SHERIFF APPEAL COURT

[2026] SAC (Civ) 68
HAM-SD135-25

Sheriff Principal Catherine Dowdalls KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL CATHERINE DOWDALLS KC

in the application for certification of the suitability for appeal to the Court of Session (Sheriff Courts (Scotland) Act 1971 section 38(b))

by

ELAINE MCCONNELL (AP)

Applicant

in the appeal in the cause

SOUTH LANARKSHIRE COUNCIL

Pursuer and Appellant

against

ELAINE MCCONNELL

Defender and Respondent

Pursuer and Appellant: Anderson, advocate; South Lanarkshire Council Legal Services
Applicant, Defender and Respondent: Mitchell KC, McPhee, advocate; Cartys

21 October 2026

Introduction

[1] On 15 June 2026 this court issued an opinion allowing an appeal by the (now) respondent local authority against the decision of the summary sheriff on 13 November 2025. On that date, the summary sheriff refused the local authority's claim in a summary

cause action for recovery of possession of heritable property under the "streamlined eviction" process in terms of section 16(2)(aa) and paragraph 2 of Schedule 2 to the Housing (Scotland) Act 2001 ("the 2001 Act").

[2] The applicant seeks certification of suitability of the cause for appeal to the Court of Session under and in terms of section 38(b) of the Sheriff Courts (Scotland) Act 1971 ("the 1971 Act"), which provides as follows:

> **"38. Appeal in summary causes**
>
> In the case of …
> (b) any summary cause an appeal shall lie to the Court of Session on any point of law from the final judgment of the sheriff principal, if the sheriff principal certifies the cause as suitable for such an appeal,
> but save as aforesaid an interlocutor of the sheriff or the sheriff principal in any such cause shall not be subject to review."

Background

[3] The factual background is not in dispute. The applicant is the tenant of a property let to her by the respondent local authority. She has lived in the property since 1996. On 22 March 2024 the applicant's adult son, who was then living with her and was a qualifying occupier of the property in terms of section 14(6)(a) of the 2001 Act, was convicted of an offence in terms of section 4(3)(b) of the Misuse of Drugs Act 1971. At the time of commission of the offence, the applicant was not present in the property and was unaware of the offending. The respondent sought recovery of possession of the property under the streamlined eviction procedure. Relevant notice was served upon the applicant.

[4] On 13 November 2025 the summary sheriff refused the respondent's application for eviction of the applicant. She found in fact that the applicant suffered from certain health conditions (which was not in dispute) and that her occupation of the property had been incident-free until her son's conviction. She accepted that the local authority had a

legitimate aim (the scourge of drug-dealing in local communities); the absence of evidence of the impact on the community of the specific incidence of drug dealing; and the community-based sentence imposed on the applicant's son, which had had a positive effect. She concluded that the impact of eviction would be disproportionate and refused the local authority's claim. The local authority's appeal against that decision was allowed by this court on 15 June 2026.

[5] The applicant now seeks certification that the cause is suitable for appeal to the Court of Session in terms of section 38(b) the 1971 as referred to above.

[6] The respondent opposes the application.

Applicant's submissions

[7] The applicant submits that this court erred in reaching its decision and that the proposed appeal raises important questions of law, including unresolved points of principle and practice concerning the proper scope of an Article 8 ECHR proportionality assessment in streamlined eviction proceedings.

[8] Where a landlord establishes a non-discretionary ground for eviction (as in this case) it is open to the court to consider whether the making of an order for recovery of possession is a proportionate interference with the tenant's Article 8 rights (*Manchester City Council* v *Pinnock* 2011 2 AC 104, paragraphs 73 to 74). The proportionality test requires an exacting analysis of (i) the importance of the objective; (ii) rational connection; (iii) whether a less intrusive measure could have been used; and (iv) whether a fair balance has been struck between the individual's rights and the community interest (*Bank Mellat* v *HM Treasury (No 2)* [2014] AC 700, paragraphs 20 and 74).

[9] It can usually be assumed that a local authority seeking eviction does so in furtherance of the "twin aims" of vindication of ownership rights and management of housing stock (*Pinnock* at paragraph 52). Against those legitimate aims, the court must "weigh up any factual objections that may be raised by the defendant and what she has to say about her personal circumstances" (*Hounslow London Borough Council* v *Powell* [2011] 2 AC 186, paragraph 41).

[10] Proportionality must be determined "with regard to the particular circumstances of the case" (Ćosić v *Croatia* 2011 52 EHRR 39, paragraphs 21 - 22); the bar to establishing a proportionality defence is high and will be met in only a small proportion of cases (*Powell*, paragraph 54). It is inappropriate to apply exceptionality as a test as to whether the proportionality defence has been established (*Pinnock*, paragraphs 51 and 52). Proportionality is more likely to be a relevant issue where a tenant is vulnerable due to a physical disability, poor health or frailty (*Pinnock*, paragraph 64) and the conduct of the occupier is relevant to proportionality (*Southend-on-Sea BC* v *Armour* [2014] EWCA Civ 231).

[11] This court failed to consider whether the "twin aims" carry the same weight under the 2001 Act streamlined eviction procedure. Both *Pinnock* and *Powell* arose from very different statutory schemes. In *Pinnock* the court acknowledged that the management aim applies "at least normally" and that "in some cases there may be cases that would tell the other way" (paragraphs 52 and 54). Such qualifications are inconsistent with the assumption that the twin aims carry constant and full weight in every eviction.

[12] The summary sheriff's approach, by accepting the specific aim (deterrence of drug dealing) but finding the balance fell against eviction on the particular facts was consistent with *Pinnock*. This court's criticism of the summary sheriff assumed the twin aims both

applied, without engaging with the issue whether the management aim applied at all, or at full and constant weight, to a streamlined eviction.

[13] How the twin aims identified in *Pinnock* and *Powell* map onto the streamlined eviction procedure and whether their weight can be assumed constant across different statutory contexts is an important, unresolved point of principle which applies to all such evictions.

[14] Further, this court wrongly excluded the circumstances of the offending, including the applicant's blamelessness and her son's sentencing and rehabilitation. The court is required to weigh the severity of the interference against the community interest (*Bank Mellat*, paragraphs 20 and 71) and, in assessing proportionality, examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8. The post-conviction conduct, rehabilitation and relocation of the applicant's son are relevant factors which were excluded by this court; exclusion of these factors was an error in law which infected the remainder of its analysis.

[15] This court wrongly concluded assessment of proportionality is confined to the impact of eviction; in stating that it required evidence of impact more than the ordinary impact of eviction; and in holding that the applicant's defence was bound to fail, and failed to ask the correct question. Reference was made to *Pinnock* at paragraphs 51 to 52:

> "… it seems to us to be both unsafe and unhelpful to invoke exceptionality as a guide. … exceptionality is an outcome and not a guide … .
>
> … The question is always whether the eviction is a proportionate means of achieving a legitimate aim".

[16] Further, this court failed to consider the applicant's blamelessness and wrongly imposed an elevated evidential threshold for vulnerability. The summary sheriff's findings

relative to the applicant's health made proportionality more likely to be an issue. Reading section 16(2)(aa) and paragraph 2 of Schedule 2 of the 2001 Act as confining the proportionality assessment to considering the impact of eviction, with a threshold requirement of "more than the ordinary impact of eviction" was incompatible with the broad, multifactorial balance required by Article 8. Thus, the court erred in law.

[17] If this court's construction of the 2001 Act is correct as a matter of domestic law, the legislation is incompatible with Article 8 and accordingly is not law. Reference was made to sections 29 and 101 of the Scotland Act 1998.

[18] Further, this court failed to identify any error of law in the approach taken by the summary sheriff, but rather disagreed with the balance struck. In any event, inadequate reasons were provided for the decision of this court, including the decision to refuse remit to a different sheriff to explore alternative means of disposing of the action.

[19] As to the substantive motion for certification of the cause as suitable for appeal to the Court of Session, it was submitted by reference to the decision of the Sheriff Appeal Court in *Chalmers* v *Melville* [2026] SAC (Civ) 60 that the appeal identifies several arguable errors in law which enjoy good prospects of success and that it raised important points of principle or practice, none of which turn upon the applicant's particular circumstances. Those matters are:

(a) It is not established in Scots law whether, in an action for recovery of possession based on conduct, the Article 8 proportionality assessment extends to the gravity and circumstances of the offending, the tenant's culpability or blamelessness and the degree of ongoing risk. The decision of this court, if allowed to stand, would determine that issue for the first time, limiting the scope of the inquiry to the impact of eviction on the tenant. Whether that

exclusion is correct, such a threshold is permissible or it is appropriate to reintroduce the exceptionality test in Scotland (which was disapproved in *Pinnock*) are unestablished points of principle governing every such case. As the statutory scheme permits mandatory eviction of a tenant based on the criminal conviction of any occupier or visitor, these are matters of general importance affecting all such tenants.

(b) The proper standard of appellate review of a first-instance Article 8 proportionality assessment is unestablished in Scots law. The question whether the appellate court may substitute its own proportionality assessment or confine itself to asking whether the judge below was wrong has not been authoritatively determined by a Scottish court. That is a point of practice affecting the conduct of every appeal of this kind and is relevant beyond actions for recovery of possession.

(c) The appeal also raises the undetermined question whether the statutory framework governing streamlined evictions is compatible with Article 8 and, separately, whether the court acted compatibly with ECHR by interpreting the law as it has. The scheme serves no housing management function and is thus of a fundamentally different character from those considered in *Pinnock* and *Powell.* The validity of the scheme affects every tenant and landlord subject to it and is therefore a point of general public importance. As such, this cause is suitable for appeal to the Court of Session.

Respondent's submissions

[20] The respondent invited this court to refuse the application for certification. In assessing suitability, this court should have regard to the prospects of success of the appeal, the importance of any point of principle at issue or any other compelling reasons why the matter may benefit from consideration by the Court of Session. The principle of finality in litigation is also a relevant consideration (*Chalmers* v *Melville* [2026] SAC (Civ) 60 at paragraphs [6] to [11]). It was submitted that prospects of success in this appeal are poor and that no important point of principle that has not already been authoritatively determined arises. There is no other compelling reason to allow a further appeal.

[21] In response to the proposed grounds of appeal, the respondent submits that the applicant's suggestion that assessment of proportionality requires consideration of the whole circumstances of an application for recovery of possession is excessively vague and would, if correct, lead to an unfocused analysis, which is not the required approach. Such an approach would lead to the re-introduction of a reasonableness test, under the cloak of proportionality, which was intentionally removed by Parliament. Proportionality is an assessment of where the balance lies between the pursuit of a legitimate aims of the local authority and the consequences of interference with a protected right of the individual (*Bank Mellat* at paragraph 74). To characterise the assessment as broader than that would give rise to the suggestion that the sheriff has a discretionary decision to make, which does not in law arise.

[22] The twin aims arise in this case and to suggest otherwise is wrong. The proceedings are inherently ones of housing management. They are not an act of punishment for wrongdoing. It is unarguable that the twin aims are not applicable or are of less weight in these proceedings. This court did not err in holding that examination of the circumstances

of the offending was unnecessary; Parliament has determined where the community interest lies, by making eviction on the ground relied upon mandatory. The focus in the proportionality assessment is necessarily on the consequences of the eviction. There was no evidence of the impact of eviction upon the applicant beyond the ordinary consequences (loss of the right to occupy), which will never be sufficient to render eviction disproportionate. If it were otherwise, all evictions would be disproportionate. The importance of the landlord's aims are presumed. Requiring that the consequences of eviction are beyond the ordinary does not introduce an exceptionality test; it is recognition of the established position that eviction is generally lawful in human rights terms.

[23] There was no error in failing to take into account the appellant's blamelessness. The tenant's culpability is irrelevant to the action taken by the landlord and to the consequences of eviction upon the tenant. A suggestion of vulnerability in the abstract is of little significance in the proportionality assessment (*A Housing Association* v *L & R* [2026] SAC (Civ) 39). Evidence of vulnerability is required and even compelling evidence of the destabilising effect of eviction may not be sufficient to render an eviction disproportionate (*Wheatley Homes East Limited* v *Rehfisch* [2025] SC EDIN 58). No such evidence was offered in this case.

[24] It is not in dispute that section 16(3A) of the 2001 Act preserves the right to rely on convention rights in an action founding on section 16(2)(aa). This obliges the court to carry out a proportionality exercise where the matter is put in issue by the tenant. In the present case, the summary sheriff failed to carry out that exercise. The action could and should have been dealt with summarily. This court recognised that the assertion of medical conditions does not give rise to an argument on proportionality meriting a proof on those issues.

[25] No relevant or specific case is advanced for any provisions of the 2001 Act being outwith the legislative competence of the Scottish Parliament. The complaint made is that the proportionality assessment, properly applied, is not sufficiently generous to tenants and does not provide sheriffs with a discretion. Even if this court erred in its approach to proportionality, which is not accepted, this does not render the provisions incompatible with ECHR and outwith legislative competence.

[26] Whether a proposed measure is an unlawful interference with Article 8 is a question of law. Once this court determined that the sheriff had erred in law, it was entitled to substitute its own view on the question. This court did not err in its approach to the appeal. Sufficient reasons were provided for the decision of this court. There was no reason to remit to another sheriff (which procedure would in any event be of questionable competency). In any event, there is no prejudice to the applicant in this request not being specifically dealt with by this court.

[27] The proposed appeal raises no important point of principle or practice (*Politakis* v *Spencely* 2018 SC 184 at paragraph 21) and raises no new point of principle or practice. The principles are established and acknowledged as applicable in Scotland (*McKenna* v *South Lanarkshire Council* 2013 SC 212 at paragraph 14). This court's approach to review of the lower court's proportionality assessment was permissible in terms of guidance given in the decision of the UK Supreme Court in *Shvidler* v *Secretary of State for Foreign, Commonwealth and Development Affairs* [2026] AC 607 at paragraph 142. No coherent argument for a devolution issue is set out in this application. The 2001 Act provides the opportunity, required by the convention, for an individual at risk of losing their home at the hand of a public authority to canvass the proportionality of that measure as a defence to the action (section 16(3A) of the 2001 Act). In any event, *McKenna* makes clear that this approach

should be adopted even in the face of a mandatory requirement to grant decree. The proposed appeal is not arguable. Even if the grounds of appeal were arguable, they amount to no more than a disagreement as to the application of established principle. As such, the appeal is not suitable for further appeal to the Court of Session and certification should be refused.

Decision

[28] As noted by Sheriff Principal Wade KC in *Chalmers* v *Melville* [2026] SAC (Civ) 60 at para [7], no clear definition of what is required to satisfy the test of suitability in section 38(b) of the 1971 Act is provided. The suggestion in Macphail,*Sheriff Court Practice* (3rd Edition) at paragraph 31.352 that the court would require to be satisfied that there was a substantial and important question of law raised by the proposed appeal was not repeated in the 4th Edition of *Macphail*, the paragraphs relating to section 38 of the 1971 Act having been omitted entirely.

[29] I agree with the analysis of Sheriff Principal Wade KC in *Chalmers* that similar considerations apply when considering an application for certification of suitability under section 38(b) of the 1971 Act as apply when an application is made for permission to appeal to the Court of Session under section 113 of the Courts Reform (Scotland) Act 2014. Permission may only be granted if (a) the appeal would raise an important point of principle or practice, or (b) there is some other compelling reason for the Court of Session to hear the appeal. The application of that test was considered authoritatively in *Politakis* v *Spencely* 2018 SC 184 at paras [20] to [22]. Its purpose is to restrict the scope for a second appeal. An appeal raises an important point of principle or practice if it refers to one which has not yet been established; it does not include the question of whether an established point of

principle or practice has been correctly applied. The existence of some other compelling reason presupposes the first part of the test has not been met and will only be relevant in exceptional circumstances. "Compelling" is a very strong word. A good starting point is consideration of the prospects of success. The test can be met if, for example, it is clear that the first appeal court reached a decision which is plainly wrong, or if there has been some procedural irregularity which demonstrates that the applicant did not have a fair hearing. Even where one of these tests is met, the court is not bound to grant permission to appeal (*Explore Learning Ltd* v *Social Care and Social Work Improvement Scotland* [2019] CSIH 53). It must consider the suitability of the particular case as a vehicle with which to advance such point as it is intended to make.

[30] The applicant argues that a number of unresolved, important points of principle or practice arise in this case, none of which turn on the facts of the particular case. Put short, these are whether the Article 8 proportionality assessment extends to the circumstances of the offending, the tenant's culpability and the degree of ongoing risk; whether an appellate court may substitute its own proportionality assessment for that of the court below; and whether the statutory framework governing streamlined evictions is compatible with Article 8, which is an important, unresolved point of principle which applies to all such evictions.

[31] The question then is whether the test for certification of the cause as suitable for appeal to the Court of Session in section 38(b) is met. By analogy with the second appeals test in section 113 of the 2014 Act, the court ought first to consider whether any important point of principle or practice which has not yet been determined exists. If not, the court may then consider whether there is some other compelling reason why the application should be granted.

[32] Whether the 2001 statutory framework governing streamlined evictions is compatible with Article 8 has not been authoritatively determined. The authorities relied upon by this court and the court below to guide and inform the decisions in this case were decided by reference to very different statutory frameworks. Separately, application of the law compatibly with ECHR in relation to the assessment of proportionality in a streamlined eviction case has not been authoritatively decided. The applicant argues that it is not necessary to persuade the court that the impact of eviction upon the tenant is greater than the ordinary impact of eviction for a defence to an application under the streamlined procedure to succeed. That argument is made on the basis that the impact of eviction, with a threshold requirement of "more than the ordinary impact of eviction" (being loss of the tenancy) is incompatible with the broad, multifactorial balance required by Article 8. The difficulty for the applicant in this context, however, is the absence of evidence relating to the impact upon her of eviction. On that basis, I consider it unlikely that this argument will succeed on appeal.

[33] I am persuaded however that this appeal raises important points of principle or practice that are not as yet authoritatively resolved. Had I been persuaded otherwise, I would have been compelled to conclude that, as the issues raised in this application affect all tenants and landlords affected by the legislation, these are matters of general public importance. While I consider the prospects of the applicant's appeal succeeding are poor in relation to her argument that the proportionality assessment does not require that the impact of eviction upon her is greater than the ordinary impact of eviction, I am not persuaded that the appeal is merely academic. There are wider issues of principle that would benefit from examination by the Court of Session. Fundamentally, the applicant argues that this court acted incompatibly with ECHR by interpreting the law in respect of

the streamlined eviction process as it did. That is a matter of principle of general public importance suitable for determination on appeal to the Court of Session.

[34] I shall grant the motion for certification of the cause as suitable for appeal to the Court of Session.

[35] Neither party in their written submissions addressed the question of expenses. If parties are unable to agree the question of expenses within 14 days, a hearing will be fixed to determine that issue.