

Appellate Deference in Scottish Child Protection Cases

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A. INTRODUCTION

It is generally accepted that an appeal court is not normally the place for a full rehearing of the case argued at first instance. The limited role of the appeal court needs to be particularly remembered in child protection cases, which tend of their nature to call for assessments of credibility in matters of high disputation, and for close evaluations of statutory tests which, however precisely expressed, always demand judgments of the nicest character. Though society rightly condemns child neglect and abuse in the highest terms, courts asked to make orders for the protection of vulnerable children are in reality rarely faced with the choice between good and evil, or with a situation in which there can only be one acceptable outcome. Instead, determining the outcome of a child protection case usually calls for an assessment of a range of options, each of which may carry serious drawbacks, in an attempt to

identify which option is the best – which all too often means the least worst – for the particular child in the circumstances that actually exist. In many, if not most, cases a different outcome from the one determined at first instance might well be as rational, reasonable and defensible as the decision actually made. For these reasons the long-recognised need for appeal courts to afford a certain degree of deference to the decisions made by the first instance tribunal is especially important in child protection cases. But identifying the precise level of deference that is appropriate in any individual case is a matter of some difficulty, not least because that level may differ depending upon the nature of the judgment being appealed against, and of the level of the court hearing the appeal.¹

The most authoritative recent discussion of appellate deference in the context of child protection cases is to be found in the Supreme Court's decision in the English case of *Re B (A Child)*.² The substantive question in that case was whether a care order made under s.31(2) of the Children Act 1989 and designed to lead to the adoption of a three year old child should stand. The order having been made, the primary dispute before the Supreme Court (and the one central to the present discussion) concerned the boundaries beyond which it would be wrong for an appellate court to set aside the decision of the court of first instance. The purpose of this article is neither to analyse the facts of that English case (as complex as they are tragic) nor to explore the English legislation at issue there (very different from the Scottish legislation): a comparative analysis must await another day. Rather, utilising the structures suggested by the Supreme Court to the issue, this article aims to explore how appellate deference operates in Scotland. The principles derived from that exploration will then be applied to the special context of the children's hearing system in Scotland – where appeals do not go beyond the Court of Session – in order to determine whether that system's peculiarities demand any modification of the traditional approach.

¹ In both *S v Locality Reporter Manager* 2014 Fam LR 109 (at [36] – [43]) and *M v Locality Reporter Manager* [2015] CSIH 56 (at [18] – [21]) the Inner House was at pains to emphasise the limited role of the court hearing appeals in child protection cases, and pointed out that the role of the Court of Session is even more limited than that of the sheriff hearing appeals from the children's hearing.

² [2013] UKSC 33.

B. THE “THRESHOLD” ANALYSIS

The Supreme Court adopted an analysis which has long been called in England the “threshold approach”, whereby a court that is asked to make a public law order for the protection of a child must ask itself two questions: first, whether the statutory threshold for state intervention in the child’s family life has been crossed and, secondly (but only if the first question is answered affirmatively), what order it would be appropriate to make. Crucially, there is no implication that, the threshold having been crossed, an order will always be made – for the making of the order, and its terms, is a matter separate from the question of the court’s statutory authority to make the order.³ The terminology of “threshold” has not traditionally been used in Scotland to describe the statutory requirements in the child protection statutes, though the word is beginning to appear,⁴ and helpfully so. The threshold analysis tends to clarify the judicial process by highlighting the conceptually different types of decision that need to be made in the course of a child protection case. Nor is it any departure in substance (as opposed to terminology) from the traditional Scottish approach. Under the now replaced Adoption (Scotland) Act 1978, the Scottish courts applied to the issue of dispensation with parental consent to adoption what came to be called “the two-stage test” – was a ground for dispensation made out and, if so, ought dispensation be granted?⁵ This is another way of expressing the threshold analysis.⁶ Again without using the “threshold” terminology, the very structure of the children’s hearing system in

³ This is the crucial underlying proposition in *Re B (A Child)*, allowing the court to find that ECHR considerations, such as proportionality, do not arise at the threshold stage of the judicial process. As Lord Wilson put it (at para [29]) “No interference [in family life] occurs when a judge concludes that the threshold is crossed. The interference occurs only if, at the welfare stage, the judge proceeds to make a care or supervision order; and it is that order which must therefore not fall foul of article 8”.

⁴ See for example *S, Petitioner* 2014 Fam LR 23 at [69] where the question of whether a ground for dispensing with parental consent to adoption was referred to as “the threshold issue”; and *Midlothian Council v M* 2014 SC 168 at [9] and *AM & SO v Brechin* [2015] SCGLA 52 at [9] where the grounds of referral to a children’s hearing were described as the “threshold criteria”.

⁵ See *Lothian Regional Council v A* (1992) SLT 858, per Lord President Hope at 862.

⁶ Under the current legislation, the two stages are conflated with the welfare ground for dispensing consent, with the result that if that ground is established, “parental consent must be dispensed with; the court then has no choice in the matter (unlike the situation when the incapacity ground applies)”: *S, Petitioners* 2014 Fam LR 23, per Lady Smith at [30].

Scotland encapsulates the separation of the two questions, by requiring two different tribunals to provide the answers.⁷ The threshold question of whether there are grounds upon which the state can legitimately interfere in a child's upbringing falls exclusively to the sheriff if the grounds upon which a child is referred to a children's hearing are challenged or not understood (i.e. if it is not accepted that the threshold has been crossed); the outcome question of whether, once the threshold is crossed, an order ought to be made, and if so on what terms, is a question to be answered at first instance by the children's hearing. The establishing of grounds never legally requires the hearing to make an order and it always retains the right to discharge the referral.⁸

So the "threshold" analysis fits the Scottish as readily as it does the English approach in child protection cases. The importance of *Re B (A Child)* is not that it legitimated this long-established terminology but that it affirmed the importance of recognising "the different intellectual exercise which is in play in each of these contexts because that will dictate the proper approach of the appellate court to a challenge about the correctness of a judge's decision".⁹ Additionally, the Supreme Court emphasised that the judicial decision-making process has considerably more stages than would be implied by the terminology of a "two-stage test". Lord Neuberger¹⁰ broke the threshold question itself down into three stages: the first instance tribunal is required (i) to make findings of fact, (ii) to identify the proper meaning of the statutory test, and (iii) to determine whether the facts meet the test. The outcome decision (described in *Re B (A Child)* as "the welfare decision") becomes therefore the fourth question for the court (or, in Scotland, the children's hearing) once the threshold question has been answered affirmatively.¹¹ An appeal may be taken

⁷ This was famously described by Lord President Hope in *Sloan v B* 1991 SLT 530 at 548E as the "genius" of the system.

⁸ Children's Hearings (Scotland) Act 2011, s.119(3)(b). See *S v Locality Reporter Manager* 2014 Fam LR 109 at [7].

⁹ [2013] UKSC 33, per Lord Kerr at [107].

¹⁰ At [50].

¹¹ Both Lord Kerr (at [107]) and Lady Hale (at [199]) describe the process as having three rather than four stages, but they do not address findings in law (Lord Neuberger's second stage) which were not at issue in *Re B*.

against the first instance tribunal's decision on each of these four issues and the considerations justifying appellate deference differ at each stage.

C. THE FOUR STAGE ANALYSIS

a. Stage one: challenging findings in fact

First instance tribunals have long been assumed across the common law world to have unique advantages in making findings in fact that cannot be reproduced on appeal and which therefore require an appeal court to defer to such findings. In *Clarke v Edinburgh and District Tramways Co*,¹² Lord Shaw of Dunfermline said this:

“In my opinion, the duty of an appellate Court ... is for each Judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment”.

The advantages adverted to in this dictum are specified more explicitly by Lord MacMillan in *Thomas v Thomas*,¹³ which is now the *locus classicus* for deference to the fact-finder, at least in Scotland:

“The appellate Court has before it only the printed record of the evidence. What is lacking is evidence of the demeanour of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial Judge possesses in reaching his conclusion, but it is not available to the appellate Court. So far as the

¹² 1919 SC(HL) 35 at p. 37.

¹³ 1947 SC(HL) 45 at p.59.

case stands on paper it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial Judge, who has enjoyed the advantages not available to the appellate Court, becomes of paramount importance and ought not to be disturbed”.

In other words, appellate deference should be shown because the judge at first instance is quite simply in a better position than an appeal court to assess the credibility of witnesses who appear before him or her.¹⁴ The assumption upon which this approach is based, that the taking into account of demeanour and atmosphere is of genuine assistance in determining credibility, finds little support in psychological literature¹⁵ but it is a deep-rooted belief in our legal culture.¹⁶ There are, however, other and stronger reasons – based on pragmatism rather than principle – justifying appellate deference to first instance findings of fact. In *Re B (A Child)*¹⁷ Lord Neuberger said that the appellate deference traditionally shown to first instance findings of fact:

“can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals on fact can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first).”

For these reasons, Lord Neuberger concluded that the appellate tribunal will interfere with first instance findings in fact “only in a rare case”. Lord Kerr put

¹⁴ *Re B (A Child)* [2013] UKSC 33, per Lord Kerr at [108].

¹⁵ D. Nicolson, “Truth and Demeanour: Lifting the Veil” (2014) 18 Edin. L.R. 254. See also A. Blumenthal, “A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanour Evidence in Assessing Witness Credibility” (1993) 72 Nebraska L. Rev. 1157; T. Bingham, “The Discretion of the Judge” (1990) Denning L.J. 22 at pp. 29-31.

¹⁶ Though accepting the lack of scientific evidence to support the special reliability of the assessment of witnesses made by the judge at first instance, Lord Bingham, op. cit. at p. 30, nevertheless said that “the trial judge’s immediate contact with the witnesses and the unfolding drama of litigation nevertheless gives him insights denied to those who come later. It is the advantage which the journalist on the scene at the time enjoys over the historian. And even if the judge may be wrong, no-one else can be sure of being right”. The last comment is unchallengeable, but the same cannot be said for the implication that the journalist’s insight is to be better trusted than the historian’s.

¹⁷ [2013] UKSC 33 at [53]. See also *Sanderson v McManus* 1997 SC(HL) 55, per Lord Hope at p. 58.

the matter rather more strongly when he stated that “unless the finding is insupportable on any objective analysis it will be immune from review”.¹⁸ Both dicta confirm that appellate deference at this first stage is of a high level and without being any more precise than that, it can be said with some confidence that an appellate tribunal will not interfere merely because its reading of the evidence would have inclined it to a different conclusion on the facts. So in *Re A (Children)*¹⁹ the judge at first instance had found on the evidence that the deliberate infliction of injury upon children by their mother had not been proved. The Court of Appeal held that while the judge could have found, on the evidence, that the injuries were non-accidental, he had fully explained why he had not so found and so the Court of Appeal could not overturn his decision just because the opposite decision had been open to him on the facts as he found them.

In a quite different context (whether a disposition of land amounted to a gratuitous alienation) Lord Reed reiterated the traditional approach in *Henderson v Foxworth Investments Ltd*,²⁰ where he concluded that:

“In the absence of some other identifiable error ... a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified”.²¹

He went on to point out that that approach was consistent both with existing Scottish authority (including *Thomas v Thomas* and the more recent *McGraddie v McGraddie*²²) and with *Re B (A Child)* itself. As in *McGraddie*, the question asked of the Court of Session had been whether the first instance tribunal’s conclusion on the evidence had been “plainly wrong”. The

¹⁸ Ibid at [108].

¹⁹ [2014] 1 FCR 24. It was stated at [34] that nothing in *Re B (A Child)* changed the traditional approach applied in this case.

²⁰ [2014] UKSC 41 at [58]-[69].

²¹ Ibid at [67].

²² [2013] UKSC 58.

appropriateness of this phrase was questioned in *Re B (A Child)* but in the context of findings of fact the language was both endorsed and explained by Lord Reed in *Henderson*:

“The adverb ‘plainly’ does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.”²³

The Court of Session commented upon Lord Reed’s analysis in *S v S*²⁴ as follows:

“The court does not understand Lord Reed to be seeking to depart from the familiar and long-settled approach of the Scottish courts hitherto in appeals on matters of fact ... (W)hat he was doing was explaining in more modern language the meaning of “plainly wrong”... When considering reversing a first instance judge’s findings–in–fact, therefore the appellate court should confine itself to situations where it can categorise the findings as incapable of being reasonably explained or justified in terms of the *dicta* quoted in *Henderson v Foxworth Investments* (at paras [63] to [65]). *Mere disagreement with the findings at first instance will not suffice*”.

b. Stage two: challenging findings of law

Once the judge at first instance has made findings in fact, he or she must then make findings of law. In Scottish child protection cases the matter will most commonly arise when a sheriff is hearing an application for a grounds determination after grounds of referral to a children’s hearing have been denied or not understood and differing interpretations of the relevant paragraph in s.67(2) of the Children’s Hearings (Scotland) Act 2011 are offered by the

²³ [2014] UKSC 41 at [62].

²⁴ 2015 Fam LR 37 at [22]-[23] (emphasis added).

parties.²⁵ Beyond the hearing system a question of law might arise when the court is asked the correct meaning of the threshold for the making of a permanence order in s.84(5)(c)(i) of the Adoption and Children (Scotland) Act 2007,²⁶ or of a ground for dispensing with parental consent to adoption.²⁷

Now, in a jurisprudential sense, divorced from practice, the interpretation of the law calls for a judgment to be made and alternative (even opposing) answers to the same question may be rational, reasonable and indeed justifiable, just as opposing interpretations of the evidence may be – for otherwise we would be obliged to dismiss all dissents in multi-bench courts as irrational and unreasonable. That there is no “purely” correct answer to questions of law is seen most clearly when a higher court is required to make a policy decision, such as when the House of Lords were asked whether the phrase “living together as husband and wife” was capable of including a same-sex couple. In 1999 that court answered that question in the negative, unanimously;²⁸ at the same time it decided (by a majority of three to two) that a same-sex couple came within the concept of “family” for the purposes of the Rent Acts. The two dissenters to that latter decision both gave reasoned speeches as to why the concept did not, in their view, include same-sex couples. One might (and most today would) disagree with the policy underlying the reasoning of the minority and how they exercised their judgment, but that does not make their conclusion irrational, unreasonable and unjustifiable. What made the minority decision wrong in law was not the weakness of its intellectual justification but the fact that a majority of the court held otherwise. In cases like these it simply cannot be said that there was only one possible answer to the question posed to the court. In *Fitzpatrick* (and examples could of course be multiplied) the view of the minority was at the very least arguable in the sense of being intellectually defensible – if for no other reason than that the case was unlikely

²⁵ In *W v Schaffer* 2001 SLT (Sh Ct) 86 at p.88 Sheriff Principal Nicholson described a failure to apply the correct statutory test as an error of law.

²⁶ As in *East Lothian Council, Petrs* [2012] CSIH 3.

²⁷ As in *P v Lothian Regional Council* 1989 SC 200, *S v M* 1999 SC 388 and *S v L* 2012 UKSC 30.

²⁸ *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27.

to have reached the highest court otherwise²⁹ – and that view might have held sway by a differently constituted bench. Yet the very fact that the highest court has answered the question it was posed gives, in legal terms, the “correct” answer. It was wrong in law to say, between 1999 and 2004, that a same-sex couple could live together as husband and wife; it has been wrong in law to deny it since the House of Lords overruled itself on the point in *Ghaidan v Mendoza*.³⁰

So the notions of “right” and “wrong” take on artificial meanings in this context. A “right” answer is an answer that is supported by legal authority rather than one that is intellectually defensible. The rule of law itself requires that the legal system provides a concrete answer to every legal question – which becomes the “right” answer – with every other possible answer, rational or irrational, reasonable or unreasonable, arguable or unarguable, being equally “wrong” (until the law is changed by judicial reversal or legislation). So by a fiction, necessary for the integrity of the legal system itself, we accept, first, that the law has one clear meaning and, secondly, that the hierarchy of courts carries with it a hierarchy of authority. It follows from this that there is no room for any appellate deference to a lower court’s conclusion on the law if challenged on appeal. As Lord Neuberger put it in *Re B (A Child)*:

“In relation to [an issue of pure law], the function of [any appellate court] is uninhibited by the fact that it is an appellate tribunal. That is because there is a single ‘right or wrong’ answer, which an appellate court has to determine for itself, although it often derives assistance from the reasoning of the court or courts below”.³¹

Any sheriff, therefore, who adopts an interpretation of one of the grounds of referral to a children’s hearing, or of the test for the making of a permanence

²⁹ Permission to appeal to the Supreme Court will be refused if the appeal does not raise any arguable point of law of general public importance: Court of Session Act 1988, s.40A(3); Supreme Court Practice Direction 3.3.3. In *R (Evans) v Attorney General* [2015] UKSC 21 Lord Neuberger at [52] affirmed that “many court decisions are on points of controversy where opinions (even individual judicial opinions) may reasonably differ”.

³⁰ [2004] 2 AC 557.

³¹ [2013] UKSC 33 at [55].

order, that is contrary to existing authority can expect to be overruled³² unless the existing authority is itself overturned; any first instance tribunal that determines a legal dispute about which there is no existing authority may hope that a higher court agrees with its determination because of the strength of its reasoning, but can expect no deference to be shown by an appellate tribunal that disagrees with the determination.

c. Stage three: challenging evaluative judgments

Once the facts are found, and the correct meaning of the statutory test has been identified, the first instance tribunal must then go on to the third stage of the threshold question, which is to apply the statutory test to the facts as found. This is the stage at which the question is, in its fundamentals: Has the threshold been crossed? So for example if the statutory test is that the child “is likely to suffer significant harm”,³³ the decisions that require to be made are whether the established facts indicate such a “likelihood”, and whether the harm that is assessed to be likely can properly be characterised as “significant”. Indeed, most threshold tests in the child protection legislation demand the making of such decisions: s.67 of the Children’s Hearings (Scotland) Act 2011, for example, lists the grounds for referral to a children’s hearing, using such evaluative concepts as “reasonable”, “serious” and “likely” as well as matters of fact; “likelihood of suffering significant harm” is one of the tests for the granting of a child protection order in s.38 of the 2011 Act;³⁴ “serious detriment” requires to be established before a permanence order may be made under s.84(5)(c)(ii) of the Adoption and Children (Scotland) Act 2007. The determination of whether tests like these are satisfied requires not so much a finding in fact but a judgment upon the facts as found.

The appropriate descriptor for decisions of this nature has been a matter of some dispute, with different judges in *Re B (A Child)* using different words to describe the process. Lord Wilson and Lady Hale adopted the terminology of a

³² See for example *S v Authority Reporter* 2012 SLT (Sh Ct) 89 where the sheriff was overruled by the Sheriff Principal for misinterpreting existing authority on *mens rea*.

³³ This was the formulation at issue in *Re B (A Child)* itself.

³⁴ Though, that order being unappealable, no issue of appellate deference arises in that context.

“value judgment”;³⁵ Lord Kerr preferred the language of an “appraisal”;³⁶ Lord Neuberger suggested “evaluation” as the appropriate characterisation.³⁷ There is unlikely to be any substantive difference in these usages for they are all intended, first, to indicate that what is being asked of the judge is not to find a fact but to make a judgment about that fact, and secondly to differentiate, at least at the conceptual level, the first instance tribunal’s decision at this third stage of the threshold question from the decisions at the previous two stages and from the decision at the outcome stage. The word “evaluation” will be used in this article because it seems to the present author to encapsulate best what each Justice is referring to: the process by which the first instance tribunal weighs up whether the facts satisfy the statutory language or not, by making a judgment call on whether something is “likely” or “serious” or “significant”.

The justification for appellate deference to evaluative judgments made by the first instance tribunal is not located in the first instance judge’s relationship with the witnesses. Rather it comes from a recognition that the concepts at issue, such as “likelihood” or “significance”, are not absolutes: they are of their nature matters of judgment rather than of definition. Words and phrases such as these, common throughout the statute book, require – indeed are designed to require³⁸ – a professional judgment to be made in the context of the facts as found, and it is in the nature of professional judgment that there is not a single definitive answer but rather a range (sometimes wide, sometimes narrow) of answers each one of which can be acceptable or justified. What is likely and significant to one judge may be unlikely and insignificant to another and yet both judges may be right – at least in the sense that neither judge is necessarily wrong. So the question for an appellate tribunal becomes whether the evaluation appealed against falls outwith the range of acceptable or justifiable answers. Since two different tribunals may come to different, even

³⁵ [2013] UKSC 33 at [44] and [199]. So too did Black LJ in the Court of Appeal [2012] EWCA Civ 1475 at [9].

³⁶ Ibid at [109]. He explicitly rejected the characterisation of the decision as a finding of fact: “it is a judgment made on the import of the facts found, rather than a factual finding”.

³⁷ Ibid at [57] and [58]. This terminology was adopted by McFarlane LJ in *Re G (A Child)* [2013] EWCA Civ 965 at [44].

³⁸ See T. Bingham, “Should Public Law Remedies Be Discretionary?” [1991] Pub. L. 64.

opposing, evaluations within the acceptable range, any appellate tribunal that wishes to overrule a first instance tribunal needs more justification for doing so than that it would itself evaluate the facts differently.

The traditional approach to evaluations has been to treat them in the same way as outcome decisions and so, as we will see in that context below, to permit a “generous ambit of reasonable disagreement” to first instance tribunals, with the result that a decision will not be overruled merely because the appellate tribunal considers that it is mistaken, but only when the lower decision can be characterised as “plainly wrong”. However, the Supreme Court, though accepting that an evaluation requires the exercise of judgment, unanimously rejected the notion that the evaluation of the first instance tribunal needs to be shown to be “plainly wrong” to be successfully appealed against. Distinguishing between an evaluative judgment on the one hand and a judgment of a “discretionary” nature on the other hand (that is one at the outcome stage), Lord Wilson stated that the language of a “generous ambit of reasonable disagreement”

“seems apt only to the review of an exercise of discretion, as in *G v G*³⁹... But it is generally better to allow adjectives to speak for themselves without adverbial support. What does ‘plainly’ add to ‘wrong’? Either the word adds nothing or it serves to treat the determination under challenge with some slight extra level of generosity apt to one which is discretionary but not to one which is evaluative. Like all other members of the court, I consider that appellate review of a determination whether the threshold is crossed should be conducted by reference simply to whether it was wrong”.⁴⁰

Lady Hale came to the same conclusion by focusing on the statutory basis for any appeal:

“In relation to evaluating whether the threshold has been crossed, we are all agreed that the proper appellate test is whether the trial judge

³⁹ [1985] 1 WLR 647, discussed below.

⁴⁰ [2013] UKSC 33 at [44]. See also Lord Kerr at [110].

was “wrong” to reach the conclusion he did. This is the test laid down in CPR 52.11(3) and there is no reason why it should not apply in this context. ‘Plainly’ adds nothing helpful”.⁴¹

It seems then that, in the view of the Supreme Court, the notion of there being a “generous ambit of reasonable disagreement” simply does not apply to evaluations: like decisions on the law there is only one right answer, with every other possible answer being wrong. The lower court’s answer might be rational, reasonable and justifiable but that is not the question for the appeal court, which is whether it was “right” or “wrong”. There is however some artificiality with this approach since words like “significant”, “serious” and “likely” are not in their nature absolute, and so do not lend themselves to a “right or wrong” answer. While the rule of law itself requires that we accept exactly this artificiality in relation to a question of law (which, as we saw above, is frequently a matter of policy and judgment as much as a matter of absolute definition), there is no similar imperative to accept such artificiality in the context of evaluation. To say that evaluations, like questions of law, are either right or wrong is true only in the sense that the first instance tribunal must come to a definite conclusion as to whether the threshold has been crossed or not, just as it must come to a definite conclusion on the law, but applying the same sleight of hand to conclude from that that there is only one correct evaluation, just as there can be only one correct legal position, would mean that, as with findings of law, no appellate deference at all is to be shown. Yet the Supreme Court, unanimous on this point, did not follow its own logic and each Justice accepted that some deference was appropriate with evaluations, less certainly than for findings in fact, but more than for findings of law. Three of the justices seemed to accept that an appellate court cannot overturn all first instance decisions it disagreed with⁴² and neither of the others said that the

⁴¹ Ibid at [202]. See also Lord Clarke at [139].

⁴² Lord Kerr at [110] talked of “a degree of reticence” that needed to be shown by appellate tribunals asked to overturn first instance evaluations; Lord Neuberger said at [60] that “the reasons which justify a very high hurdle for an appeal on an issue of primary fact apply, often with somewhat less force, in relation to an appeal on an issue of evaluation”. Lady Hale had serious doubts as to whether the threshold in *Re B (A Child)* had been crossed, but notwithstanding that she felt “driven to the conclusion that this court is not in a position to interfere with the judge’s finding that the threshold was crossed in this case” (at [214]).

appellate court could: in other words an evaluative decision might not be “wrong” even although the Supreme Court itself would have come to a different conclusion. The overall result remains, however, a lowering of the level of appellate deference to evaluative decisions from that which had previously been assumed.

The outcome of the Supreme Court’s decision on this point seems to be based on two considerations, neither of which has much resonance in Scotland. The first is that the “right or wrong” binary is necessitated by the fact that the Civil Procedure Rules lay down as the general ground of appeal that the decision was “wrong”. This argument does not work in Scotland where the ground of appeal is either not legislatively specified (as with appeals against permanence orders) or expressed in an evaluative rather than an absolutist manner (as with appeals to the sheriff from decisions of the children’s hearings).⁴³ The second consideration is that the intellectual exercise asked of first instance tribunals making evaluative judgments is seen by the Supreme Court as being closer to making findings of law (where appellate deference is low) than to making findings in fact (where appellate deference is high, being encapsulated in the “plainly wrong” test whose continuing authority in Scotland was confirmed in both *McGraddie* and *Henderson v Foxworth Investments Ltd*). The Scottish courts seem to regard evaluative judgments as being more analogous to findings in fact than to findings of law. In *S, Petitioners*,⁴⁴ which involved the question of whether the test had been satisfied for dispensing with parental consent to adoption, the Inner House said this:

“We consider that, when considering whether or not the incapacity ground applies, the court is engaged, essentially, in a fact finding exercise; what facts are established by the evidence and, on those facts, does the court conclude that the relevant parent or guardian is unable satisfactorily to discharge [parental responsibilities and parental rights]? Whilst deciding whether or not that is the correct conclusion is, we accept, a matter of judgment,⁴⁵ it will be driven very much by the

⁴³ The ground of appeal in that context is discussed in detail below.

⁴⁴ 2014 Fam. LR 23.

⁴⁵ Cf Lord Kerr’s comments quoted at n.36 above.

facts of the individual case. *That being so, where the findings in fact are not challenged and the conclusion is a reasoned one which, on those facts, was open to the judge, it will usually be very difficult indeed [for an appellate tribunal] to interfere with that part of the overall decision-making process*".⁴⁶

This decision, given a year after the Supreme Court's decision in *Re B (A Child)*, suggests that the Scottish approach to evaluative decisions is to see them as closer to findings in fact than to findings of law and thereby to accord them a higher degree of appellate deference than the Supreme Court would accord evaluative decisions of English courts or tribunals.⁴⁷ However, evaluations require a different thought-process from either decisions of fact or decisions of law: they require a judgment to be made on the nature of the facts. What can be taken from cases like *S, Petitioners* is that the Scottish courts will continue to afford an ambit of reasonable disagreement to first instance evaluations: the breadth of that ambit may well be greater than in England where it is statutorily constrained.

d. Stage four: challenging outcome decisions

Once it has been established that the threshold has been crossed, in the sense that the first instance tribunal has determined that the statutory test, correctly construed, has been met by the facts as found, that (or sometimes another) tribunal must then move on to the final question, which is what, if any, order should be made in response to the crossing of the threshold. This might be characterised as the "outcome decision", which requires of the decision-maker a judgment as to what outcome will best serve the needs of the child. It has long been accepted that an appellate tribunal is not able to overturn such a

⁴⁶ Ibid at [29], emphasis added.

⁴⁷ In *West Lothian Council v M* 2002 SC 411 Lord Justice Clerk Gill at [65] talked of the need to show "manifest error" before an evaluative judgment could be challenged. In *G v M* 1999 SC 439 the Inner House held it could overrule a sheriff's decision that a ground to dispense with parental consent to adoption had been made out only if satisfied that the sheriff "had clearly gone wrong" (at p.449).

decision merely because it would have preferred another.⁴⁸ This was not denied in *Re B (A Child)*. Lord Wilson said this:

“The function of the family judge in a child case transcends the need to decide issues of fact; and so his (or her) advantage over the appellate court transcends the conventional advantage of the fact-finder who has seen and heard the witnesses of fact. In a child case the judge develops a face-to-face, bench-to-witness-box, acquaintance with each of the candidates for the care of the child. Throughout their evidence his function is not to ask himself just ‘is this true?’ or ‘is this sincere?’ but ‘what does this evidence tell me about any future parenting of the child by this witness?’ and, in a public law case, when always hoping to be able to answer his question negatively, to ask ‘are the local authority’s concerns about the future parenting of the child by this witness justified?’ The function demands a high degree of wisdom on the part of the family judge ... but the corollary is the difficulty of mounting a successful appeal against a judge’s decision about the future arrangements for a child.”⁴⁹

However, at the same time, a long line of authority that set the level of appellate deference by reference to a “generous ambit of reasonable disagreement” was dismissed as inapplicable on the ground that it dealt with a different type of outcome decision. This line of authority is exemplified by *Jackson v Murray*⁵⁰ decided 18 months after *Re B (A Child)*. Lord Reed, with whom Lady Hale and Lord Carnworth agreed, put the matter thus:

“In the absence of an identifiable error, such as an error of law, or the taking into account of an irrelevant matter, or the failure to take account of a relevant matter, it is only a difference of view ... which exceeds the ambit of reasonable disagreement that warrants the conclusion that the court below has gone wrong. In other words, in the absence of an identifiable error, the appellate court must be satisfied that the

⁴⁸ *G v G* [1985] 1 WLR 647, per Lord Fraser, at p.651, cited with approval by Lord Reed in *Jackson v Murray* [2015] UKSC 5 at [31].

⁴⁹ [2013] UKSC 33 at [42].

⁵⁰ [2015] UKSC 5.

apportionment made by the court below was not one which was reasonably open to it”.⁵¹

The phrase “generous ambit of reasonable disagreement”, encapsulating a high level of appellate deference, seems to have been first used by Asquith LJ in *Bellenden (Satterthwaite) v Satterthwaite*.⁵² He pointed out that “it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable”. That widely differing outcomes may each be unappealable was accepted in *Re B (A Child)* to be appropriate only in respect of decisions that could be described as “discretionary”, of which *Jackson v Murray* is a clear example. That case concerned the apportionment of liability in a case of contributory negligence; *Bellenden* was a matter of assessing maintenance to be paid between divorcing spouses; *G v G*,⁵³ which is the major authority in family law cases for affording a generous ambit of reasonable disagreement to first instance tribunals, was a question of custody (residence) of a child. All of these types of decision have in common that the first instance tribunal is asked to make a decision that is not of its nature open to verifiable proof of its correctness, and while this is perhaps more obviously so in cases like *Jackson* and *Bellenden* (where the discretion is relatively unfettered⁵⁴), both Lord Wilson and Lady Hale in *Re B (A Child)*⁵⁵ endorsed the appellation “discretionary” to the residence decision in *G v G*. Lord President Rodger, however, had some years earlier taken issue with the terminology of “discretion” in cases of that type. In *Osborne v Matthan (No 2)* he said:

“It appears to me, however, that the decision which a trial judge reaches on custody may perhaps be better described not as a matter of discretion but as a matter of judgment exercised on consideration of the

⁵¹ At [35].

⁵² [1948] 1 All ER 343 at p.345.

⁵³ [1985] 1 WLR 647. Lord Fraser’s approach here was approved by the Inner House in *Britten v Central Regional Council* 1986 SLT 207 and *S v S* 2012 Fam LR 32 at [12].

⁵⁴ A decision whether to allow an action to proceed out of time, under s.19A of the Prescription and Limitation (Scotland) Act 1973 is another sort of decision where the judge’s discretion is apparently unfettered. In *EA v GN* [2015] CSIH 26 the Inner House refused to interfere with the Lord Ordinary’s exercise of his discretion in that context, citing with approval *Thomson v Glasgow Corporation* 1962 SC(HL) 36.

⁵⁵ [2013] UKSC 33 at [44] and [203] respectively.

relevant factors. The court must consider all the relevant circumstances and decide what the welfare of the child requires. Once the court has identified that, it has no discretion: the court must do what the welfare of the child requires”.⁵⁶

The importance of the point is that the Supreme Court in *Re B (A Child)* held that the “generous ambit of reasonable disagreement” test for appellate deference (the true meaning, according to Lord Fraser in *G v G*,⁵⁷ of the “plainly wrong” standard) applied only to outcome decisions that could be described as “discretionary”, while other outcome decisions were to be accorded a degree of deference on a par with that accorded to the evaluative part of the threshold decision. Lord Wilson felt “driven to jettison the principles in *G v G*”,⁵⁸ seeing no conceptual difference between the judgment the first instance tribunal was asked to make at the evaluative stage of the threshold question and the judgment required of that tribunal at the outcome stage. This led him to conclude that the level of appellate deference ought to be the same:

“There is, therefore, an attractive symmetry between the criterion for review of a determination of whether the threshold is crossed and that for review of a determination of whether a care order should be made. In each case it is no more and no less than whether the determination is wrong”.⁵⁹

To this conclusion both Lord Neuberger⁶⁰ and Lord Clarke⁶¹ adhere.

Yet that “attractive symmetry” comes at a cost: a differentiation between what a court is asked to do in a private law case like *G v G* and what it is asked to

⁵⁶ 1998 SC 682 at 688-689.

⁵⁷ [1985] 1 WLR 647 at p. 652.

⁵⁸ [2013] UKSC 33 at [46]. Lord Kerr, however, at [118], explicitly endorsed the affording of a generous ambit of reasonable disagreement in this context (at least where proportionality is not in issue).

⁵⁹ *Ibid* at [47].

⁶⁰ *Ibid* at [88]. Lord Neuberger explicitly described the outcome decision as also being an “evaluative exercise” (at [80]).

⁶¹ *Ibid* at [139].

do in a child protection case.⁶² That distinction is illusory, as indeed is the distinction between “discretionary” and other outcome decisions. Lord Bingham, writing extra-judicially, described custody (now residence) as “the last real stronghold of almost unreviewable discretion”.⁶³ Whitty⁶⁴ likewise describes residence disputes as “one of the great bastions of judicial discretion”. Both statements (one before and one after Lord President Rodger’s terminological correction) may put the matter rather too highly but the point of importance is that what is true for residence disputes is just as true for applications by the public authorities for orders designed to secure the protection of children from their parents. Both are governed by the statutory rules requiring the child’s welfare to be the paramount consideration,⁶⁵ and both require a weighing up of options against the very real harm that any court intervention (whether in public law or in private law process) will do. Both decisions are “discretionary” and both ought, therefore, to attract a generous ambit of reasonable disagreement when challenged. A better determinant of whether judicial decision-making is suitable for a generous ambit of reasonable disagreement than whether the decision is “discretionary” or not is whether the decision can be made in a mechanical fashion by applying a straight rule, or not. If so the matter becomes one of applying the law correctly and no appellate deference is appropriate; if not, because there can (in the nature of the case) be no absolutely right or wrong answer, then appellate deference is justified. The Scottish courts continue to apply the “plainly wrong” test in appeals against outcome decisions in both private law cases⁶⁶ and public law cases.⁶⁷

⁶² It had previously been accepted that the same level of appellate deference required to be shown to the outcomes in public law cases as in private law cases: *Re C (Adoption: Best Interests of the Child)* [2009] EWHC 499, per Potter P at [33]. In the private law case of *G v G* [1985] 1 WLR 647 Lord Fraser explicitly built upon the dicta of Lord Scarman in the public law case of *B v W (Wardship: Appeal)* [1979] 1 WLR 1041 at p. 1055. And in *W v Aberdeenshire Council* 2013 SC 108 the approach in *G v G* was followed by the Court of Session in an appeal relating to an application for a permanence order.

⁶³ *Ibid* at p. 41.

⁶⁴ N. Whitty, “From Rules to Discretion: Changes in the Fabric of Scots Private Law” (2003) 7 *Edin. L.R.* 281 at 333.

⁶⁵ Children (Scotland) Act 1995, s.11(7)(a); Children’s Hearings (Scotland) Act 2011, s.25(2).

⁶⁶ See for example *JM v PK* [2015] CSIH 54 at [35].

⁶⁷ In *W v Aberdeenshire Council* 2013 SC 108 the Inner House held that the sheriff principal had been right to overrule the outcome decision of the sheriff because it was “plainly wrong”.

It is obvious that a decision on apportionment of responsibility in a case of contributory negligence or the valuation of a maintenance claim can have no verifiably correct answer but it is just as true, if less obviously so, that a decision relating to a child's residence or contact is seldom absolutely certain to be either right or wrong. The decision of whether a non-resident parent should have contact with a child once a month or once a week is as "discretionary" – "open-ended" might be better – as the decision of whether contributory negligence amounts to 50% or 90% of the cause of an accident, and the approach to appellate deference in *Jackson v Murray*⁶⁸ should apply to both. Likewise in a child protection case, the first instance tribunal is required to assess and compare various possible outcomes and will seldom be faced with a case in which only one of the practical options is palpably and undeniably better than all the others. As Lord Nicholls put it in *Re B (A Minor) (Adoption: Natural Parent)*:⁶⁹

"There is no objectively certain answer to which of two or more possible courses is in the best interests of a child. In all save the most straight-forward cases, there are competing factors, some pointing one way and some another. There is no means of demonstrating that one answer is clearly right and another clearly wrong. There are too many uncertainties involved in what, after all, is an attempt to peer into the future and assess the advantages and disadvantages which this or that course will or may have for the child".

Lord Rodger was of course perfectly correct to say in *Osborne v Matthan* that once the best outcome for the child's welfare has been identified the court has no discretion and is obliged to decide in favour of that outcome, but it does not follow from this that the identification of the best outcome is devoid of judicial discretion. "Judicial discretion" was defined by Barak⁷⁰ as "the power the law gives the judge to choose among several alternatives, each of them being lawful", which can clearly encompass decisions on apportionment of liability and, equally, on which of various options are more suitable for a child in need

⁶⁸ [2015] UKSC 5.

⁶⁹ [2002] 1 WLR 258 at [16].

⁷⁰ A. Barak *Judicial Discretion* (1987) at p. 7.

of state protection. The important element of “discretion”, in this understanding of the word, is that it implies a power of choice.⁷¹ However, in few areas where judges exercise discretion is their choice completely free, and it is certainly not in relation to either private law or public law disputes relating to children. In both types of case the tribunal is constrained by the requirement to regard the welfare of the child as the paramount consideration; additionally in public law (child protection) cases the tribunal is constrained to choose an outcome that is proportionate to the legitimate aim it seeks to achieve.⁷² That there is no wholly free choice has long been recognised.⁷³ But choices still have to be made both as to the factors that are relevant to welfare and as to the weight each factor is to be accorded. Whether the weighing of the relevant factors in a child protection case is best described as exercising discretion or as making a judgment is less important – for the process clearly has elements of both⁷⁴ – than the fact that the required weighing is a matter for the first instance tribunal and that

“it is not for [an appellate tribunal] to reassess the weight to be attached to the various considerations placed before [the first instance tribunal which has] the advantages of ... close and direct familiarity with the parties and the other witnesses ... We consider that the weight to be attached to these factors in a particular case is a matter for the judge at first instance”.⁷⁵

⁷¹ See Lady Hale in *Re M and anor (Children) (Abduction: Rights of Custody)* [2007] UKHL 55 at [39].

⁷² Indeed that consideration may also constrain decision-makers in a private law dispute because the denial of contact (for example) may interfere with article 8 rights whether effected by private law or public law process: *Elsholz v Germany* (2002) 34 EHRR 58 at ([42] – [44]), cited in *JM v PK* [2015] CSIH 54.

⁷³ See *Doherty v Allman* (1878) 3 App. Cas.709, per Lord Blackburn at p. 728. Lady Hale in *Re B (A Child)* at [199] said of the outcome decision: “That is, on the face of it, a discretion. But it is a discretion in which the requirements, not only of the Children Act 1989, but also of proportionality under the Human Rights Act 1998, must be observed”. In *Lothian Regional Council v A* 1992 SLT 858 at p.862 Lord President Hope said of the court’s decision whether to dispense with parental consent to adoption: “At this stage a discretion must be exercised by the Court, and it is plain that the Court must do what s.6 of the [Adoption (Scotland) Act 1978] requires” (i.e. regard the welfare of the child as the first consideration). Lord Hope is not seeing “discretion” as synonymous with “free choice”.

⁷⁴ Lord Kerr in *Re B (A Child)* [2013] UKSC 33 at [111] was talking about outcome decisions when he said: “In truth, of course, this decision partakes of an exercise of judgment as well as discretion”. See also *West Lothian Regional Council v M* 2002 SC 411 where Lord Justice Clerk Gill described the decision whether to dispense with parental consent to adoption interchangeably as one of “discretion” (at [41]) and one of “judgment” (at [59]).

⁷⁵ *FB and AB, Petitioners* 1999 Fam LR 2 (IH) at [2.19].

The justification for appellate deference, and the setting of its level, is therefore found not in the fact that a decision is “discretionary” but in the fact that it requires the making of choices between outcomes with which rational and reasonable people may disagree.⁷⁶ This being so, it becomes of crucial importance to know whose choice counts. And that leads us to the most important reason why the appellate tribunal must allow a generous ambit of reasonable disagreement in the context of outcome decisions – a reason of particular significance in Scotland. In *Clarke-Hunt v Newcombe* Cumming-Bruce LJ said this:

“There was not really a right solution; there were two alternative wrong solutions. The problem of the judge was to appreciate the factors pointing in each direction and to decide which of the two bad solutions was the least dangerous, having regard to the long-term interests of the children, and so he decided the latter. Whether I would have decided it the same way if I had been in the position of the trial judge I do not know. I might have taken the same course as the judge and I might not, but I was never in that situation. I am sitting in the Court of Appeal deciding a quite different question: has it been shown that the judge to whom Parliament has confided the exercise of discretion, plainly got the wrong answer? I emphasise the word ‘plainly’.”⁷⁷

We see here an important constitutional doctrine at play. Because an outcome needs to be determined in circumstances in which there will seldom be only one rational and reasonable outcome, it becomes of crucial importance to identify who is lawfully appointed to determine the outcome: who, in other words, has been given the power to make the appropriate choice by Parliament.⁷⁸ Any appellate body that simply substitutes its own judgment for those that it disagrees with is similarly subverting an important constitutional principle: that decisions are to be made by the bodies chosen by Parliament to

⁷⁶Many judges are uncomfortable with the language of “choice”, as seen in Alan Paterson’s interviews with the Law Lords in *Final Judgment: The Last Law Lords and the Supreme Court* (Hart, 2013) at pp. 269-271. But that discomfort stems from the implication that the choice is free and unconstrained which, as explained in the text above, it is not.

⁷⁷ (1982) 4 FLR 482 (approved by Lord Fraser in *G v G* [1985] 1 WLR 647 at p. 651).

⁷⁸ In a quite different context, this constitutional doctrine was affirmed in *R (Evans) v Attorney General* [2015] UKSC 21.

make them.⁷⁹ This principle is particularly apt to apply to the children's hearing system in Scotland, where the first instance and the appellate tribunal are not simply different manifestations (or larger benches) of the same court but are fundamentally different bodies. The principle is given effect to by affording a generous ambit of reasonable disagreement to first instance tribunal decisions on outcome.

Of course the "generous ambit" approach was rejected by the Supreme Court in *Re B (A Child)* at least in respect of English child protection processes. However, the Court ignores a crucial distinction between the two types of decision and one, indeed, that suggests that appellate oversight ought if anything to be stronger (and appellate deference correspondingly weaker) for evaluative decisions than for outcome decisions. The difference is this. A threshold evaluation has the potential to create a precedent, and it follows that the higher courts have a direct interest in ensuring that evaluations are calibrated properly, and orientated to the direction in which they want the law to develop.⁸⁰ An outcome decision on the other hand, even when made by the highest court in the land, is the outcome that is considered best for the particular child, and that outcome itself can never (unlike the law whose application has determined it) have any precedential value because what is best for one child in one case tells us nothing about whether the same outcome would be best for another child in the necessarily different context of any other case. The appellate tribunal therefore has no ability to develop the law by either upholding or interfering with the first instance outcome decision: it has, in other words, less standing to interfere. This being so, the level of deference that it should show to first instance decisions on outcome must be at least as high as for evaluative decisions: the outcome determined by the body

⁷⁹ It was accepted in *R (Evans) v Attorney General* that this principle could be reversed by explicit statutory provision, if it is "crystal clear": per Lord Neuberger at [58]. A Scottish example would be the power of the children's hearing to review the making under ss.38 or 39 of the Children's Hearings (Scotland) Act 2011 of a child protection order, which can be brought to an end whenever the reviewing body, in its own judgment, considers that the grounds for its making are not made out – irrespective of the fact that a sheriff has previously determined that they were made out: see s.47.

⁸⁰ See, for example, the important guidance given by the House of Lords and Supreme Court as to the meaning of "likely" as it appears in much child protection legislation in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 and *Re J (Children) (Care Proceedings: Threshold Criteria)* [2013] UKSC 9.

chosen by Parliament to exercise judgment should stand until such time as the outcome is shown to be beyond the generous ambit of reasonable disagreement: in other words, that it was plainly wrong.

D. APPEALS FROM THE CHILDREN'S HEARING

In Scotland, the most important decision-maker in child protection cases is the children's hearing, for that body deals with the vast majority of such cases.⁸¹ The hearing has no role in threshold decisions (at least in relation to the grounds upon which the child is referred to a hearing) but is concerned primarily with determining the outcome of the case. The hearing has discretion in determining the outcome, in the sense of having a choice of whether to make, vary or continue a compulsory supervision order or not, and its terms. In making its choice, the hearing must exercise judgment, but that judgment is highly constrained, as is the judgment of a court asked to make a permanence order or an adoption order, by both the welfare principle and the ECHR-derived need for proportionality.

a. Appeals from outcome decisions of children's hearings

The hearing's outcome decisions may be appealed under s.154 of the Children's Hearings (Scotland) Act 2011 to the sheriff, though it is not completely self-evident that the deference a sheriff dealing with such an appeal ought to show to the hearing's decision is governed by the same principles as those discussed above. There are at least two considerations peculiar to dispositive decisions by children's hearings which carry their own implications.

First, the hearing is not a court of law but is instead a quasi-judicial tribunal, with lawful powers of course but staffed by laypersons with little formal legal training. This might suggest that appellate deference, based at least to some

⁸¹ It is true that the most extreme forms of state interference in family life, which involve a child being permanently removed from its parents, can be effected only by order of the sheriff or the Court of Session, by means of either a permanence order or an adoption order under the Adoption and Children (Scotland) Act 2007. However, the power of a children's hearing to interfere in family life is not to be under-estimated. For a detailed account, see Norrie, *Children's Hearings in Scotland* (3rd edn., 2013).

extent on an understanding of common professional courtesy underpinned by a shared training and experiential background, is less appropriate than it is with appeals from courts of law. However, “professional courtesy” has been recognised as a not particularly solid justification for appellate deference,⁸² and deference has been extended to decisions of other lay tribunals.⁸³ Much more important is the relationship with the child and other actors in the dispute developed by the first instance tribunal, as recognised by Lord Wilson in *Re B (A Child)*.⁸⁴ While he was talking within the context of the peculiar role demanded of a “family judge”, more intimate with the actors in the dispute than in most other types of court action, these comments apply with even greater force to children’s hearings in Scotland where the whole design of the system aims to ensure that a much more “hands-on” approach to adjudication is adopted by this lay panel than is possible in any court of law.

Secondly, unlike with general appeals from a court of first instance to an appeal court, appeals from a children’s hearing to a sheriff have a *ground of appeal* laid down in the governing legislation. This changes the nature of the debate, for the issue becomes less whether the limits of appellate deference (wherever they are set) have been exceeded and more whether the statutory ground for appeal has been made out. This indeed is the basis of the judgments of Lord Clarke and Lady Hale in *Re B (A Child)*:⁸⁵ for both, the primary reason why appellate tribunals should not limit themselves to overturning only decisions they consider “plainly wrong” was that the (English) Civil Procedure Rules provide that an appeal court can overrule a lower court’s decision that it considers to be, simply, “wrong”. The statutory test for appeals to sheriffs from dispositive decisions of the children’s hearing is different: under s.156 of the 2011 Act an appeal must be rejected (and the imperative is to be noted) if the sheriff considers the decision being appealed against to be “justified”. So a sheriff needs to ask, not whether the outcome was “wrong” but whether it was “justified”. These are, conceptually, entirely different questions.

⁸² *Biogen Inc v Medeva plc* [1996] UKHL 18, *per* Lord Hoffmann at [54].

⁸³ See *Sneddon v Scottish Legal Complaints Commission* [2015] CSIH 62 at [34].

⁸⁴ n.49 above.

⁸⁵ [2013] UKSC 33 at [139] and [203] respectively. Lord Wilson agreed with Lord Clarke at [46].

The very use of the word “justified” suggests that what is at issue is the exercise (constrained, of course) of a discretion. It is in the nature of a discretion that how it is exercised may be justified or not, while a conclusion on a point of law may be right or wrong. This was recognised by the House of Lords in *Thomas v Glasgow Corporation*,⁸⁶ and by the Court of Session.⁸⁷ The word has therefore been used both judicially and legislatively in contexts which lack the absolutist connotations of a “right or wrong” binary. While the hearing must make its decision as to which outcome it considers to be best for the child, that assessment is, in its fundamentals, a matter of opinion – reached by the exercise of judgment rather by a search for absolute truths. If the hearing decides that Outcome A is the best for the child, it is nothing to the point that either another hearing or a sheriff considers Outcome B to be the best. The question for the sheriff is whether, in the exercise of its judgment, the hearing chose an outcome that can be justified. The judgment reached as to what is the best option can seldom be adjudged right or wrong but can always be adjudged supportable or insupportable. It follows that in determining whether an outcome decision of a children’s hearing is “justified”, the sheriff needs to show a greater level of appellate deference than was allowed by the Supreme Court in circumstances where the statutory ground of appeal was that the decision appealed against was “wrong”.

b. The meaning of “not justified”

That the hearing’s decision was “not justified” has been the statutory ground for appeal since the commencement of the hearings system,⁸⁸ and in that time has been subject to some judicial analysis, but so far not beyond sheriff court level. Shortly after the children’s hearing system came into operation Sheriff

⁸⁶ 1962 SC(HL) 136 *per* Lord Reid at p. 66: “[T]his House would not overrule the discretion of a lower court merely because we might think that we would have exercised it differently ... We might do if some irrelevant factor had been taken into account, or some important relevant factor left out of account, or if the decision was unreasonable, and we would no doubt do so if the decision could be said to be unjustified”.

⁸⁷ *P v Aberdeenshire Council* 2001 Fam. L.R. 127 at [11], where the court held that a decision on whether a ground to dispense with parental consent to adoption had been “fully justified”. In *W v Aberdeenshire Council* 2013 SC 108 at [29] the phrase used was “plainly justified”.

⁸⁸ Social Work (Scotland) Act 1968, s.49(5); Children (Scotland) Act 1995, s.51(5).

Mowat, discussing the extent to which sheriffs ought to show appellate deference to the hearing, said this:

“A sheriff should not interfere with the determination [of the hearing] simply because he felt another form of treatment might be preferable ... Accordingly, I consider that a sheriff should not allow an appeal unless there was some flaw in the procedure adopted by the hearing or he was satisfied that the hearing had not given proper consideration to some factor in the case”.⁸⁹

Wilkinson and Norrie took from this dictum that two opposing points of view may each be “justified”, from which it followed “that the sheriff cannot substitute his own opinion for that of the hearing merely because he disagrees with it but must, if the appeal is to be allowed, have some grounds on which the hearing’s decision can justly be impugned”.⁹⁰ The matter was revisited by Sheriff Principal Nicholson in *W v Schaffer*⁹¹ who said, in an appeal against an outcome decision of the hearing:

“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 has failed to give proper, or any, consideration to a relevant factor in the case; and in general to consider whether the decision reached by 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”.

This statement has subsequently become something close to a mantra for respondents in appeals from children’s hearings⁹² but the Inner House expressed some caution and stated that “the question of whether what was

⁸⁹ *D v Sinclair* 1973 SLT (Sh Ct) 47 at 48.

⁹⁰ Wilkinson and Norrie, *Parent and Child* 3rd edn., 2013 at [19.23].

⁹¹ 2001 SLT (Sh Ct) 86 at pp.87-88.

⁹² See for example *AM & SO v Brechin* [2015] SCGLA 52 at [29]; *GD, Appellant* 2014 SCFAL 5 at [36]; *M v Authority Reporter* 2014 SLT (Sh Ct) 57 at [35]; *A v H* 2013 GWD 32-634 (Official Transcript, para [31]); *C v Principal Reporter* 2010 Fam LR 14 at [24].

said in *W v Schaffer* is both correct and comprehensive is for another day”.⁹³ That caution is, it is submitted, misplaced. Sheriff Principal Nicholson’s formulation recognises that there is no right and wrong answer to what a hearing is asked to decide, just as there is no necessarily right and wrong answer for a court charged with determining with whom a child is to live, or what level of contact a non-resident parent should have with a child after parental separation. There are, on the other hand, reasonable and unreasonable views, supportable and unsupportable opinions, and outcomes that can be justified on the facts and outcomes that cannot be justified. The children’s hearing must therefore be able to make decisions which a sheriff would disagree with, without that decision being vulnerable to overturning on appeal for that reason alone. If the outcome is, on the other hand, unreasonable, in the sense of being one that is outwith the ambit of reasonable disagreement, or it cannot be supported by the facts,⁹⁴ then it will be an unjustified decision and an appeal against it will be successful. If appeals are limited to those which on no reasonable view can be regarded as justified, then a hearing’s decision is in no different position in practice (though slightly different words are used) from a dispositive decision of a sheriff in a residence or contact dispute. The orthodox rule applies – whether traced to *W v Schaffer* or to *G v G* – and a generous ambit of reasonable disagreement is to be afforded: the decision cannot be challenged merely because the sheriff considers it to be “wrong”. A hearing’s decision is “justified”, it is submitted, when the decision can be understood, has a rational basis, and is within the range of reasonable outcomes. Lord Neuberger in *Re B (A Child)*⁹⁵, in assessing whether the judge at first instance was right or wrong in holding that the threshold had been crossed, said that his conclusions were “justified in terms of logic and common sense in the light of his findings of primary fact and his assessment of the witnesses, and they were coherently formulated”. If this can be said of a children’s hearing’s outcome decision then that decision is not challengeable on appeal (absent any error of law or procedural irregularity).

⁹³ *M v Locality Reporter Manager* 2014 Fam LR 23 at [42].

⁹⁴ Remembering always that the sheriff may hear evidence in an appeal and so test the facts upon which a hearing’s decision is based: s.155(5).

⁹⁵ [2013] UKSC 33 at [66].

There are, perhaps, two factors that might suggest that sheriffs ought not to afford such deference to the outcome decisions of the hearing. The first is that the sheriff to whom an appeal is taken is empowered (unusually for appeals)⁹⁶ to hear evidence in determining its outcome. The statute, however, explicitly provides that the sheriff is not obliged to hear evidence and it is likely to be appropriate only when the appeal is one of fact rather than of the justifiability of the outcome determined on uncontroverted facts. There is no process specified (beyond the hearing of evidence) by which the sheriff can conduct a sort of judicial children's hearing in order to reach his or her own welfare judgment.

The second potential argument against strong appellate deference in this context is the fact that the Scottish Government, introducing the Children's Hearings Bill, explicitly intended sheriffs to have more overview of hearings' decisions than they had hitherto been inclined to exercise. The Scottish Government's Policy Objective specified in its *Policy Memorandum* published with the Bill was to "make clear" that "the sheriff has available to him the power to conduct a wide review of the issues that a hearing considered".⁹⁷ This is clearly wider than a review of the facts upon which the hearing's decision was based. The *Policy Memorandum* goes on to state that this was designed to reinforce "the deliberate legislative intention of the 1995 Act" which was to provide that appeals to the sheriff can be wide in scope "such as that it can be effectively a rehearing of the matter".⁹⁸ This may well have been the Governmental intention behind both the Children (Scotland) Act 1995 and the Children's Hearings (Scotland) Act 2011, but statutory language to give effect to it is almost entirely absent⁹⁹ (which is likely to be the major reason why

⁹⁶ The only other "appeal" in the 2011 Act in which the sheriff may hear evidence is a review of the hearing's identification of the relevant local authority under s.166.

⁹⁷ *Policy Memorandum*, para [380].

⁹⁸ *Ibid* at [382].

⁹⁹ The Scottish Government's Draft Children's Hearings (Scotland) Bill, June 29, 2009 (ISBN 978 0 7559 8113 7), ss.180-184 gave sheriffs power to "review" decisions of the children's hearing, while the sheriff principal and the Court of Session were to hear "appeals" from the sheriff. But this substantial extension of the role of the sheriff was widely resisted and by the time the Bill was presented to the Parliament the existing rules for appeals to, rather than review by, the sheriff had been restored.

sheriffs since 1995 have eschewed a more proactive role in children’s hearings cases). Other than the power to hear evidence, the “rehearing” by the sheriff is supported only in his or her power to substitute his or her own outcome – after a successful appeal under the 1995 Act¹⁰⁰ and now even after an unsuccessful appeal under the 2011 Act if the child’s circumstances have changed since the time of the decision appealed against.¹⁰¹ However, that power can be exercised only after the sheriff has determined whether the appeal is successful or not (that is, whether the hearing’s decision was justified or not) and so cannot, in logic, determine the question of that success. The factors arguing in favour of reduced appellate deference in appeals against children’s hearings’ outcome decisions are not, it is submitted, sufficiently strong to overwhelm the orthodox approach described above and encapsulated in the interpretation of “justified” offered by Sheriff Principal Nicholson in *W v Schaffer*, which remains good law.

c. “Relevant person” appeals

There is another type of decision that a children’s hearing¹⁰² may make, and one that does not fall obviously within any of the categories of decision discussed earlier in this article. Since the coming into force of the 2011 Act, the children’s hearing has been empowered to determine that an individual who does not fall within the definition of “relevant person” contained in s.200 of the 2011 Act is, nevertheless, to be deemed to be a relevant person.¹⁰³ Deeming an individual to be a relevant person is a crucial protection of that individual’s participatory rights in the hearing process. The decision is certainly not a matter upon which the hearing can exercise any discretion: the Act is clear that if the statutory test – that the individual has (or has recently had) significant involvement in the upbringing of the child – is met then the individual “must” be deemed to be a relevant person.¹⁰⁴ Now, clearly this involves a matter of statutory interpretation but more directly it requires the hearing to

¹⁰⁰ Children (Scotland) Act 1995, s.51(5)(c)(iii).

¹⁰¹ Children’s Hearings (Scotland) Act, s.156(1)(b) and (3).

¹⁰² Normally, “relevant person decisions” are made by pre-hearing panels rather than children’s hearings, but the latter term will be used here for ease of reference.

¹⁰³ Children’s Hearings (Scotland) Act 2011, ss.79-81.

¹⁰⁴ *Ibid* s.81(3).

make an assessment of the facts: has the individual's involvement been "significant"; was that an involvement in the child's "upbringing"; was it "recent"? A decision to deem an individual a relevant person might at first sight be perceived as being an outcome decision, because (i) it has immediate legal consequence – the conferral of participation rights on the individual who would not otherwise have such rights – and (ii) it is a decision that is independently appealable. But to regard a relevant person decision as an outcome decision seems structurally artificial. In truth, that decision is a step in the process towards determining the final outcome *for the child*, and the decision-making process requires, by the exercise of sound judgment, an appraisal of the facts to determine whether the statutory test is satisfied. In other words, it is an evaluative decision: an evaluation of facts is required in order to reach a factual conclusion.

Prior to the 2011 Act there was no statutory mechanism to deem a person who did not fall within the definition to be a relevant person and the correct application of the definition itself was regarded as an issue of fact.¹⁰⁵ Under the 2011 Act, the decision remains perceived by the Court of Session as being one of fact. In *T v Locality Reporter*¹⁰⁶ the Inner House described the deemed relevant person test as "a factual test, albeit a conclusion which had to be derived from other agreed or established primary facts". If the deemed relevant person decision were purely one of fact then the appellate tribunal (the sheriff) ought to defer to the hearing's conclusion in the same way that the Court of Session would defer to a sheriff's findings in fact. However, the statute itself precludes the decision being seen as purely one of fact because it explicitly provides a special appeal mechanism from the sheriff to the Court of Session on the point, but only on a point of law or in respect of any procedural irregularity¹⁰⁷ and not, therefore, on a point of fact. It follows that a children's hearing's deemed relevant person decision cannot be solely a "finding in fact" such that *Thomas v Thomas* governs the level of appellate deference. The

¹⁰⁵ *S v N* 2002 SLT 589 at [6]; *P v Locality Reporter Manager* [2014] CSIH 66 at [19]. See also *S v Locality Reporter Manager* 2014 Fam LR 109 at [26] and [42].

¹⁰⁶ 2015 Fam. L.R. 2 at [12].

¹⁰⁷ 2011 Act, s.164(5).

decision required is better seen as an evaluation of the facts in order to determine whether the statutory test has been satisfied, and this suggests that the appellate deference that a sheriff ought to show should be similar to that shown by the Court of Session to the sheriff's evaluative decisions in respect of s.67 grounds of referral to the children's hearing. In fact, however, the primary determinant of the level of appellate deference is the statutory language: the ground is the same ground as that specified for dispositive decisions, that the conclusion reached by the hearing was not "justified".¹⁰⁸ It follows from this that the issue for the sheriff on appeal is whether the relevant person decision can be supported by the facts founded upon by the children's hearing, and *not* whether he or she would have come to the same conclusion as the hearing. Indeed, it might be argued that this conclusion is stronger for relevant person decisions than for dispositive decisions of the hearing because, in sharp contradistinction to appeals to the sheriff under s.154 (against dispositive decisions), the sheriff has no power to hear evidence in a relevant person appeal.¹⁰⁹ This would seem to mean that a sheriff must accept the factual basis of the hearing's decision, though if these facts have changed the appeal court is able to take that into account.¹¹⁰ A decision based upon facts that are incorrect, or no longer relevant, is unlikely to be "justified". The overall conclusion for relevant person appeals, however, is that the dictum of Sheriff Principal Nicholson applies here as it applies to dispositive decisions. In *T v Locality Reporter*¹¹¹ the hearing's relevant person decision (upheld by the sheriff) was reversed by the Court of Session because it could not, upon any reasonable view, be regarded as justified in all the circumstances of the case.

E. CONCLUSIONS

¹⁰⁸ 2011 Act, s.160(3) and (4).

¹⁰⁹ Cf. s.155(5) and s.166(4).

¹¹⁰ As the Court of Session did in *T v Locality Reporter* 2015 Fam. L.R. 2 where the children had by the time of the appeal moved from the foster carers who had been deemed by a pre-hearing panel to be relevant persons.

¹¹¹ 2015 Fam LR 2.

There is a danger, as Lord Neuberger pointed out in *Re B (A Child)*,¹¹² of over-analysis. It is tempting, but ultimately fruitless, to seek to classify every sort of decision that a first instance tribunal has to make into definable categories, to which precisely identifiable levels of appellate deference are appropriate. The categories are simply not that clear, and their boundaries, insofar as they do exist, are protean. A question of “pure law”, or of “pure discretion”, is a rare beast indeed. But if the reasoning offered above is correct, then certain conclusions can be drawn.

First, evaluative decisions straddle the boundary between findings in fact, which attract a high degree of appellate deference, and findings of law, which attract none. The Scottish courts continue to see such decisions as closer to findings in fact and if this is inconsistent with the Supreme Court’s rejection of the “plainly wrong” level in favour of the “wrong” level to determine appellate interference with evaluations then the difference is explained either by the different statutory framework or the fact that the Scottish courts do not accept the Supreme Court’s underlying proposition, that evaluations lend themselves to a “right or wrong” approach. Non-acceptance of the “right or wrong” binary means that a generous ambit of reasonable disagreement is not only justified but required.

Secondly, a generous ambit of reasonable disagreement is similarly afforded to outcome decisions: the “plainly wrong” test for appellate interference – as interpreted by Lord Reed in *Henderson v Foxworth Investments Ltd* – continues to be applied in Scotland, both in residence and contact cases and in child protection cases. The attempt to limit this approach to “discretionary” decisions fails due to the impossibility of classification. It would, in addition, create pointless complexity to treat private law cases differently from public law cases because in both a non-automatic selection from a range of acceptable options is the task before the decision-maker. Because judgment requires to be exercised, and the law has conferred the power to make that judgment on the first instance tribunal, an appeal court ought never to overturn a lower court

¹¹² [2013] UKSC at [93].

decision for no better reason than that it disagrees with the judgment made at first instance: appeals are not second chances to argue the same case.

Thirdly, children's hearings do not require a different approach to appellate deference but the structure of the system serves to emphasise the importance of ensuring that decisions are made by the body appointed by Parliament to make them. Allowing the first instance decision-maker (the hearing) a generous ambit of reasonable disagreement achieves this and, insofar as that generous ambit is encapsulated in the interpretation of the "not justified" test offered by Sheriff Principal Nicholson in *W v Schaffer*, that test, as a matter of principle, ought to be upheld.