



## DAMAGES IN CHILDCARE CASES

### **RK and AK v the United Kingdom** (Application No. 38000/05) [2008] FLR

Taking a child into the care of the State is always a difficult decision. Social Workers must discharge their statutory child protection duties under the Child Care Act, 1991. They must measure the risk to the child resulting from their action and inaction, following the Children First: National Guidelines for the Protection and Welfare of Children guidelines. This risk measurement exercise is never easy and must be undertaken in a prompt but fair and balanced way. The Court is the ultimate arbitrator of whether the balance struck in bringing the care application is justified, having regard to the right of the parents and the rights of the child in accordance with the Constitution and the law. However where the HSE's balancing exercise is flawed, the statutory mechanism for seeking damages is under the European Convention on Human Rights Act 2003 Section 3 (2). The European Court of Human Rights in the recent case of **RK and AK v the United Kingdom** (Application No. 38000/05) [2008] FLR held that the absence of an effective remedy before a national authority is a violation of Article 13 of the European Convention on Human Rights. The Court reiterated that the removal of a child from parental care did not of itself amount to a breach of Article 8 [right to respect for private and family life]. While Judicial Review was open to the parents as a remedy, it was deemed not to be an adequate remedy on its own. In the case in question the Local Authority had removed a child from the parents. There was a fear that the injuries suffered by the child in their care were non accidental. The child was placed with relatives and access was set up for the parents. However, the child sustained further fractures in the care of the relatives and subsequent tests established that the child suffered from brittle bone disease. The care measures taken by the Local Authority were balanced and proportionate and there

were relevant and sufficient reasons for the authorities to act, therefore there was no breach of the Article 8 rights of the parents. The absence of an effective remedy at that time in the UK however resulted in the Court awarding the parents €10,000 in respect of non pecuniary damages and €18,000, plus tax in respect of costs and expenses for violation of Article 13 (right to an effective remedy before a national authority).

COMMENT: Actions for damages against the HSE for breach of statutory duty in child care decisions are not common in Ireland. Public policy concerns in such actions include the need for child protection decisions to be taken professionally without unreasonable fear of over zealous suit versus the right of a parent and of the children involved to secure compensation for damage suffered by way of redress. Breach of statutory duty would encompass both negligent 'actions' and 'inactions' which resulted in damage. From an ECHR perspective there is a wide 'Margin of Appreciation' afforded to States, however this will be balanced against the principle of proportionality in order to avoid arbitrariness. Any interference by the State must be proportionate to legitimate child protection aims and the ECHR will hold State parties to account if that measure is faulty.

**For Advice on Mediation options,  
Collaborative Law, Traditional Neegotiation  
and Separation and Divorce Litigation  
contact the Ronan Daly Jermyn Family Law  
Department.**

**12 South Mall, Cork.**

**Telephone: 021 4802700**