EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 25
XA103/17

Lady Paton

OPINION OF THE COURT

delivered by LADY PATON

in

an application for permission to appeal

by

A W

Applicant

against

a decision of the Sheriff Appeal Court refusing an appeal on 30 October 2017

Applicant: Party
Respondents (adoptive parents): Inglis, SKO Family Law Specialists

7 March 2018

[1] Section 113(2) of the Courts Reform (Scotland) Act 2014 provides that the Court of Session may grant permission to appeal against a final judgment of the Sheriff Appeal Court only if the court considers that the appeal would raise an important point of principle or practice, or there is some other compelling reason for the Court of Session to hear the appeal.

[2] In this case, the applicant is the natural father of a child C, born on 29 June 2014. In the context of established family life, it is important to note at the outset that the natural parents did not look after the child. For reasons more fully set out in Sheriff McCartney's judgment of 22 June 2017, the child was immediately placed with foster carers. The natural parents had some contact with the child for a period. The contact became less frequent. Ultimately, as the sheriff noted in paragraph 48 of his judgment:

> "[The applicant] has had no contact with [C] since October 2016, and … that last contact he attended was described by the safeguarder in his report as a harrowing experience for [C]."

[3] Further details about the placing of the child with prospective adoptive parents (the respondents) on 14 September 2016, and unsuccessful attempts at direct contact in October and November 2016, can be found at pages 5, 6 and 7 of the sheriff's judgment. Formal orders for contact were ultimately terminated by the children's hearing on 15 November 2016. Thus, the natural parents have had no contact, either direct or indirect, with the child since November 2016, at which time the child was aged 2½. The child is now aged 3¾.

[4] The respondents raised a petition for adoption. The applicant initially opposed that petition. There was a proof in Paisley Sheriff Court in June 2017. The applicant participated in the proof, and was represented by a lawyer. The applicant gave evidence. Sheriff McCartney decided to dispense with the applicant's consent to the making of an adoption order for the child. The sheriff made an adoption order with no post-adoption contact.

[5] The applicant appealed to the Sheriff Appeal Court as a party litigant. The main point of his appeal was that there should be post-adoption contact. He currently seeks indirect or "letterbox" contact. However contact of any description is opposed by the adoptive parents as likely to have a marked detrimental effect on the child (pages 5, 6 and 7

and paragraph 48 of the sheriff's judgment) and possibly undermining the placement (paragraphs 48 to 52 of the sheriff's judgment, and see in this context the *dicta* of Lord Hope in *B* v *C* 1996 SLT 1370 at page 1375).

[6] In the early stages of the appeal procedure, the court granted the applicant certain indulgences. For example, the court allowed him to lodge his note of argument late; the court continued the appeal to a later date; the court extended by 6 weeks the date upon which the applicant was required to lodge the appeal prints and appendix. Then, by interlocutor dated 5 October 2017, no appeal print or appendix having been lodged, the Sheriff Appeal Court continued the respondents' motion that the appeal be refused on the grounds of the applicant's default and appointed the applicant to lodge (prior to a procedural hearing fixed for 30 October 2017) an appeal print and appendix, a letter from the shorthand writer relating to the timescale and cost of producing a transcript of the evidence, and a letter from the applicant confirming that he could meet the cost of any transcript. The interlocutor further provided "notifies the appellant that if he fails to adhere to the timetable as set out in paragraph 3, he may be found in default, and the appeal may be refused".

[7] When dealing with the case on 5 October 2017, the appeal sheriff explained clearly to the applicant the importance of lodging the necessary documents. He warned:

> "You should be absolutely clear that if these documents are not available on the 30th, in every likelihood … the appeal will be dismissed on the basis of your default, but we're giving you this final opportunity."

The appeal sheriff's oral explanation was tape-recorded, transcribed and a written copy of the explanation was sent to the applicant.

[8] The necessary documents were not lodged. The case called at a By Order hearing on 18 October 2017. The respondents' agents offered to provide documents in a redacted form

to assist the applicant in preparing the appendix and appeal print. Again, the interlocutor set out what the court expected of the applicant. The court stated that it was hoped that the applicant would be legally represented when the case next called on 30 October 2017.

[9] On 30 October 2017, the necessary documents had not been lodged. Having heard submissions from the applicant in person and the opposing solicitor, the appeal sheriff made the following orders:

> 1 Finds the appellant in default in respect of his failure to comply with the interlocutor dated 18 October 2017.
>
> 2 Refuses the appeal in terms of rule 3.2(3) of the Sheriff Appeal Court Rules 2015.
>
> 3 Finds no expenses due to or by any party in respect of the appeal procedure.

In a note attached to the interlocutor of 30 October 2017, the appeal sheriff gave further detail, and in the light of the applicant's stated position (including his inability to explain why no appendix and appeal print had been lodged, and the lack of an indication as to how he could fund the transcription of the notes of evidence) the appeal sheriff made the orders noted above.

[10] The applicant applied for permission to appeal to the Court of Session. On 28 November 2017, the appeal sheriff refused the applicant's application for the reasons given in the note attached to the interlocutor.

[11] The applicant now applies to the Court of Session for the relevant permission. In his application he explains:

> "4 … The appeal does not raise an important point of principle or practice, but there is some other compelling reason for the Court of Session to hear the appeal because of the circumstances of the case. The case before the Sheriff Appeal Court concerned an appeal brought by a lay individual without the benefit of representation. The subject matter of the case at first instance concerns the most invasive and draconian power available to the state, namely, the granting of an adoption order with no provision for contact, which, accordingly, has the

> practical effect of ending both the legal parent and child relationship and established family life between the said parent and child. The decision to find the applicant in default arises as a consequence of the applicant's failure to comply with the onerous procedural requirements provided for within the Sheriff Appeal Court Rules 2015. There is a wider public interest and clarification about how those rules ought to be treated as applying to an unrepresented individual (for example, the rules appear at face value to lack the flexibility to allow the court to require the legally represented individual to prepare the documents that would otherwise be lodged by the applicant). The combination of the nature of the underlying case, together with that wider interest justifies the Court of Session considering matters. In the alternative for the reasons given in proposed ground of appeal c) the matter is one which is easily capable of resolution on a pragmatic basis, and the granting of leave to appeal would facilitate same."

[12] Thereafter the applicant sets out three proposed grounds of appeal which, read short, are:

a) It was open to the appeal sheriff to order the legally represented party to lodge the necessary documents. The appeal sheriff could also have dispensed with an appendix. The appeal sheriff should have exhausted all other reasonably available alternatives before dismissing the appeal. Reference is made to article 6 of the European Convention on Human Rights.

b) The production of the extended shorthand notes was not mandatory. The appeal sheriff erred in relying upon on the applicant's perceived inability to fund the extension of the shorthand notes.

c) The applicant has managed to lodge an appeal print and an appendix, although he is still unable to fund the extension of the shorthand notes. The applicant is said to have purged his default, and it is submitted that it is in the interests of justice that the applicant be restored to the position he was in prior to that default.

There is also a challenge made in respect of a finding of expenses on 28 November 2017.

The applicant explained that a lawyer had assisted him in drafting his application for permission to appeal.

[13] I am unable to accept the applicant's submission that this case satisfies the test set out in section 113(2) of the 2014 Act in that there is some compelling reason for the Court of Session to hear the appeal. Clarification as to how the rules of court ought to be treated as applying to an unrepresented individual has in fact been given recently, in the United Kingdom Supreme Court, in the case of *Barton* v *Wright Hassall LLP* [2018] 1 WLR 1119 particularly at paragraphs 18 and 42. That guidance is in the following terms:

> "18 … In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themseleves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules … The rules do not in any relevant respect distinguish between represented and unrepresented parties … it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him … The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights … Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

And at paragraph 42:

> "… there cannot fairly be one attitude to compliance with rules for represented parties and another for litigants in person, still less a general dispensation for the latter from the need to observe them. If, as many believe, because they have been designed by lawyers for use by lawyers, the [rules of court] do present an impediment to access to justice for unrepresented parties, the answer is to make very different new rules … rather than to treat litigants in person as immune from their consequences."

[14] I do not therefore accept that there is a wider public interest arising from this case requiring the Court of Session to hear the appeal. Nor am I persuaded that the pragmatic solution referred to by the applicant, namely the late lodging of an appeal print and an appendix, but without necessarily any resolution of the question of transcription of the shorthand notes, resolves matters, or absolves anyone from the requirements of the rules of court. Following the guidance given in *Barton* v *Wright Hassall LLP,* the fair balance achieved by the rules of court will inevitably be disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent.

[15] For the reasons given above, the application is refused.