



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 59
P844/20, P349/21 and P598/21

Lord Menzies
Lord Woolman
Lord Doherty

NOTE

delivered by Lord Menzies

in the petitions for the exercise of the *Nobile Officium*

by

(FIRST) THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF LAMBETH

and

(SECOND) MEDWAY COUNCIL

Petitioners

First Petitioners: JJ Mitchell QC; Morton Fraser
Second Petitioners: JJ Mitchell QC; Thorley Stephenson SSC
Lord Advocate: M Ross QC; Irvine; SGLD

21 September 2021

[1] Sometimes local authorities in England and Wales are unable to find suitable placements for vulnerable children within their care. They make arrangements for the child to be placed at a residential establishment in Scotland. Almost invariably, that involves the child being deprived of his or her liberty.

[2] Such measures must be authorised by the High Court of England and Wales. It has the primary responsibility for the care and welfare of the child. Because, however, the individual child is resident in Scotland, this court is also involved.

[3] At present there is a statutory lacuna. No legislation covers the recognition of such High Court orders. That is unsatisfactory. To date there have been 22 of these petitions. More are expected.

[4] The *Nobile Officium* is intended for exceptional circumstances, not routine applications. Those representing the Scottish and UK governments have told the court in the past that they were waiting for the decision of the UK Supreme Court *In the matter of T (a child)* [2021] UKSC 35, before deciding what statutory provisions were required. The UKSC handed down its decision in *T* on 30 July 2021. We understand that urgent consideration is now being given to filling the legislative lacuna as soon as possible. We regard that as necessary and important.

[5] The purpose of this short Note is to provide guidance to practitioners as to the appropriate procedure to follow in such petitions meantime.

[6] There are three preliminary points. First, each child has their own particular needs and problems. What is appropriate by way of care provision and deprivation of liberty will differ from petition to petition. It will inform the appropriate procedure. The court is not laying down a fixed formula which must be followed in every process.

[7] Second, the function of this court is not to rubber-stamp High Court decisions which are usually taken by a single judge. Whilst it has the primary responsibility for assessing the best interests of the child, our procedures require consideration by three Inner House judges. We also have a heavy responsibility, particularly where the deprivation of liberty of a child is involved.

[8] Third, all applications to this court must be presented expeditiously. There have been cases in which this has not happened. In one case no petition was presented to this court for a period of more than 7 months after a child was made subject to a placement and deprivation of liberty order in Scotland. That will not do. This court expects petitions to be presented within a very short period after the making of the High Court order. The same applies to applications for variation, revocation or renewal. It is not acceptable that a child should be deprived of his or her liberty in Scotland without the approval of this court.

[9] With these observations in mind, we turn to the practical issues:-

- (a) Petitioners should not seek recognition of High Court orders which have expired or been recalled. Retrospective recognition is not acceptable.
- (b) This court will not normally grant open-ended orders for the future, or without limit of time. The welfare of a child, and in particular the deprivation of their liberty in Scotland, is a matter of great importance. Circumstances can change quickly. This court must be kept informed as to the present circumstances of the child. Normally the court will not pronounce orders which are effective for more than three months, even if the order of the High Court is effective for a longer period. In such circumstances applicants will require to make application to this court towards the end of the three month period for a further order. At that point the court can satisfy itself that a further order is appropriate. The court will expect to be given brief information as to how the placement of the child is proceeding, and as to the child's welfare. We do not envisage that this exercise will normally involve large files of materials, or even a full updated Social Work Report (unless the particular circumstances of the case require this), but the court will need enough information to enable it to fulfil its responsibilities. In many cases it may be possible for the

application to be considered on the papers without the necessity of a hearing. Where the court considers that a hearing is required the case will be put out by order.

[10] The steps outlined above should eliminate cases where a child has continued to be placed in Scotland and deprived of his/her liberty for a period after the expiry of a time-limited *interim* order of this court. This is not acceptable. Similarly, if a placement in Scotland is ended by the child returning to England & Wales (or for any other reason), this court should be informed promptly of this fact.

[11] If it becomes clear that a legislative solution remains some way off it may be necessary for the court to consider changes in procedure and/or issuing a Practice Note. There may be advantages in having a single designated judge who would be able to acquire expertise in this area and provide consistency of decision making. The appointment of a liaison judge (such as is designated in relation to Hague Convention cases) might promote greater dialogue between the judiciary in Scotland and England & Wales in this area. However these matters are outside the scope of this Note, and some of them (eg the *quorum* of the Bench) would probably require amendment to the Rules of Court, and an Act of Sederunt.

[12] We reiterate that what we have said is not intended to be treated as a set of hard and fast rules applicable to all such cases. In this area a degree of flexibility is required.