SHERIFF APPEAL COURT

[2025] SAC (Civ) 23

Sheriff Principal A Y Anwar KC
Sheriff Principal S F Murphy KC
Appeal Sheriff J F Kerr

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR KC

in the appeal in the summary application by

MR G

Applicant and Appellant

for

warrant to disinter the remains of the late Emma G

Applicant and Appellant: R A S MacLeod; Balfour + Manson LLP
***Amicus Curiae*: Clair; Faculty Services Limited**

20 August 2025

Introduction

[1] In Scots law the exhumation of human remains is governed by the common law. That has been the position for over two centuries. The Scottish courts have yet to consider the impact of the jurisprudence of the European Court of Human Rights ("ECtHR") on this area of the law. We do so in this appeal.

Background

[2] Emma[1] was the daughter of Mr and Mrs G. Emma had two siblings. She was born in Madrid in May 1985 and, along with her family, moved to Scotland in 1989. In late 2001, at a house party, a group of teenage boys took and shared compromising photographs of Emma, then aged 16. In the aftermath, Emma tragically committed suicide on 7 January 2002. She was laid to rest by her parents and family at Mortonhall Cemetery, Edinburgh on 12 January 2002. Since her death, her family have tended to her grave with love and care.

[3] In January 2019, Mr and Mrs G emigrated to Monaco. Their remaining two children continued to reside in Edinburgh. Mr and Mrs G visit Edinburgh four times a year to see their children, for Mr G to attend the board meetings of a family company of which he is chairman and director and to visit Emma's grave. Both of Emma's siblings are shortly to move to England as a result of the relocation of the family company. There will be no relative living within close proximity to Edinburgh to tend to Emma's grave on a regular basis. Mr G will no longer require to attend board meetings in Edinburgh as a result of the relocation of the company to England. Emma's siblings work in the family company.

[4] Mr G raised a summary application at Edinburgh Sheriff Court seeking warrant to allow Mortonhall Cemetery to disinter Emma's remains and for funeral directors to transport her remains to Monaco for reburial. Mr and Mrs G have already purchased a plot for Emma at a cemetery within Monaco for that purpose. In addition to the lodging of the summary application, Mr G lodged an affidavit, along with confirmation that Emma's mother and siblings did not object to the request to disinter and to rebury her remains in Monaco.

[1] Emma is a pseudonym for the deceased

[5] The case called before the sheriff on 22 October 2024. The sheriff asked the appellant's solicitor to be prepared to address him as to the likely state of Emma's remains when the case called again on 29 October 2024 and whether, in particular, the process of disintegration would have completed. He drew the appellant's solicitor's attention to comments made by Sheriff Cubie (as he then was) in *The Diocese of Glasgow and Galloway of the Scottish Episcopal Church, Applicant* [2019] SC GLA 33; 2019 SLT (Sh Ct) 105. The appellant lodged a letter with the sheriff from the Bereavement Services Operational Manager at the City of Edinburgh Council. Her view was that, after 22½ years, there would now only be skeletal remains in Emma's grave.

The sheriff's note and the grounds of appeal

[6] The sheriff refused the summary application. He concluded that short of a body being reduced to ashes or dust, not all processes of disintegration were complete. As the information available to the sheriff disclosed that a skeleton would likely remain, a warrant to disinter was required. The only ground upon which the summary application could be granted was whether the appellant could show cause which was sufficiently compelling to enable the court to exercise its discretion; there required to be circumstances of high expediency, necessity or cause which amounted to more than a matter of convenience.

[7] The sheriff noted that Mr and Mrs G had elected to emigrate to Monaco. The cause which was said to justify the application was no more than the convenience it would afford to Mr and Mrs G. Emma had no connections to Monaco, her parents may move again and in any event, upon their deaths there would be no one to tend to Emma's grave in Monaco similar to the situation now said to arise in Edinburgh. There was insufficient cause to

disinter Emma's remains. Against that decision, the appellant appeals on three grounds, namely that:

(a) the sheriff erred in law by failing to recognise his rights under Article 8(1) of the European Convention on Human Rights ("ECHR") and by failing to give effect to those rights;

(b) the sheriff, being concerned that to allow the application would set a precedent, erred in the exercise of his discretion by taking account of an irrelevant factor; and

(c) the sheriff erred in the exercise of his discretion by failing to take account of cases in which expatriation of remains had been approved.

Procedural matters

[8] In advance of the appeal hearing, we invited parties to provide submissions on whether it was competent to appeal a refusal of an application to disinter human remains, drawing their attention to: *Black* v *McCallum* (1924) 40 Sh Ct Rep 108 referred to in G Jamieson, *Summary Applications and Suspensions* (2000), at paragraph 10.06; *Rodenhurst* v *Chief Constable of Grampian Police* 1992 SC 1; *Kilmarnock and Loudoun District Council* v *Young* 1993 SLT 505; and Macphail, *Sheriff Court Practice* (4th edition) (2022), paragraphs 26.41 and 26.124 - 26.128.

[9] In view of the absence of a contradictor to the appeal and the importance of the legal issues arising, an *amicus curiae* was appointed by the court.

Submissions for the appellant

[10] The sheriff's interlocutor of 29 October 2024 constituted a final judgment in civil proceedings. On that basis, an appeal against the sheriff's judgment to the Sheriff Appeal Court was competent: section 110(1)(a) and section 136(1) of the Courts Reform (Scotland) Act 2014. There was no need to consider whether the sheriff was exercising a judicial or administrative capacity. In any event, the sheriff exercised a judicial capacity in determining the application, particularly as the appellant's right under Article 8 of the ECHR was engaged. In *Black*, the sheriff had refused the appeal on the basis that the sheriff-substitute had been sitting in his name, and the decision in law was the decision of the sheriff. The rationale of *Black* was that a decision of a sheriff could not be appealed and overturned by another sheriff. Beyond that, there was no reasoning as to why the sheriff-substitute's decision was an exercise of their administrative powers nor as to why no appeal could be made against any such decision. Moreover, *Black* was at odds with the earlier decisions of *McGruer, Petitioner* (1898) 15 Sh Ct Rep 38 and *Robson* v *Robson* (1897) 5 SLT 351.

[11] On the merits of the appeal, counsel conceded that the appellant's Convention rights had not been addressed before the sheriff. Article 8 was engaged on the facts of this summary application: *Drašković* v *Montenegro* (2020) 71 EHRR 31. This court required to consider whether the interference with the appellant's Article 8 rights was proportionate and reasonable: section 6 of the Human Rights Act 1998.

[12] Several factors favoured the granting of the application. The sheriff's approach – to apply a test of "cause which amounts to more than a matter of convenience" – was wrong, standing the terms of *Drašković*. The correct test under Scots law in assessing whether disinterment should be allowed was to apply Article 8. In assessing whether or not to grant such an application, a sheriff must undertake the balancing exercise required of them, under

Article 8(2), to assess whether refusal of such an application would be both proportionate and reasonable. The sheriff's refusal was neither proportionate nor reasonable.

[13] In relation to the second ground of appeal, the sheriff's judgment was not binding on any other court. The sheriff also ostensibly failed to appreciate that the circumstances of the application were exceptional and unusual, such that others could not realistically rely upon the decision in future applications.

[14] As to the third ground of appeal, the sheriff had not properly considered the terms of *Solheim, Petitioners* 1947 SC 243, which lent support to the appellant's position that weight, is afforded to the wishes of applicants. Absent any opposition, it was not clear what the public interest was in refusing the application.

Submissions for the *amicus curiae*

[15] The *amicus curiae* agreed with the appellant that the appeal was competent. While both Jamieson, *Summary Applications and Suspensions,* at paragraph 10.06 and Dobie, *Sheriff Court Practice* (1948), at p 566, support the proposition that an appeal in respect of the dismissal of a summary application for warrant to disinter human remains is incompetent, they both cited *Black* to found that proposition.

[16] That the nature of a summary application for warrant to disinter human remains falls within the sheriff's common law jurisdiction could not be in doubt. The sheriff's immemorial jurisdiction to issue warrants for the disinterment of bodies has always been at common law: Macphail, *Sheriff Court Practice* (3rd edition) (2006), at paragraphs 26.03 - 26.05; Dobie, *Sheriff Court Practice*, pp 101; and p 566. The jurisdiction has been described as part of the sheriff's "common law powers as judge ordinary of the bounds": Dobie, p 101.

[17] The decisions in *Arcari* v *Dumbartonshire County Council* 1948 SC 62 and *Rodenhurst* show "… there has been increasing acceptance by the Court of Session that the statutory rights of appeal applicable to ordinary actions also apply to summary applications": Macphail, *Sheriff Court Practice* (4th edition), paragraph 26.124.

[18] Standing the expansive interpretation which requires to be given to section 110 of the 2014 Act (per *Shepherd* v *Letley* [2015] CSIH 87; 2016 SC 238) the appeal must be regarded as competent in that it is an appeal against "a decision of a sheriff constituting final judgment in civil proceedings": sections 110(1)(a) and 136(1) of the 2014 Act.

[19] On the merits of the appeal, the ECtHR held that a request for exhumation of the remains of a close relative does fall within the scope of Article 8: *Drašković* at para [48]. This approach appeared to have been adopted in England and Wales in the case of *In re Hither Green Cemetery* [2019] Fam 17. Moreover, Lord Brodie proceeded on the basis that Article 8 was engaged in similar (though not identical) circumstances in *C* v *Advocate General for Scotland* [2011] CSOH 124; 2012 SLT 103.

[20] The assessment of competing rights in cases of this nature must turn on their own facts and circumstances: *Drašković* at para [48]. The assessment entailed weighing the individual's interest in effecting a burial transfer against society's role in ensuring the sanctity of graves. As this is an important and sensitive issue, Contracting States are afforded a wide margin of appreciation in balancing parties' respective rights: *Dödsbo* v *Sweden* (2007) 45 EHRR 22 at para [25]; *Drašković* at para [51]; and *Vassiliou* v *Cyprus* (2022) 74 EHRR 14 at para [97].

[21] As Article 8 was engaged, the sheriff required to act in a manner that was compatible with the appellant's Convention rights: section 6 of the Human Rights Act 1998. The proper approach for the sheriff was to consider: (i) whether there should be an interference with

the appellant's right under Article 8(1); (ii) would any such interference be according to law; and (iii) would such interference be justified by any of the other provisions in Article 8(2).

[22] Refusal of the application was a decision open to the sheriff; however, any such decision must be justified. The sheriff required to act in a considered and measured way in determining how far it was appropriate to interfere with the appellant's rights in order to protect the rights of others: *C* (*supra*) at para [69]. The decision required to be proportionate and necessary. In the exercise of his discretion, however, a sheriff requires to apply a sense of "reverence, dignity and respect": *Diocese of Glasgow and Galloway* at para [9].

[23] The sheriff's stated justification for refusing the summary application was that he was concerned that granting it "could set a precedent for relatives who moved abroad to apply for warrant to disinter their deceased relative's remains", albeit in the context that he considered there were no issues of high expediency, necessity or cause which amounted to more than a matter of convenience to the appellant. He did not consider that justified the application being granted and was unwilling to make a decision that could be relied upon to justify exhumation of human remains where parents move to live abroad. It is open to the court to hold that, in the circumstances, the sheriff's reasoning accorded with his duty to weigh the public interest in ensuring the sanctity of graves. If the court also accepted that, in reality, the basis for the application – whilst undoubtedly of great importance to the appellant – did amount in substance to a "matter of convenience", then the court may consider the sheriff's decision to have been a proportionate interference with the appellant's Article 8 right.

[24] The sheriff's decision had no precedential value as a matter of *stare decisis*; the court may, nonetheless, consider that it was still a relevant consideration for the sheriff (as it also appeared to be to the sheriff in *Nicholls* v *Angus Council* 1997 SCLR 941) to consider whether

it was desirable, having regard to the established public interest in maintaining the sanctity of graves, to grant a summary application which might be at least perceived as establishing a form of precedent, using the common parlance, if not the strictly legalistic, sense of that term.

[25] As to the submission that the sheriff failed to properly consider *Solheim*, the facts of that case were markedly different to the present appeal.

Decision

Competency

[26] Historically, the question of the competency of an appeal in relation to summary applications was resolved by reference to whether the application was administrative or judicial in nature. Appeals were permissible only in relation to those which were judicial in nature. Since the Full Bench decision in *Rodenhurst*, however, there has been an increasing acceptance that the statutory rights of appeal applicable to ordinary actions also apply to summary applications: Macphail, *Sheriff Court Practice* (4th edition) at paragraph 26.124.

[27] *Black* v *McCallum* (1924) 40 Sh Ct Rep 108 concerned an appeal against a sheriff-substitute's dismissal of a summary warrant to disinter human remains. On appeal, the sheriff held that the appeal was not competent because the sheriff-substitute's decision had been made "by virtue of his or her ministerial or executive powers". *Black* is the only authority cited in Jamieson, *Summary Applications and Suspensions,* paragraph 10.06 and in Dobie, *Sheriff Court Practice,* at p 566, in support of the proposition that an appeal in relation to a summary application for warrant to disinter human remains is incompetent. If *Black* represents a correct statement of the law, the present appeal would be incompetent. We have concluded that *Black* was wrongly decided.

[28] First, no authority was cited or referred to in *Black* to support the proposition that a decision on a summary application to disinter human remains was ministerial or administrative in nature. That such a decision involved invoking a sheriff in his judicial capacity is clear from the earlier decisions of *McGruer* and *Robson*, both of which involved an appeal from a sheriff-substitute to a sheriff and in relation to which no issue of competency arose. Second, it is not the form but the substance and nature of a decision which determines whether the matter before a sheriff is administrative or judicial in nature: *Magistrates of Glasgow* v *Glasgow District Subway Co* (1893) 21 R 52; *Arcari*; and *Rodenhurst*. As questions of law arise in such cases upon which a sheriff requires to pronounce judgment, the sheriff is acting in a judicial capacity. Third, in *Black*, the sheriff appears to have concluded that the matter before him was administrative in nature because the original interment had been approved by a local cemetery committee; his decision requires to be considered in that context. Fourth, as we explain below, applications by close relatives to exhume the remains of a deceased family member involve a consideration of Article 8 rights. As a consequence, they require the sheriff to act in a judicial capacity. Fifth, the appeal is clearly against a decision of a sheriff "constituting final judgment in civil proceedings" in terms of sections 110(1)(a) and 136(1) of the 2014 Act (which replaced section 27 of the Sheriff Courts (Scotland) Act 1907, being the provision in force when *Black* was decided).

[29] Accordingly, this appeal is competent.

Merits

Applications to exhume or disinter – the ECtHR jurisprudence

[30] Article 8 of the ECHR provides:

"Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[31] The ECtHR first considered the impact of Convention rights on the exhumation of human remains in *Dödsbo*. Ms Dödsbo wished to disinter her husband's ashes from a cemetery in Fagersta to her family burial plot in Stockholm, where she too intended to be buried. The Swedish authorities refused her request, with reference to the notion of "a peaceful rest" required by the relevant Swedish statute. The Swedish Government did not dispute that the refusal to grant permission to remove the ashes from one burial place to another involved an interference with Ms Dödsbo's private life. It maintained, however, that its interference was in accordance with the law, that it served legitimate aims and was justified under Article 8(2) of the Convention: *Dödsbo* at para [19].

[32] By a majority of 4 to 3, the ECtHR agreed with the Swedish Government. The ECtHR did not consider it necessary to decide whether a refusal to disinter involved the notions of "family life" or "private life" contained in Article 8(1) and proceeded on the basis of that concession having been made by the Swedish Government: *Dödsbo* at para [24]. The question for determination, therefore, was whether the refusal by the Swedish authorities to allow disinterment was justified under Article 8(2) of the Convention. The court stated that:

> "This assessment entails balancing the individual's interest in having a burial transfer against society's role in ensuring the sanctity of graves. In the Court's view,

> this is such an important and sensitive issue that the states should be afforded a wide margin of appreciation."; para [25]

[33] Having undertaken that assessment, the majority of the ECtHR concluded the Swedish authorities had taken all relevant circumstances into consideration and balanced them carefully: para [28]. They noted in particular that there was no indication that the deceased was not buried in accordance with his wishes and that nothing prevented Ms Dödsbo from having her final resting place in the same burial ground as that of her husband. The minority of the ECtHR, while understanding of the principle of the sanctity of graves, did not accept that removal of an urn from one burial plot to another would jeopardise that principle. They therefore doubted the interference by the Swedish authorities pursued a legitimate aim: *Dödsbo* at para [O-I5]. Moreover, they considered the applicant's interests weighed more heavily than the public interest invoked by the Swedish authorities: *Dödsbo* at para [O-I11].

[34] In 2011, Lord Brodie recognised a widow's right to respect for family life was engaged by an act of the state which results in her deceased husband's body being interred in a location which is not of her choosing: *C* v *Advocate General for Scotland.* He did so having regard *inter alia* to the opinion in *Dödsbo*.

[35] The ECtHR revisited the issues in *Drašković* (*supra*). Ms Drašković lived in Bosnia & Herzegovina. Her husband had been buried in Montenegro in 1995 during the Balkan Wars in a family plot owned by his nephew. In 2014, she asked his nephew for permission to move her husband's remains to Bosnia & Herzegovina; he refused. The ECtHR held that a refusal by the domestic courts of Montenegro to allow a request by a close relative to exhume and transfer the remains of a deceased family member did amount to an interference with an individual's right to respect for private and family life: *Drašković* at

para [48]. It found that the domestic courts of Montenegro had failed to consider whether exhumation and transfer had been possible in practical terms, whether any public interests were involved and had failed to consider matters such as the deceased's wishes and his connection to the area in which he had been buried. It also found that Montenegro did not have in place an appropriate legal framework to balance the competing interests and no mechanism to review the proportionality of the restrictions on Ms Drašković's Article 8 rights: *Drašković* at paras [55] – [57].

[36] The court made clear that the nature and scope of the applicant's rights under Article 8 and the extent of the state's obligations in such cases would depend upon the particular facts and circumstances. A fair balance requires to be struck between the competing interests; domestic authorities require to weigh an individual's interest in effecting a burial transfer against society's role in ensuring the sanctity of graves. Describing this as "an important and sensitive issue" it repeated the position it had set out in *Dödsbo,* namely, that states should be afforded a wide margin of appreciation.

Was Article 8 engaged in the present case?

[37] The sheriff was not referred to Article 8 of the ECHR, nor to the decisions of the ECtHR in *Dödsbo* or *Drašković*. Nevertheless, the court, as a public authority, was required to act in a manner which was compatible with the appellant's Article 8 rights: section 6(1) of the Human Rights Act 1998. Having produced a note of his decision following sight of the grounds of appeal, the sheriff expressed his doubts that the appellant's Article 8 rights were engaged. The issue is now beyond doubt: Article 8 rights are indeed engaged in applications by close relatives to exhume and transfer the remains of a deceased family member. A decision to refuse such an application will inevitably involve interference with

any such applicant's right to private and family life. The sheriff required to have regard to the appellant's Article 8 rights and to the need to ensure that any interference with those rights was proportionate and necessary. He erred in law in failing to do so. Accordingly, we shall allow the first ground of appeal.

[38] In that event, we were invited by the appellant to recall the sheriff's interlocutor and to grant the summary application. To do so, we require to be satisfied that there is a basis in law to grant warrant to disinter and reinter Emma's remains and that it is appropriate for this court to exercise its discretion in favour of the appellant.

Scots law on the exhumation of human remains

[39] The Scottish Parliament enacted the Burial and Cremation (Scotland) Act 2016 to restate and amend the law relating to burial and cremation in Scotland. Section 27 of the 2016 Act regulates exhumation; however, the Scottish Ministers have yet to issue regulations under that section. Until they do so, the common law continues to regulate the right to exhumation of human remains.

[40] Under the common law, all human remains have "the right to sepulture" and to violate such remains deliberately is a criminal offence. The law recognises that human remains are sacred; they require to be protected against disturbance and should be treated with reverence, dignity and respect. However, human remains can be exhumed in certain well-defined circumstances.

[41] The starting point for the consideration of the right to exhume human remains begins with Erskine, *An Institute of the Law of Scotland*, published in 1773, which stated the following in relation to burial grounds:

> "By the Roman law, every place where one buried his dead, became *res religiosa*, and was for ever after exempted from commerce. With us, though every man is at liberty to bury his dead within his own property, such burying-place continues to be *juris privati*; and so passes in a sale to the purchaser, as part of the lands within which it lies. As for our common burying-places, decency requires that these, when they are no longer to continue such, should be sequestered from the ordinary uses of property till the remains of the bodies there interred shall have returned to their original dust.": *Institute*, II.1.8

[42] Erskine's reference to the disintegration of human remains to "their original dust" arises in the context of a discussion of the exclusion of common burying-places from the "ordinary uses of property". In Book II, Title 1 - from which paragraph 8 above is quoted - Erskine primarily deals with property rights.

[43] Around half a century later, two cases considered the circumstances in which there might be interference with a burial ground. First, *Earl of Mansfield* v *Wright* (1824) 2 Sh App 104. In 1804, the Earl sought to relocate a church in Scone so that he could extend his lands to include the grounds of the existing church. He applied to the Presbytery for Perth for authority to remove the church to another part of the parish, which was granted and confirmed by a decree of the Court of Teinds. The decree, however, gave no authority to interfere with the churchyard, or any burial place, which remained in their original locations. Subsequently, in 1817, Mr Wright visited the churchyard of the old church to attend to the grave of his father. He wished to install a fence around his father's grave and insisted on his right to attend the grave without first seeking the leave of the Earl. The Earl did not agree. Mr Wright successfully raised a bill of advocation in the Court of Session. Refusing the Earl's reclaiming motion, the Lord Justice Clerk (Boyle) observed:

> "It is clear…that by the common law no person can interfere with these graves, or do any thing affecting the ground, that can tend in any way to injure the feelings of the connexions of those who are there interred. No one has a right to break up the ground of interment to the remotest periods of time. There the dust must for ever remain.": p 108

[44] It might be considered that the Lord Justice Clerk's observations do not sit comfortably with the references in Erskine's *Institute* to burial sites being sequestered from the ordinary uses of property "till the remains of the bodies there interred shall have returned to their original dust." However, it requires to be borne in mind that the Lord Justice Clerk's observations were *obiter*; the court was not dealing with the right to exhume the remains of Mr Wright's late father, but rather with Mr Wright's entitlement to erect a fence around the grave and to visit without the Earl's permission.

[45] The second case was *Officers of State* v *Ouchterlony* (1823) 2 S 437. The Crown sought to exhume and relocate several members of the Ouchterlony family who had been buried within the grounds of Arbroath Abbey. The grounds of the abbey had become accumulated with soil and rubbish and needed to be cleared. Mr Ouchterlony sought interdict to stop the exhumation. In a short report, which does not explain their reasoning, the Second Division upheld the Lord Ordinary's decision to refuse interdict.

[46] Over 40 years later, the Second Division arrived at a different outcome in similar circumstances in *Hill* v *Wood* (1863) 1 M 360. Mr Hill sought interdict to prevent the owners of Abbey Church in Coupar Angus from constructing a new church over part of the cemetery; Mr Hill objected on the basis that his relatives were buried in a family burial place in the area. Following proof, perpetual interdict was refused by the Lord Ordinary but granted by the Second Division on appeal.

[47] A number of observations were made by members of the Second Division as to the circumstances in which a grave might be interfered with to allow alternative use to be made of the grounds. For Lord Cowan, for interference to be justified, there would need to be: "some overruling necessity or strong expediency": p 370; and would require "a strong case indeed": p 371. For Lord Benholme, it would require: "the occurrence of strong necessity to

justify the interference with the individual right of sepulture": p 373. The Lord Justice Clerk (Glencorse) considered that the heritors of a church could not interfere with a burial ground except:

> "on the ground of some absolute necessity, or some such high expediency as in such cases, and in many other departments, the law considers as equivalent to such necessity…when the heritors proceed, on this ground…they are bound to address their minds to the consideration of the question fairly and deliberately – to weigh, on the one side, the rights and interests with which they are going to interfere, and the necessity and expediency, on the other, which they think justify the interference…": p 377

[48] Their Lordships were dealing with attempts to build over burial grounds and with the legal character of Mr Hill's right in the burial ground, rather than an application by a relative to disinter; however, it is noteworthy that they envisaged the need for a balancing exercise of the competing interests and placed emphasis upon Mr Hill's interests in preventing the existing graves from being disturbed beyond those which might be described as a "right of sepulture to be exercised in future" on his own account. The underlying reasoning for their approach is taken from observations that were made by Lord Curriehill in *McBean* v *Young* (1859) 21 D 314 at p 319, which Lord Cowan explicitly endorsed in the following terms in *Hill* at p 370:

> "Where ground so allocated has been used for the interment of one's family and kindred, he is entitled to prevent their graves from being violated or disturbed, and the ground from being encroached upon, for the law goes far to save those feelings of regard which are deeply implanted in the human heart for the remains of deceased relatives."

[49] Another example of a church expansion causing interference with burial grounds arose just under 30 years later in *Steel* v *Kirk-Session of St Cuthbert's Parish* (1891) 18 R 911. It concerned a dispute regarding the churchyard at St Cuthbert's Church at the west end of Princes Street in Edinburgh. The church had been built in 1775. The original churchyard was closed in 1874. Subsequently, in 1887, due to the church falling into a poor state, the

kirk-session resolved to make alterations and improvements. Part of the improvement works involved expansion into the churchyard. Mr Steel objected to the interference with the churchyard.

[50] By the time the action came to proof, there had been no interment at the site for 16 years. Following proof, the Lord Ordinary (Stormonth Darling) drew a distinction between churchyards which were still in use and those to which burials were closed. He said:

> "With regard to the former, surviving relatives have an interest to see that they are preserved for future interment. With regard to the latter there is, I think, no higher right than to secure that, in the words of Erskine (ii, 1, 8), 'these, when they are no longer to continue such, should be sequestrated from the ordinary uses of property till the remains of the bodies there interred shall have returned to their original dust.'… In my view…it will require a much stronger case to justify a serious disturbance of graves, involving the re-interment of recognisable human remains, than if the operations are to be conducted in ground where the resolution of the remains into their kindred dust is all but complete.": p 914

[51] The evidence led at proof was that the period of time during which a body was expected to disintegrate into dust, at this location, was expected to be 7 to 8 years. This was established by the evidence of a sexton of the church in question and a report from the Demonstrator of Public Health at Edinburgh University. The Lord Ordinary accepted that the only traces left of burial would be pieces of bone and fragments of the wood from the coffins. In those circumstances, he did not consider the exhumation would amount to desecration nor cause any offence to public decency or private sentiment: p 916.

[52] Mr Steel's reclaiming motion was refused. A number of comments were made by the First Division relating to the protection afforded to human remains under Scots law. The Lord President (Glencorse) stated:

> "… it is a very well established fact, leading to a rule of law, that after a certain period human remains resolve into their original dust, and it is by no means necessary to maintain the ground, in which they are buried, intact.": p 918

[53] Lord Adams noted that, on the evidence before the Lord Ordinary, the human remains had returned to their "kindred dust". Lord McLaren and Lord Kinnear concurred. Thus, the First Division adopted Erskine's statement of the law; human remains required to resolve into their "original dust" for the process of disintegration to be completed. The position, however, was not quite as unequivocal as their Lordship's comments might at first lead one to conclude; not all skeletal remains required to be returned to dust. If the position were otherwise, the First Division would have overturned the Lord Ordinary's decision on the basis of the expert evidence led. It is not necessary for us to consider the question of when human remains can be regarded as having resolved into their "original dust"; however, we note that the decision in *Steel* suggests that the process of disintegration might be completed even where some skeletal remains exist.

[54] In *Mitchell, Petitioner* (1893) 20 R 902 a widow whose husband's remains had been interred by relatives in their burial-ground sought authority to disinter and reinter the remains in another churchyard. The Inner House found that the sheriff had jurisdiction to deal with the application and remitted the petition to the sheriff to inquire into the facts "with power to proceed in the petition as should be just".

[55] In *Robson* v *Robson* (1897) 5 SLT 351 the deceased's spouse wished to exhume and re-inter his body by moving it a distance of around 200 yards from one part of a cemetery to a lair purchased by her and in which she had buried the posthumous child of their marriage. The deceased's father objected. The sheriff-substitute refused the petition. The appeal was heard by Sheriff Campbell who noted that the widow had left the matter of burial to the deceased's father and that questions arose as to whether the subsequent birth and death of a child of the marriage presented a material change of circumstances. He did not require to

decide the issues as matters settled by way of a joint minute. He made the following comments before dismissing the appeal which are of note:

> "An application of this nature is in no case to be lightly granted, or without good and sufficient cause shown. It is probable, however, that had this been an uncontested application by the widow, it might have been granted without difficulty, so far as the regards the public interest": p 352

[56] The sheriff's comments suggest that in the circumstances of that case, he considered the public interest in maintaining the sanctity of the grave would not have precluded the court from granting the orders sought. There was no discussion as to whether it was necessary to establish that the process of disintegration was complete; indeed, the application was presented by the widow within a year of her husband's death.

[57] *McGruer, Petitioner* (1898) 15 Sh Ct Rep 38 concerned the death of an illegitimate child. The mother's friends, who had a charitable interest in her, arranged the burial of the child; however, she subsequently raised a petition to disinter her child's body and have them buried elsewhere. The sheriff-substitute refused the petition. In doing so, he made the following observations:

> "that, after a body has once been interred, it is not to be disturbed except upon weighty cause shown. Further, there is no right of property in a dead body which our law will enforce. The right of relatives and representatives to select the place of burial, and even to have the body of the deceased removed from one grave to another, on cause shown, has, however, been recognised by the Courts.": p 38

[58] The sheriff-substitute did not consider the question of whether such "weighty cause shown" was established on the facts. He considered that, as the mother of an illegitimate child, she had no title to sue: as the law then stood, "the petitioner and the deceased were strangers to each other, with no reciprocal duties towards, or interest in, each other.": p 39.

[59] The broad principles of the common law relating to the exhumation of human remains were summarised in the introduction to the chapter "Burial and Cremation" in

Green's *Encyclopaedia of the Laws of Scotland* (2nd edition), Vol. II, paragraph 1265 which was published in January 1927. After a body has been interred:

> "… the remains are sacred wherever they are interred; and so a grave is protected against disturbance, at least until 'the process of disintegration is complete'. There are two exceptions to this rule: (1) If those having the management of a public burial-ground are compelled to disturb the grave from considerations of necessity or high expediency or (2) if the burial was in ground in which there was no right of burial; in these cases disinterments appears to be permissible, on condition that the remains be reinterred with all decency and respect. In other cases authority to disinter and reinter may, on cause shown, be obtained from the Court of Session or (more usually) from the sheriff".

[60] The passage cites *Earl of Mansfield*, *Ouchterlony*, *Steel* and *Mitchell* for its statement on the law. The author, Laurence Hill Watson, Advocate, makes a careful distinction in this passage, which finds its foundation in Erskine's statement of the law, between the two exceptions to the rule which protect sacred remains until the process of disintegration is complete on the one hand (referred to as "disinterment of remains as a matter of legal right": *Paterson, Petitioner (No.2)* 2002 SC 160 at para [51]), and "other cases" where authority to disinter and reinter may, on cause shown, be obtained from the court. In relation to the first exception, the law applies a higher test, variously described as overruling, strong or absolute necessity or a high or strong expediency. In relation to the category of "other cases", it is of note that the author refers to "cause shown" and not to "weighty cause shown" (*McGruer, Petitioner*) or to "good and sufficient cause shown" (*Robson).* Nevertheless, as Lord Carloway (as he then was) has explained, because of the manner in which the general law regards remains, such cause would have to be something more than a matter of mere convenience (his Lordship cited the decision of the sheriff in *Nicholls*) and involves the court exercising a discretion whether or not to permit the disinterment having regard to all of the circumstances: *Paterson* at para [52].

[61] *Nicholls* involved a widow who had moved from Auchterhouse, where her husband was buried, to Montrose to be near her family. They had been married for 42 years and she had nursed him for the last 4 years of his life. She had become increasingly infirm and was unable to visit her husband's grave. She sought to have his body disinterred and reinterred in Montrose, 9 years after his death. Her children consented to the application. The application was, however, opposed by the local authority. The sheriff refused the application. The report of the decision in *Nicholls* does not contain any analysis of the particular facts and circumstances of the case which led the sheriff to conclude that he was not satisfied that "good reasons" had been made out, beyond a reference to paragraph 535, Volume 3 of *The Laws of Scotland: Stair Memorial Encyclopaedia* (1994), which is in the following terms and, self-evidently, provides a non-exhaustive list of examples of good reasons:

> "Examples of good reasons are where a body has been buried in the wrong grave and where the relatives of a foreigner whose remains have been buried in Scotland wish to have them removed for re-interment in his home country."

[62] Notably, the sheriff referred to "the wholly exceptional circumstances" justifying the granting of a warrant to disinter in *Sister Jarlath, Petitioner* 1980 SLT (Sh Ct) 72 and to the "very special" facts in *Mitchell.* The sheriff may have formed the view that the reasons presented by Mrs Nicholls were matters of "mere convenience"; however, his explanation for refusing the application suggests that he required to be persuaded that something more than "good reasons" existed.

[63] In *Drašković*, whilst acknowledging that states are entitled to a wide margin of appreciation in regulating disinterment, Judges Pavli and Roosma made the following observations in their concurring opinion:

> "The reasons that are generally considered legitimate for requesting exhumation include, among others, the ability of relatives to better care and pay their respects in a new location; a claim that the final wishes of the dead relative have not been respected; reuniting the remains of various family members in the same place; or the temporary nature of the original burial": para [OI-4]

They also emphasised that even requests grounded on such motives are not necessarily granted automatically, and may be rejected when balanced against other considerations such as the "immutability of burials" or the wishes of other family members.

Summary of the law

[64] When considering an application by a close relative to exhume and transfer the remains of a deceased family member, the starting point is to recognise the reverence with which society expects human remains to be treated; human remains are sacred wherever they are interred and they are protected against disturbance. For those reasons, as Lord Carloway explained in *Paterson*, the court may grant such applications on cause shown, which requires to be something more than a matter of convenience. Clearly, the onus of establishing such cause falls upon the applicant. In our judgment, references to "weighty cause", or "compelling reasons" or "sufficient cause" do not change the character of the test to be applied by the court: they are different means of expressing the same underlying principle, namely that the starting point is that the status quo should be maintained and such applications will not be lightly granted. The questions for the court are: (i) has cause been shown; and (ii) if so, should the court exercise its discretion to grant the application?

[65] It is neither desirable nor possible to identify what might amount to cause shown in any particular case. Every case will turn on its own facts and circumstances. However, the following matters are relevant to the question of whether the court should exercise its discretion to grant such an application:

(a) the deceased's wishes and instructions, if any, in relation to their death: *Robson* at pp 352 – 353; *Dödsbo* at paras [26] and [O-I8]; and *Drašković* at para [54];

(b) the circumstances of the death: *Solheim*;

(c) the deceased's connections with the area in which they have been laid to rest: *Solheim*; and *Dödsbo* at para [26];

(d) the involvement of the applicant in the funeral arrangements at the time of death: *Robson* at p 353; and *Nicholls* at pp 944 – 945;

(e) the length of time which has passed since the death – the passage of time being relevant to the process of disintegration and the extent to which the remains will be disturbed: *Steel* at p 918;

(f) whether there is any opposition to the application, including by other family members, or by the proprietors or those responsible for the maintenance of the burial site, and the reasons for such opposition: *Sister Jarlath, Petitioner* at p 73; *Nicholls* at p 944; *Diocese of Glasgow and Galloway* at paras [13] and [16]; and *Drašković* at para [53];

(g) whether the remains can be disinterred sensitively with due regard to the reverence to be afforded to the deceased and without causing offence to public decency, public health concerns or disturbance of other human remains: *Sister Jarlath* at p 73; and *Drašković* at para [53];

(h) the location of the proposed burial site and whether the proposed reinternment can be conducted with dignity and respect: *Sister Jarlath* at p 73; *Drašković* at para [54]; and

(i) whether any interference with the applicant's Article 8 rights is proportionate and necessary to protect the public interest in preserving the sanctity of graves: *Dödsbo* at para [25]; and *Drašković* at paras [51] – [52].

Application of the law to the present appeal

[66] Turning to the facts of this case, we do not agree with the sheriff's assessment that the reasons advanced in favour of the application amount to no more than a matter of mere convenience. The appellant has established sufficient cause. The summary application was lodged in September 2024. By that time, the appellant, his wife and their children had visited and tended Emma's grave for over 22 years. The appellant and his wife moved to Monaco in January 2019. They did not seek authority to exhume and reinter Emma's grave at that time. Instead, they continued to visit her grave when they travelled to Edinburgh and Emma's siblings continued to reside in the city. Soon, Emma's siblings will no longer reside in Edinburgh. The appellant will no longer require to travel to Edinburgh for work. There will be no one to tend to Emma's grave. The appellant and his wife intend to reside permanently in Monaco and upon their deaths, they wish to be buried in the same cemetery in Monaco. They have purchased a burial plot for Emma's remains to be reinterred in Monaco. It is a decision which they appear to have reached after a period of reflection over 5½ years; convenience might have dictated an earlier application. The court can have some confidence that the appellant seeks a final resting place for Emma in Monaco with her parents and that the application is not presented as little more than an attempt to disturb sacred human remains to suit the needs of an increasingly mobile society.

[67] Turning to the exercise of the court's discretion, we have had regard to the following matters:

(a) Emma had lived in Edinburgh since the age of around 4. She died in her teenage years. There is no information about her wishes or intentions upon her death which might otherwise have been afforded considerable respect. The appellant was clearly involved in Emma's funeral arrangements at the time;

(b) Emma died in tragic circumstances. The appellant lodged news articles published in 2002 concerning her death. The appellant and his wife have experienced a deep sense of injustice that no disciplinary action was taken against those school boys alleged to have been involved in taking and distributing inappropriate images of her. At the time, her mother had required psychiatric assistance and had experienced a profound sense of guilt;

(c) Emma was buried 23 years ago. According to the Bereavement Services Operational Manager at Mortonhall Cemetery, it is likely that after this length of time, only skeletal remains exist; exhumation in those circumstances would not amount to desecration nor cause any offence to public decency;

(d) There is no opposition to the application; Emma's siblings and her mother have consented;

(e) A certificate of feasibility has been provided by the City of Edinburgh Council which confirms that the removal of Emma's remains will cause no disarrangement of the cemetery and no interference with the rights of third parties. The information provided confirms that her remains can be disinterred sensitively;

(f) The funeral company of the Principality of Monaco have confirmed that the reinterment of Emma's remains is feasible and will be accommodated in a burial plot purchased by the appellant.

[68] We are satisfied that this court should exercise its discretion to grant warrant authorising the disinterment and reinterment of Emma's remains. To refuse to do so would constitute an interference with the appellant's Article 8 rights which is neither proportionate nor necessary; in the circumstances we have set out above, the appellant's interests require to be afforded more weight than the public interest in preserving the sanctity of the grave. As the minority observed in *Dödsbo,* the "sanctity of graves and reverence for the deceased can be regarded in many respects, including visiting graves and bringing flowers on them": *Dödsbo* at para [O-I5]. In this case, those observations are apt.

[69] Accordingly, we shall allow the appeal and grant the warrants sought by the appellant.

Remaining grounds of appeal

[70] It is not necessary for us to address the second and third grounds of appeal. However, as we heard submissions, we shall do so briefly. In relation to the second ground of appeal, it is unfortunate that the sheriff indicated that he was unwilling to make a decision which could be relied upon to justify exhumation of human remains where parents move abroad: that was an irrelevant factor. Three observations require to be made: first, the sheriff's decision has no binding effect upon any other sheriff or any other court; second, future cases of this nature will require to be considered on their own facts and circumstances; and third, the sheriff required to consider the application solely on its own merits. The remaining ground of appeal is entirely without merit. In *Solheim,* the court granted warrant to disinter the remains of Norwegian seamen who had been buried in Scotland whilst Norway was under a wartime occupation, and allowed their remains to be reinterred in their native land. Had the sheriff considered the decision in *Solheim*, he would

have found it to be of little assistance and would no doubt have readily distinguished it from the facts of the present case.

Disposal

[71] Accordingly, we will allow the appeal, recall the sheriff's interlocutor of 29 October 2024, uphold the appellant's first plea-in-law and thereafter grant the first, second, third and fourth craves of the summary application.

[72] We are grateful to counsel and to the *amicus curiae* for their assistance and helpful submissions in this sensitive and anxious matter.