SHERIFF APPEAL COURT

[2024] SAC (Civ) 27

Sheriff Principal D Pyle
Sheriff Principal N Ross
Appeal Sheriff W Sheehan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D PYLE

in causa

F (FIRST PURSUER), M (SECOND PURSUER), X (THIRD PURSUER), Y (FOURTH PURSUER) F as legal representative of Z (a child under the age of 16) (FIFTH PURSUER)

Pursuers and Respondents

against

MORAY COUNCIL having a place of business at Moray Council Office, High Street, Elgin, Moray, IV30 1BX

Defender and Appellant

Appellant: Crawford KC, Byrne KC; Ledingham Chalmers LLP
Respondents: Munro; Livingstone Brown Ltd

24 November 2023

Introduction

[1] This is an appeal by Moray Council in respect of awards of damages in favour of the first and second respondents. Certain other awards of damages were agreed between the Council and the other three respondents. These awards are not subject to appeal. Accordingly, references herein to the respondents refer to the first and second respondents alone. In 2012, the respondents became the foster parents of a family of one girl and two boys. The children were brought into the care system by the appellant. The appellant

had a fostering contract with an independent agency which provides fostering services and which in turn entered into a contract with the respondents.

[2] The children all had major challenges. The respondents decided that they would enrol them in a local private school on the basis that all monies they received from the fostering agency would go to the school in payment of fees. Accordingly, not only did the respondents provide their own time looking after the children free of any charge, they also paid for everything else required to give the children a stable and normal family life.

[3] During the course of the placement, the relationship between the appellant and the respondents broke down. The cause of that was the egregious conduct of members of the appellant's Social Work Department, including underlying prejudice against the decision to send the children to the private school. The respondents raised the present action, seeking declarators that there had been interference with their separate rights under Article 8 of schedule 1 to the Human Rights Act 1998, and sums of damages. Albeit only in the middle of a lengthy proof and after the submission of evidence that was patently false, the appellant admitted liability for a claim by the respondents that there had been a breach of their said rights.

[4] The sheriff decided that a declarator of a breach of Article 8 would be insufficient. In order to grant the respondents just satisfaction she made an award for non-patrimonial loss and an award for patrimonial loss arising from the breakdown of the placement by way of enhanced fostering fees and allowances.

[5] The appellant criticises the sheriff's reasoning both in determining the extent of the appellant's admission of liability and the awards which she made. On the latter, the appellant also criticises the basis in law of the awards and their quantification. In doing so,

the appellant invites this court to scrutinise the sheriff's judgment with particular care given the unusual circumstances in which it was prepared.

[6] We begin by dealing with the latter point. We will then discuss the sheriff's judgment and the circumstances at the proof, which led to the appellant's volte-face. Thereafter we will discuss the detailed grounds of appeal.

The sheriff's judgment - procedure

[7] After hearing 9 days of evidence over two periods, one in November 2021 and the other in the spring of 2022, the sheriff made avisandum on 6 May 2022. On 17 August - over 3 months later - the sheriff pronounced an interlocutor in which she made 102 findings in fact, some findings in fact and law and granted decree in favour of the respondents. No judgment in normal form was produced; nor was a note attached to the interlocutor. We were informed that the sheriff indicated to parties that a note would follow some time after the interlocutor, due to pressure of business. She did not want parties to remain meantime ignorant of her decision. The note was eventually produced, in the form of a judgment containing the same findings in fact and fact and law, but not until 22 November 2022.

[8] The appellant submitted at a procedural hearing that this state of affairs required the cause to be remitted to another sheriff for proof. Under reference to *Chief Constable, Lothian and Borders* v *Lothian and Borders Police Board* 2005 SLT 315, this court decided that no matter the unsatisfactory circumstances it was in the interests of justice that the appeal proceed without a remit. The sheriff's findings in fact were repeated exactly in the sheriff's judgment. There was nothing to suggest that the reasons within the judgment were anything other than the genuine reasons of the sheriff, unaffected by the grounds of appeal (which the sheriff may or may not have in any event seen) by way of self-justification. The

reason for the delay was a genuine one: the sheriff had been unable due to other work pressures to produce the note of reasons at the time of the production of the interlocutor. Natural justice had been properly served and that it was unnecessary to take the drastic step proposed by the appellant. To do otherwise, while not determinative, would result in an injustice to the respondents in respect of something for which they were entirely blameless. In these circumstances, we do not recognise the submission that we have to scrutinise the judgment with particular care. Any judgment needs to be scrutinised with care - that is self-evident.

The sheriff's judgment - findings in fact

[9] In the interests of confidentiality, we set out only in broad terms the findings in fact of the sheriff.

[10] The children were placed with the respondents, who are spouses, in 2012. It was intended that the placements remain until the end of the August following each child's 18th birthday. The placements were through a private fostering agency. The eldest child suffered from attachment disorder. Her two brothers suffered from ADHD. Care of all three children was extremely challenging for the respondents. The children were treated as members of a "living family", went on holidays with the respondents and their extended family and called the respondents mum and dad. By 2014, the children were each subject to a permanence order jointly in favour of the appellant and the respondents, subject to the usual provision that the mandatory right to regulate the children's residence be solely with the appellant. The two older children were enrolled in a local private school to provide them with structure. All monies received by the respondents from the fostering agency were deployed for the school's fees. In January 2017, an incident occurred at the school,

which resulted in a deterioration in the behaviour of the eldest child who was by then 15 years of age. The appellant did not offer any support or guidance to the child (although she might not have accepted it in any event); nor was any guidance offered or given to her two brothers. Instead, the child would not engage in any discussion about the incident other than with the second respondent. In the spring of that year, her social worker, with whom she had a good relationship, was replaced by another. No handover of the case took place. No effort was made to build a working relationship between the child and the new social worker. In June 2017, the respondents withdrew her from the school. They urgently sought the assistance of the appellant to find her a new school. A formal plan was agreed on the support required for her, but by the beginning of the autumn term the appellant had taken no steps to find her a new school. This caused a further deterioration in her behaviour. On 4 August 2017, the respondents gave 30 days' notice of termination of the placement unless the agreed support was provided by the appellant. They received no substantive response. The respondents themselves arranged a new school for the child, albeit only after the first week of the new term. On 30 August 2017, the appellant held a professionals' meeting during which it was agreed that should a plan of support be put in place for the child the notice to end the placement would be rescinded. An action plan was drawn up. As well as providing support for the child, a meeting was to be arranged to commence the transfer of the fostering services provided by the respondents for the children to the appellant's own fostering agency, rather than the independent one. The significance of this, as the evidence made clear, was that the appellant would pay a lower sum and the respondents would receive a higher sum by way of fees. At a planning meeting on 19 September 2017, it was decided that the child be moved to a residential home. A threat was made by an employee of the appellant to move the child immediately without notice and without any preparation

for the child or her brothers. In the event, no place was available and the move to the residential home did not take place until the December. The minutes of this meeting were not produced until February 2018. They were inaccurate, in that they wrongly vilified the respondents, were critical of them and made unfounded allegations about them and their care of the eldest child. She was eventually placed in the residential home on Christmas day (or a day or two before it). This had been agreed to be on a shared care arrangement, but the appellant did not facilitate it. The child was not allowed to stay at the respondents' home. Indeed, both the child and the respondents were led to believe that if the child returned to the respondents' home, her brothers' placement would be jeopardised. This was despite the child wanting to return to the respondents' care and they likewise. At the residential home, the child did not feel safe. She was allowed to come and go as she pleased. There was no compulsitor on her to attend school and no limits were placed on socialising and staying overnight with people who had not been vetted. During this period, her brothers' behaviour deteriorated and no assistance was given by the appellant to the respondents. In January 2018, a looked-after child review took place, but the decision permanently to end the child's placement with the respondents had already been made without any discussion with the child or the respondents. Prior to the review, the appellant made erroneous and misleading statements about the respondents, including a false allegation of sexual impropriety being levelled at the first respondent.

[11] The sheriff went on to make certain findings in fact and findings in fact and law in relation to damages and quantum. We discuss these later.

The appellant's admission of liability

[12] The circumstances in which the appellant came to admit liability are unusual. They are particularly significant because of the appellant's position before this court that the admission was more restricted than the sheriff decided, which, it was argued, was an error of law. It is therefore necessary to discuss the circumstances in some detail.

[13] In the pleadings, the respondents offered to prove (Article XX of Condescendence) that the acts and omissions of the appellant and its social workers gave rise to significant and unnecessary interference in the family life of the respondents with the eldest child. They go on to aver that the initial disruption and the later termination of the placement was a direct result of the appellant's failure properly and meaningfully to support it. Opportunities to reintegrate the child into the respondents' care were missed. The child's views went unheeded. No enquiry was made of the views of her brothers. While much of the detail of the alleged failures is set out in the rest of the pleadings, the best summary appears in Article XVII in which the respondents narrate the detailed heads of complaint as submitted to the appellant in September 2018:

1. A failure properly to assess and support the placement (instead, assuming that the fault lay with the respondents);
2. A failure timeously to refer the child to CAMHS (that being the branch of the National Health Service, which deals with child and adolescent mental health problems);
3. A failure to support the respondents in finding a new school for the child;
4. Misrepresenting the position at the meeting in August 2017;
5. Inaccurate recording of the meeting in September 2017;
6. Failure to implement the plan agreed at that meeting;

7. Significant delays throughout;

8. Inadequate communication throughout.

[14] The admission of liability was made by the appellant after the evidence of the children's social worker. The transcript of her whole evidence is contained in the appendix. We readily agree with the sheriff's conclusion that her evidence after cross-examination was "helpful in establishing the case for the [respondents]".

[15] Senior counsel for the appellant criticised the approach of the sheriff in her identification of the nature and extent of the interference with the respondents' Article 8 rights. While the appellant does not seek to resile from its admission of liability, in the face of an admission the court can either ask the party to identify what it admits as giving rise to an interference or can proceed itself to specify that having regard to the evidence heard. In the present case, the sheriff did not ask the appellant (who did not offer) to specify what acts and omissions it admitted interfered with the respondents' Article 8 rights. The sheriff discussed the nature and extent of the interference but made no specific findings in fact. The admission of liability could only be in respect of the acts and omissions condescended upon. In broad terms, they can be characterised as a failure to support, of misreporting and the making of false allegations. The sheriff identified a unilateral decision to end the placement, but did not state that the decision was itself an interference with the respondents' Article 8 rights. She did not identify the lack of support which led to the placement breakdown as such interference.

[16] This submission was not presaged in the grounds of appeal. The appellant was afforded an earlier opportunity to amend the grounds of appeal, but did not introduce any ground asserting that the admission must be restricted to the respondents' averments in condescendence. In any event, in our opinion the ground has no merit. It is important to

highlight the stage at which the admission of liability was made. The respondents' proof had ended. The social worker was the first witness for the appellant. In examination-in-chief she affirmed the evidence contained in her affidavit. Much of it left gaps which were explored in cross-examination; or contained evidence which often skirted round the issues she raised. There is no basis to impose an onus upon the sheriff to interrogate the appellant on the extent of the admission. By making an unqualified admission, the appellant perilled its case on the possibility that the sheriff would reach conclusions on the totality of the evidence she had already heard. In particular, if there was anything in the evidence of the social worker during cross-examination with which the appellant disagreed, it should have led evidence about it.

[17] The mode of proof was a proof before answer. Senior counsel appeared to accept that this had in some way been lost by the wayside. In any event, we were not told that counsel for the appellant at the proof had objected to evidence being led about the prejudgment of the LAC decision. We assume that there was none. Moreover, as the solicitor for the respondents pointed out, the fact of the prejudgment became clear only during the cross-examination of the social worker.

[18] The sheriff's judgment is sparing in its analysis. It proceeds with short sentences with little development. The style is discursive. Nevertheless, it is the function of this court to consider the judgment as a whole. In paragraph 244, the sheriff set out her decision on the extent of the interference with the respondents' Article 8 right. We do not agree that the issues which the appellant seeks to exclude, namely the prejudgment before the LAC review (ie the unilateral decision to end the placement) or the lack of support, are not encompassed within that paragraph. On the former, the sheriff made a specific finding in fact (no 60). She also made numerous findings in fact on the lack of support (nos 19, 21, 22, 25, 27, 28, 32, 35,

36, 37, 43, 45, 48, 50, 57, 58, 61, 64 and 65). While we accept that the sheriff has not stated in terms that the prejudgment and the lack of support form part of the interference, it is in our opinion clear that these were factors which the sheriff took into account. That is evident from the detailed findings in fact (*supra*) but also by the reference to "general inaction", which we consider encompasses the lack of support. On the matter of prejudgment, that is encompassed within the passage:

> "… decisions in relation to a troubled child were made on the basis of erroneous information, on a whim, and, in some cases, in complete ignorance of any facts and without regard for the information provided by the child or the child's carers."

That is an obvious reference to the appellant's conduct immediately prior to and at the LAC review. Indeed, in paragraph 244.2 the sheriff states that the failure to provide support was included in the factors for causing the placement to fail.

[19] Similarly, we do not accept counsel's submission that it is unclear that the sheriff applied the same test of interference to the patrimonial loss as to the non-patrimonial loss. Looking at the judgment as a whole, it is clear to us that the sheriff was well aware that the extent of interference had to be the precursor for a claim in damages. There is no reason to construe the relevant paragraphs (nos 244.1 and 244.2) in that restricted manner.

Just satisfaction - remedy

[20] The court's power to grant a remedy for an unlawful act of a public authority arising from a breach of Article 8 rights is contained in section 8 of the Human Rights Act 1998. The test is "just and appropriate" (section 8(1)). Section 8(3) provides that no award of damages is to be made:

> "unless, taking account of all the circumstances of the case, including - (a) any other relief or remedy granted, or order made, in relation to the act in question…, and (b) the consequences of any decision… in respect of that act, the court is satisfied

> that the award is necessary to afford just satisfaction to the person in whose favour it is made."

Senior counsel submitted that the sheriff misdirected herself in law. Nowhere in the discussion of an award of damages for non-patrimonial loss did the sheriff address whether the appellant's conduct led to the breakdown of the placement; whether the breakdown of the placement caused the appellant to withdraw the transfer application; or whether the respondents suffered loss. On patrimonial loss, the sheriff's reasoning was opaque. She appeared to have approached matters from a common law perspective and on the basis of *restitutio in integrum*. Alternatively, she has worked backwards from a financial loss which she linked to the breakdown of the placement, which in turn is linked to the breach of the Article 8 right. She had not taken into account that any compensation will come from the public purse. The respondents' claim should be equiperated with claims by asylum seekers (*Anufrijeva* v *Southwark LBC* [2004] QB 1124, paragraph 75).

[21] In our opinion, this criticism of the sheriff's judgment has no merit. At paragraphs 227-245 of her note, the sheriff sets out the relevant law in some detail. Senior counsel did not criticise that analysis. Ultimately, awards of non-patrimonial loss under the Convention are essentially a jury question. We do not consider that the sheriff has failed to take into account relevant considerations, taken into account irrelevant considerations or otherwise made an error of law. The awards are within the range of awards which were open to her. Nor do we consider that the sheriff fell into error in her approach to determining whether an award of patrimonial loss should be made. Indeed, she has approached the matter in accordance with the ECHR Practice Directions on Just Satisfaction Claims, Rules of Court (3 June 2022) which, per paragraph 8, expressly endorses the *restitutio in integrum* principle as being the appropriate one. That approach is also endorsed in

decisions of the ECHR Court (see *R (Greenfield)* v *Home Secretary* [2005] 1 WLR 673, per Lord Bingham of Cornhill at 678-679). It is clear that the sheriff was mindful of compensation being paid from the public purse, in that she expressly records (paragraph 227 of her note) that the impact of an award on the funds of the relevant department was not confirmed and no details were provided in relation to any budget. We do not agree that the respondents' claim should be equiperated with asylum seekers. The concern in *Anufrijeva* was about creating the impression that asylum seekers whether genuine or not are profiting from their status. That is a quite different matter from the circumstances which apply in this case.

Damages - causation and quantum

[22] In addition to the criticisms made about the sheriff's overall approach to damages and causation, which we have dealt with under the preceding heading, senior counsel for the appellant also criticised the sheriff's reasoning on the patrimonial awards and their quantum. On the evidence, there was no basis for the sheriff to hold that the admitted breaches by the appellant caused the breakdown of the eldest child's placement, or that it caused the respondents not to transfer from the private fostering agency to the appellant's. There was no basis to hold that it would extend past the 18th birthday of each child, as any payments by a local authority after a child's 18th birthday are discretionary. A prerequisite of the schemes operated by the appellant through its fostering agency was that at least one of the foster carers is full time at home to take care of the children. The sheriff found in fact that the second respondent gave up well-paid employment to care for the children (finding in fact 13). In addition, as the sheriff recorded, the second respondent works part time in the medical profession (note, paragraph 38). The fact that there was an incident involving

the eldest child at school and that no guidance or support was offered or provided to or for her by the appellant (finding in fact 19) is irrelevant in identifying causation. The sheriff failed to take into account that the respondents were by June 2017 already doubtful that the child's placement could continue (email dated 21 June 2017 from the first respondent to the appellant - revised appendix, p 1503). In finding that the lack of support and assistance by the appellant and the unilateral decision of the appellant to end the placement caused the breakdown of the child's placement (finding in fact 65) the sheriff failed properly to understand the evidence of Dr Robinson, the respondents' expert witness. That witness was unwilling to speculate whether support and assistance from an external agency would have been of benefit to the child after the incident at the school (revised appendix, p 282ff). To reach the conclusion that the appellant's failures in support and guidance caused the placement breakdown could only be on the basis of Dr Robinson's evidence, but that evidence did not say so in terms. Moreover, it is unclear from the judgment what the sheriff considered was the reason for the transfer from the private agency to the appellant's agency not taking place. On the evidence, there was no link between the breakdown of the child's placement and the decision not to proceed with the transfer of agencies for her two brothers. The sheriff appeared to conclude that it was not financially viable for the transfer to take place, but there was no evidence to support that conclusion. It could not be right that it is all the fault of the appellant that the transfer did not take place. The sheriff in any event failed to take into account the detailed conditions for entitlement to the highest level of foster carers contained in the appellant's handbook (revised appendix, p 1896ff) and the evidence of the appellant's witness on how the scheme worked (revised appendix, p 393 and p 425). Nor did she take into account that the payments from the private fostering agency made no distinction between fees and allowances (note, paragraph 247). Without

evidence of what part of the payments were for allowances, the sheriff did not have sufficient information to calculate the detailed loss.

[23] In our opinion, these criticisms of the sheriff have no merit. The starting point for damages for patrimonial loss for breaches of Article 8 is, as we have described above. The court requires to regard it as a matter of ECHR jurisprudence, not domestic law. In *Kingsley* v *United Kingdom* (2002) 35 EHRR 10 (a decision of the Grand Chamber), paragraph 40 the court said:

> "The court recalls that it is well established that the principle underlying the provision of just satisfaction for a breach of article 6 is that the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention's requirements. The court will award monetary compensation under article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found, since the state cannot be required to pay damages in respect of losses for which it is not responsible."

As Lord Bingham of Cornhill explained in *R (Greenfield)* v *Home Secretary*, (*supra*, p 679),

> "… the court has ordinarily been willing to depart from its practice of finding a violation of article 6 to be, in itself, just satisfaction under article 41 only where the court finds a causal connection between the violation found and the loss for which an applicant claims to be compensated. Such claim may be for specific heads of loss, such as loss of earnings or profits, said to be attributable to the violation. The court has described this as pecuniary loss… It is enough to say that the court has looked for a causal connection, and has on the whole been slow to award such compensation."

Where Article 6 is found to have been breached, the outcome will often be that a decision is quashed and a retrial ordered, which will vindicate the victim's Convention right (ibid, p 678). Thus, it is likely that awards of damages for just satisfaction in Article 6 breaches will be rare. For Article 8 breaches, the position might be different, given that vindication of the victim's right does not concern the quashing of a decision and a retrial. The underlying expectation is that a member state found to have violated the Convention, whether under Article 6 or otherwise, will act promptly to prevent a repetition of the violation, and in this

way the primary object of the Convention is served. Equally so, the European Court has made awards of damages for breaches of Article 8, including for patrimonial loss (eg, *Hansen* v *Turkey* (2004) 39 EHRR 18, a case concerning the member state's failure to enforce the victim's right to access to her children). That case is instructive in that there was no alternative remedy available to the victim, other than an award of damages. In this appeal, the failures of the appellant cannot be reversed - the child cannot be returned to the care of the respondents. Nor can the transfer to the appellant's agency take place or be backdated to when it ought to have occurred.

[24] In discovering the causal connection between the breach of Article 8 and the loss for which the respondents seek to recover by way of damages, the sheriff had to look at the evidence as a whole. It is not just a case of finding one failure and identifying the causal connection to the head of damages sought. Instead, rightly in our view, the sheriff considered the evidence in the round, identified the appellant's failures and then decided what would have happened if they had not occurred. It was unnecessary for her to determine whether the eldest child would definitely have taken advantage of support which ought to have been offered to her, or whether she would have remained within the appellants' home and family. The test is the balance of probabilities. In any event, the child herself in her evidence, as the sheriff found, considered that the only reason the placement ended was as a result of the decision taken unilaterally by the appellant (note, paragraph 166). Dr Robinson, whose evidence the sheriff accepted, concluded that the appellant's failures "contributed significantly to the breakdown of the placement" (note, paragraph 168). During cross-examination the social worker conceded the point (revised appendix, p 971).

[25] The same point can be made in respect of the transfer to the appellant's agency. As the sheriff found, there was no justification for the volte-face by the appellant, from describing the respondents in glowing terms for the purposes of the transfer, to regarding them as unsuitable. As the sheriff records (note, paragraph 172), the reasons why the respondents were no longer suitable were not clear, to the point that she concluded that the appellant withdrew the offer of transfer because of the complaint made by the respondents. That is a conclusion the sheriff was entitled to reach on the evidence. The fact that the eventual decision would be made by an independent panel does not compel a finding that on the balance of probabilities it would not have gone through.

[26] Senior counsel's criticisms of the sheriff's conclusions on quantum ignore the fact that, as the solicitor for the respondents noted, the evidence of the respondents themselves was of a bespoke arrangement recorded in great detail and with precision. The appellant did not lead evidence from its employees who had entered into the discussions with the respondents on this issue. Instead, the appellant perilled its defence on the sole evidence of a witness who had no direct involvement in the case - and indeed, as the sheriff records (note, paragraph 200), was unable to assist the court about the scheme which was in place prior to 2019. Accordingly, on the evidence the sheriff was entitled to prefer that of the respondents, namely that a bespoke arrangement had been agreed and that but for the volte-face by the appellant and the other causes of the breakdown of the placement the respondents would have received the sums they spoke to. That this was not put to the appellant's witness in cross-examination is unsurprising given that her evidence was that she was not involved in the discussions about it. Nor do we consider that the sheriff required evidence on the breakdown of the monies paid by the independent fostering agency between fees and allowances. As a matter of fact, there was no distinction, and to

seek to do so would be hypothetical. It is true that there was no evidence showing a detailed calculation of the monies which would have been spent on the eldest child if she had remained within the respondents' home, rather than in the residential home, but on the evidence of the respondents the sheriff found (note, paragraph 269) that for that period the respondents kept her room for her, continued to involve her in family activities and paid for her mobile phone. In any event the period was a very short one. Finally, we do not accept the criticism that by definition the payments would end on the 18th birthday of each child, rather than the 31 August following. As the solicitor for the respondents noted, their evidence was that this had been expressly agreed by the appellant, no matter that from the 18th birthday the payment would be a discretionary one. No evidence was led by the appellant in contradiction of that. Indeed, the appellant's witness accepted that there can be circumstances where payments will be made when a child reaches 18 but is still in full time education (revised appendix, p 450 ff).

Decision

[27] For the foregoing reasons, the appeal is refused. Accordingly the awards of damages in the sums of £8,000, £61,277.80 and £131,107.06 remain standing. Parties submitted that expenses should follow success. We will accordingly award the expenses of the appeal in favour of the respondents.