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FAMILY LAW BULLETIN
WINTER 2010
www.rdj.ie

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

A, B. and C. v. Ireland 16/12/2010

Grand Chamber Jugment

Three women challenged Ireland's existing abortion law before the European Court of Human Rights. All three women became pregnant unintentionally and travelled to England for abortions. All experienced a financial burden in travelling. All experienced after-effects requiring treatment in Ireland. The court noted that all three felt a deep sense of moral stigma about their abortions; that they had done something in England which was a crime in Ireland.

But the women were different in important ways. Only one (C) was eligible for an abortion under existing Irish law as her life was at risk by virtue of the pregnancy as she was undergoing treatment for cancer. There is no regulatory regime currently in place which would allow the risk to the life of the mother to be assessed and her qualification for an abortion in Ireland. B & C found themselves in different circumstances, but argued that abortion should be permitted where the life of the mother is not at stake, but her health and well-being is. A, for instance, was living in poverty, struggling with alcoholism and had lost custody of her other children. She suffered from post natal depression and did not wish to risk a further pregnancy as she was seeking to become reunited with her children in care. B believed and had been advised that she was at risk of an ectopic pregnancy.

The Court held that there had been no violation of Article 8 in respect of the first and the second applicants, and unanimously, that there had been a violation of Article 8 in respect of the third applicant.

COMMENT

Under Article 8, the State has a positive obligation to provide effective and accessible means of protecting the right to respect for private life. The State, enjoys a broad margin of appreciation as to whether to permit various categories of abortion. However, abortion is permitted under Irish law where there is a real and substantial threat to the life of the mother. There must be a legal framework devised so that an individual can access the rights provided by the Constitution and the Court held that such framework should be *"shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention"*. Ireland has a wide margin of appreciation on such sensitive issues however and there is no requirement under the ECHR to permit abortion where there is no risk to the life of the mother. The right to travel abroad for abortion and the right to information on abortion in other circumstances was deemed to be sufficiently respectful of the private life of A & B as this

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"…struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn".

Because Ireland failed to enact legislation on abortion within the parameters provided under the Irish Constitution there was no appropriate framework available to C within which she could vindicate her right to private life.

Article 10

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Gillberg v Sweden *(Application no. 41723/06)* 2/11/2010

A Swedish professor at the University of Gothenburg had been responsible for a long-term research project on hyperactivity and attention-deficit disorders in children. Certain assurances were made to the children's parents and later to the young people themselves concerning the confidentiality of the collected data. According to Mr. Gillberg, the university's ethics committee had made it a precondition for the project that sensitive information about the participants would be accessible only to him and his staff, and he had therefore promised absolute confidentiality to the patients and their parents. The research papers, contained a very large amount of privacy-sensitive data about the children and their relatives. Some years later, two other researchers not connected to the University of Gothenburg requested access to the research material. One had no interest in the personal data as such but in the method used and the evidence the researchers had for their conclusions, the other wanted access to the material to keep up with current research. Both requests were refused by the University of Gothenburg, but the two researchers appealed against the decisions.

The Administrative Court of Appeal found that the researchers should be granted access to the material, as they had shown a legitimate interest and could be assumed to be well acquainted with the handling of confidential data. A list of conditions was set for each of the two researchers, which included restrictions on the use of the material and the prohibition to remove copies from the university premises etc. Mr. Gillberg and the university refused to give access to the researchers. The university decisions were annulled however by two judgments of the Administrative Court of Appeal. A few days later, the research material was destroyed by a few colleagues of Mr. Gillberg. The Swedish Parliamentary Ombudsman brought criminal proceedings against Mr. Gillberg, who was then convicted of misuse of office and given a suspended sentence and a fine. The university's vice president and the officials who had destroyed the research material were also convicted. Mr. Gillberg's conviction was upheld by the Court of Appeal and leave to appeal to the Supreme Court was refused. Short time later Mr. Gillberg lodged an application with the EctHR claiming the conviction breached his rights under Articles 8 and 10, because his promise of confidentiality to the participants in the research was allegedly imposed on him by the university's ethics committee, as a precondition for carrying out his research.

The Court rejected the claims and held that the assurance of secrecy did not take precedence over the law in Sweden and there was a 200 year history of access to information in Swedish law. What mattered was that the university administration had understood that it was incumbent on it to release the documents without delay and that for a considerable period Mr Gillberg in his capacity as head of the Department of Child and Adolescent Psychiatry, intentionally failed to comply with his obligations as a public official arising from the judgments of the Administrative Court of Appeal

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COMMENT

While on the face of it the case raised important ethical issues involving the interest of the children participating in the research, medical research in general and public access to information, the Court considered itself only being in a position to examine whether Mr. Gillberg's criminal conviction for refusing to execute a court order granting access to official documents was compatible with the Convention.

The assessment of a request for access to research material containing sensitive medical data cannot solely be based on the consensual agreements between the researchers and the data subjects or on the basis of data protection regulation. Article 10 of the European Convention of Human Rights requires that confidentiality of data used for scientific research and the protection of sensitive personal data must be balanced with the interests and guarantees related to transparency and access to documents of interest for the research society or society as a whole.

According to recent case law of the ECHR Article 10 of the ECHR is considered to include the right of access to documents held by authorities or public institutions (see Társaság a Szabadságjogokért v. Hungary, Application no. 37374/05 and Kenedi v. Hungary, Application no. 31475/05).

RECENT DEVELOPMENTS

MEDIATION DIRECTIVE

EU Directive 2008/52 has been adopted by Ireland and the transposition date is set for 21 May 2011 the Department of Justice Equality and Law Reform is in the process of drafting the Statutory Instrument to transpose the Directive by the 21 May 2011.

The Mediation Directive applies only to cross-border disputes within the meaning of the Directive but Member States are free to expand its application to domestic disputes. Cross border family disputes may not feature in the transposed directive, however the matter has not been determined yet. Enforceability is seen as the key to ensuring that Mediation is not regarded as the poor relation to judicial proceedings. If the outcome is legally enforceable then it is important that the parties have been fully advised during the process to ensure Article 6 ECHR rights are respected.

The Law Reform Commission Report published in November 2010 (LRC 98-2010) does not recommend that family law guardianship issues be regarded as "cross border" disputes.

Helpfully, the LRC does recommend that attendance at an information session on family dispute resolution processes including mediation, conciliation, and collaborative practice should, in general, be a statutory mandatory requirement in family law cases.

The 1996 Hague Convention on Jurisdiction Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

This Convention was ratified by Ireland in September 2010. The Commencement Order for the legislation is the Protection of Children (Hague Convention) Act, 2000. It has been dormant on the statute books since then but will be commenced by Ministerial Order 3 months after ratification (1 January 2011). The Convention provisions mirror many of those in the Regulation 2201/2003 which takes precedence of the convention however it has important implications in non EU situations. It is also important to note that it provides for the application in Ireland of foreign law in some situations. A change of habitual residence cannot extinguish parental responsibility accorded already- but it can confer it see Art. 17, 18 & 22. *J.McB and L.E* [2010] IESC 48 ECJ referral on issue of parental responsibility for 'fathers' without judicial determination of parental responsibility under (EC) 2201/2003. A situation may arise where another Member State accords automatic guardianship for an unmarried father and that would have to be implemented in Ireland in situations in which the 1996 convention applied. The implementing may therefore have some practical application in such situations.

The 1996 Convention will have broader scope in child protection matters but "overlaps" of Convention provisions will complicate National practice and procedure and much remains to be teased out in practice.

Council of Europe Guidelines

The Council of Europe has recently adopted Guidelines on child friendly justice intended to enhance children's

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access to and treatment in justice in Member States. In the drafting process, it decided to listen directly to children and young people. The guidelines deal with the issue of the place and role, as well as the views, rights and needs of the child in judicial proceedings as well as in alternatives to such proceedings. The guidelines were adopted by the Committee of Ministers on 17 November 2010 at the 1098 meeting of the Ministers' Deputies. The guidelines also deal with legal counsel and representation of children in legal proceedings and the right to be heard and express views. The guidelines are available on the COE website. Member States have been invited to ensure that the Guidelines are widely disseminated among all authorities responsible for or otherwise involved in children's rights in Justice.

CHILD ADOPTION

The Adoption Act, 2010 became law in November 2010 and heralds a whole new era for both domestic and inter-country adoption in Ireland. The Adoption Act, 2010 gives force of law to the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption (ICA). Ireland is now part of the "Hague Club" of multi-lateral regulation for such adoptions. The 2010 Act incorporates the provisions of the Hague Convention, and is designed to provide a framework to ensure that appropriate procedures have been followed when adopting a child from abroad and that all adoptions are effected in the best interests of the child.

The Act tasks the new Adoption Authority with ensuring high standards, setting guidelines for the HSE and other 'accredited' bodies and regulating and monitoring all adoption activities.

SOME CHANGES

- The 2010 Act imposes a mandatory requirement to register ICA adoptions in the future. Failure to do so will be regarded as an offense. This change benefits the child by ensuring that his/her ICA is recognised in Ireland.

- Prospective ICA adopters will only be able to seek a child from another Hague Member State, or a State with which Ireland establishes a Bilateral Agreement;

- The Adoption Authority will be Central Authroity for ICA and entitled to negotiate "bi-lateral" agreements with non-Hague countries.

- Declarations of eligibility and suitability will now have a "life span" of 24 months and will be renewable for a further 12 months;

- Adoption Agencies must seek new "accredition" and focus on the interests either on birth parents or adoptive parents to ensure that there is no role ambiguity or conflict of interest. Adoption Agencies may no longer have an integrated service even for domestic adoptions. The HSE may deal with "all issues" of adoption however.

- The 2010 Act does not alter the existing position on the right to identifying information, step-parent adoption, the category of child eligible to be adopted or the category of adult(s) eligible to adopt.

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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