SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2022] SC GLW 3

GLW-AD31 21

JUDGMENT OF SHERIFF A M CUBIE

in the Application

AB

Applicant

for access to Adoption Papers

Glasgow 7 January 2022

[1] I have been asked to consider an application for access to an adoption process by the child of the adopted person.

Background

[2] The applicant JH seeks access to the adoption process relating to JH's father who was adopted in 1933, the year of his birth. He has, the applicant explains, since died. The applicant has no siblings. The basis for the application is broadly curiosity – to know the birth family name. The applicant asks to be put in the same position as the adopted person.

[3] The matter was subject to an earlier refusal by another sheriff *in hoc statu*; no note was issued. The applicant has provided further material and I am content to treat this matter as a fresh application.

[4] The further information said to support the applicant consisted of a letter from an individual who had made a similar application in England, and an email from a self-titled "DNA Search Angel" which supported the applicant on the basis that information allowing

families to be traced by way of DNA was so widely available as to render the confidentiality academic and unnecessary.

The Applicable Law

[5] Adoptions are private; they are held in private in terms of s109 of Adoption and Children (Scotland) Act 2007 (The 2007 Act). The disclosure of information is controlled in relation to adoption agencies by the 2007 Act which provides:

> "38 **Disclosure of information kept under relevant enactment**
>
> (1) The Scottish Ministers may by regulations make provision for or in connection with the disclosure by adoption agencies to adopted persons and other persons of a description or descriptions specified in the regulations of information kept by virtue of a relevant enactment.
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> (2) Regulations under subsection (1) may in particular include provision—
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> (a) in circumstances specified in the regulations, conferring discretion on adoption agencies as to whether to disclose or withhold information,
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> (b) specifying conditions which are to apply in relation to the disclosure of information, or information of a type so specified, to adopted persons of a description or descriptions so specified,
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> (c) specifying circumstances in which information should not be disclosed to adopted persons of a description or descriptions so specified,
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> (d) about the review of decisions of adoption agencies in connection with—
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> (i) the disclosure of information,
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> (ii) the conditions applicable to such disclosure.
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> (3) In this section, "relevant enactment" means—
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> (a) section 37, or
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> (b) any other enactment (whether or not in force) which imposes a requirement (however expressed) to keep records relating to adoptions."

[6] Access to the adoption court process is also protected in accordance with the confidentiality that characterises adoption proceedings. The matter is regulated by Rule 25 of the first schedule to Act of Sederunt (Sheriff Court Rules Amendment)(Adoption and Children (Scotland) Act 2007) 2009 (SSI 2009/284) which is in the following terms, underlined so far as relevant to this application:

> "25.— **Final procedure**
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> (1) After the granting of an adoption order or order under section 59 of the 2007 Act, the court process must, immediately upon the communication under rule 23 being made or, in the event of an extract of the order being issued under rule 24, immediately upon such issue, be sealed by the sheriff clerk in an envelope marked "Confidential".
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> (2) The envelope referred to in paragraph (1) is not to be unsealed by the sheriff clerk or by any other person having control of the records of that or any court, and the process is not to be made accessible to any person for one hundred years after the date of the granting of the order except—
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> (a) to an adopted child who has attained the age of 16 and to whose adoption the process refers;
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> (b) to the sheriff clerk, on an application being made to him by an adoption agency, and with the consent of the adopted person for the purpose only of ascertaining the name of the agency, if any, responsible for the placement of that person and informing the applicant of that name;
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> (c) to a person on the granting of an application made by him to the sheriff setting forth the reason for which access to the process is required;
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> (d) to a court, public authority or administrative board (whether in the United Kingdom or not) having power to authorise an adoption, on petition by it to the court which granted the original order requesting that information be made available from the process for the purpose of discharging its duties in considering an application for adoption and specifying the precise reason for which access to the process is required;
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> (e) to a person who is authorised by the Scottish Ministers to obtain information for the purposes of such research as is intended to improve the working of adoption law and practice."

[7] The starting point in relation to the current statutory regime is the sealing of the process and the maintenance of confidentiality for a period of one hundred years. I observe (in relation to a comment in material presented by the applicant) that the rules are not the remnant of some antiquated system but were promulgated in 2009 following the introduction of the 2007 Act, at a time when matters such as rights under Articles 8 and 10 of the ECHR were factored into legislative thinking. The wording of the rules can be taken to have been selected advisedly and having regard to ECHR rights.

[8] Against that background of confidentiality for one hundred years, the law provides various routes and criteria for opening the process depending upon the identity of the applicant; but critically, in terms of the regulations as currently worded, descendants of the adopted person (such as the applicant) have no special status or means of access to the papers.

[9] Beyond the terms of the rule, which is that any person must set forth the reason for which access to the process is "required," the law in Scotland does not lay down any guidance as to when it would be appropriate for the court to allow such disclosure of information to a person other than the adopted person. But the use of the word "required" suggests a standard beyond a request. I am not aware of any reported case in Scotland in which the matter has been examined (in paragraph 5-08 *Adoption of Children in Scotland* (5th edition) by Morag Jack, there is reference to one unreported case from 1984).

Case law from England and Wales

[10] I consider that some limited assistance can be gleaned from the approach taken in authorities from the courts in England and Wales; although the wording of the statutory provisions is different, the confidentiality of the process is recognised in the same way. (See

AB and CB v *X's Curator* 1963 SC 124 at 125 for an expression of the assistance that can be gleaned from English cases)

[11] In the case of *Re L (Adoption: Disclosure of Information*) [1997] 2 WLR 739 the Court of Appeal in England approved the judge's observations at *D* v *Registrar General* [1996] 1 FLR 707 at 715

> "In my judgment, it is necessary to have regard to the mandatory language of section 50(5) of the Adoption Act 1976, that is to say the precise words of the subsection:
>
> > 'the Registrar General shall not' - mandatory - 'furnish any person with any information contained in or with any copy or extract from any such registers or books except in accordance with section 51 or under an order of any of the following courts …'
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> It seems to me that the use of the word 'shall,' coupled with the use of the words 'except in accordance with section 51 or under an order,' imports an element of the exceptional into the situation.
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> This is not, as Cazalet J [1996] 1 FLR 707, 715 made clear, a situation where a court could not deal with the matter simply upon the basis of the
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> > 'emotional desire in any birth relative to obtain information … it involves something more than the strongly held wish to know or the strong underlying curiosity to find out; there must be a need or benefit, which must relate to the adopted person rather than to the birth family.'
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> … I believe that it would have to be a truly exceptional circumstance if the confidential registers and books were to be opened to anybody in the case of an adopted child. … There is not of course a statutory test, but I consider that something requiring an exceptional 'need to know' the information which it is sought to obtain should be established."

[12] Although this case related to a request for access to papers held by the Registrar General rather than the court, there is in my view a reasonable read across to the confidentiality of the court process; in the circumstances, even in the absence of a statutory test of "exceptional circumstances" the court held that such access to the papers may only be provided in "exceptional circumstances", for example if it was required for medical reasons.

[13] The law in England and Wales then developed so that the relevant statutory provision, Section 79 of the Adoption Act 2002 (the 2002 Act), reads, so far as relevant, again highlighted for ease of reference:

> "(1) The Registrar General must make traceable a connection between any entry in the registers of live-births or other records which has been marked 'Adopted' and any corresponding entry in the Adopted Children Register.
>
> (2) Information kept by the Registrar General for the purposes of (1) is not to be open to public inspection or search.
>
> (3) Any such information, and any other information which would enable an adopted person to obtain a certified copy of the record of his birth, may only be disclosed by the Registrar General in accordance with this section.
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> (4) In relation to a person adopted before the appointed day [ie 30 December 2005] the court may, in exceptional circumstances, order the Registrar General to give any information mentioned in (3) to a person."

[14] These provisions were subject to judicial analysis in the case of *FL* v *Registrar General* [2010] EWHC 3520 as follows, dealing with an application from the daughter of an adoptee to access the adoption papers held by the registrar general.

> "56 The first advanced reason is that FKL would wish 'to know more about my father'. This is, although entirely understandable, nothing out of the ordinary for it applies to any curious human being anxious to understand their forbearers and the effect those forbearers had in shaping their own genetic inheritance, possibly character and development.
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> 57 The 'life timeline' document at section C28 to 32 contains, if I may say so, many examples of egregious behaviour by her father which impacted upon her mother, herself and her sibling and which may have been borne of the 'mental health difficulties' to which she elsewhere refers. They include examples of bullying, rudeness, financial irresponsibility, persistent excessive alcohol consumption with all its consequences, including such was the excessive nature of his consumption, cirrhosis of the liver, the condition from which he died, and many examples of aggression and intolerable behaviour.
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> 58 … [W]hat she has described, whilst profoundly shocking to the individuals concerned, does not in my judgment fall within the category of exceptional but is all too sadly a tale too often told, both within the forensic area and outwith.

> 59 … There is no evidence of any kind put forward to suggest that she or her brother nor, indeed, any other member of her family, including her children, do suffer or have ever suffered from any such illness, and there is no evidence of further engagement with the mental health services referred to above. Again, it is a surprise to many to hear of the statistically very significant percentage of the population who at one time or another in their adult lives will encounter first-hand as patients the mental health services or at second-hand, being associated with such a patient. I regret to say that again, viewed objectively, I do not find this factor to fall within the category of exceptional.
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> 60 Her father's behaviour, social isolation, his jealousy, aggression and obsessive nature may FKL speculates, have been "exacerbated" by his adoption. Yet, sadly and all too evidently, many in society suffer from such characteristics and such behaviour and there is no obvious or necessary connection between them and adoptive status. This too I do not regard as exceptional.
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> 61 FKL says:
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> > 'Although it was my father who was adopted and not me, the void created by his unknown background has effective me enormously'".
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> I do not doubt that for one moment, but it is an issue with which many in the population, even if I were to limit my consideration to the children or grandchildren of adopted persons, struggle with, and again, whilst recognising its profound sadness to her, it does not in my view qualify for exceptionality. …"

[15] The court, constrained by the need for exceptional circumstances to be shown, refused the request to access the papers.

[16] These cases emphasise the importance of confidentiality to the adoption process.

[17] I turn to the case of *X (Adopted child: Access to Court file)* [2014] EWFC33 which did relate to an application to have access to the court papers; the judge was Sir James Mumby, then President of the Family Division of the High Court of England and Wales, who commented on the fact that there was no reported case on the matter.

[18] The judge examined the different regimes under which parties in England and Wales might seek sight of adoption papers. Where the applicant was a descendant of the adopted person, there were only two statutory routes available. One was under the 2002 Act s79 (4) and the other was under the Family Procedure Rules 2010 r14.24.

[19] As has been noted, s79 (4) includes the qualifying expression "in exceptional circumstances", so access cannot be granted if the facts of the case are not "exceptional",

[20] The judge considered the terms of the Family Procedure Rules which are in the following terms:

> 14.24. **Documents held by the court not to be inspected or copied without the court's permission**
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> Subject to the provisions of these rules, any practice direction or any direction given by the court—
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> (a) no document or order held by the court in proceedings under the 2002 Act will be open to inspection by any person; and
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> (b) no copy of any such document or order, or of an extract from any such document or order, will be taken by or given to any person.

[21] Accordingly as far as r14.24 was concerned, the court could grant permission to allow inspection or copying of documents held. Under r14.24 and its predecessors, the court was given power to permit the opening to inspection of any document held by the court, with no apparent limitation on that power. There was nothing which required the court to take the approach which would apply in a s79 (4) application. But even allowing for that apparent freedom, the court held that an application under r14.24 should always be approached with an appropriate degree of caution.

[22] In considering the matter, the court identified a number of principles, holding in relation to these rules that:

(a) the court had a discretion whether to disclose information contained in its own file to an applicant;

(b) in considering whether to exercise that discretion, the court had to have regard to all the circumstances of the case and had to exercise its discretion justly;

(c) the public policy of maintaining public confidence in the confidentiality of adoption files had to be considered;

(d) important considerations were the duration of time that had elapsed since the order was made, and the question of whether any or all of the affected parties were deceased;

(e) the nature of the connection between the applicant and the information sought was relevant;

(f) it was important to consider the potential impact of disclosure on any relevant third parties, and any safeguards that could be put in place to mitigate that.

[23] The court determined that the circumstances were not exceptional; relief accordingly could not be granted under s79(4) of the 2002 Act. But having regard to r14.24, and applying the principles which had been identified, the court did grant the order sought, based on a number of factors. These included the limited contents of the court file, that the adoptee, his adoptive parents, and (probably) his birth mother, were dead, that the adoption was over 84 years ago; that the applicant was the daughter of the adoptee; that her reasons for wanting the information were entirely genuine and understandable; and that any upset which might be caused to any surviving relatives of *X*'s birth mother was speculative.

[24] I have drawn at length from the decision in *X* for two reasons; firstly because of the status of the deciding judge and the weight to be given to his observations about confidentiality in adoption proceedings notwithstanding the different jurisdiction; and secondly because in the application before this court, reference was made by the applicant to correspondence from a supporter who I deduce was the successful applicant in *X*.

Analysis of the current position in Scotland

[25] Access is determined solely by the proper application of rule 25. Rule 14.24 of the Family Procedure Rules 2010 which was the basis of the decision in X is not applicable in relation to Scottish adoptions. I consider that the use of the word "required" in rule 25 is akin to the exceptional circumstance situation anticipated in D and brought into law in England & Wales. There are no alternative routes for applicants in Scotland; the only basis on which access can be granted is if the person applying can make out that there is a requirement, and that I conclude can only be done if there are exceptional circumstances.

[26] I recognise that words need not necessarily be interpreted in accordance with their day-to- day usage; see *M* v *C* 2021 SC 324 paragraph (9), where the court said:

> "9. … The aim is to ascertain the intention of Parliament, which requires the passage in question to be set in its context, not only in respect of the surrounding provisions, but also with regard to its purpose. Where necessary the court can imply a meaning which the words used would not ordinarily carry. If a suggested meaning would contradict another provision in the statute, that should prompt particular care as to whether another construction is available which would avoid the conflict."

[27] But even armed with this apparent flexibility, I am unable to determine that "required" in the context of these regulations, and given the purpose of maintaining confidentiality, can be seen other than as meaning some exceptional circumstance - a pressing need or other compelling justification; the provision could have been worded to set the bar lower for disclosure, or to put direct descendants into a different category. The legislature did not do so.

[28] Accordingly in the absence of exceptional circumstances, such as a medical query, an application such as this, based primarily on curiosity, cannot succeed during the 100 year restriction period.

[29] In reaching this view, I associate myself with the words of McDonald J in *H* v *R and another (No. 2)* [2021] EWHC 1943 (Fam):

> "60. I acknowledge that there is increasing debate regarding certain of the matters set out in the foregoing paragraph, and in particular whether confidentiality with respect to adoptive placements is any longer possible in the face of advancing communications technology. However, in accordance with the principles I have summarised above, those debates and the consequences flowing from them remain matters for Parliament and not the court, and have not, to date, led to any substantial amendment to the public policy approach recognised by law that I have articulated above."

[30] McDonald J was to an extent echoing the words of Wood J in *FL* at para 27:

> "It is not, in my view, for me to in effect, rewrite the plain words of section 98 of the 2002 Act so as to include such acts nor, indeed, should I approach the case as if it were some Parliamentary oversight and make allowance for the omission. This is pre-eminently a matter for Parliament. Until Parliament does address that issue, if it ever chooses so to do, I must continue to recognise that for whatever reason, which I decline to speculate upon, Parliament intentionally left such a group out of the definition which had they been included would have afforded them different rights and different routes to obtaining information."

[31] It is for the Scottish Parliament to consider the current provisions which regulate the opening of adoption petitions.

The circumstances of this application

[32] But this matter, as I discovered in making further enquiries, is not determined by these observations about the current law. I return to the application. The adopted person was adopted in 1933. The law at that time was regulated by the relatively new Adoption of Children (Scotland) Act 1930, which came into force on 1st August 1930 (the 1930 Act). Rules were promulgated under the 1930 Act by way of the Act of Sederunt to Regulate Proceedings … in the Court of Session or in any Sheriff Court (SI 891 of 1930). I record my thanks to the staff of the sheriff court library service for tracing a copy of the Act of Sederunt.

[33] These rules from 1930 provide as follows at paragraph 12:

> "12.—(a) In the case of an application to the Court of Session, immediately upon the communication referred to in paragraph 9 hereof being made, or, in the event of an extract being issued in terms of paragraph 11 hereof, immediately upon the issue of such extract, the Clerk of Court or the Extractor shall send to the Keeper of the Registers and Records the Petition and whole process in a sealed envelope marked "confidential," bearing the name or names, surname or surnames, of the petitioner or petitioners, the name and surname of the child to whom the adoption order relates, and the date of the order; and the said envelope shall not be opened nor made accessible to any person within the twenty years next after the date of the adoption order, except (i) to an adopted child who has attained the age of seventeen years and to whom such order refers, or (ii) by authority of the Division by which the order was pronounced, obtained on Petition to said Division, and setting forth the reasons for which access to the process is required.
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> (b) In the case of an application to any Sheriff Court the process shall, immediately upon the communication referred to in paragraph 9 hereof being made, or, in the event of an extract being issued in terms of paragraph (11) hereof, immediately upon the issue of such extract, be enclosed by the Clerk of Court in a sealed envelope, docqueted as aforesaid, and the said envelope shall not be opened by the said Clerk, or by any person having control of the records of any Sheriff Court, nor shall the process be made accessible to any person within the twenty years next after the date of the adoption order, except (i) to an adopted child who has attained the age of seventeen years, and to whom such order refers, or (ii) by authority of the Sheriff Court in which the order was pronounced, obtained on Petition to said Sheriff Court, and setting forth the reasons for which access to the process is required."

[34] As can be seen, the same provision in relation to confidentiality applied, with the same test of a "requirement". But, crucially for the applicant in this case, the period within which the process remains confidential was of a duration of twenty years. The period expired in 1953. Accordingly having regard to the passage of time and the absence of any obvious saving provision, the process can be opened without the need for any exceptional circumstances, or a requirement, to be established.

[35] The court should still proceed with caution but having regard to the considerations which applied in *X* as identified by Sir James Mumby, I consider that the court has a wider

discretion whether to disclose information contained in the process to an applicant, freed from the constraints of the requirement for confidentiality.

[36] The court has to have regard to all the circumstances of the case and has to exercise its discretion fairly; the public policy of maintaining public confidence in the confidentiality of adoption files has to be considered and respected. In exercising its discretion, important considerations are the duration of time that had elapsed since the order was made, the question of whether any or all of the affected parties are deceased, the potential impact of disclosure on any relevant third parties, and any safeguards that could be put in place to mitigate that, and the nature of the connection between the applicant and the information sought is relevant.

[37] The applicant is the child of the adopted person; the adopted person and his wife, the applicant's mother are both deceased. The applicant has no siblings. It is highly likely that the birth mother is deceased. Any upset which might be caused to any surviving relatives of the adopted child's birth mother is speculative. The adoption was over 88 years ago. The applicant's reasons for wanting the information are both intelligible and genuine.

[38] I am accordingly satisfied that the application can be granted and that the applicant can see the adoption process relating to the applicant's birth father.