SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT KIRKCALDY

[2023] SC KDY 1

KKD-B581-22
KKD-B582-22

JUDGMENT OF SHERIFF PAUL REID

in the cause

in the appeal under s.154(3)(d) of the Children's Hearings (Scotland) Act 2011
by

GW and CW

against a decision of the Children's Hearing at Glenrothes in respect of the child ZW born in 2018

Act (GW and CW): Allison, Advocate; Robert F MacDonald, Solicitors and Ferguson Walker Alt (Reporter): Howe; SCRA Fife Team
Alt (Relevant Persons): Bradbury, Advocate; Wright, Johnston & Mackenzie LLP

KIRKCALDY, 21 December 2022

Introduction

[1] ZW is a four-year-old girl who lives with foster parents, the Relevant Persons. Her birth parents are the appellants. This appeal arises from a decision taken by the Children's Hearing on 15 September 2022. On that day, the Children's Hearing continued and varied a Compulsory Supervision Order ("**CSO**") dated 14 December 2021. The result of the varied order, which is to have effect until 14 September 2023, is that ZW must reside with the Relevant Persons and is to have no contact with the appellants. Immediately prior to that order being made, the appellants' had a degree of direct contact with ZW. For the discussion that follows, it is important to note that the hearing on 15 September 2022 was a consequence of an appeal to this Court against a decision of the Children's Hearing of

20 July 2022. That appeal was, in part, conceded by the Principal Reporter. Accordingly, this is the second time in six months that the care of ZW has ended up before the Court.

[2] For the reasons more fully set out below, in my opinion, the decision of 15 September 2022 cannot stand. I am not satisfied that I can properly assess what is necessary in the best interests of ZW. Accordingly, I shall require the Principal Reporter to arrange a Children's Hearing so that the care of ZW can be properly considered with due regard to the observations in this Note. I was told that 23 January 2023 was available for such a hearing and I would expect it to proceed on that date. In the meantime, standing the concession that notwithstanding the clear terms of the CSO attempts have been made to arrange indirect contact, I shall vary the CSO so as to allow for indirect contact between ZW and the appellants.

[3] Standing the delays there have already been for ZW as a result of multiple appeals, I undertook to produce this decision as expeditiously as possible. In that I have been greatly assisted by the clear and helpful written submissions which were lodged by all parties and which were then supplemented at an oral hearing. I have had regard to all that has been said in those submissions. That work has made the production of this decision in such a short timeframe possible. I am grateful to the parties for their work in that regard. For the avoidance of doubt, I have not sought to repeat all of what was submitted but have sought to summarise the thrust of their respective submissions.

Grounds of Challenge

[4] What happened at the Children's Hearing on 15 September 2022 is not in dispute between the parties. The Panel were asked, by the appellants' solicitor, to view a recent video of contact between ZW and the appellants. The chair of the Panel indicated she was

happy to view the video. The social worker who was present, however, objected and there followed a "*heated discussion*". The upshot of that discussion was that the Panel did not view the video but they were told that it showed ZW enjoying her time with her parents. Having heard about how ZW was behaving before and after contact, but without any direct account from ZW's nursery, the Panel made an order that there be no contact between ZW and her parents. It is averred by the appellants, and not disputed by the other parties, that "[n]*o discussion took place in respect of any other form of contact*" and "[i]*ndirect contact was not discussed nor was alternative timescales or ways of arranging contact*." The issue of sibling contact was also raised. I shall deal with the issue of sibling contact separately and after considering parental contact.

[5] By the time the appeal was heard, the focus of the appellants' challenge had sharpened. Essentially three complaints were maintained. First, that the Panel were wrong not to have viewed the video footage of the contact between ZW and the appellants. Secondly, the Panel were wrong to have ended all contact between ZW and the appellants. Thirdly, that the Panel were wrong not to have made any provision for sibling contact. Two overarching themes emerged from the submissions on behalf of the appellants: the overall fairness of the proceedings before the Panel and the adequacy of the reasons given for their decision. For the Relevant Persons, it was accepted that by making no provision for indirect contact the Panel had gone too far and, in any event, the reasons on that issue were deficient. But otherwise it was submitted that the decision was justified and in particular on the issue of direct contact between ZW and the appellants the information before the Panel clearly supported the conclusion they reached. In that context, counsel for the Relevant Persons reminded me of the narrow jurisdiction that is conferred upon the Court in an appeal of this nature.

[6] The same point was made on behalf of the Reporter, who mounted a fuller defence of the Panel's decision. It was said that nothing had been said on behalf of the appellants about indirect contact to the Panel and, in any event, the appellants knew the matter would be discussed and made no submissions on it. That said, the Reporter was "*not opposed*" to indirect contact (indeed, contrary to the terms of the CSO, the local authority had been seeking to facilitate it) but was concerned that there was no current information about ZW and her presentation since contact with the appellants ended in September 2022. Separately, it was, argued the Reporter, wrong to characterise the Panel's decision as ending contact between ZW and the appellant. The Panel, and by implication the Court, cannot second guess what the best interests of the child will require in future. In respect of the quality of reasons provided by the Panel, the Reporter reminded me that reasons did not have to be lengthy and proper regard had to be had to the lay composition of the Panel. The reasons were, submitted the Reporter, "*clear, proper and adequate*". If the appeal was to be allowed, the proper course, argued the Reporter, was to require her to convene a further Children's Hearing as the Court could not properly determine what the best interests of ZW required. That, to a large extent, appeared to be founded upon the passage of time.

The Legal Framework

[7] An appeal lies to the Sheriff against particular decisions taken by a Children's Hearing: s.154 of the Children's Hearings (Scotland) Act 2011 ("**2011 Act**"). That includes, as here, a decision to make, vary or continue a CSO: s.154(3)(a). No specific grounds of appeal are stated in the 2011 Act. The sole question for the Court is whether the decision of the Panel is "*justified*": s.156(1). What that requires of the Court was explained by the Sheriff Principal in ***W* v *Schaffer*** 2001 SLT (Sh Ct) 86 at 87-88:

> *"the task facing a sheriff to whom an appeal has been taken is not to reconsider the evidence which was before the hearing with a view to making his own decision on that evidence. Instead, the sheriff's task is to see if there has been some procedural irregularity in the conduct of the case; to see whether the hearing can be characterised as one which could not, upon any reasonable view, be regarded as being justified in all the circumstances of the case."*

That passage has been approved by the Inner House: ***CF* v *MF*** 2017 SLT 945 at para.37. The same approach, in essence, is adopted by the Strasbourg Court: ***Strand Lobben***, below, para.213. Put shortly, the Court's task is not to review whether the Panel reached the "right" decision but review whether the route by which is reached its decision was, in all the circumstances, fair. A decision, whatever its merits, that is reached by route which is not fair in a material sense cannot be said to be justified.

[8] In respect of the powers of the Children's Hearing, s.138(4) explains when it may vary or continue a CSO:

> *"The children's hearing may vary or continue a compulsory supervision order only if the children's hearing is satisfied that it is necessary to do so for the protection, guidance, treatment or control of the child."*

As is stated in terms in that provision, the test to be applied is one of necessity. That is an exacting standard. It reflects, and gives effect to in domestic law, the obligations imposed by Art.8 of the Convention which require that any interference with the Convention rights of the parents is necessary in a democratic society.

[9] It is also worth noting that the law recognises the momentous nature of a decision to end contact between a child and its parents. It is an exceptional course of action. It should not be sanctioned lightly. Where the State takes steps which restrict the family life of parents and child, it comes under a positive duty to take measures to facilitate family reunification as soon as reasonably feasible. Whilst the best interests of the child are always the paramount concern, they do not render nugatory any and all rights that the parents may have. In particular, it is recognised that Art.8 has a procedural, as well as a substantive,

content and so *how* a decision to end contact is taken is important. The threshold is one of necessity (no other measure will secure the best interests of the child) and the decision must be taken in a procedural robust manner. See, generally, ***Strand Lobben and others* v *Norway*** (2020) 70 EHRR 14 at paras.202-213. As the Supreme Court explained in ***In re S-B (Children)(Care Proceedings: Standard of Proof)*** [2009] UKSC 17; [2010] 1 AC 678 at paras.6-7:

> *"In this country we take the removal of children from their families extremely seriously … it is not enough that the social workers, the experts or the court think that a child would be better off living with another family. That would be social engineering of a kind which is not permitted in a democratic society."*

In a similar vein, the Strasbourg Court has observed in ***Johansen* v *Norway*** (1996) 23 EHRR 33 at para.78:

> *"These measures were particularly far-reaching in that they totally deprived the applicant of her family life with the child and were inconsistent with the aim of reuniting them. Such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests."*

Those observations were made in the context of a permanent placement with a view to adoption. The current circumstances are analogous given the stated objective of the local authority and the reality that having ended any contact with the natural parents, a new family unit will be cemented and the prospects of undoing that being in the best interests of the child will only recede. I reject as unrealistic and entirely artificial the submission for the Reporter that this is to impermissibly "*second guess*" what a future Children's Hearing might decide. Rights are meant to be meaningful and effective. That requires them to be considered in the real world. Where all contact has been ended between a child and its parents, and in circumstances where the local authority are pursing adoption, the idea that ending contact is some sort of interim decision that cannot be said, with any degree of certainty, is likely to continue is not tenable (see, for example, ***Strand Lobben***, above, at

para.211). The appellants are, in my view, quite right to demand that the decision is treated with the seriousness that its practical effects will likely have. That is, as decision to end all contact between them and ZW.

[10] Where the Sheriff is satisfied that the decision under appeal is justified, that decision must be confirmed: s.156(1)(a). The Sheriff may also take other steps, such as requiring the Principal Reporter to arrange a Children's Hearing or vary any order that is in effect, if satisfied that the circumstances of the child in relation to whom the decision was made have changed since the original decision was made: s.156(1)(b). Where the Sheriff is not satisfied that the decision under appeal is justified, in certain circumstances (which are not relevant for present purposes), they "*must*" take certain steps: s.156(2)(a). In all other cases, which includes the present circumstances, the Sheriff "*may*" take one or more steps set out in the 2011 Act: s.156(2)(b). Those steps are set out in s.156(3).

[11] Finally, at this point, it is helpful to say something about the requirement to provide reasons. First, it is implicit in the 2011 Act that the Panel are required to provide reasons for their decision: s.155(2)(a) of the 2011 Act (which provides that the Principal Reporter "*must*" lodge, *inter alia*, the reasons for the Panel's decision; *a fortiori* the Panel must have provided them). Where there is an obligation to provide reasons, reasons must be lawfully adequate to fulfil the duty: ***Chief Constable of Lothian and Borders* v *Lothian and Borders Police Board*** 2005 SLT 315 at para.70. That is, the informed reader (which includes this Court, on appeal) must be left with no real and substantial doubt as to what the reasons were for the decision: ***Wordie Property Co* v *Secretary of State for Scotland*** 1984 SLT 345 at 348. A sense of proportion has to be retained in respect of what is expected of a decision-maker in terms of reasons: ***Uprichard* v *Scottish Ministers*** 2013 SC (UKSC) 219 at paras.44-48. Reasons generally promote good decision-making by focusing the mind of the decision-

maker on the points that need addressed. In turn, proper reasons promote better acceptance of decisions because a party is able to understand why they have won or lost. Where it is not apparent why one party has won and one party has lost, justice is unlikely to be done: ***English* v *Emery Reimbold & Strick Ltd*** [2002] 1 WLR 2409 at para.16.

Is the Panel's decision "fair"?

[12] In my opinion, when the proceedings before the Panel are considered in the round, they cannot be said to have been fair and thus cannot be said to have produced a result which was justified.

[13] A number of different concerns were raised by the appellants and I address those below. In my opinion, however, the start, and the end, point is what is said and is unchallenged about the discussion around contact. It is averred by the appellants, and not disputed by the other parties, that "[n]*o discussion took place in respect of any other form of contact*" and "[i]*ndirect contact was not discussed nor was alternative timescales or ways of arranging contact*." In that unchallenged factual scenario, it is impossible to conclude that the Panel properly had regard to the necessity of the measure they made. Inherent in considering the necessity of the measure (i.e. to order that there be no contact) is a consideration of whether there are alternative, and less intrusive, means by which the child's interests can be protected. When it is recalled that the Panel say in their reasons that a "*lengthy discussion*" was had around contact that is impossible to reconcile with their being no discussion of any alternative to the direct contact that had been taking place.

[14] For the Reporter, it was submitted that criticism of the Panel on this matter was unfair because no other alternatives were canvassed before them. I reject that submission. In my view, it completely fails to recognise what is required of the Panel by the statutory

threshold imposed for the making of the CSO. The language of s.138(4) of the 2011 Act is clear: "…*only if the children's hearing is satisfied that it is necessary to do so…*". The test is necessity ("…*it is necessary to do so…*") and the Panel require to satisfy themselves of that test ("…*only if* [the Panel] *is satisfied*"). It matters not that nobody has mentioned alternatives. That does not change what is required of the Panel: that they are satisfied that there are no alternatives. The Panel were under an obligation, irrespective of what any of the parties said or did not say, to consider whether an order that there be no contact with the appellants was necessary. If it never considered or applied its mind to alternatives (and as counsel for the appellants' correctly pointed out, there are a whole range of possible alternatives between the direct contact the appellants did have and having no contact at all) then it has not undertaken the task required of it by the Parliament before making the CSO. In fairness to the Panel, the Reporter recognised that they were being asked to reduce contact to nil (see para.28, below). So, to support that submission the Reporter must have applied her mind to proportionality. If anyone ought to have raised the issue before the Panel, it was the Reporter. In all those circumstances, the decision cannot be said to be justified.

[15] That conclusion in and of itself vitiates the Panel's decision. Other factors were also relied upon by the appellants to support the contention that the decision was not justified. Those included:

a. The conduct of the social worker generally. It is averred by the appellants that:

> "*The said social worker had interrupted the solicitor for* [CW] *on almost every occasion she was asked to contribute and continued to do this with the solicitor for* [GW]. *This made it difficult for the legal representatives for both* [of the appellants] *to properly and fairly represent their respective clients' interests.*"

There is no response to those averment. Whilst other averments in the same paragraph are subject to specific admission or specific denial, the Answers lodged are silent on them. Given both the Reporter and the Relevant Persons have specifically denied other averments in the same paragraph, the inference is that there is no challenge to that description of the conduct of the Social Worker. Certainly, nothing was said at the oral hearing of the appeal to suggest issue was taken with them. Leaving aside the basic discourtesy such behaviour would represent towards the appellants' solicitor, it is of concern that a Social Work considered it appropriate to conduct themselves in such a manner. Bearing in mind that the Social Worker is meant to have a functioning relationship with the parents and ought to have in mind at least the desirability of family reunification, that she was allowed to behave in such a manner, seemingly unchecked by the Panel, raises a concern as to the overall fairness of the proceedings.

b. The decision not to view the video. That is the sort of discretionary procedural decision that the Court on appeal ought to be very slow to interfere with. It is quintessentially a discretionary decision for the Panel. It does, however, cause some concern that the Panel seemed open to viewing the video but only after "*heated discussion*", prompted by the Social Worker, that it was decided not to view it. If it is accepted that how the child enjoyed contact with her parents is relevant (and given oral evidence to that effect was allowed, it must have been), it is hard to understand why direct, video, evidence of the contact is not relevant (and helpful). A picture, after all, speaks a thousand words. Certainly no convincing explanation was offered by the Reporter for why the Social Worker was so opposed to the video being watched. Had the viewing of the video been the only concern, it is doubtful whether

it would have been sufficiently material to render the decision not justified. However, when coupled with the Social Worker's conduct discussed above, it adds to concerns about the overall fairness of the process.

(For completeness, the videos were lodged in Process but I have not viewed them. Having reached the view I have on the appropriate disposal, it was unnecessary to do so.)

c. No direct and up-to-date information was available from ZW's nursery. Given the importance placed upon how ZW was before and after contact with the appellants, that is unfortunate. Ordinarily, an account of the nursery's position being relayed through the Social Worker would not cause undue concern. Where, however, the Social Work Department are already committed to a pathway that leads to adoption, and in the particular circumstances of the conduct of this Social Worker, it is understandable that the appellants would have some concern about how balanced such a second-hand account would be. Like the video point, on its own it would not vitiate the decision. But as part of the overall context, it is a cause for further concern.

d. Reliance on the Parenting Capacity Assessment ("**PCA**") is no longer founded upon as a discreet ground of challenge. That is a concession properly made. It could only be said to be an irrelevant consideration if it would be irrational to have regard to it. That cannot, in my opinion, be said of the PCA. Once it is recognised as a relevant factor, the weight to be attached to it is, within the bounds of rationality, entirely a matter for the Panel: ***Tesco Stores Ltd* v *Secretary of State for the Environment*** [1995] 1 WLR 759 at p.764. Nothing has been said to suggest the Panel placed an irrational amount of weight on the PCA.

e. The failure of the Panel to have regard to the threshold test. For the appellants, it was said that the failure of the Panel to anywhere acknowledge that the test they had to apply was one of necessity was concerning. I accept the submission for the Relevant Persons that this is an issue of substance, not form: a specialist tribunal is presumed to know the relevant law and requiring a mindless recitation of a statutory formulation is pointless. As to the substance of it, it is hard to accept that a Panel who were persuaded to give advice in support of an adoption application and to make provision that a child is to have no contact with either parent (despite having recently had direct contact) would not have in mind the test of necessity. Given, however, the complete lack of engagement with a proportionality assessment, I am left with a real doubt that the Panel had in mind what the test of necessity actually involved and how exacting it was.

[16] While each of those factors may not in and of itself have vitiated the Panel's decision, collectively, and when considered in light of what was not discussed or considered in respect of contact, they reinforce my conclusion that the decision cannot be characterised as justified. In other words, having regard to all of the circumstances of the case, I am not satisfied the decision was justified.

Are the reasons adequate?

[17] In short, no. The fundamental problem is there are no reasons to support the decision that there be no contact. In a sense, that is not surprising given, for the reasons set out above, it appears that the Panel did not properly address their mind to the issue of necessity. But there is, as I have explained, a statutory duty to provide reasons and that being so the common law demands that those reasons are adequate. Such reasons as are

given do not support, in the sense of leaving the informed reader with no real and substantial doubt as to the reasons for, the decision that there be no contact. On the contrary, they simply beg questions. In those circumstances, the decision is not justified.

[18] That conclusion renders the arguments about what should be expected of the Panel in terms of reasons redundant. There is no question of whether their reasons are adequate; they have provided no reasons. In any event, in my opinion, there is only so far such an argument could have carried the Reporter. Whilst part of the context in which the adequacy of reasons would fall to be assessed would be the nature and composition of the Panel, that context would also include the fact it is recognised as a "court" for other purposes (e.g. in European law), that the decision it has taken is such a fundamental and profound interference with the rights of the appellants and positive duties owed by the State to the appellants in respect of such rights. Quite simply, the Panel are required as a matter of law to provide reasons which leave parents in the position of the appellants with no doubt as to why the decision to end contact with their child has been taken. On no view, do the reasons provided by the Panel come close to meeting that obligation.

[19] This ground of challenge inevitably overlaps with the other complaints advanced on behalf of the appellants. Reasons are insisted upon because they ought to improve decision-making. Had a properly reasoned decision been produced by the Panel, many of the problems discussed earlier ought to have been revealed and then addressed. Accordingly, reasons are not some *ex post facto* consideration, to be written up once the substantive decision has been taken. As this case has demonstrated, where reasons are not hardwired into the decision-making process, that process can easily go wrong. No doubt a desire to avoid precisely this sort of outcome informed the Parliament's decision to impose an

obligation to provide reasons. That obligation ought to have saved the Panel from the errors identified above. In future, it should.

The Siblings

[20] So far, I have considered matters through the prism of the complaint about parental contact. I can deal with the sibling issue more shortly. All that the Panel could do was make an order in respect of ZW. Contact with her siblings required the co-operation, and was subject to the views, of others (most notably her siblings and those caring for them) that were not before the Hearing and in respect of whom no orders could be made. The Relevant Persons, I am told, are not opposed to contact with the siblings. From ZW's perspective, there was no need for a contact order in respect of her siblings. She was willing (in the sense that the Relevant Persons were prepared to facilitate) to have contact with her siblings. The inhibitor was at the siblings' end. No order made in respect of ZW would change that. And nothing in the measures contained in the CSO prevent sibling contact. In all the circumstances, I am satisfied that the absence of any provision about sibling contact does not render the order unjustified.

[21] At para.22 of their written submission, the appellants conclude on this issue in the following terms (my emphasis):

> "*The hearing ought to have imposed a measure <u>that guaranteed</u>, not on the occurrence of sibling contact, but that it occurred with a frequency and consistency consistent with the significance of those relationships to the child.*"

The flaw with that argument, in my opinion, is that the Panel could not impose such a measure because the occurrence of sibling contact is dependent upon the other sibling. And the Panel were not in a position to make an order in respect of those siblings. It may be that

sibling contact needs to be regulated going forward. But, in my opinion, the Panel cannot be faulted for having not done so on 15 September 2022.

Remedy

[22] For the appellants, it was submitted that I should vary the CSO so as to reinstate direct contact between them and ZW. In short, it was argued that returning the case to a Children's Hearing without such an order would delay addressing the unjustified ending of contact. That, it was argued, was reinforced when it was recalled that this was the second appeal to the Court in six months. In short, it was said that the Children's Hearing had had their chance to sort this; it was now appropriate for the Court to intervene. For the Relevant Persons, they accepted that the decision was inadequate in respect of indirect contact and it is said they have always been committed to indirect contact. It was accepted on their behalf that I could properly vary the CSO to provide for indirect contact but should not go further as the decision to remove direct contact was justified. For the Reporter, in her written submission, it was said that the matter should simply be returned to the Children's Hearing (and that a hearing would be available on 23 January 2023). That was because the Children's Hearing was the proper place to determine the best interests of ZW. At the hearing, that position appeared to be qualified to the extent that I could make provision for indirect contact given the parties had all proceeded on the basis that was to continue. But the Reporter maintained that direct contact should not be introduced by the Court, primarily because the Court had no current information about how ZW was doing or how she had been since 15 September 2022.

[23] Parliament clearly envisaged that at the stage of an appeal the Sheriff may make substantive decisions which would ordinarily fall to the Children's Hearing. Indeed, when

confirming a decision as justified, the Sheriff may, for example, vary the terms of a CSO if satisfied that there has been a change in circumstances since the decision was made: s.156(1)(b). Where a decision is held not to be justified, the Sheriff has the same powers: s.156(2)(b). Given any decision taken by the Court must consider the need to safeguard and promote the welfare of the child throughout the child's childhood as at least a primary consideration (but more often the paramount consideration)(s.25(2) and s.26(2)), the Court necessarily has to consider whether variation of any order is required in consequence of allowing an appeal. That being so, it cannot be an acceptable reason to decline to make any variation on the basis that the Court has no information about any change in the child's circumstances. The parties, in particular the Reporter, know that however an appeal is disposed, the Court will have to consider whether variation of any order is necessary. That being so, it is, in my view, incumbent upon the parties, but in particular the Reporter, to ensure that the Court is furnished with any information about a material change in circumstances. In this case, for the reasons I will explain in a moment, nothing turns on the absence of information in this case. But in general, in my view, the parties, and in particular the Reporter, ought to be in a position to advise the Court of any change in circumstances, or that there has been no such change, whilst the appeal has been pending.

[24] In this case, the decision facing the Panel in September required them to balance the benefit of what was said to be positive contact with the appellants against what was said to be adverse effects on ZW before and after such contact. It required a judgment call to be made having regard to all the facts and circumstances. That is not an assessment the Court is well-placed to make on appeal. It is precisely the sort of judgment call that the Parliament has entrusted to a specialist decision-making body, composed of members with experience of, and particular training in, making such decisions. Whilst the Court may properly be able

to intervene in a case where there was a consensus about a clear change in circumstances which justified a variation, this is not such a case. So far as the question of contact is concerned, the Children's Hearing are by far and away the more qualified, and more appropriate, body to make the necessary assessment of ZW's best interests. I am reinforced in that conclusion by the point made on behalf of the appellants that whilst the discussion treated direct and indirect contact in a binary fashion, there is in fact a spectrum of options available for consideration. Where on that spectrum this case sits is quintessentially a judgment for the Children's Hearing. Separately, I accept, without expressing a concluded view, that there is some force in the submission made on behalf of the Relevant Persons that in the materials before the Panel there was justification for ending direct contact. In that regard, the observations of the Independent Report Writer are instructive. That all underscores the unsuitability of the Court making an assessment of what is necessary in the best interests of ZW in these circumstances. Accordingly, I shall require the Reporter to arrange a Children's Hearing (and based on what was said on behalf of the Reporter at the hearing, I would expect that to happen on 23 January 2023).

[25] That is subject to one qualification. I shall vary the CSO so that it provides for indirect contact between the appellants and ZW. Notwithstanding the clear terms of the CSO, I was told that the Social Work Department had been seeking to facilitate such contact. I was also told that the Relevant Persons had always expected indirect contact to be a feature of ZW's life. Whilst I accept that the appellants will wish to argue for greater contact at a Children's Hearing, allowing for indirect contact appears to me to reflect what at least the parties understood the outcome of the discussion in September 2022 to be. That being so, I am satisfied the Court can properly make that decision, at this time, as it requires none of the judgment calls discussed above which are inherent in the issue of direct contact.

Accordingly, I shall vary the CSO so that paragraphs 2 and 3 of the measures read "*The child is to have only indirect contact with…*" rather than "*The child is to have no contact with*".

[26] For completeness, I recognise that I am under an obligation to consider including a contact direction in respect of the siblings: s.29A(2)-(4) of the 2011 Act. For essentially the same reasons that I do not accept the criticism made of the Panel for making no such direction, I too make no such direction.

[27] Before parting with this issue, there are two points I wish to make. First, for the Reporter, it was said that the appellants had not properly engaged with the Social Work Department in respect of attempts to arrange indirect contact. For my part, given the appellants had engaged solicitors to appeal the decision but meantime had an order that provided that they were to have no contact whatsoever with their daughter, I am surprised that such a criticism was made. At the very least, the appellants would have been confused by communication in respect of indirect contact when the Reporter's position to the Court was that such contact had been justifiably stopped. Furthermore, the current relationship between the appellants and the Social Work Department has to be seen in the context of the Social Workers conduct at the hearing.

[28] Secondly, the disconnect between the Reporter's stated position to the Court and what was in fact being done by the Social Work Department is of concern. Until as recently as the day before the hearing of the appeal, the Reporter's position was that the appeal should be refused. The Reporter's motion (para.4 of the supplementary submission) was:

> "*1. The Sheriff should find that the decision of the children's hearing on 15.09.2022 is justified, and should confirm the decision.*
>
> *2. Esto the decision is not justified (which is denied), the Sheriff should require the reporter to arrange a children's hearing to review the compulsory supervision order as per section 156(3) of the Children's Hearing (Scotland) Act 2011.*"

In the course of the appeal hearing, the Reporter advised the Court that the Social Work Department had been trying to contact the appellants to organise indirect contact. It was not explained why the Social Work Department had been doing that whilst at the same time the Reporter was asking this Court to confirm a decision that there be no contact. It is crystal clear from the grounds of appeal that a central complaint of the appellants is the ending of *all* contact. Indeed, the appellants aver that "[d]*uring the hearing the Reporter gave advice to the panel to consider matters very carefully given they were being asked to reduce contact to nil*…" (my emphasis). That is met by the Answer (for the Reporter): "*Admitted that this is a true narration of the events of the hearing. Denied this is a procedural irregularity.*" It is therefore admitted that a reduction to nil contact was sought, which begs the question why the Social Work Department were trying to set up indirect contact. However it came about, such a disconnect is to be regretted and should, so far as practicable, be avoided in future.

Conclusion

[29] For all those reasons, the appeals by both appellants are allowed, the decision of the Children's Hearing of 15 September 2022 is held not to be justified, the Reporter is required to arrange a Children's Hearing as soon as practicable and the CSO is varied so as to allow for indirect contact.

Postscript

[30] This is the second time an appeal has been taken to this Court in the last few months against a decision of a Children's Hearing and, as explained, these proceedings will have to return to the Panel again. If it is in the best interests of ZW, and that is a decision not for me but for others, that she cease to have contact with her parents and be adopted by the

Relevant Persons then it is in her interests that such a decision is taken without further avoidable delay. As Lord Reed put it in ***ANS* v *ML*** 201 SC (UKSC) 20 at paras.51-52:

> "*unless and until the proceedings are concluded in their favour, the respondents have to hold back from treating him fully as their son: he is not their child, and they do not know whether he ever will be. He has only one childhood, and it is rapidly passing. The appellant* [mother] *and the respondents have only one opportunity to fulfil the role of parents towards this child during his childhood. The delay can only be causing anguish to all the individuals involved. … In the interests of the welfare of the child, and out of common humanity towards all the individuals involved, it is imperative that unnecessary delay should be avoided.*"

I respectfully agree. This child requires certainty and stability and that requires the State actors who have taken it upon themselves to regulate the life of ZW to do so properly, lawfully and without unnecessary further delay ("*…the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent with whom it does not live*": ***Strand Lobben***, above, at para.208). As I have explained, requiring that momentous decisions be properly explained is not some sort of procedural nicety. It is important to proper decision making and as importantly it is imperative to such decisions being accepted by all those that are affect, but most especially those that are disappointed by them. It may well be in the best interests of ZW that she has only limited, if any, contact with her parents in future. I express no view on the matter. But it is in everyone's interests, and basic humanity demands, that her parents understand why, despite contact which appeared to them to be positive, they are to be excluded from their daughter's life. If that is in ZW's best interests the very least the Panel owe to her parents is a proper and coherent explanation of that decision. Absent such explanation, it is little wonder that the parents turn to the Court for answers. The effect of these protracted proceedings on the Relevant Persons is not lost on the Court either: they wait anxiously and patiently to learn whether this young girl it to become a permanent part of their family. Meanwhile, the childhood this young girl is entitled to vanishes, unable to

be paused whilst the social workers and the lawyers sort out which family she should grow up in. It is imperative that whatever is best for this child is determined, and properly explained, expeditiously.