



SHERIFF APPEAL COURT

**[2026] SAC (Civ) 30
EDI-A568-24**

Sheriff Principal AY Anwar KC
Sheriff Principal N Ross
Sheriff Principal A Miller

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR

in appeal in the cause

MARTHA MAGAISA as executrix-dative of the late TANYARADZWA MAGAISA

Pursuer and Respondent

against

LORD STEWART OF DIRLETON KC, THE ADVOCATE GENERAL FOR SCOTLAND
as representing the SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defender and Appellant

**Pursuer and Respondent: Shabbir, advocate; McGlashan MacKay, solicitors
Defender and Appellant: Iridag, advocate; Anderson Strathern LLP, solicitors**

12 May 2026

Introduction

[1] Mr Tanyaradzwa Magaisa (“the deceased”), a Zimbabwean national, entered the UK in May 2004. He was convicted of a number of criminal offences in the UK. The Secretary of State decided to deport him. He was detained by order of the Secretary of State for the Home Department between 11 October 2018 and 8 January 2020. He was released on immigration bail. He subsequently died on 30 September 2023. There is no suggestion that his death was linked to his detention.

[2] The respondent is the deceased's mother and was appointed his executrix-dative on 5 February 2024. She raised proceedings seeking damages of £200,000 for the distress and inconvenience, injury to feelings, loss of liberty and separation from family, suffered by the deceased as a result of his alleged unlawful detention. The deceased had not raised any proceedings seeking damages in respect his alleged unlawful detention prior to his death.

[3] The appellant sought decree of absolvitor on the basis that the respondent, as executrix-dative, had no title to sue for damages for non-patrimonial loss. Following a diet of debate, the sheriff repelled the appellant's plea in law challenging the respondent's title to sue and fixed a diet of proof before answer.

[4] The appellant appeals the sheriff's decision on three grounds;

- (i) that the sheriff erred in placing the burden of proof on the appellant;
- (ii) that the sheriff erred in law in finding that an executor has title to bring an action *de novo* for delictual non-patrimonial losses not provided for in terms of the Damages (Scotland) Act 2011 ("the 2011 Act"); and
- (iii) that the sheriff erred in considering the terms of the 2011 Act to be exclusionary and as restricting the prior common law position. The 2011 Act created rights for an executor to certain damages, specifically because the common law does not provide for transmission of such losses.

[5] The respondent has lodged a motion for remit of the appeal to the Court of Session in terms of section 112(2) of the Courts Reform (Scotland) Act 2014 ("the 2014 Act"). She relied upon grounds of appeal two and three only for the purposes of the motion. The motion was considered on the basis of written submissions.

Legislation

[6] Section 112 of the 2014 Act provides as follows:

“112 Remit of appeal from the Sheriff Appeal Court to the Court of Session

- (1) This section applies in relation to an appeal to the Sheriff Appeal Court against a decision of a sheriff in civil proceedings.
- (2) The Sheriff Appeal Court may —
 - (a) on the application of a party to the appeal, and
 - (b) if satisfied that the appeal raises a complex or novel point of law, remit the appeal to the Court of Session.
- (3) Where an appeal is remitted to the Court of Session under subsection (2), the Court of Session may deal with and dispose of the appeal as if it had originally been made direct to that Court.”

[7] Section 2 of the 2011 Act is in the following terms:

“2 Transmission of deceased's rights to executor

- (1) There are transmissible to a deceased person's executor ('E') the like rights to damages, including a right to damages for non-patrimonial loss, in respect of injuries suffered by the deceased ('A') and vested in A immediately before A's death, being—
 - (a) personal injuries, or
 - (b) injuries which, though not personal injuries, are—
 - (i) injuries to name or reputation, or
 - (ii) injuries resulting from harassment actionable under section 8 or section 8A of the Protection from Harassment Act 1997.
- (2) The 'like rights' mentioned in subsection (1) do not include any right to damages by way of compensation for patrimonial loss attributable to any period after the date of death; and in determining the amount of damages for non-patrimonial loss payable to E by virtue of this section, the only period to which the court is to have regard is that ending immediately before A's death.
- (3) In so far as a right to damages vested in A comprises a right to damages for non-patrimonial loss in respect of such injuries as are mentioned in sub-paragraph (i) of subsection (1)(b), that right is transmissible to E only if an action to enforce the right is brought by A and is not concluded before A's death.
- (4) For the purposes of subsection (3) an action is not to be taken to be concluded—
 - (a) while an appeal is competent, or
 - (b) before any appeal taken is disposed of.”

Submissions for the respondent

[8] It was submitted that the test in section 112(2) of the 2014 Act was met. The appeal concerns the relationship between the common law principle that, in relation to legal rights, an executor is *eadem persona cum defuncto* (ie steps into the shoes of the deceased) and the statutory provisions governing the transmissibility of certain claims under the 2011 Act. The effect of the appellant's argument, which was rejected by the sheriff, would be to significantly restrict the rights of an executor. There is no binding authority which resolves the issue. The issue was likely to attract the attention of the UK Supreme Court in the future.

[9] The issues raised in this appeal are not confined to damages arising from unlawful detention; the consequences would extend to any delictual claim in which the deceased had suffered a non-patrimonial loss but had not raised proceedings prior to death. That would affect a wide range of claims including claims arising from, for example, breaches of privacy, nuisance, a breach of confidence and data protection breaches.

[10] Actions for damages arising from unlawful detention and other delictual claims may competently be brought in either the sheriff court or the Court of Session. A decision of the Sheriff Appeal Court would be binding on the sheriff courts but would not bind the Court of Session. A decision of the Inner House would provide binding authority across both forums. There is an obvious advantage in having the issue resolved by the Inner House rather than through parallel developments in different courts.

[11] The only authority relied upon by the appellant before the sheriff court was an Outer House decision by Lord Carloway (as he then was) in *Mackintosh v Morrice's Executors* 2006 SLT 580. The appellant sought to rely upon the comments made by Lord Carloway at

para [9] but that argument was rejected by the sheriff. As the issue in the appeal involves the proper interpretation of a decision of the Court of Session and having regard to the consequences of the appeal for a wide class of claims across different forum, there is a clear advantage in having the law clarified by the Court of Session.

[12] The decision of the sheriff is not a “final judgment”. Further appeal to the Court of Session is precluded, if this appeal is refused by the Sheriff Appeal Court. A proof before answer would require to take place, with the prospect of the appellant seeking to appeal thereafter on the same grounds. Remitting the appeal to the Inner House at this stage would allow the grounds of appeal to be determined definitively prior to a proof before answer. Any short delay occasioned by the remit would avoid a greater delay at a later stage.

[13] It was accepted that the Sheriff Appeal Court was capable of determining the appeal. The question was not one of capability but of appropriateness. Both parties in the present action are represented by counsel in this appeal. Any additional costs arising by remitting the appeal to the Court of Session are unlikely to be significant.

Submissions for the appellant

[14] The appellant accepted that there “is some nuance to the appeal”, however, submitted that the issues were not particularly complex. The point was a narrow and focused issue of statutory interpretation (*MM v Glasgow City Council* [2024] SAC (Civ) 14), capable of being considered by a bench of three appeal sheriffs.

[15] Even if the criteria in section 112(2) were met, there was no obligation upon the court to remit and the court should exercise its discretion to refuse to do so. The outcome of this appeal would only affect a very small number of cases. The vast majority of such cases are likely to be presented in the sheriff courts. This case was concerned with “largely private

interests within a particular parcel" (*Donnelly v Royal Bank of Scotland Plc (No 2)* 2016 SLT (Sh Ct) 333), in this instance, of law enforcement and immigration. Moreover, both parties are funded by the public purse. Court of Session procedure would incur additional unnecessary expense. The period of detention complained of ceased 6 years ago. Further delay caused by a remit was not in the interests of the expedient progress of justice. No prejudice was caused to the respondent by the Sheriff Appeal Court hearing this appeal. If the appeal is refused, the respondent can continue with the sheriff court process. If the appeal is allowed and the action dismissed, the respondent would be able to seek permission to appeal to the Court of Session in terms of section 113 of the 2014 Act.

Decision

[16] In order to grant a motion to remit an appeal to the Court of Session, this court requires to be satisfied that the appeal raises a complex or novel point of law in terms of section 112(2) of the 2014 Act. Useful factors for assessing the complexity or novelty of a point of law include whether it may be said that there is a real likelihood that the issue may attract the attention of the Supreme Court at some later stage, or that there are conflicting authorities, or that the case raises a point of wider interest which will have general application (*First Time Ltd v Liquidator of Denmore Investments Ltd* [2016] SAC (Civ) 9). That issue is to be resolved by reference to the particular legal issues set out in the grounds of appeal. If it is satisfied that a novel or complex point of law arises, the court then requires to be persuaded to exercise its discretion to remit the appeal to the Court of Session. As explained by Sheriff Principal Scott in *Donnelly v Royal Bank of Scotland Plc (No 2)* 2016 SLT (Sh Ct) 333, even if an appeal raises a complex or novel point of law, there is no necessity to remit it to the Court of Session.

[17] In the present case, the legal issue said to arise can be stated in brief terms; does section 2 of the 2011 Act provide an exhaustive list of claims for non-patrimonial losses that can be transmitted to an executor?

[18] The parties were agreed that in general, an executor stepped into the shoes of a deceased (*eadem persona cum defuncto*) and therefor enjoyed the same rights as the deceased while the deceased was still alive. The respondent submitted that at common law, an executor acquired all vested rights of the deceased, including claims for non-patrimonial loss. The appellant accepted that an executor has the right to pursue a claim for patrimonial loss, but no similar ability to pursue a claim for non-patrimonial loss if proceedings had not already been raised by the deceased prior to his death. Neither party was able to found on any authority which examined either the common law position or provided guidance as to the correct approach to section 2 of the 2011 Act. Insofar as reliance was placed on comments made by Lord Carloway (as he then was) in *Macintosh v Morrice's Executors*, his Lordship's comments were confined to a discussion of the ability of an executor, at common law, to sue for patrimonial losses suffered by the deceased. Nothing more can be read into that discussion which would support either party's submissions in this appeal.

[19] We are satisfied that the point of law arising is novel. We are also satisfied that is complex. It is not merely a question of statutory interpretation. The appellant submits no common law principle exists which confers upon an executor title to sue for non-patrimonial losses *de novo*, and if such a principle did exist, it has been replaced and restricted by section 2 of the 2011 Act. The respondent submits that there is such a common law principle and that it is unaffected by the 2011 Act. We accept that the test in section 112(2) of the 2014 Act is met.

[20] We are also persuaded that it is appropriate for this court to exercise its discretion to grant the respondent's motion for remit. The appeal raises a wider point of general application relating to the ability of an executor to pursue non-patrimonial claims beyond those mentioned in section 2(1)(b). The appeal will have consequences beyond the interests and rights of the parties to the present case. There is no binding authority on the issue. We accept that some additional delay and cost may be occasioned in remitting the appeal to the Court of Session. That however is not a matter to which we attach significant weight in the circumstances of this case. Both parties are already represented by counsel and would be so represented whether the appeal is heard by this court or by the Court of Session. In terms of delay, that consideration requires to be balanced against the expediency of a decision from the Inner House which may obviate the need for proof or a further appeal on the same grounds following a proof.

[21] For these reasons we will grant the respondent's motion and remit the appeal to the Court of Session. The respondent also sought to have her answers to the appeal received although late. That motion was unopposed. We shall also grant that motion.

[22] The written submissions did not address the expenses of the motion to remit. Parties should endeavour to agree the expenses within 14 days. If they are unable to do so, the clerk will arrange a hearing on expenses.