



SHERIFF APPEAL COURT

**[2026] SAC (Civ) 25
DNF-A139-25**

Sheriff Principal A Y Anwar KC
Sheriff Principal N A Ross
Sheriff Principal C Dowdalls KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

KEVIN RUSHFORD

Pursuer and Appellant

against

HELEN MCALPINE

Defender and Respondent

**Pursuer and Appellant: Party
Amicus Curiae: Manson, advocate**

21 April 2026

[1] An ordinary action in the sheriff court is commenced by an initial writ which complies with Ordinary Cause Rule 3.1. It requires to be warranted by the court (rule 3.3). A warrant may be signed by the sheriff or by the sheriff clerk, as more fully regulated by rule 5.1. The rules recognise that a sheriff clerk may refuse to sign a warrant (rule 5.1(3)), but do not further regulate the circumstances in which warrant may be refused.

[2] In the present appeal, the appellant lodged a writ for warranting. The writ claimed payment of £99,000 from his neighbour, in respect of insults allegedly shouted at him, and

referring also to other grievances such as food-throwing and parking. The clerk referred the matter to the sheriff, who refused to grant a warrant. The basis for refusal was the failure, in the sheriff's view, to present a relevant case in law. The sheriff issued an interlocutor, which both recorded the refusal and purported to determine that the interlocutor was final.

[3] The appellant marked an appeal to this court. The action not having been warranted or served, there was no appearance for the nominal defender. As the action raised questions of competency, not least of the appeal itself, the court appointed an amicus curiae to make submissions as to the applicable law.

The appellant's submissions

[4] The nominal appellant submitted that the appeal was competent as the sheriff had delivered a final judgment, and so section 110(1)(a) of the Courts Reform (Scotland) Act 2014 conferred jurisdiction. It was both certified by the sheriff as such, and final in form, because no further procedure was possible in the absence of warrant. Refusal of a warrant raised an obstacle to justice, in contravention of Article 6 of the European Convention on Human Rights, which also arose if any appeal were rendered incompetent. There was no other effective remedy where warrant was refused. Finality required to be determined on the basis of effect and consequence. In any event, the sheriff did not have power under either the 2014 Act or the rules to refuse a warrant on the basis of the merits. The appellant made reference to a number of supportive cases, in what resembled a software-assisted presentation.

Submissions by amicus curiae

[5] The amicus submitted that the sheriff's interlocutor did not amount to a final judgment, as that term should be understood. He presented a full analysis of the law as it presently stood. The scheme of the 2014 Act did not innovate on the established law that finality required disposal of craves and adjudication of expenses. Anything short of that was merely a decision, which did not confer finality. Moreover, the sheriff had fallen into error in following the approach in Macphail *Sheriff Court Practice 4th Ed* at paragraph 6.09, because that approach was wrongly stated. Self-certification of finality was not sufficient to confer the status of final judgment, which was always a question of law. The statement in Macphail was not supported by other authority and should be disapproved. The appeal was not from a final judgment and was incompetent.

[6] The amicus discussed other means of bringing an appeal within the definition in section 110 of the 2014 Act. An artificial approach might be to make a determination on the merits and expenses, but that was of dubious merit as a mere device. Another approach might be to seek leave of the sheriff, which would engage section 110(2). Neither assisted in the present appeal. Similar questions had been addressed by the Inner House in the cases of *Davidson v Davidson* (1891) 18 R 884 and by the Sheriff Principal in *Fitzpatrick v Advocate General for Scotland* 2004 SLT (Sh Ct) 93.

[7] In *Davidson*, the court considered a refusal by a sheriff substitute to grant warrant, and dismissed the appeal as incompetent. The court considered whether dismissal, rather than refusal, would have rendered an appeal competent, but the context was particular to section 65 of the Court of Session Act 1868, which in turn engaged the pre-1868 law on advocacy. The court still faced the problem of the absence of a final judgment, and did not opine on the propriety of dismissal of craves and making findings on expenses prior to a

warrant being granted. *Davidson* tended to support the requirement for a final judgment. It notably did not dispute the propriety of dismissal prior to warrant and service. In *Fitzpatrick* Sheriff Principal Macphail, as he then was, overstated the ratio of *Davidson* in stating that an appeal against a warrant to cite is incompetent. It was also submitted that there was no reason that an interlocutor refusing warrant to cite could not be pronounced. *Fitzpatrick* had correctly set out the law in relation to Article 6. These cases could only be resolved on an individual basis. In relation to the present appeal, the sheriff had wrongly made a decision on relevancy, not on competency.

Decision

[8] The question of remedy following a refusal to warrant an initial writ is resolved, in our view, by considering the nature of the refusal decision. An administrative process will engage a different remedy to a judicial process. The first question is whether refusal to warrant is an administrative act, or a judicial one. The question is authoritatively resolved by *Canada Trust Co v Stolzenberg (No 2)* [2002] 1 AC 1 per Lord Hope:

“... in the sheriff court when the warrant for citation is issued by the sheriff clerk under rule 5.1 of the Sheriff Court Ordinary Cause Rules 1993...this is an essential preliminary to the service of the summons or the initial writ on the defender, but in neither court is this in *any* sense a judicial act...the date when the court is seised of the case for the purposes of articles 21 to 23 is the date of service on the defender...this rule was so well established that it needed no statutory amplification.” (per Lord Hope at p24D)).

[9] Accordingly, the refusal of a warrant is an administrative act, and is made at a point where the court is not seised of the case and cannot make any judicial decision. That, in our view, has the following consequences.

[10] A refusal by a clerk to warrant an initial writ is not a judicial act, and cannot be converted into a judicial act by the clerk taking advice from a sheriff or from any other source. It remains the clerk's administrative responsibility, at least initially. If the clerk refuses warrant, the party has a remedy of referral to the sheriff, who may address that decision of new (OCR 5.3(3)).

[11] As Lord Hope's opinion referred to rule 5.1 in its entirety, including rule 5.1(2) (warrants to be signed by a sheriff) and rule 5.1(3) (the party may apply to the sheriff for signature), the mere fact that the clerk passes the application to the sheriff, or the pursuer applies direct to the sheriff under rule 5.1(3), cannot convert the administrative decision into a judicial act. So the whole procedure may involve both refusal of warrant by the clerk (against which there is no right of appeal, merely a fresh application to the sheriff under rule 5.1(3)), and refusal by a sheriff, but remains only an administrative act.

[12] Thereafter, an appeal to the Sheriff Appeal Court against refusal to warrant can only proceed if this court has jurisdiction, which turns on the terms of section 110 of the 2014 Act. An appeal is only available against a "decision of a sheriff in civil proceedings". So there are two questions: is the refusal of warrant a "decision"? If so, is it a "decision in civil proceedings"? In our view it is neither.

[13] Section 136 of the 2014 Act defines "decision" as "in relation to a sheriff, judge or court, includes interlocutor, order or judgment". That is an inclusive, not exclusive definition, but on a contextual analysis it refers to written disposals, not undocumented refusals, and to judicial acts, not administrative acts. On a purposive analysis it was not the intention of the legislature to extend the definition beyond judicial decisions to include pre-service administrative decisions. That distinction has purpose, because judicial decisions are expected to be transparent, fixed and reasoned and thus capable of challenge upon appeal.

[14] In our view, on either a purposive or contextual analysis, refusal to warrant is not a "decision". For that reason, section 110 is not engaged and this court does not have jurisdiction to hear an appeal against refusal to warrant.

[15] Further, even if that were wrong, section 110 requires a decision to be "in civil proceedings". That can only include decisions taken by a court seised of the action. On the authority of *Canada Trust Co*, a decision to refuse warrant is made at a point where the court is not seised of the action, and cannot be described as a "decision of a sheriff in civil proceedings". Again, section 110 would not be engaged.

[16] As a result, the Sheriff Appeal Court has no jurisdiction to hear an appeal against refusal to warrant an initial writ. That position would not be remedied by the sheriff granting permission to appeal, because the court is not at that point seised of the case. That conclusion means the present purported appeal must be refused for lack of jurisdiction. The procedure adopted in *Fitzpartick*, by which leave to appeal to the Sheriff Principal was sought and granted, is accordingly disapproved.

[17] This conclusion has the consequence that an interlocutor cannot and should not be pronounced when a sheriff refuses to sign. An interlocutor is (Macphail at paragraph 5.71) an "order or determination pronounced by the sheriff...and embodied in writing". A refusal to grant warrant does not amount to a determination or order by a sheriff which is embodied in writing. Although it is competent to make a judicial decision, such as an award of interim interdict, prior to service, that is an exceptional judicial remedy regulated by its own principles, and for which express provision for appeal is made by section 110((1)(b) of the 2014 Act.

[18] This confirms the decision in *Fitzpatrick*, to the effect that without a warrant of citation the action cannot be brought into court, to be correct. While Sheriff

Principal Macphail (as he then was) considered the question of compatibility with Article 6 rights in *Fitzpatrick* (see para [4]), he pointedly declined to make any general statement on the issue, confining himself instead to the facts of that case. In our view, no issue of incompatibility with Article 6 arises. The right to practical and effective access to a court has been described as “the right to have a legal issue brought before a court or tribunal without improper or impractical difficulties” (Reed & Murdoch *Human Rights in Scotland* (5th Edition) at paragraph 5.55). Access to a court is not absolute, but subject to limitations which are proportionate to achieving legitimate aims. There is a right to institute proceedings before the courts in civil matters (*Sabeh El Leil v France* (2012) 54 EHRR 14 at [46]), but this may be subject to limitations which the contracting state will enjoy a certain margin of appreciation to impose (*Sabah El Leil* at [47]); *Golder v United Kingdom* (1979-80) 1 EHRR 524 at [38]). The restricted basis upon which a warrant can be refused serves a legitimate aim, namely to prevent incoherent or *ex facie* incompetent actions, such as those which seek remedies the court cannot competently grant. Refusal on that restricted basis does not present a nominal pursuer with improper barriers to justice.

[19] If an appeal is not competent, what remedy exists for the disappointed litigant whose writ has been refused warrant by a sheriff clerk and a sheriff? Refusal to warrant, being an administrative act, would appear to be subject to the direction of the Sheriff Principal under section 27 of the 2014 Act, who may direct that the writ is warranted. It would also be open for the party to re-present the initial writ in proper form, as no judicial decision had been made on the merits of the action.

[20] We accept the submissions of the amicus curiae that when the whole of the Scottish procedural system is considered it cannot reasonably be regarded as one which is not compliant with Article 6. All persons in Scotland enjoy an unfettered right to present a writ

to the sheriff clerk for warranting. If the sheriff clerk refuses to grant the warrant there is then a right under the procedural rules to have that decision reviewed by a sheriff. The sheriff principal has power under the 2014 Act to direct that the warrant be granted. By that stage, the party would have the benefit of decision by the sheriff clerk, a sheriff and a sheriff principal. In our view that cannot be said to be an illegitimate or disproportionate restriction on the right to raise proceedings. Even if that were not enough by itself to satisfy the requirements of Article 6, there remains the possibility of review in the Court of Session, whether by an application to its supervisory jurisdiction, or by petitioning the nobile officium (Macphail, above, at paragraph 18.01), although taking that step may be correctly viewed as “an unattractive and disproportionate” choice by the litigant (Macphail, above, at paragraph 6.09). In our view, while every case must be considered on its own merits, Scottish practice and procedure strike a proportionate balance in pursuing the legitimate aim of facilitating responsible access to the court in civil cases.

[21] Accordingly, the present appeal must be refused as incompetent, because the terms of section 110 of the 2014 Act do not confer jurisdiction on this court. In reaching this decision we require to disapprove the observation in paragraph 6.09 of Macphail that “If the sheriff refuses to grant a warrant they pronounce an interlocutor to that effect”. The sheriff was not seised of an action, and there was no process in which to pronounce an interlocutor. That position is not incompatible with the purported appellant’s Article 6 rights.

[22] In our view refusal to warrant, far less seeking review of such refusal, remains a rare and exceptional event. The proper criteria for refusal are circumscribed either by another court having exclusive jurisdiction (*Canada Trust Co*, above, at 25 D-G) or the terms of Chapter 3 of the Ordinary Cause Rules which set out the requirements of an initial writ, or by the equivalent rules in simple procedure, summary application, summary cause or other

processes. If those requirements are met, there will rarely be a basis to refuse a warrant.

The stage of warranting is not the proper point at which to decide points of specification, of relevancy, or other objections more properly left to argument at debate. In our view, the sheriff went too far in deciding the merits of this case at the stage of warranting.

Irrespective of the correctness of that view, the stage at which to address it was once the action had been served and defended. As the cause is not properly before us, we cannot issue any direction or other interlocutor other than refusal. The remedy for the appellant is to present his initial writ again, should he deem that course to be legally sound.

[23] We note for completeness that the grounds of appeal did not in any event adequately set out grounds in law to support an appeal. The disposal is unaffected.

Disposal

[24] There being no jurisdiction under section 110(1) of the 2014 Act, and no process, the present appeal is refused as incompetent. No issue of expenses can arise, so we make no order. We record our appreciation of the thorough submissions of the amicus curiae.