SHERIFF APPEAL COURT

[2026] SAC CIV 65

Sheriff Principal A Miller
Appeal Sheriff I Fleming
Appeal Sheriff G Murray

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL ANDREW MILLER

in

in appeal in the cause

AC

Pursuer and Respondent

against

BD

Defender and Appellant

Pursuer and Respondent: Aitken, Advocate; Lisa Rae & Co
Defender and Appellant: Forrest, Advocate; Norman Lawson & Co

8 October 2026

Background

[1] By *ex tempore* decision issued at the conclusion of an appeal hearing on 26 August 2026, we refused the appellant's appeal against the sheriff's decision to deprive him of parental responsibilities and parental rights in relation to his daughter, G. The appellant subsequently made an application for permission to appeal to the Court of Session against

our decision, in terms of section 113(1)(a) of the Courts Reform (Scotland) Act 2014. We elected to deal with this application on parties' written submissions, in terms of rule 12.2(3)(b) of the Act of Sederunt (Sheriff Appeal Court Rules) 2021.

[2] The parties married on 22 April 2016. They separated on 28 May 2022. They have one daughter, G, who was born in 2018 and who lives with the respondent. The respondent raised an action in the sheriff court for divorce, on the grounds of the appellant's unreasonable behaviour. The respondent's other craves included crave 5, which sought a residence order in relation to G, and crave 6, which sought an order in terms of section 11(2)(a) of the Children (Scotland)Act 1995 (the 1995 Act) depriving the appellant of his parental responsibilities and parental rights in relation to G.

[3] The appellant did not oppose the respondent's crave for a residence order. He accepted that the marriage had broken down irretrievably, but opposed the respondent's crave for divorce on the ground pled by her. He also opposed her crave for an order depriving him of his parental responsibilities and parental rights in relation to G. The appellant also craved an order for contact with G. The appellant has had no contact with G since 31 March 2022, when she was aged around three and a half.

[4] In January 2024 the appellant was convicted after trial on summary complaint in the Sheriff Court of the domestically aggravated assault of the respondent on various occasions between 1 January 2017 and 31 March 2019, and of a contravention of section 1 of the Domestic Abuse (Scotland) Act 2018 involving a course of abusive conduct which spanned a period of over 3 years between 1 April 2019 and 30 July 2022 and which included not only various forms of abusive conduct directed towards the respondent but also the libel that he did on various occasions, repeatedly shout and swear and utter threats of violence towards the respondent and towards G. That conviction resulted in the imposition of a high tariff

community payback order, a 5-year non-harassment order (NHO) for the protection of the respondent and a one-year NHO for the protection of G. Although the appellant continued to maintain his innocence in relation to these convictions at the time of the proof, he did not appeal against either conviction or sentence.

[5] At the conclusion of the proof, the sheriff granted the respondent's craves for divorce, residence and for an order depriving the appellant of his parental responsibilities and parental rights in relation to G. The sheriff refused the appellant's crave for a contact order. The appellant appealed to the Sheriff Appeal Court solely against the order depriving him of parental responsibilities and parental rights in relation to G. He did not appeal against refusal of his crave for contact. In the course of his appeal, the appellant did not seek to challenge any of the sheriff's findings in fact or findings in fact and law.

The appeal to the Sheriff Appeal Court

[6] At the hearing of the appeal we decided, applying the guidance given in *J* v *M* [2016] CSIH 52; 2016 SC 835 with regard to the proper approach to appellate scrutiny of an order granted at first instance under section 11 of the 1995 Act, that the appellant had failed to identify any basis which would have entitled us to interfere with the decision reached by the sheriff, on the basis of her unchallenged findings in fact and findings in fact and law and her detailed reasoning in relation to her decision to grant the order for deprivation, which was set out from paragraph [139] of her judgment. We felt able to give an *ex tempore* decision refusing the appellant's appeal and did so, having regard to the interest in minimising unnecessary delay in the resolution of proceedings relating to the welfare of children.

[7] In relation to the first ground of appeal relied on by the appellant, which criticised factors which the sheriff took into account or left out of account in reaching her decision, the

appellant relied on the sheriff's expression of concern about the motivation underlying the appellant's approach to the proceedings. In essence, the sheriff expressed concern that the appellant's approach to the proceedings may have been motivated by his wish to retain a connection with his daughter, which would support him in relation to ongoing proceedings at the instance of the immigration authorities challenging his entitlement to remain in the United Kingdom. The appellant also relied on the sheriff's observations, arising from her assessment of the evidence, about his beliefs with regard to gender, honour and the status of women and girls in society. However, we were satisfied that the appellant's reliance on these issues as a basis for criticising the sheriff's decision ignored the many other factors identified by the sheriff, which were firmly grounded in her unchallenged findings in fact and findings in fact and law. It was clear to us that none of the factors relied on by the appellant were critical to the sheriff's decision to grant the order for deprivation.

[8] The appellant's further submissions with regard to the sheriff's alleged failure to have proper regard to the "no order" principle overlooked the multiple unchallenged findings in fact and findings in fact and law which supported the sheriff's decision to deprive him of his parental responsibilities and parental rights, including those highlighted in particular by counsel for the respondent during the appeal hearing (findings in fact numbers 15-17, 20 to 23, 26 and 31 to 42 and findings in fact and law numbers 6 to 12), which made it clear that the sheriff was satisfied that it would be positively detrimental to G's welfare for the appellant to retain his parental responsibilities and parental rights in relation to her. None of these findings in fact and findings in fact and law were challenged by the appellant. We were satisfied that, in granting the order for deprivation, the sheriff had appropriate regard to G's clearly expressed views (recorded in a child welfare report prepared for the proof) that she did not want to see the appellant, to the other factors which

she was required to have regard to in terms of section 11 of the 1995 Act and to the appellants rights under Article 8 ECHR.

[9] The appellant's reliance in his note of argument (although not further addressed by his counsel during the appeal hearing) on the role played by the court-imposed NHO in the lengthy period since he last saw G ignored the reasons for that NHO. We also heard no suggestion that the appellant had sought variation of the NHO in relation to the respondent to allow him to seek contact with G, an exception which is sometimes provided for where the terms of an NHO might otherwise operate as a practical impediment to contact between the parent against whom the NHO is directed and a child of the parties. We also had regard to the fact that the appellant was also made subject to a shorter NHO focusing specifically on G, which could only have been made because the sheriff who made it considered that such an order was required for G's protection.

[10] We were satisfied that the sheriff explicitly had regard to the "no order" principle and that her decision that it was better for G that the order for deprivation be made than that no order be made was one which was open to her on the evidence and on her unchallenged findings arising from it.

[11] With regard to the second ground relied upon by the appellant, which criticised the sheriff's assessment of the proportionality of the order for deprivation having regard to his rights under Article 8 ECHR, the appellant conceded that the first and second steps in the assessment of proportionality set out by Lord Reed at paragraph 74 of his opinion in *Bank Mellat* v *Her Majesty's Treasury (No. 2)* (2013) UKSC 39 were met in this case. He argued that the third and fourth steps were not. We disagreed. We were satisfied that, even though the sheriff did not explicitly refer to the *Bank Mellat* approach to the assessment of proportionality, she explicitly took account of the proportionality of the order sought by the

respondent, having regard to the appellant's Article 8 rights, and that had she explicitly applied the *Bank Mellat* approach she would have reached the same decision, having regard to her unchallenged findings in fact and findings in fact and law. We were satisfied that the sheriff's approach to the assessment of the proportionality of the deprivation order was entirely consistent with the guidance of the ECtHR in *Strand Lobben* v *Norway* [2020] 70 EHRR 14, paragraphs [202] to [207].

[12] The third ground relied upon by the appellant, which overlapped to some extent with the second, asserted that the sheriff erred in making the order depriving him of his parental responsibilities and parental rights by failing to adequately explain why a less restrictive measure, specifically suspension of those responsibilities and rights, would not have been sufficient, having regard to the need to balance G's welfare and the appellant's rights under Article 8. It was submitted that the order for deprivation was a disproportionate interference with the appellant's Article 8 rights. However, we agreed with the submission on behalf of the respondent that, having regard to the sheriff's approach to the assessment of proportionality, she was entitled, in light of her unchallenged findings in fact and findings in fact and law, to make an order depriving the appellant of his parental responsibilities and parental rights, rather than making an order for suspension. Although paragraph [142] of the sheriff's judgment makes it clear that she considered and rejected the option of depriving the appellant of some, but not all, of his parental responsibilities and parental rights (an issue which did not specifically attract criticism on behalf of the appellant in the hearing before us), counsel for the appellant confirmed that suspension, as opposed to deprivation, was not an option which was ever suggested to the sheriff for consideration.

[13] With regard to the proportionality of an order for deprivation rather than an order for suspension, counsel were in agreement before us that an order for suspension of parental responsibilities and parental rights would have been competent in terms of the court's wide jurisdiction under section 11(2) of the 1995 Act, even though not specifically provided for, in contrast to the explicit provision made in subsection (2)(a) for an order for deprivation. They were also in agreement that an order for suspension, unless it was time limited (for example, to the duration of a lengthy custodial sentence), would have precisely the same practical effect as an order for deprivation. They agreed that neither order would have permanent effect, in the sense that either (if made under section 11 of the 1995 Act, rather than in the course of adoption proceedings), would be open to subsequent review by minute in the process in the event that circumstances arose which justified that course, having regard to the child's welfare.

[14] However, counsel for the appellant submitted that an order for suspension would have represented a lesser interference with the appellant's Article 8 rights than the order for deprivation which the sheriff made. Passing reference was made to the Sheriff Court decisions in *AB* v *CD* [2024] SC KDY 2, in which the sheriff, in the particular circumstances of that case, declined to make an order depriving a child's father of parental responsibilities and parental rights, but did make an order suspending some of those parental responsibilities and parental rights, and *SA* v *LT* [2026] SC PER 15, in which the sheriff refused to grant an order depriving a father of parental responsibilities and parental rights. However, these decisions were explicitly referred to as case-specific examples which demonstrated the particular approaches taken by the sheriffs in those cases to issues concerning deprivation of parental responsibilities and parental rights. The appellant's

counsel made it clear that he did not seek to identify or rely on any principle arising from either decision.

[15] Against the background of the common ground identified at paragraph 13 above, counsel for the appellant was unable to identify any authority or legal principle as a basis for his assertion that, in the circumstances of this case, an order for suspension would have represented a lesser interference with the appellant's Article 8 rights than the order for deprivation which the sheriff made. He simply asserted that, as a matter of practicality, it would be a less onerous task to persuade a sheriff to revisit an order for suspension on the basis of a change of circumstances than an order for deprivation. Counsel frankly recognised the level of speculation which was inherent in that submission, and recognised that the outcome of any such hypothetical application would depend entirely on the particular circumstances presented to the court. In response to a question from the bench, counsel stated that the order for suspension which he had in mind in the context of this ground of appeal would have been an open-ended order, as opposed to a time limited order.

[16] We agreed with counsel for the respondent that, in the circumstances of this case and having regard to the basis upon which this ground was advanced, the distinction between suspension and deprivation was illusory. We were satisfied that, in the circumstances of this case, the sheriff was entitled to make an order for deprivation of the appellant's parental responsibilities and parental rights, having regard to her unchallenged findings in fact and findings in fact and law, and that no basis had been identified which would have entitled us to interfere with the sheriff's decision.

[17] Accordingly, we refused the appeal and adhered to the sheriff's interlocutor. Having regard to the fact that both parties were in receipt of legal aid, we found no expenses due to or by either party.

The application for permission to appeal to the Court of Session

[18] The appellant's written submissions relied on two factors in support of the application for permission to appeal. Firstly, that we erred in concluding that the sheriff's assessment of the proportionality of the order for deprivation was appropriate, having regard to the significance of that order for the appellant and for G. Secondly, that we erred in our assessment of the sheriff's approach to the question of whether an order for suspension, rather than deprivation, of the appellant's parental responsibilities and parental rights would have been the more proportionate outcome to the process of balancing various relevant factors, particularly the welfare of G and the appellant's Article 8 rights. Under reference to paragraph [21] of *Politakis* v *Spencely* 2018 SC 184, the appellant asserted that "whether deprivation of a parent's rights and responsibilities is compatible with Article 8 ECHR is a new and not an existing point of principle."

[19] The respondent opposed the application for permission to appeal. The application failed entirely to address the sheriff's clear findings in fact and findings in fact and law, recognised by this court in refusing the appeal, to the effect that the appellant's retention of parental responsibilities and rights would positively harm G's welfare. In those circumstances, an order for deprivation was entirely consistent with established ECHR jurisprudence, having regard to the paramountcy of the child's best interests (*Strand Lobben* v *Norway*, paragraphs 202 to 213). Given that those findings were not challenged on appeal, the appeal to the Sheriff Appeal Court had no prospects of success and the same must be true of any potential second appeal to the Court of Session. No new matters of principle were engaged by the circumstances of this case, including in relation to the question of whether any principle-based distinction exists between the proportionality of

orders for suspension and deprivation of parental responsibilities and parental rights, at least when made under section 11 of the 1995 Act, having regard to the basis upon which that issue had been approached by the appellant on appeal.

Decision

[20] This application for permission to appeal to the Court of Session is refused. In reaching that decision we have had regard not only to the terms of section 113(2) of the 2014 Act but to the guidance given by the Inner House in *Politakis* v *Spencely* at paragraphs [21] to [23]. In terms of section 113(2), permission may be granted only where an important point of principle or practice is raised, or there is some other compelling reason for the Court of Session to hear the appeal. The purpose of the two-part test in section 113(2) is to restrict the scope for a second appeal. An important point of principle or practice is a reference to one which has not yet been established, rather than a disagreement with the conclusions of the sheriff or the Sheriff Appeal Court as to whether an established principle or practice has been correctly applied. In the absence of an important point of principle or practice, a compelling reason to grant permission will exist only where the decision of the Sheriff Appeal Court is plainly wrong, for example because it ignored established precedent, or where it was tainted by a procedural irregularity which deprived the appellant of a fair hearing. The word "compelling" points towards the exceptional nature of the jurisdiction to authorise a second appeal. In considering whether a compelling reason to grant permission exists, the court is entitled to have regard to the applicant's prospects of success.

[21] We accept the submissions of the respondent that, when these principles are applied to the present application, they indicate that it essentially arises from the appellant's disagreement with the conclusions reached by the sheriff and by this court, relating not to

consideration of any new point of principle or practice which has not yet been established, but rather to the question of whether established principles, particularly in relation to the assessment of the proportionality of the order for deprivation, were correctly applied.

[22] We have considered whether the general question of the comparative proportionality of orders for suspension and deprivation of parental responsibilities and parental rights engages an issue of principle which would justify the grant of permission to appeal. However, we have concluded that, in the particular circumstances of this case, having regard to the sheriff's unchallenged findings in fact and findings in fact and law to which we have referred and to the fact that the appellant's submissions on appeal with regard to this issue were explicitly founded on a speculative practical basis, rather than on any identified legal principle, no issue of principle arises which would justify the grant of permission.

[23] The appellant has not identified any irregularity of procedure affecting the fairness of the appeal proceedings. The only errors of law which are said to have affected our decision to refuse the appeal relate to the conclusions we reached in relation to the application of the established legal principles upon which we heard submissions.

[24] Looking again to the unchallenged findings in fact and findings in fact and law on which the sheriff based her decision, to which we inevitably required to have regard in deciding the appeal and to which the Court of Session would also require to have regard in considering any second appeal, we agree with the respondent that any second appeal would have very limited prospects of success.

Conclusion

[25] For all of these reasons, this application for permission to appeal is refused. At the joint invitation of the parties, we find no expenses due to or by either party in relation to this application.