EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 18
XA95/25
XA106/25

Lord Malcolm
Lady Wise
Lord Clark

OPINION OF THE COURT

delivered by LADY WISE

in the applications

by

AEV and LE

Applicants

against

SHARON MCARTHUR, Locality Reporter Manager

Respondent

For an order requiring the sheriffs at Aberdeen to state a case

Applicant: AEV; Party
Respondent: Middleton; Anderson Strathern LLP

10 April 2026

Introduction

[1] AEV is the mother of a 5 year old child, NE. The second applicant, LE, is NE's father. He did not actively participate in the proceedings before this court but has been involved in some aspects of ongoing proceedings before the children's hearing and in the sheriff court. The first applicant seeks to pursue an appeal in terms of section 163(1)(v) of the Children's

Hearing's (Scotland) Act 2011, the process for which is by way of stated case. These applications are unusual in that AEV seeks to have certain sheriffs at Aberdeen ordained to state a case as they have refused to do so. The first application (XA95/25) seeks to challenge orders made by two different sheriffs on 28 July, 18 August and 8 September, all 2025, that relate to NE's interim supervision, together with orders made on 8 and 25 August 2025 appointing a curator ad item. The second application (XA106/25) seeks to challenge orders made on 29 September and 20 October 2025 relating to NE's interim supervision. Details of each order are set out in paras [15]-[20] below. This Opinion deals with both applications and an associated Devolution Minute.

Factual background

[2] NE initially lived with both of his parents, but they separated and his father LE went to live in the Netherlands. He continued to be looked after by his mother until February 2025. At that time he was referred to the children's hearing in Aberdeen. Between February and April 2025 two Interim Compulsory Supervision Orders (ICSOs) requiring him to live at a place of safety away from either of his parents were made by the children's hearing. Thereafter, the ICSO was extended on several occasions by the sheriffs at Aberdeen on applications made by the Principal Reporter. NE has not lived with his parents at all during the last 13 months. He has some limited contact with each of them separately.

[3] NE's parents contested the grounds of referral to the children's hearing. Following a protracted procedure, including evidential hearings in the sheriff court, the sheriff found those grounds of referral to be established on 9 January 2026. Thereafter the children's hearing made a Compulsory Supervision Order (CSO) on 16 February 2026.

[4] The applicants, particularly AEV, sought to oppose the various ICSOs made. She attempted to appeal a number of decisions made by different sheriffs in Aberdeen between February and October 2025 in terms of which those orders were extended. In essence, the sheriffs (and on one occasion the Sheriff Appeal Court) took the view that as ICSOs are of short duration the appeals taken would be academic by the time they reached either the Sheriff Appeal Court or this court. Some other points were made by the sheriffs about whether AEV's applications posed relevant questions capable of determination. Some were regarded as frivolous. The issue of principle is whether the applicants have been deprived of an effective remedy to challenge the decisions made by the sheriffs on an interim basis pending the grounds of referral being established and the CSO made.

The statutory scheme

[5] The Children's Hearing (Scotland) Act 2011 sets out a comprehensive scheme for proceedings involving state intervention in the lives of children through the children's hearing system. Where there are contested issues of fact only a sheriff can adjudicate on those. In general terms the children's hearing's role is to decide what measures to impose to protect, guide, treat or control a child in light of factual findings made (or admitted). Where there is considered to be an urgent need to protect, guide, treat or control a child pending the establishment of grounds of referral, the children's hearing may make an Interim Compulsory Supervision Order at an early stage - section 93(5).

[6] Section 86(3) of the 2011 Act provides that an ICSO expires after 22 days if it has not been extended. Importantly, section 96(4) of the Act limits the number of ICSOs that the children's hearing can make in the same case to two. Thereafter, only the sheriff can extend an ICSO.

[7] Where by virtue of section 96(4) the children's hearing would be unable to make a further ICSO, the reporter may apply to the sheriff who may vary or extend it. The test for extension or variation of an ICSO is found in section 98(4):

> "The current order may be extended, or extended and varied, only if the sheriff is satisfied that the nature of the child's circumstances is such that for the protection, guidance, treatment or control of the child it is necessary that the current order be extended or extended and varied."

[8] The test of necessity in section 98(4) is a stringent one, consistent with the right to family life enshrined in Article 8 ECHR and the guiding principles articulated by the Strasbourg Court on justification for state interference with that family life – *Strand Lobben and others* v *Norway* [2019] ECtHR 615, paragraphs 202 - 213.

[9] The legislation does not limit the number of times an ICSO can be extended or extended and varied. Section 99 of the Act provides that so long as the test of necessity is met, further applications to extend a previously extended ICSO can be made to the sheriff.

[10] Section 163 of the Act makes provision for appeals by stated case either to the Sheriff Principal (now the Sheriff Appeal Court) or this court against various orders made by a sheriff. These include orders extending an ICSO under section 98 or further extending such an order under section 99 – section 163(1)(a)(iv) and (v).

[11] As a CSO has now been made in this case, provisions relating to review and or appeal in relation to that more permanent order should also be noted. Section 110 provides that where a section 67 ground for referral to the children's hearing has been made a person in the position of the applicants (who are relevant persons in relation to the child) may apply to that sheriff for a review of the grounds of determination. This is a form of reconsideration procedure permitting the sheriff to review his or her own decision. If for example there is evidence in relation to the ground that was not considered by the sheriff when making the

grounds determination, where that evidence would have been admissible, there is a reasonable explanation for the failure to lead that evidence and it is significant and relevant, the sheriff must review the grounds determination - section 111(3).

[12] Where a CSO is in force, section 132 of the Act gives the child, and any relevant person or other participant the right to require a review of that order, but not during the first 3 months - section 132(4). In the present case, the CSO having been made on 16 February 2026, the applicant would not be able to seek a review of that order before 17 May 2026.

[13] Decisions such as the making, extension or further extension of an ICSO are included in lists within section 163(1) of the Act specifying the orders that may be the subject of appeals by stated case to either the Sheriff Principal (now the Sheriff Appeal Court) or to this court. Section 163(9) provides that such appeals may be made only on a point of law or in respect of any procedural irregularity.

The test for refusing to state a case

[14] The Rules of the Court of Session ("RCS") provide that in circumstances such as those that apply here, an application for a case for the opinion of the court must be made within 14 days of the decision being challenged (RCS 41.8(3)(c)). In limited circumstances a sheriff may refuse to state a case. RCS 41.10 provides that within 21 days after the expiry of a period in which other parties than the applicant may seek to add questions to the case, the tribunal (here the sheriff) shall:

> "(a) decide to state a case on the basis of the questions set out in the application…
> (b) refuse to state a case on a proposed question where it is of the opinion that that question
> (i) does not arise;
> (ii) does not require to be decided for the purposes of the appeal; or
> (iii) is frivolous … or

(c) where the application under rule 41.8(1) is made before the facts have been ascertained and the tribunal is of the opinion that it is necessary or expedient that the facts should be ascertained before the application is disposed of, defer further consideration of the application until the facts have been ascertained by it."

The decisions under challenge

[15] The applicants seek to challenge seven decisions in total. The first of these was an order of a sheriff at Aberdeen on 28 July 2025 to extend the ICSO. As any appeal by stated case must be made before the expiry of the period of 28 days beginning with the day in which the determination or decision appealed against was made (section 163(8) of the 2011 Act) the deadline for appealing the 28 July 2025 order was 24 August 2025. No application was made until 15 September 2025 and the application was accordingly out of time. There is no power in terms of the legislation enabling sheriffs to extend the 28 day period and the sheriff said that the first proposed appeal was accordingly incompetent.

[16] The second proposed appeal was against the extension of the ICSO made by the sheriff on 18 August 2025. The sheriff refused to state a case in relation to that order on the basis that, although the application to state a case was lodged in time, the ICSO itself had already expired. The sheriff considered the appeal to be academic. This application was also made late. It had to be made by 14 September 2025 and was made on 15 September 2025.

[17] The third challenge is to the decision of the sheriff on 8 September 2025 to extend the ICSO again. This application was lodged timeously, on 15 September 2025. The sheriff refused to state a case on the basis that, by the time the appeal would be heard, the ICSO would be at an end. Accordingly the sheriff considered that this would render the appeal academic.

[18] The next ICSO extension under challenge is that of 29 September 2025. The application was again out of time. The deadline for appealing was 26 October 2025 and the application was made the following day, 27 October. That application is said to be incompetent.

[19] The fifth and final ICSO extension under challenge is that made on 20 October 2025 and this application was lodged in time. The sheriff refused to state a case on the basis that it was said to be academic, disclosed no question capable of determination and was frivolous. The sheriff also considered that it would have no practical purpose or value.

[20] There are two further interlocutors that the first applicant seeks to challenge. These are orders made by the sheriff on 8 August and 25 August 2025. Those appointed a *curator ad litem* and ordained the *curator ad litem* to report respectively. They are in a different category to the extension of the ICSO orders as it seems that no application for a stated case in respect of either of them was made to the sheriff. In any event, decisions to appoint a *curator ad litem* and ask that *curator* to report do not fall within the specified list of decisions of the sheriff that are appealable by way of stated case in terms of section 163(1) of the 2011 Act. There was no focus on these orders at the hearing before us and we consider that they cannot properly be included within these applications. Accordingly we will not address the terms of those proposed applications further.

Submissions at the appeal

[21] AEV acknowledged that these applications were procedural in nature and could not address her substantive appeal, which contained wide ranging challenges to the decision making to date for NE. They were brought because it was inappropriate for the sheriffs to decide whether the applications for a stated case were competent or academic, only the

higher court should do that. Procedural technicalities should not be adhered to when there were fundamental human rights issues involved.

[22] The concern about the ICSO extensions was that as they are of short duration the appeal window ended before there was an opportunity for effective challenge. As each ICSO was appealable a fair hearing was required where that was sought. There should be relief for failure to comply with timescales. There was a problem with a system in which the ICSO would always expire before any appeal on the merits. An attempt to appeal the very first ICSO granted by the sheriff in June 2025 had been refused as academic by the sheriff appeal court. This court should recognise the human rights violations being caused by repeated decisions each of which denied her the right to an appeal hearing.

[23] The court should order the sheriffs to state a case regardless of the ICSOs having expired, otherwise there would be continued denial of an effective remedy.

[24] Counsel for the authority reporter focused on the two interlocutors against which an appeal had been sought timeously. She accepted that the sheriff ought not to have refused to state a case in relation to the proposed appeal against the order of 8 September extending the ICSO on the basis that by the time the appeal would be heard the ICSO would be at an end. Other bases for refusal had been available, in accordance with RCS 41.10(1)(b). The application lacked substance and did not merit consideration. It did not pose any question capable of inquiry, nor did it identify an error of law or procedural irregularity in the sheriff's decision. In broad terms the application involved a wholesale attack on the ICSO scheme, concerns about the conduct of the social work department and a general challenge to the appropriateness of an ICSO on the facts. Applications of this sort cannot be used to undertake a general review of the sheriff's substantive decision *(C* v *Miller* 2003 SLT 1379).

In any event, the application had no practical purpose or value and so any resulting appeal would be academic. This rendered it frivolous.

[25] The second timeous application related to the interlocutor of 20 October 2025 further extending the ICSO. That application was frivolous and academic. It posed no question capable of inquiry and identified no error of law or procedural irregularity. The sheriff could have refused to state a case on that basis alone. It set out wide ranging complaints alleging breach of statutory duty by the social work department which could not be the subject of an appeal of this type, issues of competence which repeated earlier complaints about the ICSO scheme and issues relating to delays following the appointment of the *curator ad litem* and conduct of the pre-hearing panel. None of these could be said properly to fall within the scope of a section 163 appeal.

[26] The second relevant application had no serious purpose or value because any appeal would be academic. The sheriff had been correct to refuse it on that basis too. The separate devolution minute should be refused. The proceedings concerned only the discrete question of whether the sheriff ought to be ordained to state a case and the minute did not raise a recognisable devolution issue. If the court took a different view, intimation of the minute to the Lord Advocate and the Advocate General for Scotland would be required.

Decision

[27] Interim Compulsory Supervision Orders can be imposed where a child requires urgent protection pending the establishment or otherwise of grounds for referral to the children's hearing. As the interference with family life will be significant, the combination of the test of necessity and their limited duration provide essential safeguards against such interference being oppressive. While the legislation does not limit the number of times a

sheriff can extend an ICSO, the test of necessity must be satisfied on each occasion such an application comes before the sheriff. The context of such an application will require to be considered, including the number of previous extensions, the progress being made with the determination of proposed grounds for referral to the children's hearing and the likely prejudice in the event of delay with substantive decision making.

[28] The present case involves a 4 year old boy who had lived with one or both of his parents from birth until he was removed from parental care in February 2025. Delays in decision making relating to him are not likely to coincide with his best interests and risk the creation of a new *status quo* in his care arrangements that could prejudice the chance of him returning to parental care. We acknowledge that some of the first applicant's proposed challenges were *ex facie* incompetent as out of time or relating to orders against which an appeal by way of stated case is not available (such as the appointment of a *curator ad litem*). The key issue relates to the two applications made timeously.

[29] By the date of the first timeously marked application for the sheriff to state a case about an extension of the ICSO, NE had been living away from his parents at state instigation for over 6 months. Significantly, the applicants had tried to appeal the very first ICSO, made by the Children's Hearing on 25 February 2025. On 1 July 2025 the Sheriff Appeal Court dismissed that application as academic. Further applications relating to subsequent ICSO's made or extended in each of March, April, May and June do not appear to have resulted in cases being framed by any of the sheriffs so requested. The cycle of applications considered by the sheriffs to be academic was accordingly well established before the applications with which we are concerned. As each extension of the ICSO would last only 22 days, it was always likely that the order would have expired by the date of appeal, albeit that there is some scope for expediting appeal procedures. In our view, where

a proposed appeal against a court order raises a point of law or procedural irregularity, the anticipated expiry of that order during the future appeal process does not of itself render the appeal academic. In some cases, a successful appeal of this kind can vitiate earlier decisions. In others, errors can be corrected and affect future decision making in the same case. Generally, it is not for a sheriff determining an application to state a case to address the merits of an appeal, save to the closely circumscribed extent permitted by RCS 41.10. An anticipation that an order may expire before the hearing of an appeal cannot be said to render that appeal frivolous; nor is it likely, of itself, to indicate that a question posed does not require to be answered.

[30] So far as the second timeously marked application for a stated case is concerned, this was dealt with by the sheriff on 5 December 2025, by which time the child had been in the care of the state for over 9 months. The contested proceedings to determine whether grounds for referral to the children's hearing could be established had not concluded. It seems that the first applicant contributed to that by a failure to engage in the proceedings at one stage, leading to further delay following the appointment of a *curator ad litem*. The sheriff indicated that, even if the application had not been considered academic, it would have been deferred until after the fact finding hearing in terms of RCS 41.10(c). However, the primary basis for rejection was that the ICSO would expire and so the appeal would be academic.

[31] Both of the timeous applications made were considered by the same sheriff, who in our view erred in determining that each proposed appeal was academic. We have seen an informal note by the sheriff in relation to the second of those applications. It raises other potential reasons for refusing to state a case. Nonetheless on both occasions the sheriff's primary reason for refusal was that by the date of any hearing the appeal would be

academic. That is a material error of a kind that justifies the applicants' decision to raise the matter with this court and resonates with her concerns about a lack of effective remedy. Where legislation provides a route for appeal and that is pursued within the applicable time frame, the lower court is not the forum for determining whether the proposed remedy should be available. While parts of the applications for a stated case might not withstand scrutiny, a substantive point is raised about whether it was wrong for the ICSO to have been granted and then extended. In the absence of a stated case, the reasons for the sheriff considering that the stringent test of necessity was met are unknown.

[32] Counsel for the reporter queried whether any of the proposed applications properly posed questions capable of inquiry. Some of the issues raised by the applicant were not framed as errors of law or procedural irregularity. Reference was made to *AB* v *Locality Reporter Manager, Kilmarnock* [2026] SAC (Civ) 1, where the Sheriff Appeal Court was critical of an applicant's failure to comply with the stated case procedure. The difficulty with such an approach in the present case is the background of a number of ICSO's and relevant extensions before any determination of disputed facts. Faced with an application for a stated case, timeously lodged albeit unusually framed, the sheriff should have taken into account the unsatisfactory perpetuating cycle of the ICSO's and the applicants' lack of legal representation. Against that backdrop, consideration should have been given to whether this was a case where procedural and legal niceties ought to give way to the paramount consideration in all such cases of the welfare of the child (*Girvan* v *Girvan* 1988 SLT 866, at page 871). Such an approach may have avoided the applicants' perception that successive ICSO's were being "rubber stamped" at the same time as decision makers appeared to thwart the statutory mechanism for their proposed appeals. While each application for a stated case must be determined individually, the whole unfortunate background of

successive attempts to appeal being rejected due to the time limited duration of the orders in question ought to have informed the sheriff's approach to the timeously marked applications.

[33] Having decided that the sheriff erred in regarding a proposed appeal as academic, at least on two occasions, the question then becomes whether we should order that to be done now. This is a less straightforward issue. On 9 January 2026 the sheriff found established the grounds of referral of NE to the children's hearing. At the same time the ICSO was extended again (in terms of section 109 of the 2011 Act) to preserve the position until a children's hearing could be convened. On 28 January 2026 the children's hearing deferred making a decision about whether to make a Compulsory Supervision Order, but that was done on 16 February. In making the CSO, the children's hearing specified that NE will have contact with his father twice per week and with his mother once per month, both supervised. The first opportunity for the applicants to seek a review of the CSO in terms of section 132 of the 2011 Act will be on 17 May 2026. Going forward, the children's hearing will be the substantive decision making forum for NE.

[34] In the course of preparation for the hearing in this case, we noted that on the face of the paperwork certain assumptions appear to have been made about NE's future before grounds for referral to the children's hearing had been established. In the most recent "Child's Plan" for NE dated 19 January 2026 there is reference to a Looked After Child Review that took place on 16 December 2025. It is recorded that the recommendation of the social work department at that meeting was "that rehabilitation to parental care was ruled out" and that this "was agreed by all professionals within the meeting". Such a recommendation seems both premature and draconian, coming as it did before anything more than interim removal of the child from parental care pending determination of the

facts had been authorised. Having raised our concern about this with counsel for the reporter at the hearing, we were assured that the reporter's understanding is that, now that the children's hearing is seised of the matter of decision making for NE, all options are open for consideration, including rehabilitation to parental care.

[35] We have concluded that, while it would be appropriate in circumstances such as these to order the sheriff to state a case, there is a risk that this might deviate attention away from other effective remedies now available. It is of concern that the applicants are not legally represented and we would encourage them to seek independent legal advice before considering what steps to take next. The statutory appeal remedies that ought to have been properly implemented to date will be available against any decisions to make, review and extend the CSO. The children's hearing requires to give reasons for its decisions that can be subjected to review or appeal. With some hesitation, we consider that the best way forward in this case is to encourage the first applicant to continue to engage (as she has done more recently) in the proceedings now before the children's hearing rather than to order the sheriff to state a case. That does not amount to a conclusion that the matter is now academic; on the contrary, the whole history of these proceedings can and should be before the children's hearing when it next makes a decision about whether compulsory supervision measures for NE are necessary.

[36] For the reasons given we will decline to order the sheriff to state a case. By bringing this application, AEV has brought to our attention a tension between the legislation permitting the granting of ICSOs and the way in which applications to state a case have been dealt with to date. Sheriffs require to consider carefully all applications to make or extend ICSOs and to grant them only when satisfied that the test of necessity is met. Reasons for any such decision should be available to those who may seek to challenge it.

Sheriffs should be slow to refuse to state a case for a proposed appeal. It is almost invariably for the appellate court to determine the issues of substance in any challenge to the lower court's decision making, albeit within the confines of the nature of appeals under section 163 of the Act.

[37] Finally, we can deal with the proposed Devolution Minute briefly. Counsel for the reporter accepted that in principle a devolution issue can arise in the context of ICSO proceedings, but that no such issue arises in these applications, which are restricted to ordaining the sheriff to state a case. We agree with that to the extent that the 2011 Act scheme, properly operated, is consistent with the procedural aspects of the right to family life in terms of Article 8 ECHR (*ABC* v *Principal Reporter* 2020 SC (U.K.S.C.) 47, at paragraph 32). The problem that has arisen in this case is the erroneous approach of the sheriff and the Sheriff Appeal Court in treating timeously lodged appeals as academic and thereby depriving the applicants of a forum in which to challenge invasive measures such as the making and extension of ICSO's. On the face of it no issue of the compatibility of the legislation arises.

[38] The difficulties caused by the approach taken to the stated case applications have been compounded by the unduly protracted nature of the contested proceedings in the sheriff court to establish grounds of referral. We hope that this is atypical and not representative of a systemic issue. While many plausible reasons for delay can be advanced, the overriding duty of sheriffs dealing with applications under the 2011 Act is to deal with them expeditiously, giving them the priority they require.

[39] It bears repeating that every decision to authorise the removal of a child, or his or her continued retention away, from a parent, represents a significant interference with family life that must be exercised in a measured and proportionate manner. That includes taking

care to ensure that legislative provisions designed to afford parties with a meaningful appeal route are not frustrated by the passage of time. In cases such as the present, that ought to have included consideration of curtailing the time frame for progressing the appeal process.