72 hours referred to in paragraph (5) within which to comply with the requirements in paragraph (5)."

It can be seen that the SA Regulations specify that once a referral is made the Principal Reporter is to proceed in accordance with sections 66 to 69 of the 2011 Act. This includes arranging a children's hearing to decide whether to make a compulsory supervision order (CSO).

[7] The issue raised on behalf of the petitioner is based on section 199 of the 2011 Act which provides:

"(1) In [the Children's Hearings (Scotland) Act 2011], 'child' means a person who is under 16 years of age".

This definition is subject to the exceptions set out in the rest of section 199. One of the exceptions covers a person who is 16 or over in respect of whom information in terms of section 66 of the 2011 Act had been passed to the Principal Reporter before his or her sixteenth birthday. The petitioner does not fall within any of the exceptions mentioned in section 199.

[8] The petitioner was referred to the children's hearing for a decision on whether to make a CSO. A component of a CSO may be an authorisation which allows the child to be

placed and kept in secure accommodation within a residential establishment. A "grounds hearing" (see sections 69(2) and 90) took place before the children's hearing. An interim compulsory supervision order (ICSO) was made, including an authorisation that the petitioner be placed in secure accommodation. The Principal Reporter was directed to make an application to the sheriff for a determination on whether grounds under section 67 were established. An application was made. At the first calling the sheriff adjourned the hearing until a later date for an update on this petition for judicial review, and for discussions to take place between parties.

[9] The petitioner appealed the ICSO to the sheriff. Her appeal was refused, the sheriff holding that the procedure had been lawful. The ICSO required to be reviewed and in due course it was renewed. In the meantime the Lord Ordinary refused the present petition. A reclaiming motion was marked, and subsequently it was granted urgent disposal. The petitioner remains in secure accommodation.

The petition

[10] The petitioner seeks declarator that she has been unlawfully deprived of her liberty, and reduction/suspension of the ICSO and the decisions of the CSWO and head of unit to implement the secure accommodation authorisation contained in it. She also seeks interdict and interdict *ad interim* preventing the Principal Reporter from arranging any future children's hearings in terms of the 2011 Act in respect of the petitioner and from proceeding with the application to the sheriff in respect of a statement of grounds. Finally, the petitioner seeks damages for unlawful deprivation of liberty under article 5(5) ECHR and section 8 of the Human Rights Act 1998 in the sum of £20,000 with interest.

[11] The basis of the petition is that the petitioner's referral to the children's hearing, the ICSO and the implementation of it are all unlawful because, for the purposes of the relevant legislation, she is not a "child"; and only a child can be competently referred (*Cameron* v *Gibson* 2006 SC 283, paragraphs 8 and 14-16). As a person with full legal capacity, not subject to the exercise of any parental right by any other person to determine her residence, she was free to decide where she would live and could not be detained in accommodation provided under section 25 of the 1995 Act.

The Lord Ordinary's decision

[12] Before the Lord Ordinary the parties agreed that the following issues required to be determined. First, did the petitioner have a right of appeal to the Sheriff Appeal Court (SAC) against the refusal of the appeal to the sheriff under and in terms of section 163(1) of the 2011 Act? Second, if she did have a right of appeal, should the petition be sisted meantime to enable her to proceed with such an appeal or are there exceptional circumstances rendering it appropriate to allow her to proceed with this petition? Third, was the petitioner a "child" for the purposes of the SA Regulations? Finally, if she was not a "child" for those purposes, was her placement in secure accommodation under the ICSO unlawful?

[13] The Lord Ordinary considered that whether the petitioner was able to appeal to the SAC depended on whether she was a "child" within the legislative framework under which she was placed in secure accommodation. This required the court to decide whether the applicable definition of a child was to be found in section 199 of the 2011 Act or in section 93(2)(b) of the 1995 Act. It was important that from 1997 to 2013 the legislation providing for

the children's hearing system was the 1995 Act. The predecessors to the SA Regulations were the Secure Accommodation (Scotland) Regulations 1996. The 2013 Regulations were made under sections 152 and 153 of the 2011 Act and section 75 of the 1995 Act. This was important because if they were construed in accordance with the 1995 Act, a "child" was a young person under the age of 18. This flowed from the terms of section 93(2)(b), which had been introduced by the 2011 Act (schedule 5, paragraph 2(11)).

[14] The 2011 Act put children's hearings on a new statutory framework. It repealed almost all of parts 2 and 3 of the 1995 Act which had previously governed children's hearings. The changes to section 93(2) of the 1995 Act required to be considered having regard to those factors. It was clear that Parliament's intention when promulgating the 2011 Act was as suggested by the CSWO, namely that Regulation 9 could apply to someone under 18 years of age. There were supportive practical considerations for this interpretation which, though they could not assist in a matter of statutory interpretation, could indicate current practice. In that respect, the sheriff adopted the same interpretation when refusing the petitioner's appeal. For these reasons the Lord Ordinary refused the petition.

Analysis and decision

[15] At the close of the hearing the court refused the reclaiming motion and adhered to the interlocutor of the Lord Ordinary refusing the petition. It now gives its reasons for this decision.

[16] Rule of Court 58.3(1) provides that a petition for judicial review may not be lodged if the application "could be made by appeal or review under or by virtue of any enactment". Statutory mechanisms for challenging decisions of a children's hearing are set down in the

2011 Act. Such challenges can include issues as to competency or jurisdiction. Even accepting the hypothesis, the petitioner's submission that she could not invoke these procedures because she is not a child for these purposes is not persuasive. She has been referred to the children's hearing, and she is the subject of their decisions. Indeed the petitioner has already invoked these procedures in respect of the first ICSO. This court's supervisory jurisdiction will not be exercised when alternative remedies are available. Regulations 9 and 10 set down detailed mechanisms for the protection of someone such as the petitioner. It follows that the petition falls foul of the terms of Rule 58.3(1) and the reclaiming motion was refused for that reason.

[17] While the court disapproves of the raising of these proceedings, nonetheless given that the point was fully argued it will express its view on the legal issue raised as to whether the petitioner was subject to the statutory provisions under which the CSWO and other parties proceeded. Without intending disrespect to the detailed submissions on the point, it can do so in brief compass. The central argument for the petitioner was that the definition of "a child" in section 199 of the 2011 Act is exhaustive and therefore applies in the present circumstances. The petitioner not being a child in terms of that provision, she could not be referred to the children's hearing which operates under and in terms of the 2011 Act. The hearing had no power to impose compulsory measures depriving her of her liberty. It is said that she is in no different position from someone aged 25.

[18] So far as the amendment to section 93(2)(b) of the 1995 Act and its impact on regulations made under section 75 is concerned, it was contended that this was simply in recognition of the provision in section 199 which extended its reach to someone who had turned 16 if they had been referred to the reporter before then. The difficulty for the

submission is that there is no warrant for such a gloss on the clear and unambiguous terms of the provisions under which the CSWO, the Principal Reporter and the children's hearing acted. When read with the relevant legislation in the 1995 Act, the effect of regulation 9(2) is that for these purposes "a child" is someone under 18 years of age. It is clear that the 2011 Act amended section 93(2)(b) of the 1995 Act so that regulations could be made under section 75 (in the event regulations 9 and 10) which apply to someone such as the petitioner, namely a person under 18, not the subject of a CSO or similar measure, and who is being looked after by a local authority under section 25 of the 1995 Act. If the petitioner had previously been the subject of compulsory measures, section 152 of the 2011 Act and regulations 7 and 8 would have applied.

[19] Section 75, quoted earlier, is the enabling provision. In terms it envisages someone such as the petitioner being referred to the children's hearing system. Sections 66/69 of the 2011 Act are referred to in regulation 10 in order to identify an appropriate legal and procedural framework for dealing with someone referred to the Principal Reporter under the regulation. They provide the necessary safeguards for such a person. This does not set aside all of the above and import the definition of a child contained in section 199 of the 2011 Act. As demonstrated by the present circumstances, that definition is not exhaustive for all proceedings before a children's hearing. In short the petitioner is a child for the purposes of regulations 9 and 10 of the SA Regulations and thus could lawfully be placed in secure accommodation and then brought before a children's hearing for consideration of whether a a CSO should be made. The damages claim as stated in the petition raises no separate issue and therefore falls away.