
SCOTLAND / JUDGMENT

Aberdeen City Council v. Shauri [2006] ScotSC 51 (26 May 2006)

[2006] ScotSC 51

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SHERIFFDOM OF GRAMPIAN HIGHLAND AND
ISLANDS

AT

ABERDEEN

SD1425/03

JUDGEMENT

of SHERIFF PRINCIPAL SIR STEPHEN S T YOUNG Bt QC in the cause ABERDEEN CITY COUNCIL Pursuers and Respondents against MUHAMED SHAURI Defender and Appellant Act: Mr Charles Smith, solicitor, Aberdeen City Council Alt: Miss Julia Donnelly, solicitor, Shelter Scottish Housing Law Service Aberdeen : 26 May 2006 The sheriff principal, having resumed consideration of the cause, refuses the appeal and answers the first question in the case stated by Sheriff Buchanan in the affirmative and the second and third questions in the negative; finds it unnecessary to answer the two questions in the case stated by Sheriff Harris; adheres to the decree by default pronounced by Sheriff Buchanan on 3 June 2005 and the final decree pronounced by Sheriff Harris on 11 August 2005; reserves meantime the question of the expenses of the appeal and appoints parties to be heard thereon in chambers at Aberdeen Sheriff Court on Tuesday 6 th June 2006 at 9.30 am. Note [1] In this summary cause the pursuers and respondents are the landlords, and the defender and appellant the tenant, of a dwellinghouse in Aberdeen which was let to the defender by way of a Scottish secure tenancy in terms of the Housing (Scotland) Act 2001. The pursuers seek decree for recovery of possession of the dwellinghouse in terms of section 16(2)(a) of the Act. This provides inter alia that in proceedings under section 14 (which these are) the court must make an order for recovery of possession if it appears to the court that (i) the landlord has a ground for recovery of possession set out in any of paragraphs 1 to 7 of schedule 2 to the Act and specified in the notice required by section 14, and (ii) it is reasonable to make the order. In their statement of claim the pursuers averred that as at the date of raising the action (which was 3 December 2003) the defender was in arrears of rent to the extent of £783.30 and that decree for recovery of possession should be granted inasmuch as they had a ground for recovery of possession, being a ground set out in paragraph 1 of schedule 2 and specified in the relevant statutory notice, and it was reasonable that decree for recovery of possession be granted. [2] It appears that a statement of response was lodged on behalf of the defender, and the first hearing duly took place on 22 January 2004 . On that date the hearing was continued until 11 March 2004 when a proof was assigned to take place on 7 May 2004 . In the event this was discharged on the motion of the defender and the cause was sisted. An incidental

application by the pursuers to have the sist recalled was refused by the sheriff on 29 July 2004 but eventually, on 21 October 2004, the sist was recalled and a proof assigned to take place on 12 November 2004. [3] In addition on 21 October 2004 the sheriff on the motion of the defender allowed the existing defence (of which I can find no trace among the papers in the case) to be deleted and the following substituted therefor:- The Defender is an Asylum Seeker. He has an Appeal against his removal pending with the Immigration Authority. Reference is made to copy letter dated 19 February 2004 from Peter G Farrell, the Defender's solicitors conducting his Immigration Appeals. If the outstanding Appeal is successful, the Defender will be entitled to receive Housing Benefit in full and accordingly it is not reasonable to grant a Decree for Repossession until the Appeal has been determined. The Defender has been a tenant of the Pursuers for over five years and he has up until July 2003 been in receipt of Housing Benefit and Income Support. For reasons unknown to the Defender the Income Support and Housing Benefit was withdrawn in July 2003. The Pursuers have a duty once Income Support and Housing Benefit have been withdrawn to support the Defender in terms of the relevant legislation, however, they failed to meet their obligations and the rent arrears accrued. Eventually the Pursuers commenced paying approximately £40 per week to the Defender in May 2004. They still refuse, however, to pay the Defender's rent. An Application for Judicial Review is pending. Legal Aid has been granted and the Writ for Judicial Review will be served shortly on the Pursuers. It would cause undue hardship to the Defender to grant Decree for Repossession in all the foregoing circumstances. It would render him homeless and as the Pursuers are only at present paying him £40 per week, he would be unable to find any accommodation. In all the foregoing circumstances, it is not reasonable that Decree be granted. [4] At the diet of proof on 12 November 2004 the cause was again sisted, this time apparently on the motion of the pursuers to await the outcome of a petition for judicial review which the defender had presented against the pursuers in the Court of Session. [6] On February 2005 the pursuers lodged an incidental application in terms of which they moved the court to recall the sist which had been granted on 12 November 2004, to re-enrol the cause and to fix a hearing. It was said in this incidental application that the circumstances of the defender had changed since November 2004 in that he had been deemed a failed asylum seeker since 1 December 2004. It appears that this incidental application was considered by the sheriff on March 2005 and again on April 2005 when the sist was recalled and a proof assigned to take place on 3 June 2005. [7] On or about 1 June 2005 the defender's then solicitors wrote to the sheriff clerk to advise that they were having to withdraw from acting on behalf of the defender and had advised the pursuers of their position. [8] According to the scheme of business, Sheriff Buchanan was scheduled to hear summary cause proofs on 3 June 2005. What happened in court that day is narrated in his stated case as follows:- It is correct that although I was due to hear summary cause proofs on 3rd June I had to continue on that day with a sensitive and difficult part heard summary trial. In these circumstances I sat in the proofs court briefly for the limited purpose of postponing to a later date any cases which were due to proceed to proof that day. When the case involving the appellant was called I was told by his solicitor, Mr Lindsay, that he was withdrawing from acting. Mr Lindsay advised that the defender had been attending Cornhill Hospital. Mr Lindsay explained that the appellant had been told that he required to attend court that day but when his name was called outside the

court room there was no answer. The solicitor for the pursuers asked me to grant decree in their favour and I duly did so. I know nothing of what happened that day outwith the court in which I was sitting and I am unaware of whether or not the appellant appeared at the court building. However, I can say that if the appellant had been present in the court room when the case was called there would have been no chance of the proof actually proceeding that day. [9] Sheriff Buchanan having granted decree with expenses against the defender, the case was called in court on 28 July 2005 for approval of the pursuers' assessed account of expenses. At that hearing a motion was made for modification of the defender's liability in expenses in terms of section 18(2) of the Legal Aid (Scotland) Act 1986. As the defender's legal aid certificate had not then been lodged, the sheriff continued the cause to 11 August 2005 in order that it could be ascertained whether the defender was in fact in receipt of legal aid or not. [10] At the continued hearing on 11 August 2005 Sheriff Harris refused as incompetent the motion for modification of the defender's liability in expenses and granted final decree against him for recovery of possession of the dwellinghouse and payment of the assessed expenses in the sum of £1,853.20. [11] On 23 August 2005 a note of appeal was lodged by the defender. In terms of this he challenged both the decision of Sheriff Buchanan on 3 June 2005 to grant decree by default and the decision of Sheriff Harris on August 2005 to refuse his motion for modification of his liability in expenses and to grant final decree. In the note of appeal it was said that the points of law upon which the appeal was to proceed were: The case called for a proof hearing before Sheriff Buchanan on 3/6/05 in Court 6. No proof hearings went ahead on this date as the Sheriff had to finish another case. The Defender's agent Mr Lindsey explained that he had to withdraw from acting, and advised that the tenant had been informed that he needed to attend the hearing. He further advised the Sheriff that the defender had been attending Cornhill Hospital . The Sheriff granted decree for recovery of possession against the Defender. The Defender had arrived at the court at about 9.55. He had taken a seat in the Atrium to wait for his name to be called. He did not hear his name called so he went into the lobby to find out what was happening. He met his solicitor and the agents for the pursuers in the lobby. They advised him that decree had been granted and that his only remedy was to appeal. The Defender contacted the Sheriff Clerk's office who referred him to the In-Court Adviser for assistance in submitting an appeal. The Sheriff Clerk's Office advised that the appeal cannot be submitted until after the hearings on expenses have been dealt with. The diet of Assessment of Expenses was set for 7/7/05 . The Defender intimated his intention to appeal to the court and the pursuers. The case called before Sheriff Buchanan for a hearing to approve the expenses. The Defender appeared and asked for the expenses to be reduced because he was covered by legal aid. The legal aid certificate was not in the court papers, and Sheriff Buchanan continued the case for 2 weeks for the legal aid certificate to be produced. The case called again on 11/8/05 before Sheriff Harris. The effective date of the legal aid certificate was 9/2/04 . The Sheriff concluded that he had no discretion where the legal aid certificate had not been lodged in process at the time it was issued, and refused modification of the expenses and granted decree for expenses as assessed. Did the Sheriff err in concluding that he had no discretion in this matter? Would modification have been have been an appropriate exercise of his discretion? In this case, the pursuers were well aware that the defender has no means and that legal aid had been applied for. The Defender understands that they should have been notified by the legal aid

board when legal aid was granted. The Defender has contacted Mr Lindsay and asked him to find out whether the legal aid certificate was lodged in process. The Defender wishes to defend the action for recovery of possession on the grounds that it would not be reasonable for decree for recovery of possession to be granted in terms of Section 16 of the Housing (Scotland) Act 2001. The Defender has letters from NASS to confirm Aberdeen City Council's duty to support the Defender until the exhaustion of the legal process. The Defender has been living on handouts. He has tried to pursue the matter of the pursuer's refusal to provide him with support via an application for judicial review, which remains outstanding. The Defender has been in Britain since 16/2/98 . The Defender has to remain at the address 4d Kerloch Gardens otherwise he becomes a person who is liable to be detained for breaching UK immigration rules. He has nowhere else to go. The Defender has mental health problems and has been attending Cornhill as an outpatient. The Defender has been making efforts to secure employment to enable him to pay his rent. The Defender was granted legal aid to defend the eviction action. It is in the interests of justice that this appeal be allowed to enable the Defender to have a fair hearing. [12] Sheriff Harris duly prepared a stated case to explain the reasons for his decision on 11 August 2005 to refuse the defender's motion for modification of his liability in expenses and to grant final decree. It was no doubt in light of these reasons that the solicitor who acted for the defender in the appeal subsequently wrote to the court on 26 April 2006 to say that it was no longer intended to argue in the appeal that Sheriff Harris had erred in refusing as incompetent the motion for modification. It was said that the appeal would be confined to Sheriff Buchanan's decision to grant decree by default on June 2005 . But of course it followed that, if the decree pronounced by Sheriff Buchanan were to be recalled in the appeal, then the final decree pronounced by Sheriff Harris ought also to be recalled. [13] Opening the appeal, the defender's solicitor submitted under reference to *Hyslop v Flaherty* 1933 SC 588, *McKelvie v Scottish Steel Scaffolding Co Ltd* 1938 SC 278, *Differ v GKN Kwikform Limited* 1990 SLT (Sh. Ct.) 49, *Grampian Housing Association v Pyper* 2004 HousLR 22 and *Macphail's Sheriff Court Practice* (2 nd Edn) paragraph 14.12 that it would be in the interests of justice to allow the defender to be reponed since he had a real prospect of persuading a sheriff that it would not be reasonable to grant an order for recovery of possession of his dwellinghouse and that his failure to appear or be represented at the diet of proof on 3 June 2005 had been the result of an error on his part. In these circumstances the decrees pronounced by Sheriffs Buchanan and Harris on 3 June and 11 August 2005 respectively should be recalled and the cause remitted for proof on the issue whether or not it was reasonable to make an order for recovery of possession of the dwellinghouse. [14] The defender's solicitor explained that on or about 1 June 2005 the defender's previous solicitor, Mr Lindsay, had telephoned him to advise him that he (Mr Lindsay) would no longer be representing him in the case and that he should attend court personally on 3 June 2005 to represent himself. Mr Lindsay had advised him that he could ask the presiding sheriff to adjourn the proof to allow him an opportunity to obtain alternative legal representation. On 3 June 2005 the defender had duly come to court with the intention of requesting a postponement of the proof. Not knowing which particular court room the case would be called in, he had gone to reception and had been advised by the staff there to sit in the atrium and wait for his case to be called. Having arrived at approximately 9.55 am , he had waited for about thirty five minutes in the atrium. Concerned

that his case had not by then been called, he had gone out into the main foyer where he had met Mr Lindsay and the pursuers' solicitor (and this was confirmed by the latter). He had been told that the case had already been called and disposed of and he had been referred to the in-court adviser for advice about his position. Thus his failure to appear before Sheriff Buchanan had not been as a result of his failure to attend court altogether and in the event, if he had appeared before Sheriff Buchanan, it was clear from what the sheriff had said in his stated case that the proof would have been adjourned until a later date. [15] Turning to the merits of the defender's proposed defence to the action, his solicitor accepted that when the action had been raised the arrears of rent had amounted to £783.30 and that by 10 April 2005 they had risen to £3,379.78. Since then the rent for the property had been £42.48 per week and the arrears had continued to rise so that as at 1 February 2006 they amounted to £4,656. It was accepted too that these arrears now stood at £5,607.82, but only on the basis that five monthly payments, each of £189.92, which had been made by the defender to the pursuers since January 2006 had been credited to a separate suspense account rather than his rent account. On the basis that the rent was now approximately £170 a month, this meant that the defender was paying off the arrears of rent at the rate of approximately £20 per month. It had been indicated that, if the appeal were successful, then the payments which had been made by the defender since January 2006 would be paid into his rent account but that, if the appeal was unsuccessful, these payments would be applied towards the arrears of rent. It was acknowledged that the arrears of rent were high and that the present rate of repayment was unsatisfactory to the pursuers. But the sheriff had a wide discretion in deciding whether or not it was reasonable to grant decree in a case such as this and would be obliged to consider all the circumstances and in particular would have to weigh up against the arrears of rent the unusual and complicated circumstances in which the defender found himself. [16] The defender's solicitor went on to explain that the defender was not entitled to receive any financial support from any government or other agency. He had received correspondence from the Home Office which confirmed that he was entitled to work but, according to him, he had had difficulty in persuading those employment agencies which he had approached to accept the correspondence from the Home Office as evidence of his entitlement to work. In this situation he had found it difficult to obtain work although he continued to seek this. If he did obtain work, then he would be able to pay much more towards the arrears of rent than he was paying at present. The dwellinghouse in question had two bedrooms and in January 2006 he had taken in a lodger who had been paying him the sum of £190 per month towards board and household expenses. This was how he had been able to make the regular payments to the pursuers since January 2006. For the remainder of his income he had been dependent on handouts from friends to meet his own household expenses and to buy food. It should also be noted that, before he had taken in a lodger, he had been willing to pay the rent and arrears, but had simply been unable to do so. [17] The defender's solicitor went on to explain that the defender had come to the United Kingdom from Mombasa in 1998 and had made a claim for asylum on his arrival at Heathrow Airport . He had thereafter travelled around England before coming to Aberdeen in 1999. He had applied to the pursuers for housing as a homeless person and had been allocated a council tenancy in February 1999. At that stage he had been entitled to claim housing benefit and income support and these had continued to be paid until 2003 when

payment of both had been stopped. It was thought that this was because his original application for asylum had been rejected. He had submitted an appeal against this decision but by then the rules in relation to asylum seekers had changed and he had no longer been entitled to claim any financial support (including housing benefit) while his appeal was under consideration. At that time, if and when his appeal had been allowed, he would have been entitled to claim payment of back-dated housing benefit which would have allowed the then arrears of rent to be paid off. In the event his appeal had been refused in 2004. Because he had originally entered the United Kingdom before the Immigration and Asylum Act 1999 had come into force he had not been entitled to claim support through the National Asylum Support Service (NASS). In short therefore he had not been entitled to financial support from any quarter since 2003 and this was why he had been unable to pay the rent and arrears. At one point he had presented a petition for judicial review to the Court of Session in order to challenge the pursuers' refusal to give him financial support. But the petition had been itself refused after he had failed to implement an order by the court that he should find caution. In any event he had been advised both by counsel and his solicitors that the petition had no hope of success on the merits. [18] In November 2005 the defender had instructed a solicitor in London to submit fresh information to the Home Office with a view to consideration being given to the possibility that he might be allowed to submit a second application for asylum. According to the London solicitor, it normally took between two and eight months for a decision to be made by the Home Office on such an issue and, if he were to be allowed to make a new application for asylum, it was likely that the defender would then be entitled to claim financial support from NASS as he would then be claiming under new regulations now in force. It was thought that this financial support would include rental payments. If he did receive such financial support, inquiry would be made to ascertain whether he would be entitled to claim back-dated housing benefit but at present it was thought that it was unlikely that such a claim would be successful. If the case were now to be sent back to the sheriff for proof on the issue of reasonableness, the sheriff would be invited to take into account the fact that issues around the defender's asylum status had still to be resolved and that there was a prospect of his financial position improving so that he could increase his payments towards the arrears of rent. If the Home Office were to refuse to allow him to make a new claim for asylum, he would nonetheless continue to pay £20 a month towards these arrears. But if he were to be evicted, the pursuers would not recover any further sum towards these arrears. The London solicitor had advised that the defender was not now liable to be detained even if he was not permitted to present a new claim for asylum (or indeed if he were to be evicted). Thus he would propose to remain in the tenancy and continue to make payments as at present towards the arrears of rent and to seek work. [19] The defender's solicitor concluded by stating that, according to a medical report which had been obtained, the defender now had a substance abuse problem which had given him symptoms of mild depression. It would be easier for him to obtain treatment for this if he were to remain in his present tenancy. If he were to be ejected, he would be "street homeless". He would have no income and would not be entitled to claim to be housed. At present he had no family or friends who could put him up. In all these circumstances it was submitted that he would have at least a prospect of persuading a sheriff that it would not be reasonable to make an order for recovery of possession of his dwellinghouse. [20] In response,

the pursuers' solicitor emphasised the extent of the arrears of rent due by the defender which had never been disputed by him. In his original defence to the action (of which, as noted, there is no trace in the process) the defender had founded on the provisions of the Asylum Support (Interim Provisions) Regulations 1999. Paragraph 1(2) of these regulations specifically provided that they did not extend to Scotland. Later, on 21 October 2004, new defences had been lodged in which the reference to the 1999 Regulations had been deleted and reference had been made instead to the defender's status as an asylum seeker and his petition to the Court of Session for judicial review. In a letter dated 8 February 2005 from the Home Office, the terms of which had subsequently been agreed by the defender's then agents, it had been stated that the defender had been deemed a failed asylum seeker since 1 December 2004. His petition for judicial review had also been refused so that his defences, both in their original and in their substituted form, had been irrelevant. All that had been said about the possibility of his making a second application for asylum was speculative and it was not reasonable to expect the pursuers to wait to find out whether such an application would be entertained by the Home Office. Under reference to *Assessor for Edinburgh v Brodie* 1976 SLT 234 it was submitted that the pursuers had no duty to provide accommodation for the defender in a private house in terms of section 12 of the Social Work (Scotland) Act 1968. Thus, even if the defender were an asylum seeker, the pursuers would have no duty to house him in his present dwellinghouse so that his position that it would be reasonable for him to remain there could not be sustained. If he were to be ejected he could go and live with his current lodger when the latter obtained accommodation. [21] The pursuers' solicitor continued by submitting that, in considering whether or not to recall the order for possession and remit the cause to the sheriff, I should take into account the interests of both the pursuers and the defender. There would be prejudice to the pursuers in particular if the case were to be referred back. Under reference to *Angus Housing Association Ltd v Fraser* 2004 HousLR 83 and *Glasgow District Council v Erhaiganoma* 1993 SCLR 592 it was submitted that the extent of the existing arrears of rent of itself made it reasonable to grant the order for recovery of possession. It could not be reasonable that these arrears of rent should be allowed to increase pending a resolution of the defender's fresh application for asylum. In all the circumstances the appeal should be refused. [22] In addition to the authorities already mentioned, the pursuers' solicitor also referred to *Trad Hire & Sales Ltd v Campbell* SLT (Sh. Ct.) 41, *Bradford & Bingley plc v Bayley* 2003 HousLR 53, *Charles Stewart Plumbing and Heating Ltd v Lowe* 2005 SCLR 235, *McDonald v Stirling Council* (Court of Session, 18 November 2005) and *Glasgow City Council v Shirazi* 2004 SCLR 189. [23] In my opinion the submissions for the pursuers are to be preferred. I do not doubt that Sheriff Buchanan was correct to grant decree by default on 3 June 2005 in terms of rule 22.1(1) of the Summary Cause Rules 2002. But it is well established that, where decree by default has been pronounced against a defender, an appeal court will be most reluctant, in any case in which *prima facie* there appears to be a proper defence put forward, to allow decree to pass against the defender without investigation of that defence - see Macphail's Sheriff Court Practice (2nd Edn) at paragraph 14.12 and the other authorities upon which the defender's solicitor relied at paragraph [13] above. In the present case it is perfectly clear that the defender intended to appear before Sheriff Buchanan at the proof diet on 3 June 2005, and it was just unfortunate that he did not make the final move from the atrium to court room 6. So, if it had

appeared that he now had any real prospect of persuading a sheriff that it would not be reasonable to make an order for recovery of possession of his dwellinghouse, I should have had no difficulty in concluding that he should be reponed and the decree by default and the final decree granted by Sheriffs Buchanan and Harris respectively recalled. But the fact of the matter is that the arrears of rent due by the defender, which were already £783.30 when the action was raised, have continued to rise so that at the beginning of this year they admittedly amounted to the sum of £4,656. It is true that the defender has, since the beginning of this year, made five monthly payments each of which includes approximately £20 towards the arrears of rent. But, if he continues to make payments at this rate, I calculate that it will take him some eighteen to nineteen years to pay off the arrears - and all this after nothing at all had apparently been paid towards the arrears in the two years or so following the raising of the present action. His original application for asylum was refused and his appeal against this decision was unsuccessful as was his petition to the Court of Session for judicial review of the pursuers' refusal to support him financially. It was said on his behalf that the Home Office has been asked to allow him to make a further application for asylum in the light of new information. I was not told what this information was, and it seems to me to be at best for the defender speculative to conclude that he will be allowed to make a fresh application and, if it were possible, even more speculative to conclude that such an application would be successful. In the meantime the defender has apparently no right to claim financial support from any public source within the United Kingdom and so is dependent on the uncertain income which he receives from his lodger and the similarly uncertain generosity of other individual persons. No doubt his situation would be improved if he were able to obtain work, but he has not so far been able to do so and nothing that was said by his solicitor gave any reason to think that he would be successful in obtaining work in the future. In all the circumstances I consider that, if he had to consider the matter now, the sheriff would be driven inexorably to the conclusion that it would be reasonable to make an order for recovery of possession of the defender's dwellinghouse in terms of section 16(2)(a)(ii) of the Act. Accordingly, as in *Grampian Housing Association v Pyper*, I consider that this is another of those rare cases in which it would not be appropriate to allow the defender to be reponed against the decree by default which was pronounced against him by Sheriff Buchanan. [24] It was agreed that the expenses of the appeal should follow success and I should therefore normally, and without further ado, have found the defender liable to the pursuers in the assessed expenses of the appeal. But the defender's solicitor indicated that, if the expenses of the appeal were to be awarded against him, then she would wish to seek modification of his liability as an assisted person in terms of section 18(2) of the Legal Aid (Scotland) Act 1986. I have therefore reserved the question of expenses and fixed a hearing so that this question of modification may be considered. If parties can reach agreement on this question and so advise my secretary, then I anticipate that I would be able to give effect to the agreement without the necessity of the further hearing (which I should discharge accordingly). But, if the matter cannot be agreed, then I shall hear parties at the hearing which has been fixed in terms of the foregoing interlocutor.

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