



SHERIFF APPEAL COURT

[2022] SAC (Civ) 25

Sheriff Principal Aisha Y Anwar
Appeal Sheriff T McCartney
Appeal Sheriff W Sheehan

OPINION OF THE COURT

delivered by Sheriff Principal Aisha Y Anwar

in appeal by

JT

Appellant

against

SCOTTISH CHILDREN'S REPORTER ADMINISTRATION

First Respondent

SM

Second Respondent

Appellant: Melvin-Farr, Advocate; Lee Doyle Solicitors

First Respondent: Flannigan; Anderson Strathern LLP

Second Respondent: Sturdy; Livingstone Brown

18 August 2022

Introduction

[1] Does JM have, or is he likely to have, a close connection with his father in terms of section 67(2)(c) of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act")? That is the central issue in this appeal.

[2] JM is a young child who is not yet one years old. His mother is SM and his father is JT. They each hold parental rights and responsibilities in respect of JM. Immediately after his birth, a child protection order was granted authorising the removal of JM to a place of safety. JM was placed with a kinship carer. JM has three older siblings all of whom are accommodated with a kinship carer.

[3] JT has been convicted of an offence specified in paragraph 1A of Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (“a schedule 1 offence”). In 2012 JT penetrated sexually with his penis the vagina and mouth of a child who had attained the age of 13 years but had not attained the age of 16 years in that he had sexual intercourse with her, contrary to section 28 of the Sexual Offences (Scotland) Act 2009.

[4] The first respondent (“the reporter”) formed the view that the grounds of referral set out in section 67(2)(c) of the 2011 Act applied and that JM is in need of compulsory measures of supervision. The reporter referred JM to a children’s hearing. SM accepted the grounds of referral. JT did not. An application was made to the sheriff to find the grounds established. On 27 April 2022, following proof, the sheriff found the grounds of referral established.

[5] JT has appealed the decision of the sheriff in terms of section 163(1)(a)(i) of the 2011 Act.

The Statutory Provisions

[6] Section 67 of the 2011 Act so far as relevant provides:

“67 Meaning of ‘section 67 ground’

(1) In this Act ‘section 67 ground’, in relation to a child, means any of the grounds mentioned in subsection (2).

- (2) The grounds are that—
- (a) the child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired, due to a lack of parental care,
 - (b) a schedule 1 offence has been committed in respect of the child,
 - (c) the child has, or is likely to have, a close connection with a person who has committed a schedule 1 offence,
 - (d) the child is, or is likely to become, a member of the same household as a child in respect of whom a schedule 1 offence has been committed,
 - (e) the child is being, or is likely to be, exposed to persons whose conduct is (or has been) such that it is likely that—
 - (i) the child will be abused or harmed, or
 - (ii) the child's health, safety or development will be seriously adversely affected,
 - (f) the child has, or is likely to have, a close connection with a person who has carried out domestic abuse,
 - (g) the child has, or is likely to have, a close connection with a person who has committed an offence under Part 1, 4 or 5 of the Sexual Offences (Scotland) Act 2009 (asp 9),

....

- (3) For the purposes of paragraphs (c), (f) and (g) of subsection (2), a child is to be taken to have a close connection with a person if—
- (a) the child is a member of the same household as the person, or
 - (b) the child is not a member of the same household as the person but the child has significant contact with the person."

The sheriff's findings

[7] Before the sheriff, SM accepted the grounds of referral and all supporting facts. JT did not accept the grounds of referral. Neither SM nor JT gave evidence. The findings in fact made by the sheriff and which are relevant to this appeal are as follows:

(5) The appellant first exercised contact with the child and a sibling of the child on 10 January 2022. The contact took place at the request of the appellant and in furtherance of an interim compulsory supervision order. Contact took place at [Social Work Offices] and endured for one hour. The contact was supervised by [a social worker]. The purpose of the contact was to assess the parenting skills of the appellant, to assess his ability to look after the child and to fulfil a legal order. The exercise of contact was part of the bonding process between the appellant and the child. The said contact was direct and was familial. During contact the appellant fed the child and under the guidance of members of the Social Work Department he changed the child's nappy.

(6) After contact had taken place the appellant expressed to members of the Social Work Department that he thought that the period of contact had gone well.

(7) A further period of supervised contact took place on 28 March 2022 at [social work offices]. The contact took place at the request of the appellant and in furtherance of an interim compulsory supervision order. Said period of contact endured for one hour. The contact involved the appellant, the child and the child's sibling. The contact was supervised by [a social worker]. The room within which the contact was taking place was overheated. This caused the child to become uncomfortable. The appellant was attuned to the needs of the child. The appellant removed the socks of the child and wiped his brow. The appellant required further instruction from [the social worker] as to how to adequately cool the child down.

(8) The child was awake for most of the period of time within which contact endured. The appellant enjoyed the said period of contact and was able to focus upon the child.

(9) The appellant is unhappy with the current level of contact with the child. He is of the view that the limitations in contact do not allow him to adequately bond with the child. The appellant wishes to exercise more contact with the child. The appellant wishes to create and develop a bond between him and his child.

(10) The mother of the child wishes the appellant to spend more time with the child in order to create a bond between the appellant and his child.

(11) A further purpose of the contact between the appellant and the child is to preserve the child's sense of identity insofar as the appellant is concerned.

(12) The contact between the appellant and the child is significant contact."

[8] Finding in fact 2 contained the following finding: "Sometimes [SM] and [JT] reside together at [SM's address]". The sheriff noted that SM and JT had been living together prior

to the birth of JM but were living separately at the time of proof “as bail conditions prevented their contact” (paragraph 12 of the stated case).

[9] None of the sheriff’s findings in fact were challenged on appeal, nor was it suggested that there was insufficient material before the sheriff to allow him to make these findings.

[10] The questions posed by the sheriff are: (a) did I err in finding the appellant has or is likely to have close connection to the child; and (b) accordingly, did I err in finding the grounds of referral established?

Submissions for the appellant, JT

[11] Counsel for JT adopted his note of argument. Reliance was placed on the terms of section 67(3) and the analysis of the concepts of “household” and “significant contact” contained in Professor Norrie’s book *Children’s Hearings in Scotland* 4th edition, para 3.09. It was submitted that although JT had parental rights and responsibilities, he was not part of SM’s household. The sheriff had not been entitled to conclude that because SM and JT sometimes lived together, this created a household or a close connection for the purposes of section 67(2)(c). While SM was supportive of contact, that was not a factor which pointed to either the existence of a “household” of which JT was part or a close connection between the child and JT. Reliance was ostensibly placed upon dicta in *McGregor v H* 1983 SLT 626, *A v Kennedy* 1993 SC 131 and *ZM and AM v Locality Reporter* 2016 SAC (Civ) 16, however upon questioning by the court, counsel was unable to explain exactly which principles or propositions established by these authorities was relied upon by JT.

[12] It was submitted that the sheriff had erred in law when he made finding in fact 12. There has been no judicial consideration of the term “significant contact” and the term was not defined in the 2011 Act. There had been no finding that JT regularly visited the child’s

family circle or that he regularly visited SM. JT had only enjoyed two contact visits with the child.

[13] A criminal conviction was not a prerequisite to the establishment of grounds of referral: *LO & EO v Children's Reporter* 2020 Fam LR 56. If the court were to conclude that the child did not have a close connection with JT, the grounds would not be made out.

Submissions for the reporter

[14] The agent for the reporter submitted that section 67(2)(c) required to be read with section 67(3). The term "significant contact" was not defined in the 2011 Act, however the word "significant" had been considered in *JT v Stirling Council* [2007] CSIH 52 at paragraph 23. A narrow interpretation of the word "household" has been rejected (*McGregor v H*; *Kennedy v R's Curator ad Litem* 1992 SC 300; *A v Kennedy*). A similar approach required to be taken to the term "close connection".

[15] Section 67(2)(c) also required the court to look to the future and to determine what the likely future position might be. The court must have regard to past events and the character of the people involved to draw conclusions as to what is likely to occur in the future (*M v McClafferty* 2008 Fam LR 22). Moreover, it can be assumed that JT's challenge of the grounds of referral flows from a desire to avoid state interference with his ability to have contact with JM. He cannot legitimately found upon his lack of contact to assert that there is no likelihood of there being a close connection between himself and JM (*KH v Children's Reporter* [2016] 3 WLUK 142).

[16] The sheriff had provided adequate and comprehensible reasons for findings in fact. This appeal is not a general review of the sheriff's finding in fact. Even if this court were to come to a different view on the facts, the sheriff's decision was one he was entitled to make.

[17] The court was invited to answer the questions in the negative, refuse the appeal and to remit the matter to the sheriff to proceed as accords in terms of section 163(10) of the 2011 Act.

Submissions for the second respondent, SM

[18] SM adopted the submissions made on behalf of the reporter. She invited this court to answer the questions in the negative and to refuse the appeal.

Decision

[19] We have no difficulty in answering the questions posed in the stated case in the negative.

[20] The term “close connection” was first introduced to grounds of referral by the 2011 Act. The statutory predecessors to section 67(2)(c) of the 2011 Act focused upon the question of whether a child was, or was likely to become, a member of the same “household” as a schedule 1 offender.

[21] Section 67(2)(c) requires to be read together with section 67(3). However, section 67(3) ought not, in our view, to be read as restricting the terms of section 67(2)(c). While the explanatory notes to the 2011 Act refer to section 67(3) as defining the term “close connection”, section 67(3) might properly be described as a deeming provision rather than an exhaustive statutory definition. A child is “to be taken to have” a close connection with a person if subsections (a) or (b) are satisfied. The words used in section 67(3) can be contrasted with those used in section 67(1) which define a “section 67 ground” as meaning those grounds set out in subsection 2.

[22] The concept of a “close connection” is easily recognised if the purpose of the legislation is borne in mind and a narrow or literal interpretation is avoided. The need for a liberal interpretation to the term “household” has been repeatedly emphasised (*McGregor v H; Kennedy v R’s Curator ad Litem; A v Kennedy*). A similar approach to the term “close connection” is required.

[23] Section 67(3) extends the grounds of referral to include not only those in the same household as the child, but to those with whom the child has “significant contact”. It is plainly intended to provide a greater degree of protection to a child who may be at risk of harm than its statutory predecessors. While the term “significant contact” is not defined in the Act, again, having regard to the mischief with which section 67(2)(c) is concerned, these words require to be construed broadly.

[24] The Extra Division of the Inner House considered the word “significant” in section 2(1) of the Education (Additional Support for Learning)(Scotland) Act 2004. Delivering the opinion of the court, Lord Nimmo Smith noted that at one end of the scale the word “significant” can mean no more than “not insignificant” and at the other “important” or “notable”; we agree that it is a word that has shades of meaning, depending on the context (*JT v Stirling Council* [2007] SC 783 at paragraph 23).

[25] Professor Norrie’s discussion of the term “significant contact” (as it appeared in the 3rd edition of *Children’s Hearings in Scotland*) was approved by this court in *ZM & AM v*

Locality Reporter:

“‘significant contact’ is intended to cover the situation where the source of potential danger does not live with the child but nevertheless is regularly present in the child’s family circle – the typical example will be the boyfriend of the child’s mother who lives apart from the mother and the child but who frequently visits ‘Significant’ means regular, or at least frequent.” (*Children’s Hearings in Scotland*, 4th edition, para 3-09).

[26] It is plain that “significant contact” in the context of the provisions of the 2011 Act is concerned with more than simply an arithmetical analysis of the frequency or the regularity of the contact between the child and the schedule 1 offender. Contact can be “significant” because of the underlying relationship it is designed to promote and maintain. Having regard to the need to protect the child from harm, contact might be significant if it is direct or residential, even where it is irregular or infrequent. It would be unwise to attempt to set out an exhaustive list of factors which might be taken into account when considering whether contact is significant; much will depend upon the facts and circumstances of each case. The following factors are however likely to be relevant:

- (a) The nature of the relationship between the child and person;
- (b) The purpose of the contact or likely contact between the child and the person;
- (c) Whether the contact is direct or indirect;
- (d) The frequency/regularity and future likely frequency/regularity of the contact;
- (e) The present, past and likely future attitude of the primary carer of the child to contact;
- (f) The reason for any temporary suspension of contact;
- (g) The likely contact arrangements between the child and the person, were there to be no compulsory measures of supervision.

[27] In the present case, the sheriff, having carefully considered the evidence before him and having set out clearly his findings in fact, noted that the contact was between an infant child and his biological father who holds parental rights and responsibilities. The contact was direct, took place in the context of a developing relationship, at the request of JT, was familial, personal and regular. Notwithstanding that contact had taken place on only two

occasions prior to the proof, the sheriff concluded that the contact was significant (finding in fact 12). He was, in our view, correct to do so.

[28] Regrettably, the submission advanced on behalf of JT both at the proof and on appeal was misguidedly preoccupied with the question of whether a close connection currently existed between JM and JT and largely ignored the prospective element of the grounds of referral set out in section 67(2)(c). In order to find these grounds established, the court requires to be satisfied that “the child has, **or is likely to have** a close connection with a person who has committed a schedule 1 offence”. The court requires to consider events in the past and to draw inferences by a process of inductive reasoning from those events and what else is known about the character or the persons involved to draw conclusions about what might occur in the future. “Likely” means more than simply “probable”; the court requires to be satisfied that there is a substantial or significant future risk of the child having a close connection with a person who has committed a schedule 1 offence (*M v McClafferty* [2007] CSIH 88).

[29] JT has not challenged findings in fact 9 and 10. We were advised by parties that following the proof, JT appealed a decision of the children’s hearing dated 30 May 2022 which made a direction that contact between JM and JT take place once every two months for one hour, supervised by the social work department. JT seeks contact every three weeks and has in those proceedings referred to “the importance of frequent contact to promote a bond between [JT] and the child”. Counsel for JT maintained that the appeal of the decision of 30 May 2022 was independent of the proceedings before this court however, he submitted that JT “made no secret of wanting more contact”.

[30] Findings in fact 9 and 10 are sufficient to establish that there is a likelihood that JM will have a close connection with JT. Both parents, who hold parental rights and

responsibilities and who, in the absence of state intervention would make decisions regarding his welfare and care, wish to promote that connection by increasing contact. It is clear from finding in fact 2 and paragraph 12 of the stated case, that, but for the imposition of bail conditions, such contact may sometimes involve JT residing with SM and JM. When asked what the position would be if the grounds were not established and if there was no state intervention in the regulation of contact between JM and JT, Counsel for JT finally conceded that it was likely that JM would return to SM's care. Counsel submitted that "at that point" JT would have a close connection with JM. That submission fails to recognise the function of the court; looking to the future is exactly what the court is tasked to do in terms of section 67(2)(c).

[31] The likelihood of a future close connection cannot be dismissed simply by reference to the lack of such a connection at the present time, particularly where the lack of contact is attributable to state interference. Here, both SM and JT wish there to be further contact between JT and JM, in furtherance of a paternal relationship.

[32] As noted by Sheriff Principal Scott in *KH v Children's Reporter* :

"where [an appellant] challenges the establishment of grounds for referral, it is to be assumed that her motivation in doing so, flows from a desire to avoid state interference with her ability to have contact with the child, or put another way, to gain a measure of exposure to the child. Such an 'interested person' (if that is what she be) cannot legitimately found upon lack of exposure where her involvement in the proceedings seeks to procure exposure" (para 40).

[33] Any contrary conclusion would be perverse and would have the undesirable consequence of undermining the purpose of the grounds of referral; to protect the child from those whose conduct might create a risk of harm. It is, in our view, unarguable that the prospective test in section 67(2)(c) has, on the facts of the present case, not been met. The

unchallenged findings in fact are compelling. The events subsequent to the proof simply bear out the sheriff's findings.

Disposal

[34] We answer the questions in the stated case in the negative, refuse the appeal and remit the application to the sheriff to proceed as accords in terms of section 163(10) of the 2011 Act.