EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 15
XA3/24

Lord Malcolm
Lord Doherty
Lady Wise

OPINION OF THE COURT

delivered by LORD DOHERTY

in an appeal by stated case under section 163 of the Children's Hearings (Scotland) Act 2011

by

GORDON BRECHIN, Locality Area Manager for the Scottish Children's Reporter Administration

Appellant

against

LO and EO

Respondents

_____

Appellant: Brabender KC; Anderson Strathern LLP
First respondent: Party
Second respondent: Scott KC; Conroy Storrie Gosney
***Curator ad litem*: Donachie; Balfour and Manson LLP**

22 May 2025

Introduction

[1] This appeal by stated case under section 163 of the Children's Hearings (Scotland) Act 2011 against the interlocutor of the sheriff at Glasgow (S Reid) dated 1 November 2003 is a sequel to this court's decision in *LO and EO* v *McGinley* [2022] CSIH 50, 2023 SC 39. In that case we set out the circumstances in which the respondents and their four children came to reside in Scotland and in which compulsory measures of supervision were made in respect of three of the children, MO (now aged 20), NO (now aged 13), and EO (now aged 8). For present purposes it suffices to say that in November 2016 the respondents came to live in Scotland with NO and EO after their home in Italy was badly damaged in an earthquake. The two older children, P and MO, were taken out of boarding school in Nigeria and joined the rest of the family in Scotland. In February 2017 MO disclosed to teachers and social workers that he had been physically and emotionally abused by the respondents for several years. On 28 February 2017 all four children were removed from the respondents' care. Grounds of referral were prepared. In late 2017 a sheriff authorised the return of P (who was then aged nearly 17) to the care of the respondents. On 16 March 2018, after many days of evidence, the sheriff (F McCartney) found that grounds of referral were established in terms of section 67(2)(a), (b) and (c) of the 2011 Act in respect of P and MO, and in terms of section 67(2)(c) in respect of NO and EO. She found P and MO to be credible and largely reliable witnesses. She did not find the respondents to be credible witnesses. She found that they had assaulted and abused P and MO in both Italy and Scotland. She described the evidence of abuse which she heard as "overwhelming", and as being:

> "so clear and strong that in my view it would not be possible to reach any conclusion other than to be satisfied not only on the balance of probabilities but beyond reasonable doubt that [P and MO] were subjected [to] assault by both parents."

The respondents did not appeal the sheriff's decision. On 14 May 2018 the children's hearing made MO, NO and EO subject to compulsory supervision orders. The respondents' appeal was refused by the sheriff (A Mackie) on 23 June 2018. MO was placed with foster parents in Scotland. EO has been placed for adoption with foster parents in England. NO resides in a care unit with other young people in Glasgow. He has Down's syndrome. He also has other health issues.

[2] The respondents returned to Italy in February 2020 after their home there was rebuilt. In July 2020, the central authority in Italy informed the central authority in Scotland that the respondents had asked the Juvenile Court of Ancona to request the Scottish courts in terms of Article 15 of Council Regulation (EC) No 2201/2003 ("Brussels IIa") to transfer jurisdiction in the proceedings relating to MO, NO and EO to it. On 7 December 2020 the Juvenile Court declined to make such a request. By letter of 10 February 2021, the Italian central authority sent a copy of the Juvenile Court's judgment to the central authority in Scotland. In that judgment the Juvenile Court determined that it would not be in the best interests of MO, NO and EO to request that the proceedings be transferred to Italy from Scotland. It observed that over a lengthy period the proceedings in Scotland had "adopted the most appropriate measures in the best interests of the children, taking into account the dangerous situations reported." It noted that over the years the respondents had not always acted straightforwardly or honestly with the Italian authorities.

[3] The respondents have challenged the decisions taken by the children's hearing since the compulsory supervision orders were made. They maintained that the children were not habitually resident in Scotland at the outset of the proceedings and that the Scottish courts

did not have jurisdiction over them in terms of Article 8 of Brussels IIa. That point was conclusively determined against them by the decision of this court in *LO and EO* v *McGinley*.

[4] Initially the respondents had frequent contact with NO. Over time, that contact has diminished. For present purposes it is not necessary to explore the circumstances in which that has occurred, at least some of which are contentious. Contact became virtual (by video-conference) and by letter. Since the respondents returned to Italy contact has been increasingly infrequent.

Relevant legislation

[5] The Children's Hearing (Scotland) Act 2011 (asp 1) ('the 2011 Act') provides:

> **"Meaning of 'section 67 ground'**
>
> 67.–(1) In this Act 'section 67 ground', in relation to a child, means any of the grounds mentioned in subsection (2)
>
> (2) The grounds are that–
>
> (a) the child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired, due to a lack of parental care,
>
> (b) a schedule 1 offence has been committed in respect of the child,
>
> (c) the child has, or is likely to have, a close connection with a person who has committed a schedule 1 offence
>
> . . .
>
> (6) In this section–
>
> . . .
>
> 'schedule 1 offence' means an offence mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act 1995 [(cap 46)] (offences against children under 17 years of age to which special provisions apply)
>
> . . . .
>
> **Meaning of 'compulsory supervision order'**
>
> 83.–(1) In this Act, 'compulsory supervision order', in relation to a child, means an order–
>
> (a) including any of the measures mentioned in subsection (2),

(b) specifying a local authority which is to be responsible for giving effect to the measures included in the order (the ''implementation authority'') and
(c) having effect for the relevant period.

(2) The measures are–
(a) a requirement that the child reside at a specified place
. . .

Appeal to sheriff against decision of children's hearing

154.–(1) A person mentioned in subsection (2) may appeal to the sheriff against a relevant decision of a children's hearing in relation to a child.

(2) The persons are–
. . .
(b) a relevant person in relation to the child
. . .

(3) A relevant decision is–
(a) a decision to make, vary or continue a compulsory supervision order
. . .

Determination of appeal

156.–(1) If satisfied that the decision to which an appeal under section 154 relates is justified, the sheriff–
(a) must confirm the decision
. . .

(2) In any other case, the sheriff—
. . .
(b) may take one or more of the steps mentioned in subsection (3)

(3) Those steps are—
(a) require the Principal Reporter to arrange a children's hearing for any purpose for which a hearing can be arranged under this Act,
(b) continue, vary or terminate any order, interim variation or warrant which is in effect,
. . .

(5) The fact that a sheriff makes, continues or varies an order … does not prevent a children's hearing from continuing, varying or terminating the order...

Appeals to … the Court of Session: children's hearings etc

163.–(1) A person mentioned in subsection (3) may appeal by stated case to … the Court of Session against–

(a) a determination by the sheriff of–

. . .

(iii) an appeal against a decision of a children's hearing

. . .

(3) The persons are–

. . .

(e) the Principal Reporter.

. . .

(9) An appeal under this section may be –

(a) on a point of law, or

(b) in respect of any procedural irregularity.

(10) On deciding an appeal under subsection (1) … the Court of Session must remit the case to the sheriff for disposal in accordance with such directions as the court may give.

(11) A decision in an appeal under subsection (1) or (2) by the Court of Session is final."

[6] Schedule 1 to the Criminal Procedure (Scotland) Act 1995 lists certain sexual and other offences relating to children under the age of 17 years including:

"2. Any offence under section 12, 15, 22 or 33 of the Children and Young Persons (Scotland) Act 1937 …

. . . .

3. Any other offence involving bodily injury to a child under the age of 17 years."

[7] Council Regulation (EC) No 2201/2003 provides:

"Article 8

General Jurisdiction

1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised

. . .

Article 15

Transfer to a court better placed to hear the case

1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed

to hear the case, or a specific part thereof, and where this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or

(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:

(a) upon application from a party; or

(b) of the court's own motion; or

(c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3

. . . .

A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1 if that Member State:

. . .

(b) is the former habitual residence of the child;

(c) is the place of the child's nationality; or

(d) is the habitual residence of a holder of parental responsibility

. . .

4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1. If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

…"

[8] Brussels IIa applies to children's hearing proceedings (*Principal Reporter* v *LZ* [2017] CSIH 51, 2017 SLT 961). It is common ground that it applies to the present proceedings, notwithstanding the United Kingdom's withdrawal from the European Union, because they were commenced prior to 1 January 2021 (Jurisdiction and Judgements (Family, Civil Partnership and Marriage) (Same Sex Couples) (EU Exit) (Scotland) (Amendment etc) Regulations (SSI 2019/104), reg 6; Agreement on the withdrawal of the United Kingdom of

Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01), Art 67(1)(c)). We are content to proceed on that basis.

The children's hearing on 7 September 2023

[9] On 7 September 2023 NO's compulsory supervision order was reviewed by the children's hearing. Although the respondents attended the hearing by video-conference, they informed it that they had not received papers which the appellant had sent to them. Notwithstanding that difficulty, the children's hearing did not adjourn to enable provision of the appropriate papers to the respondents. It proceeded with the hearing. It continued the compulsory supervision order. Contact remained restricted to letterbox contact and supervised virtual contact if deemed appropriate.

The appeal to the sheriff

[10] The respondents appealed to the sheriff in terms of section 154(3)(a) of the 2011 Act. The sheriff heard submissions from the respondents and their Italian lawyer and from the appellant. The appellant conceded that there had been a material procedural irregularity at the hearing on 7 September 2023 (because it proceeded without the respondents having the papers which had been sent to them) and that the appeal should be allowed. The appellant submitted that the case should be remitted to the children's hearing to proceed as accords. However, the respondents moved the sheriff to issue a request to the competent Italian court to assume jurisdiction in terms of Article 15 of Brussels IIa.

[11] On 1 November 2023 the sheriff continued the compulsory supervision order for 6 months. He appointed the sheriff clerk to write to the Italian central authority requesting

that the competent Italian court assume jurisdiction over NO in terms of Article 15. (In the event that Brussels IIa did not apply, a request was also made under Article 8 of the 1996 Hague Convention for the Protection of Children. Since Brussels IIa does apply, it is unnecessary to discuss that fall-back request). The sheriff ordered that in the event of there being no reply from Italy within 6 months the request would be deemed to be refused. Thereafter, he drafted the request, which he signed on 24 November 2023.

[12] The sheriff reasoned that, notwithstanding this court's decision in *LO and EO* v *McGinley*, the children's hearing, and on appeal the sheriff, each had a continuing duty to consider whether proceedings should be transferred to the Italian courts. In his view he was in a better position than the children's hearing to decide that question, for three reasons. First, the question was a novel and difficult one, more suited to determination by a sheriff. Second, unlike the position before the children's hearing, in the sheriff court the respondents could always be assured of having the services of an interpreter. Third, the children's hearing had "twice failed to engage" with the Article 15 issue – at the hearings on 19 November 2021 and 7 September 2023. The sheriff was concerned that no meaningful contact was taking place between NO and the respondents, and he thought it unlikely that there could be meaningful contact if NO continued to reside in Scotland. The Italian courts were better placed to facilitate contact, and the respondents would not have language difficulties there. Transfer of the proceedings would be in NO's best interests because it would enable him to have effective family relationships with his parents and his older sibling P. At present he was in a care unit, he had no meaningful contact with his siblings, and there seemed to be no long-term plan for his future. His health needs could be appropriately met in Italy, as they had been before he came to Scotland.

[13] The appellant promptly appealed the sheriff's decision to this court. As a result, the sheriff's interlocutor was suspended.

Events since the sheriff's decision

[14] The court appointed a *curator ad litem* to ensure that NO's interests were properly considered. The curator has visited NO and has prepared reports which set out his current circumstances.

[15] A further children's hearing was held on 22 April 2024. On that date NO's compulsory supervision order was continued until the next children's hearing**,** which was held on 6 September 2024.

[16] Despite the appeal against the sheriff's decision and the resultant suspension of his interlocutor of 1 November 2023, that interlocutor and the request which the sheriff drafted were provided, by or on behalf of the respondents, to the Juvenile Court of the Marche. By a decree dated 10 June 2024, and in answer to the sheriff's request, that court purported to accept transfer to it of the proceedings relating to NO.

[17] At the children's hearing on 6 September 2024 NO's compulsory supervision order was continued until 1 November 2024. A further children's hearing was held on 28 October 2024. At that hearing the compulsory supervision order was continued for a further year. The children's hearing had advice from the National Convener of Children's Hearings Scotland about the Juvenile Court of the Marche's decree. The hearing treated the decree as a request by that court that jurisdiction be transferred to it. The hearing refused to grant that request. The respondents have appealed to the sheriff against the children's hearing decisions of 6 September 2024 and 28 October 2024. The sheriff has continued those appeals to await the outcome of this appeal.

The appeal

[18] In the stated case the sheriff poses three questions of law:

> "(1) Did I err in refusing the reporter's motion to direct the reporter to convene a children's hearing to re-consider the renewal of the compulsory supervision order in respect of the child?
>
> (2) Did I err in concluding it was competent to entertain an invitation by the parents to issue a request (via the central authorities) for the Courts of Italy to assume jurisdiction in respect of the child, in terms of the 'transfer' mechanism in Article 15 of the Council Regulation (*et separatim* Article 8 of the 1996 Hague Convention)?
>
> (3) Did I err in concluding that it was appropriate to issue a request (via the central authorities) for the Courts of Italy to assume jurisdiction in respect of the child, in terms of the 'transfer' mechanism in Article 15 of the Council Regulation (*et separatim* Article 8 of the 1996 Hague Convention)?"

[19] The appellant, the *curator ad litem*, and the second respondent, EO, were each represented by counsel. The first respondent, LO, appeared as a party litigant, but he adopted the submissions made by senior counsel for the second respondent. The court had the benefit of written notes of argument and oral submissions.

Submissions for the appellant

[20] The three questions in the stated case should be answered in the affirmative. Parts 1, 2, 3(i) and 3(ii) of the sheriff's interlocutor of 1 November 2023 should be recalled. In view

of the developments since that date, the case should simply be remitted to the sheriff with a direction that he make no further order.

[21] It had not been competent for the sheriff to make an Article 15 request. His appellate jurisdiction was a narrow one - to decide if the decision of the children's hearing was justified (section 156). Since the children's hearing decision had not concerned whether or not to make an Article 15 request, that was not a matter which the sheriff had jurisdiction to consider. He did not have jurisdiction to conduct a wholesale review or reconsideration of the merits of the children's hearing's decision, or to consider new issues which the hearing had not been asked to consider *(CF* v *MF* [2017] CSIH 44, 2017 SLT 945, Lord Malcolm at paras [37] - [39]; *Application in respect of A and B* 2014 Fam LR 137, Sheriff Scott at para [11]). Where a sheriff held that the decision of a children's hearing was not justified, the remedies were those listed in section 156(3). Those remedies did not include making or inviting an Article 15 request. If a sheriff formed the view that consideration ought to be given to the possibility of an Article 15 request, the appropriate course was to direct the Principal Reporter to arrange a children's hearing for that purpose (using the power in section 156(3)(a)).

[22] In any case, the sheriff's decision to make an Article 15 request was one which no sheriff acting reasonably could have made. There had been no material change of circumstances since this court's decision in *LO and EO* v *McGinley*. In considering whether to exercise its powers under Article 15, the court with substantive jurisdiction required to determine i) whether the child had a particular connection with another Member State, ii) whether the courts of that other Member State were better placed to hear the case, or part of it, and iii) whether the transfer was in the best interests of the child. The sheriff had made the same mistake as the first-instance judge (Mostyn J) in *Nottingham City Council* v *LM and*

Ors [2014] EWCA Civ 152 (also reported *sub nom, Re: D (A Child) (Transfer of Proceedings)* [2014] Fam Law 966) by treating i) as significantly more important than ii) and iii).

[23] NO had a particular connection with Italy. The material before the sheriff was inadequate to enable him to conclude that the Italian courts were better placed to hear the case, or that the transfer was in the best interests of NO. The respondents provided no information suggesting a further application had been made to the Italian courts subsequent to the Juvenile Court of Ancona declining to make a request in December 2020. The sheriff had no information about the social work system in Italy; the procedure that would be adopted by the Italian courts for assessing NO's views on a transfer; the likely timescales for decision-making there; the resources available to the Italian court and social work systems; or the remedies available in those courts.

[24] The sheriff conflated the transfer of jurisdiction from Scotland to Italy with the physical transfer of NO. He seemed to have assumed that the competent Italian court would inevitably order NO's return to Italy. Although Brussels IIa continued to apply after Brexit in relation to transfer of jurisdiction because of the saving provisions, there was no saving provision which preserved the mechanism under Brussels IIa which could have been used before Brexit to place a child in another jurisdiction. Article 33 of the 1996 Hague Convention would now govern any such placement. At the time of the sheriff's decision no such transfer of a child between Scotland and Italy under Article 33 had been undertaken. The sheriff had no information as to how co-operation between those jurisdictions under that Article would work in practice.

[25] The sheriff made no attempt to ascertain NO's views about the proposed transfer. His reasoning discloses no assessment of powerful factors which weighed against a transfer. NO had been resident in Scotland for 7 years. Two of his three siblings lived in the United

Kingdom. He saw one of them, MO, regularly and he had a good relationship with him. He required ongoing medical treatment in Scotland. The sheriff had no vouching about medical treatment in Italy, notwithstanding his finding - apparently on the untested assertion of the respondents - that this would be provided there to a high standard. If it had been competent for the sheriff to consider making an Article 15 request, he had power under section 155 of the 2011 Act to hear evidence and to order reports. Despite the large gaps in the information before him, he did not exercise that power.

[26] At the time of the sheriff's decision there was no suggestion that the Italian courts wished jurisdiction to be transferred. There had been no communication from the Italian national authority or the Italian courts in that regard since the Juvenile Court of Ancona had declined to make a request in December 2020. This court should not place any weight on the Juvenile Court of the Marche's subsequent purported acceptance of the sheriff's request that the Italian courts assume jurisdiction. There had not been a competent and valid request for the Juvenile Court to accept, and the terms of the request had not accurately set out NO's circumstances.

[27] The respondents' "fall-back" position, that this court should itself make an Article 15 request, should be rejected. The court's jurisdiction was to consider an appeal on a point of law or in respect of a procedural irregularity (section 163(9) of the 2011 Act). It did not have primary jurisdiction to consider the making of an Article 15 request. In any case, the court did not have all the information it would need to decide that question. The information before the children's hearing on 7 September 2023 did not, and was not designed to, address the critical Article 15 issues.

Submissions for the curator ad litem

[28] The submissions for the *curator ad litem* mirrored those for the appellant, which she adopted. The curator had visited NO and had interviewed the professionals involved in his care. NO was settled and happy in his residential accommodation. He had good relationships with those involved in his care and with other children at school and in the unit in which he resided. Some of the sheriff's findings did not accord with the curator's observations. NO has a familial bond and meaningful contact with his brother, MO. NO has some understanding of, and ability to communicate in, English. He uses Makaton and other communication aids. He is taught at school in English, and the staff at his children's unit understand him.

[29] The professionals involved with NO's care were ambivalent about the posiibility of NO moving to Italy. The manager of the children's unit said she would be "very concerned" this would set back his progress. His child advocacy worker and his social worker were neutral, but both emphasised very careful consideration of his interests would be required before any such transfer could take place. The sheriff had not given NO an opportunity to express his views on the proposed transfer of jurisdiction. Notwithstanding his Down's syndrome and developmental delay, he can communicate his needs and wishes.

Submissions for the respondents

[30] The three questions in the stated case should be answered in the negative and the appeal should be refused. That would allow transfer of jurisdiction to be effected without further delay.

[31] It had been competent for the sheriff to make the Article 15 request, for two reasons. On the information before the children's hearing it had been aware that it was the

respondents' wish that jurisdiction be transferred to the Italian courts. Even if the issue was not raised at the hearing, the sheriff had a pro-active duty to consider it.

[32] A sheriff has wide powers in an appeal under section 154. The Policy Memorandum which accompanied the Children's Hearings (Scotland) Bill stated:

> "the Bill does clarify the scope of appeal and review that is available to the sheriff in considering any appeal, and makes it clear that the sheriff has available to him the power to conduct a wide review of the issues that a hearing considered. We anticipate that the sheriff would use the full range of these powers infrequently".

A sheriff has power to make an order transferring jurisdiction, and he ought to do so in appropriate circumstances.

[33] *CF* v *MF* had been concerned with a different provision of the 2011 Act, section 160, which deals with the identification of a "relevant person". That was a narrow issue, and the statute envisaged an expedited process for determining such appeals. That was the context in which the *dicta* in paragraphs 37 - 39 in that case should be read. *A and B* concerned the establishment of grounds of referral. The sheriff's role in that case had been limited to determining whether to direct the Principal Reporter to arrange a children's hearing.

[34] The sheriff had given cogent reasons for exercising his discretion to make a request. The issues involved were novel. They did not fall within the usual experience of the children's hearing, which did not have the same ready access to interpreters as the sheriff court. The children's hearing ought to have been astute to the fact that a transfer of jurisdiction remained a live issue, even if it was not sought by the respondents at the hearing on 7 September 2023. It ought to have considered whether a transfer was appropriate. By adjudicating upon the issue himself, the sheriff avoided the delay which would have resulted had he remitted it to the children's hearing for determination. He was in as good a

position as the children's hearing to do that, because he had all the papers which the hearing had on 7 September 2023.

[35] The court of a requested state will be better placed to deal with a case if it can provide "genuine and specific added value" to the examination of the case (*Child and Family Agency* v *D (R Intervening)* (Case C-4228/15)[2017] Fam 248, paras 57 and 61). The requirement that the transfer of jurisdiction be in the best interests of the child implies that the court having jurisdiction must be satisfied that the transfer is not liable to be detrimental to the situation of the child: this involves assessing any negative effects a transfer might have on the familial, social and emotional attachments of the child (*Child and Family Agency* v *D*, paragraphs 58, 59, and 61). The question is whether the transfer of jurisdiction is in the child's best interests, not whether the eventual outcome will be in the child's best interests (*In re N (Children) (Adoption: Jurisdiction) (AIRE Centre and others intervening)* [2016] UKSC 15, [2017] AC 167, paragraph 44). The process for considering whether to transfer jurisdiction is a summary process and hearings should be measured in "hours not days" (*In re N (Children) (Adoption: Jurisdiction) (AIRE Centre and others intervening*, Sir James Munby P in the Court of Appeal ([2015] EWCA Civ 1112) at paragraph 113, Baroness Hale in the UKSC at paragraph 18). It would have been an error of law for the sheriff to have conducted a "profound investigation".

[36] There is a principle of mutual trust and respect embedded in Article 15. The courts of all member states are in principle competent to deal with the matter (*In re N*, paragraph 4). The effect of NO's long residence in Scotland was that he had been "detained" away from his parents, which had implications for rights under Article 8 of the European Convention on Human Rights (*Olsson* v *Sweden* (1989) 11 EHRR 259). The court had an obligation under section 6 of the United Nations Convention on the Rights of the

Child (Incorporation) (Scotland) Act 2024 to render a decision which was UNCRC-compliant. Relevant rights included NO's rights to the protection and preservation of his identity and family relationships (Article 8); to protection against separation from his parents (Article 9); to special protection and assistance as a child looked after away from his family (Article 20); to the continuity of his ethnic, religious, cultural and linguistic background (Article 20); and, as a disabled child, to a full and decent life with dignity, independence and active participation in the community (Article 23).

[37] The sheriff had made the correct decision. The Italian courts were better placed to facilitate face-to-face contact (assuming NO was transferred to Italy). They would have the option of returning him to familial care if appropriate. His religious and cultural heritage could be better safeguarded in Italy. Language barriers and problems around legal representation would no longer be problematic. Potential avenues for NO's future which were not available at present could be feasible options in Italy if jurisdiction was transferred. It was not clear from the court's decision in *LO and EO* v *McGinley* that the court's attention had been drawn to *In re N (Children) (Adoption: Jurisdiction) (AIRE Centre and others intervening* or to *Child and Family Agency* v *D (R Intervening)*. In any case, there had been a material change of circumstances since *LO and EO* v *McGinley* was decided which justified the sheriff taking the course which he did.

[38] There had also been a change of circumstances since the sheriff's decision, because the Italian courts were now prepared to accept a transfer of jurisdiction. Even if the court was not persuaded that the sheriff had been entitled to make the request, the respondent's fall-back position was that this court ought to make one. It had sufficient information to do so. On the basis of that information it was clear that the Italian courts were better placed to hear the case and that it was in NO's best interests that they do so.

Decision and reasons

[39] We are satisfied that the respondents did not ask the children's hearing on 7 September 2023 to make an Article 15 request. The hearing was aware (i) of the respondents' previously stated wish in that regard; (ii) of the children's hearing decision of 6 September 2021 refusing to make a request; (iii) of the sheriff's decision refusing the respondents' appeal against that decision; and (iv) of this court's decision in *LO and EO* v *McGinley.* In those circumstances the children's hearing was not obliged to reconsider, at its own instance, whether to make an Article 15 request, and we are clear that it did not do so. We reject the proposition that a children's hearing ought, *ex proprio motu*, to consider at every hearing whether to make an Article 15 request. That would be very wasteful of valuable and limited resources. Repeated Article 15 applications based on the same facts are to be deprecated. Repeated applications will usually fail unless there has been a change of circumstances (*In the matter of N (Children)* [2017} AC 167, Sir James Munby P in the Court of Appeal, para 118; Baroness Hale in the UKSC, para 28). Similarly, in our opinion the question of whether to make an Article 15 request ought not normally to be revisited *ex proprio motu* by a court or children's hearing unless there has been a material change of circumstances since the issue was previously considered.

[40] The decision which was appealed to the sheriff did not involve Article 15. The sheriff's jurisdiction under section 156 was to decide if the decision was justified. It was common ground that, because of the procedural irregularity, it was not justified. It follows that this is not a case where it is necessary to explore the precise ambit of a sheriff's jurisdiction under section 156 (as to which see the interesting discussion in *Norrie*, Children's Hearings in Scotland (4th ed), paragraph 14-13; *Norrie*, Appellate Deference in Child

Protection Cases, (2016) 20 Edinburgh L R 149; and *Macfarlane et al*, Greens Annotated Acts: Children's Hearings (Scotland) Act 2011 (1st ed), the annotations to sections 154 and 156).

[41] Here, the respondents asked the sheriff to issue an Article 15 request. It was competent for the respondents to raise that issue before the sheriff. An Article 15 application may be made at any stage of proceedings (see, eg, *In the matter of N (Children)*, Sir James Munby P in the Court of Appeal, paragraph 117), albeit it is desirable that it be made as early as possible. The application having been made to the sheriff, in our view he had jurisdiction to consider it, and, if appropriate, to grant it. It was competent for him to do both of those things. However, for reasons which we shall come to, it will rarely be appropriate for a sheriff to grant such an application, and the sheriff ought not to have granted it here.

[42] The forum with primary jurisdiction for deciding issues concerning the welfare of a child is the children's hearing. Consistently with that, where, on appeal, a party asks the sheriff for an Article 15 transfer of proceedings, generally the appropriate course will be to require the Principal Reporter to arrange a children's hearing to consider the matter (using the power conferred by section 156(3)(a)). The hearing will be in a position to require that any necessary investigations are carried out to ensure that it has all the information which it needs to determine the issue. The sheriff recognised (para [102] of the stated case) that that was the "normal" course (as to which see also *Norrie*, Children's Hearings in Scotland (4th ed), paras 14-24 and 14-25). He declined to follow the normal course because he considered the case was "extraordinary", for the reasons he set out at paras [103] - [107] of the stated case. In our opinion those reasons do not withstand scrutiny.

[43] The first reason was that the issues of law involved were novel and difficult and were more appropriate for consideration by a sheriff than by the children's hearing. With all

due respect to the learned sheriff, the children's hearing's jurisdiction is not limited to questions of law and fact which are well-worn or straightforward. Children's hearings often have to deal with difficult legal and factual issues. They do so with the benefit of submissions from the parties and, where necessary, guidance from the National Convener of Children's Hearings. Here, if the sheriff had concerns that the hearing might be unaware of the correct legal approach, he too could have offered guidance and advice on the law to assist them (*Children's Reporter* v *N* 2016 SLT (Sh Ct) 23, Sheriff Principal Scott at para [36]; *Norrie*, Children's Hearings in Scotland (4th ed), para 14-25).

[44] The second reason (para [104]) was that the sheriff was "not aware of the children's hearing having the same ready access to interpreters as the sheriff court" and that it was "liable to be hampered … by the language barrier". In our view this perceived concern did not justify the sheriff declining to follow the usual course. Appropriate arrangements for the use of an interpreter can be made at children's hearings. The history of these proceedings demonstrates that. Indeed, it also shows that on at least one occasion an interpreter had been provided but had not been used by the respondents.

[45] The third reason (paras [105] - [106]) was that the children's hearing had failed to engage with and consider the Article 15 issue at the hearings on 19 November 2021 and 7 September 2023. This reason represents a serious misunderstanding by the sheriff of the true position.

[46] On 19 November 2021 the hearing did not fail to engage with and consider Article 15. It duly considered it, refused to make a request, and gave adequate oral reasons for that. The procedural failure was not a failure to engage with and consider Article 15. It was a failure to provide written reasons (*LO and EO* v *McGinley*, paras [15] - [16], [18], [39] - [40]). On 7 September 2003 the hearing did not "again entirely [fail] to engage with"

Article 15. No Article 15 issue was raised at the hearing and there was no good reason for the hearing to revisit the Article 15 question *ex proprio motu*.

[47] The sheriff reasoned (para [106]):

> "[T]he children's hearing having twice failed to engage with this significant issue, I concluded that it was in the child's best interests that I address the matter myself. I was in a position to do so; all the papers presented to the children's hearing were available to me …"

[48] It was wrong of the sheriff to mischaracterise what took place at those hearings, and it was wrong of him to treat what took place as a good reason to lack confidence in the children's hearing duly performing its functions.

[49] The sheriff was also wrong to think that he was in a position to decide the Article 15 question on the basis of the papers which were before the hearing on 7 September 2023. The *curator ad litem*'s reports and the submissions which we have heard in relation to the facts leave us in little doubt how unwise it was for him to follow that course. There was, of course, no difficulty with the sheriff proceeding on the basis that NO had a particular connection with Italy. That was clear. The problem was that the papers for the hearing on 7 September 2023 were not directed towards answering the questions whether the Italian courts were better placed to hear the case, or a part of it, or whether it was in the best interests of NO that they should do so. The sheriff had no information about NO's views on the proposed transfer. Even if it was likely that NO's comprehension of the relevant issues might be limited, a view which considered matters from his perspective (rather than from the perspective of the respondents) could be obtained in a number of ways, eg from a safeguarder or advocacy worker, or from a *curator ad litem.* Had the sheriff directed that the matter be determined by the children's hearing, it is likely that enquiries would have been carried out and that all relevant information would have been provided to the hearing.

Besides, had it been appropriate for the sheriff to refuse to remit the matter to the hearing (and we do not think it was), in our opinion it would have been essential that he exercised the powers in section 154(5) and (6) to obtain the information needed to determine the Article 15 issue himself. He did not do that.

[50] In our opinion there is also force in the criticism that the sheriff's reasoning appears to be predicated upon NO being transferred to Italy. That would be a possible, but not an inevitable, outcome of the proceedings being transferred.

[51] For these reasons we are satisfied that the sheriff materially misdirected himself; and that his decisions to decide the Article 15 issue himself and to make an Article 15 request were decisions which no reasonable sheriff properly directing themselves would have made in the circumstances.

[52] There is no merit in the respondents' fall-back position. Even if the children's hearing had not subsequently considered the Article 15 issue, we would not have thought it right for this court to step in and displace the forum with primary jurisdiction, for much the same reasons as made it inappropriate for the sheriff to follow that path. The decree from the Juvenile Court of the Marche was a change of circumstances, but the children's hearing could (and it appears that, on 28 October 2024, did) take that into account. The fact that since the sheriff's decision, on 28 October 2024, the children's hearing has ruled on the Article 15 question makes it even more inappropriate that this court should proceed in the way which the respondents suggest.

[53] It follows that we answer Questions (1) and (3) in the affirmative and Question (2) in the negative. We shall allow the appeal and recall parts 1, 2, 3 (i) and 3 (ii) of the sheriff's interlocutor of 1 November 2023. Matters have moved on since the sheriff's decision. There have been further decisions at children's hearings, one of which included a ruling in relation

to an Article 15 issue, and those decisions are under appeal. In those circumstances it seems to us that the appropriate course is simply to remit this case to the sheriff with a direction that he makes no further order.

[54] We add these observations.

[55] The correct legal approach to Article 15 is not in doubt. It is set out in *Child and Family Agency* v *D (R Intervening)* and in *In the matter of N (Children)*. Contrary to senior counsel for the second respondent's suggestion, this court was well aware of those cases when it decided *LO and EO* v *McGinley* - we were referred to them by counsel for the respondent in his written and oral submissions. Those cases were not referred to in the court's opinion because on the facts they were not pivotal to the outcome.

[56] We appreciate that the sheriff sought to provide what he described as a "Brief Statement of Facts" in the request which he drafted, but at least some of what was stated seems to have been erroneous, or an inaccurate summary of the position. For example, para 8 mentions only MO having made allegations of abuse. P also made such allegations. Para 12 infers that it was established that only LO was responsible for mistreatment. That was not the sheriff's finding at the evidential hearing (see para [1] above). The terms of paras 11 and 12 might be thought to understate the nature and extent of the mistreatment involved. In para 18 the sheriff stated (wrongly) that MO lives in England, and at para 27 he stated that NO has no contact of any substance with any of his siblings – which appears to have been inaccurate in relation to MO. We have no doubt that the sheriff was endeavouring to give an accurate summary of the facts. However, we think it right to stress that when a children's hearing or a court makes an Article 15 request care requires to be taken that the requested authority is given a fair and accurate account of the relevant circumstances.