

Family Law Online Index

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EFFECTIVE PARTICIPATION AND THE RIGHT TO RESPECT FOR FAMILY LIFE - P, C and S v United Kingdom [2002] FLR 631 (Application No 56547/00 16.7.2002)

Dermot Casey (Coram Chambers), Barbara Hewson (Littman Chambers) and Nuala Mole (AIRE Centre) represented P, C and S in Strasbourg.

1 The European court of Human Rights has made an important decision in P,C and S which will have implications for family law practice in terms of parental participation and effective access to the court. The removal of a baby at birth under an emergency protection order breached the parents' right to respect for their family life. The mother and father's right to a fair trial was breached as they did not have legal representation in care and freeing proceedings. Not only did the Strasbourg court find violations under Article 6 but also found that the lack legal representation breached their right to respect for family life under Article 8. Without representation they were unable to be involved in the decision-making process about their child to a degree sufficient to provide them with the requisite protection of their interests. The court found that the child's right to respect for family life was breached even though she was represented throughout the proceedings.

The facts

2 S is the natural child of P (mother) and C (father). P is a citizen of the United States.

3 S is C's only child. P has two other children. The oldest, A, is now an adult and he was raised by P in the United States. Her second child, B, was born in a relationship with her former husband. That relationship broke down very acrimoniously in 1992 when B was aged 7. A and B continued to live with P. During that time P brought B to hospital many times with complaints of fever and diarrhoea. In 1994 a stool test proved positive for a laxative. The hospital reported the mother and B was placed in the care of his father where he remains. P was convicted of a misdemeanour, that is, of administering the laxative to B. She was given a three month

suspended sentence and put on probation for three years. P continued to have monthly supervised contact with B following her conviction until 1996 when she left the United States.

4 P met C in the United States while he was researching his PhD thesis on the issue of Munchausen's Syndrome by Proxy ("MSP"). P followed C to the UK in 1996. P was in breach of her probation order by leaving the US. P and C were married in 1997 and P became pregnant.

During the pregnancy the local authority were made aware of the previous proceedings in the US by B's father. P and C did not accept the label of MSP which was then used in relation to her behaviour regarding B. A pre-birth Child Protection Case Conference decided to place the child's name on the Child Protection Register at birth. In April 1998 the local authority decided to apply for an emergency protection order (EPO) on the birth of the baby rather than an interim care order "as the care proceedings would require notice and [the local authority] had reasons to believe that the parents would evade the authorities". In May 1998 a Consultant Child and Adolescent Psychiatrist advised the local authority that the risk factors were not sufficiently worrying to justify not telling the parents about the proposed application.

5 S was born prematurely by Caesarean-section in the early hours of 7th May 1998. P required constant monitoring. The local authority obtained an EPO ex parte at 10.30am that day but delayed removal of the child as P's obstetrician had warned that it would cause P's blood pressure to rise. The local authority removed S at 4.30 pm that day. P was not permitted to see S until she was discharged from hospital a few days later.

P and C had supervised contact with S four times each week during the course of the care proceedings and their contact was described as "exemplary".

THE CARE, FREEING AND CONTACT PROCEEDINGS

6 The local authority instigated care proceedings and subsequently applications for leave to refuse contact and for a freeing order. The care plan was for adoption with indirect 'letterbox' contact. The matter was listed for final hearing of the care, contact and freeing applications on 3rd February 1999 with a time estimate of 20 days. P and C were separately represented by leading and junior counsel, as was S. On 5th February C was granted leave to withdraw from the care proceedings given the prospect of a long trial and little prospect of defeating the local authority applications. On the same day, P's counsel advised the court that her legal aid had been withdrawn on the basis that P was asking that they conduct her case in an unreasonable manner. Wall J remarked that P still had the right to show cause why her legal aid certificate should not be discharged. He allowed P's legal team to withdraw nonetheless.

7 Wall J granted P an adjournment on 5th February (Friday) until 9th February. P sought a further adjournment on 9th February to allow her to apply for her legal aid certificate to be reinstated. Wall J refused. He gave his reasons for the refusal in his final judgement in the care proceedings on 8th March 1999: (i) he had been satisfied that the mother had a good grasp of the documentation; (ii) the mother was able to put her case in a clear and coherent way; (iii) counsel for other parties would assist the mother on any points she wished to advance; (iv) the outcome of the case seemed to hinge or be likely to hinge on the mother's cross examination, where the ability of lawyers to protect her was limited; (v) the judge was concerned about the prejudice to S which a very lengthy adjournment would entail and (vi) Dr Bentovim had advised that a decision should be made about S before her first birthday.

8 P conducted her own case over a period of 20 days.

9 Wall J concluded that if the mother had been represented by counsel her case would have been conducted differently but he was satisfied that the result would have been the same. Wall J made threshold findings that P had administered laxatives to B on three occasions and that her behaviour towards him had caused serious psychological harm. He concluded that P was unwilling to accept she had harmed B and, therefore, she was not amenable to any treatment at that time. He found that C was incapable of altering his emotional perception of P or of accepting that she was responsible for harming B. Wall J concluded that S could not be placed with her parents.

10 On 8th March 1999 Wall J made a care order. He adjourned the S. 34 and freeing applications to the 15th March and ordered a transcript of his judgement to be made available to the parents. It was not ready for the hearing on 15th March. P and C were in court on 15th March and indicated their opposition to the freeing application. P applied for an adjournment to obtain legal representation. Wall J refused the application for an adjournment stating that P was capable of representing herself and that her former lawyers would have put the parents on notice that the freeing proceedings would follow the care proceedings. He noted, however, that that there might be an "element of railroading" but on balance S' interest in having her future decided should prevail. He made a freeing order.

11 In relation to contact Wall J noted that "there will be the usual letterbox contact. But it will in due course ..be essentially a matter for the adoptive parents as to precisely what contact S has with her natural family".

12 On 15th March 1999 Wall J refused leave to appeal. The Court of Appeal also refused leave to appeal on 5th July 1999. P and C then complained to the ECHR in Strasbourg.

13 P and C continued to have direct contact with S until 21st July 1999. S

was placed for adoption on 2nd September 1999 and was adopted on 27th March 2000. P and C have not received any form of indirect contact from the adoptive family. So P and C complained to the ECHR again, this time on behalf of S too. The complaints were declared admissible on 11 December 2001.

Removal at birth

15 The removal of S on her birth raises a number of issues. The first is the lack of consultation with the parents about the plan to remove her. However, the court did not find the ex parte EPO to be a breach of Article 8 apparently on the basis that P and C were aware that S might be removed on birth and there were relevant and sufficient reasons for an order. This is in striking contrast to the earlier decision in *K and T v Finland* (Application no. 25702/94 12.7.01 Grand Chamber) which was very similar on its facts. In that case the Grand Chamber found that the making of the emergency care order without notice to the parents, and the subsequent removal of the child, breached Article 8. The breach in P, C and S arose because of the way the EPO was implemented (removal of the child). It is not clear why the court distinguished the facts of these two cases, especially as the expert advice to the local authority in P, C and S had been that the parents could be told of the plan to apply for an EPO.

16 The court held that there must be "extraordinarily compelling reasons before a baby can be physically removed from its mother against her will, immediately after birth as a consequence of a procedure in which neither she nor her partner has been involved" (par 116). The court went on to say that the authority should look at the impact on the parents of the plan to remove the child and at the alternatives to removal. The court also considered in some detail what risk P posed to S if both remained together and concluded that it was manageable with supervision (par 132). The message to local authorities must be that if there is a way to manage a perceived risk which will allow the mother and child to remain together it must be the preferred option. A less rigorous risk assessment will be open to challenge under Article 8 before or after that step is taken (see below).

Article 6

17 P and C's right to a fair trial were breached as they were not represented in the care and freeing proceedings. The court summed up the breach of Article 6 as follows: ".the lack of legal representation of P during the care proceedings, and of P and C during the freeing for adoption proceedings, together with the lack of any real lapse of time between the two procedures.deprived the applicants of a fair and effective hearing in court" (par 137). In the freeing proceedings, for example, Wall J had concluded that the parents would have been alerted to the issues involved in freeing by their lawyers before they withdrew. The Strasbourg court did not agree and held that "this does not mean however that [P and C] were in an adequate position to cope with the hearing when it occurred. This hearing

also raised difficult points of law and emotive issues, in particular since the issuing of the care order [a week earlier], and the rejection of the applicants' claims to have S returned home, must have had a significant and distressing impact on the parents" (par 97).

18 The effect of not being represented was that the parents were prevented from putting forward their case in a proper and effective manner on the issues which were important to them. The court noted, for example, that in deciding to free S for adoption the court gave no explanation as to why direct contact was not to be continued nor why an open adoption was not possible (99).

Article 8 procedural breaches

19 The court found that there were procedural breaches of Article 8 in respect of P, C and S. The court has developed its case law to include the right of parents to be involved in the decision-making process which will have an impact on their family life with their child.

20 The court referred to *W v UK* [1987] 10 EHRR which set out the approach to the procedural aspects of Article 8: "What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8" (par 64 and par 119 in P, C and S).

21 In P, C and S the court considered the legal proceedings to be part of the decision-making process and the lack of legal representation had a direct impact on the parents' ability to be involved to a sufficient degree. The court noted that: "It was crucial for the parents in this case to be able to put forward their case as favourably as possible, emphasising for example whatever factors militated in favour of a further assessment and for their viewpoints on the possible alternatives to adoption and the continuation of contact even after adoption to be put forward at the appropriate time for consideration by the court" (136). Here the court identified some of the issues which could and should have been raised on behalf of the parents if they had been represented.

22 Sir Nicholas Bratza QC, the UK judge, addressed these procedural breaches under Article 8. He said ".I attach importance to the fact that, even if a care order was inevitable in the case of S and even if the legal representation of P could have made no difference to the result of those proceedings, the same is not necessarily true in the case of the freeing for adoption proceedings, in which effective legal representation could well

have had a material influence on the decision to free S for adoption and on the decision relating to continuing contacts between S and her parents prior to and after her adoption".

Implications for practice

23 The procedural obligations implicit in the right to respect for family have far-reaching implications for family law. For example, the recent case of *Re M (Care: Challenging Decisions by Local Authority)* [2001] 2 FLR 1300 found that a change in the care plan after the care order had been made was unlawful as the parents had not been involved sufficiently in the decision. Holman J said: "My consideration of this aspect of this case has emphasised to me what a heavy responsibility and wide discretion the Human Rights Act 1998 has placed upon a court in considering, after the event, the lawfulness of a decision-making process such as this" (p 1313). That decision was approved by the House of Lords in *Re S (Minors)(Care Order: Implementation of Care Plan)* [2002] 2 WLR 720. The President has recently reviewed the relevant case law in *C* and another v *B Metropolitan Borough Council* [2002] EWHC 1438 (Fam) and made the following comment: "The approach of the court

to a challenge to the procedures followed and the care plan adopted by the local authority which is being criticised has to be broader and more investigative than prior to the implementation of the Human Rights Act 1998 and the court must apply the requirements of Article 8(2) of the Convention" (par 56). Where human rights challenges to care plans and placements of children in care are brought they should be heard in the Family Division and, if possible, by judges with experience of sitting in the Administrative Court (par 55).

Challenging local authority decision making and effective remedy

24 Both *Re M* and *C* (above) related to decision-making by the local authority after a final care order where it was alleged that the parents has been excluded from significant decisions. *K and T v Finland* and *P, C and S* relate to decisions at a much earlier stage in child protection procedures.

25 *P, C and S* involved an unlawful decision by the local authority to remove S on the day of her birth supported by an emergency protection order. The breaches of Article 8 in *P, C and S* and *K and T v Finland* would suggest that there is a particular quality to the family life of a new born child which attracts special protection at that crucial time. There is also the importance of breast-feeding both for the mother's and the baby's health. The question arises as to whether if the Human Rights Act 1998 ("HRA") had been in force at the relevant time, *P* and *C* could have brought a claim under the HRA to prevent her removal. Local authorities and courts may have to review their use of ex parte emergency protection orders in relation to newborns. Parents will be able to raise human rights issues at an inter partes EPO hearing but should the court now be asked to grant an EPO subject to a condition that a newborn remain with its mother and be breast-fed, if necessary under supervision, while she recovers in hospital?

When parents have reason to believe that a child will be removed at birth their only effective remedy (Article 13) to prevent that proposed action (under S 7) would be an injunction (under S 8). Applying for a remedy after the removal of the new-born baby would be too late and the traumatic separation will already have taken place causing irreversible consequences for the mother and baby relationship.

26 There are other areas of decision making within child care procedures and proceedings which may be susceptible to challenge under Article 8 such as decisions about initiating care, adoption and freeing proceedings. Recommendations by Adoption Panels, for example, are made without parental involvement even though those recommendations steer the local authority decision-making on those issues. Is the exclusion of parents from effective participation in those far-reaching decisions compliant with Article 8?

27 The decision in P, C and S underlines the requirement that parents be fully involved both in decision-making, including court proceedings, which will affect their family life. It is one of a growing number of cases which demonstrate that the Convention which now has direct effect following the enactment of the HRA will have far-reaching implications for the practice of family law in the future.