



ARTICLE 8 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ECHR CASES

Neulinger & Shuruk v. Switzerland
(Application no. 41615/07) handed down on 6 July 2010

The European Court of Human Rights held that there would be a violation of the rights of a mother and child if a “return order” under the Hague Child Abduction Convention was enforced. The rights of the child required a measured rather than a mechanical application of the Hague Convention.

Facts:

A Swiss couple moved to Israel and the child was born there in 2003. The mother was anxious that the father had become involved in an extremist religious sect. In June 2005 the mother abducted the child to Switzerland. On 30 May 2006 the Family Court in Tel Aviv issued an order confirming the removal to have been wrongful. On 8 June the father filed a petition seeking the return of the child to Israel. On 29 June the justice of the peace for the district of Lausanne declined to order the return of the child, finding that the

‘grave risk of harm’ exception to have been established.

On 27 May 2007 the cantonal court in Vaud dismissed the father’s appeal, again relying on Article 13(1) *b* of the Hague Child Abduction Convention. On 16 August the Swiss Federal Court ordered the return of the child, finding no basis for a grave risk of harm: On 26 September mother and child petitioned the European Court of Human Rights. On 27 September 2007 the President of the Chamber indicated to the Swiss Government, on the basis of Art 39 of the Rules of the Court (Interim Measures), not to proceed with the return of the child. On 1 October the father withdrew his application for enforcement.

On 8 January 2009, by a 4:3 majority, the Court ruled that there had not been a breach of the mother and child's right to family life under Article 8 ECHR: *Neulinger & Shuruk v. Switzerland*, No 41615/07, 8 January 2009.

On 31 March the applicants requested that the case be referred to the Grand Chamber. By a 16:1 majority, the Court ruled that there had been a breach of the mother and child's right to family life under Article 8 ECHR.

The Court held that child's interest comprised two limbs. First the child's ties with its family must be maintained, except in cases where the family had proved particularly unfit. Family ties could only be severed in very exceptional circumstances and everything must be done to preserve personal relations and, if and when appropriate, to ‘rebuild’ the family. On the other hand, and secondly, it was also in the child's interest to ensure its ‘*development in a sound environment*’. A parent could not be entitled under Article 8 to have such measures taken as would harm the child's health and development. The Court noted that the same philosophy was found within the Hague Convention, in that the prompt return mechanism was balanced against the exceptions to return, notably Article 13(1)(b), grave risk of harm.

COMMENT

There has been considerable controversy over this decision and suggestions that the Hague Child Abduction will be treated differently in Europe than in other jurisdictions. However, some countries, including within the EU, take an unacceptably long time to deal with child abduction litigation including appeals. As a consequence, the life of the child has genuinely moved on. The solution appears to be to insist on the rapid disposal and prompt return of abducted children to the habitual place of residence so that the substantive issues of custody can be determined there. Ireland endeavours to largely adhere to the requirements in the Revised Brussels II bis Regulation 2201/2003 (BIIR) of a six-week determination (including appeals) of child abduction cases and this time period is normally extended to all Hague child abduction cases. The Swiss legal system failed to deal expeditiously with this case.

IRISH CASES

McE V O'S, GO'S Notice Party

Sheehan J. (HC) [2009] IEHC 52

This case highlighted the different rules and procedures applicable in the case of applications for maintenance and support of non-marital children. The mother was not married to the father of the child. The father was already married with a family. The mother sought periodical maintenance with included a "carers allowance" for herself. She also sought and obtained a substantial lump sum to provide accommodation for herself and her child. She was successful in the Circuit Court and suffered a reversal of fortunes in the High Court on appeal where the father's wife was joined as a notice party to the proceedings. The periodical child maintenance order was upheld but the lump sum order for housing was not. The Judge highlighted that the legislative basis was different depending on whether the child was a marital or non-marital child.

COMMENT

Section 42 of the Family Law Act 1995 allows for the making of a lump sum order in addition to a maintenance order in favour of a non-marital child. However the Court in making orders for the support of a marital child following his or her parent's separation or divorce must also consider and have regard to their accommodation needs.

B v O'R [2009] IEHC 247

This case concerned an appeal from a decision of Judge Michael White of the Circuit Court with regard to the guardianship custody and access to three children. It relates to a "move away application".

The Court stated that;

"A court cannot proceed to determine the issue in a way which separates the issue of relocation from that of residence and the best interests of the child. There can be no division of the case into discreet issues such as primary issues as to who should have residence and a further issue or separate issues as to whether the relocation should be permitted"

It went on to determine that welfare of the children was of paramount importance and they formed a family unit with their mother. The way in which the parent having primary care may choose in a reasonable manner to order her way of life is one of those things which the parent who has not been given custody or, in this case primary care, may well have to bear. The rights of the other parent are best regulated by reasonable access.

COMMENT

"Move Away" applications can be particularly fraught as the "left behind" parent may suffer the absence of their children very deeply. The B v O'R Judgment is slightly out of step with the rationale arrived at in England in the case of F v M [2010] EWHC 2046 where Mostyn J stated that he found that the Washington Declaration (March 2010) supplied a more balanced and neutral approach to a relocation application, as it specifically ordains a non-presumptive approach. In his view *"It requires the court in a real rather than a synthetic way to take into account the impact on both the child and the left-behind parent of the disruption of the periodicity and quantum of the prevailing contact arrangement"*.

The B v O'R judgment is in line with earlier English Judgments (The Payne and Poel cases) which give a child's primary carer considerable freedom to relocate abroad with the child. Judge Mostyn complained that the rationale in those earlier English Court decisions have the tendency to almost invariably allow applications to succeed, save in those cases where it is demonstrably irrational, absurd or malevolent.

McD v L [2008] 1 I.L.R.M (SC)

The Applicant was a single homosexual man who acted as a sperm donor in the conception of a child with a lesbian couple by way of artificial insemination. The parties entered into an agreement as to his future relationship with the child. However he subsequently sought Guardianship and access. The Supreme Court considered the welfare of the child to be a critical factor. The High Court has dismissed the father's application for guardianship and access to the child finding that the couple were a "de facto family" which had to be accorded rights under Article 8 of the ECHR. The Supreme Court unanimously dismissed the appeal on the issue of guardianship but allowed the appeal on access and remitted that back to the High Court to be determined. The Supreme Court indicated that there is no institution in Ireland of a "de facto family".

The High Court subsequently heard the access application but at that point the couple had emigrated to Australia and intended staying there and did not want the father to have access. The Court made orders regarding access in Australia and Europe when the couple visited there.

COMMENT

The Supreme Court reasserted the position of the family under the Irish Constitution and reaffirmed well known principles regarding the fact of there being no constitutional right to guardianship or custody for unmarried fathers the only right is the right to apply to Court and that application will be judged by reference to the "best interests" of the child.

J.McB and L.E [2010] IESC 48

An Irish father and British mother cohabited for more than 10 years and had three children. The family had lived in the UK but were resident in the Republic of Ireland when the mother left home with the children and moved to a women's refuge. The father applied to the Irish court seeking rights of custody but before the court case, the mother flew to England.

The father sought summary return of the children under the Hague Convention. The English court sought determination by the Irish authorities as to whether the removal of the children was wrongful.

The Irish court held that the father had no rights of custody and that the removal had not been wrongful.

Mr. Justice Fennelly referred a question to the Court of Justice of the European Union for a Preliminary Ruling

which was delivered by the 30th day of July, 2010. The question to be determined was whether council Regulation 2201/2003 precluded a member state from requiring an unmarried father to obtain a custody order in order to qualify as having custody rights having regard to the Charter and in particular Article 7 thereof (on the respect for private and family life) and Article 24 thereof, (on the protection of the rights of the child).

The ECJ Judgment in Case C-400/10 *J.McB .v. L.E* confirmed that a member state is not precluded from making the acquisition of rights of custody by an unmarried father dependent on obtaining a court order.

COMMENT

The principal of making unmarried fathers apply to Court for rights was not held to be inconsistent with the Charter or the European Convention of Human Rights. 'Rights of custody' is an autonomous concept independent of the law of member states, but it is for the member state to determine who has rights of custody at the relevant time. In practice therefore fathers who are not married to the mother of their children should ensure that they secure legal Guardianship following the birth of their children. Guardianship can be secured either through parental agreement and the completion of a Statutory Declaration (S.I No. 5 of 1998) Guardianship of Children (Statutory Declaration) Regulations, 1998. If no agreement is forthcoming then an Application may be made in the District Court for an Order appointing the natural father as Guardian jointly with the mother of the child. Mediation is a sensible and cost effective way of resolving such issues.

RECENT DEVELOPMENTS

CIVIL PARTNERSHIP AND CERTAIN RIGHTS AND OBLIGATIONS OF COHABITANTS ACT 2010

This legislation came on the statute books with much fan fair in July of 2010. The Commencement Order will bring the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 into effect from 1 January 2011. In essence, the Act enables persons in committed gay relationships who wish to share duties and responsibilities to have the choice to register their civil partnership and become part of a legal regime (akin to marriage) that fully protects them in the course of that partnership and, if necessary, on its termination. From April 2011 - bearing in mind the 3 month notification requirement we should see the first Civil Partnership Celebrations of 2011. An information

booklet on the Registration process is available at <http://www.groireland.ie/>.

The second part of the Act provides a redress scheme or safety net scheme, designed to provide some protection of vulnerable cohabitants. The redress scheme will be a legal safety net for people in long-term relationships who may otherwise be very vulnerable financially at the end of a relationship, whether through break-up or through bereavement.

The redress scheme may only be activated at the end of a relationship of at least 5 years duration, whether by break-up or death. A financially dependent cohabitant may apply to court for certain remedies, including maintenance, pension or property adjustment orders, or provision from the estate of a deceased cohabitant.

However the Act also makes provision for the recognition of **“cohabitant agreements”** which regulate the shared financial affairs of cohabiting couples and enable couples to legally “opt out” of the application to them of the redress scheme.

PRE-NUPTIAL / PRE-REGISTRATION AGREEMENTS

Pre ‘Nuptial’ Agreements (PNA’s) and by extension Pre Civil Partnership Registration Agreements (PRA’s) are not legally enforceable in either Irish or UK law. However this is not to suggest that they are of no value!

Both the Family Law Act, 1995 and the Family Law Divorce Act, 1996 refer to the power of the Court *to vary* an ante-nuptial or post nuptial settlement. These provisions are replicated in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 Act. Courts may therefore vary any ante-nuptial or post-nuptial settlement made for the benefit of one of the spouses or civil partners. Such agreements are not ignored however and are “taken into account”.

The Succession Act 1965 refers to ante-nuptial contracts and provides for an ‘opt out’ of the legal rights provisions of the act s.113 of that act provides that the

“legal right of a spouse may be renounced in an ante-nuptial contract made in writing between the parties to an intended marriage or may be renounced in writing by the spouse after marriage and during the lifetime of the testator”.

Many couples who have been through divorce or who are marrying for the second time or who wish to ‘ring fence’ business assets/farms from the ravages of matrimonial litigation seek advice on pre-nuptial agreements. Such agreements are bound by the ordinary laws of contract and so it is well to be mindful that standard contractual considerations may vitiate an agreement, for example, mistake misrepresentation, undue influence, fraud or duress. It is important that the parties are independently advised, that the agreement is not forced or suggested at the eleventh hour and that there is a disclosure/negotiation process. It is also important that it is clear, unambiguous and objectively fair.

In England & Wales, the Supreme Court in the case of ***Radmacher -v- Granatino*** [2010] UKSC 42 determined that prenuptial agreements should be given decisive weight where entered into freely by both parties. The Court further determined that the agreement was not unfair. Fairness did not entitle the husband to a portion of the wife’s wealth. There was no argument for ‘compensation’. There was no issue of duress, misrepresentation, or anything else that would invalidate the prenuptial agreement and so the Court held that it was fair to hold the husband to the agreement, and therefore right that the court should do so.

If you would like to discuss how RDJ might help you, please contact any member of the RDJ Family Law Department.

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