

ECHR and Family Law Litigation

- **Introduction:**
- Impact of the ECHR on Family Law Litigation. We will try to present some of the ways the ECHR can be an effective tool in a Family law litigation.
- More precisely, we will present how ECHR case law can reinforce our arguments both from a procedural and a substantial point of view.

Introduction-2

- **Focus:**
- On the right of one of the parents to exercise contact rights and,
- On parentage rights following a surrogacy procedure.
- We will try to shed light on arguments grounded on ECHR case law and clarify when, and under which circumstances, one may successfully invoke these arguments.

I. Contact rights of one of the parents

- **Case law:**
- *KACPER NOWAKOWSKI v. POLAND*, Case no. 32407/13, 10 January 2017
- *ÓNODI v. HUNGARY*, Case no. 38647/09, 30 May 2017
- *McILWRATH v. RUSSIA*, Case no 60393/13, 17 July 2017

Friday Session 3: The EU & ECHR Cases

KACPER NOWAKOWSKI v. POLAND, Case no. 32407/13, 10 January 2017

- **Facts and procedure:**
- Couple with hearing impairment; Birth of a son.
- Father had communication difficulties due to hearing and speech impairment.
- Divorce and failure of father to stick to the contact schedule which led to a reduction of contact, on the basis of an expert report, to four times each month.
- Dismissal of the applicant's request for an extension of contact on the basis of communication difficulties and the relationship between the father and son being weak in comparison to that of the mother and son.
- Appeal of the father dismissed.

KACPER NOWAKOWSKI v. POLAND, Case no. 32407/13, 10 January 2017

- The domestic courts did not properly examine the possibility of resorting to different existing legal instruments which could have facilitated the broadening of contact between the applicant and his son.
- Court underlines the obligation of the authorities *“to take measures that would reconcile the conflicting interests of the parties, keeping in mind the paramount interests of the child”*.
- **Duty of the domestic courts, to examine what steps can be taken to remove existing barriers in order to facilitate contact** between the child and the non-custodial parent.
- Authorities have failed to adequately secure the applicant's right to respect for his family life by failing to adequately secure his right to effective contact with his son.

ÓNODI v. HUNGARY, Case no. 38647/09, 30 May 2017

- **Facts and Procedure :**
- - Couple married (1990); birth of a daughter (1994); divorce (2004); initial agreement on custody & other parental rights; Attempts to exercise contact failed.
- - Judgment of district court of 10 June 2008 restricting the applicant's contact based on the practical conclusion that the previous contact arrangements could not be implemented.
- - Applicant lodged numerous enforcement requests with the guardianship authority, in order to have his right respected, with no result.
- - 62 applications to the guardianship authorities requesting the enforcement of his contact rights.
- - Refusal of the child to have any contact with the parent.

Friday Session 3: The EU & ECHR Cases

ÓNODI v. HUNGARY, Case no. 38647/09, 30 May 2017

- Art. 8 imposes positive obligations which are inherent in an effective respect for family life.
- The obligation of the National authorities is one of means and not of result.
- **Swiftiness of implementation** of the measures is a basic criterion to judge their adequacy.
- Active parental participation in the proceedings concerning children is required under Article 8
- Applicant's conduct at the enforcement stage is an important parameter and shall be carefully considered.

Outcome & Consequences

- Court found that the applicant's own behaviour was not crucial for the non enforcement of the contact right.
- In its decision the Court underlines that a legal order must provide for "*sufficient legal arsenal to ensure compliance with the positive obligations*" imposed by art. 8.
- Finally, the Court notes that domestic authorities did not deal promptly with several enforcement requests which remained unprocessed for a year.
- Held that there was a violation of article 8 by the Hungarian authorities.

McILWRATH v. RUSSIA, Case no 60393/13, 17 July 2017

- **Facts and procedure:**
- Couple of an American and a Russian woman; after marriage habitual residence in Italy; Birth of 4 children.
- Problems lead to separation and proceedings are initiated in Italy for the divorce and custody rights.
- Interim decision grants rights of custody to the father and contact right to the mother; prohibition of change of residence without consent.
- Wife takes the children out of Russia illegally.
- 12 December 2012: divorce decision in Italy, joint care & residence with husband.
- Husband unsuccessfully tries to have the provisional judgement recognised and enforced.
- Parallel proceedings on custody and contact rights start on the initiative of the wife in Russia.

Friday Session 3: The EU & ECHR Cases

McILWRATH v. RUSSIA- Facts & Procedure

- Proceedings (January 2012) in Russia. Wife invokes the refusal of children to be in contact with the father as an argument for the limitation of father's rights.
- October 2012: agreement on father-children contact which was later cancelled due to an incident.
- Wife unsuccessfully invokes violent conduct of spouse.
- Father shows a vivid interest to be in contact with children (has travelled on fifty occasions to Russia).
- Russian courts refuse to recognise the final judgment on divorce, custody and contact rights arguing that it would violate national sovereignty and general principles of Russian law (25.01.2013 & 12.03.2013).

McILWRATH v. RUSSIA- Facts & Procedure

- A parent and child's mutual enjoyment of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8.
- States have positive obligations inherent in an effective "respect" for family life.
- The Russian Court finally decided on the matter of divorce and contact rights only on 13 May 2014.
- The Court considers that the **time** it took the domestic court to finally determine the dispute, along with the **absence of any temporary regulation of the applicant's contact rights** since December 2012, had irreparable consequences for relations between the applicant and his children and resulted in a de facto determination of the matter.
- Therefore, the Russian authorities failed to assist the applicant in his claims and, as consequence, they failed to fulfill the positive obligations under art. 8 ECHR.

Consequences

- From a procedural point of view:
- **i.** the plaintiff that seeks to exercise his contact right can support his interim relief application on article 8 ECHR to have his right respected.
- **ii.** Depending on the national civil procedure rules a plaintiff may invoke article 8 ECHR to ask for expedited procedures.
- **iii.** National authorities must examine all adequate measures to guarantee the exercise of the contact right.
- **Thus,** the aforementioned case law must be understood as creating procedural obligations on the States that are responsible of the execution of contact rights.
- Such Procedural Obligations can be useful in the context of this litigation.

Consequences

- From a substantial point of view:
- It can be also inferred from the aforementioned cases and especially from cases involving illegal abduction and/or retention of the child that in judicial procedures in connection with parental rights a provisional contact regime must be established in order to ensure the continuity of emotional connection with the child.

2. ECHR and Parentage Following Surrogacy

- ECHR Case law:
- *Mennesson v. France*, no 65192/11 and *Labassee v. France*, no 65941/11, 26 june 2014
- *Foulon et Bouwet v. France*, nos 9063/14 et 10410/14, 21 juillet 2016
- *Laborie v. France*, 44024/13, 19 janvier 2017
- *Paradiso et Campanelli v. Italy*, 24 January 2017

Mennesson and Labassée c. France

- **Facts and procedure:**
- Two couples (have) had access to surrogacy in California and Minnesota respectively.
- The *Mennesson* attempted to have the parentage of their children transcribed in the birth certificate – Refusal.
- The *Labassée* family sought to have the legal relationship recognised on the basis of de facto enjoyment of status (“possession d’état”). They obtained an “acte de notoriété”, a document issued by a judge attesting to the status of son or daughter, based on the existence of a *de facto* parent-child relationship. The public prosecutor refused to (register the document with the relevant registry.

Menesson and Labassée c. France-2

- **6 April 2011:** Claims dismissed at final instance by the Cour de Cassation on the grounds that recording such entries in the register would give effect to a surrogacy agreement that is null and void on public-policy grounds under the French Civil Code.
- French judges saw no violation of article 8 ECHR in that the annulment of the entries in the civil register :
- **i.** had not deprived the children of the maternal and paternal legal relationship recognised by the laws of California and Minnesota and
- **ii.** had not prevented them from living in France with Mr and Mrs Menesson and Mr and Mrs Labassée.

Menesson and Labassée c. France-3

- Claim on grounds of art. 8 for non recognition of their parentage.
- Claim on art. 8 combined with art. 14 ECHR for discrimination against their children.
- **Court:**
- Held that the regulation of parentage constitutes a limitation to the right of parents to family life but the Court considered whether such a limitation is in conformity with article 8 given the fact that a) States have a wide margin of appreciation in similar cases and b) the parents in this case were not deprived of the opportunity to a normal family life.

*Menesson and Labassée c. France –
Solution*

- The Court held that there was a violation of art. 8 ECHR as regards the private life of children born following surrogacy.
- Found a direct link between the private life of children born following surrogacy treatment and the legal determination of their parentage.
- The right to identity constitutes an integral part of the concept of private life there is a direct link between the private life of children born following surrogacy treatment and the legal determination of their parentage.
- The margin of appreciation recognised to states is narrow when it concerns parentage, which constitutes a key aspect of individuals' identity.

Mennesson and Labassée c. France –
Solution

- The Court noted that they were in a state of legal uncertainty: the French authorities, although aware that the twins had been identified in another country as the children of Mr and Mrs Mennesson, had nevertheless denied them that status under French law. The Court considered that this **contradiction** undermined the children's identity within French society.
- The Court further observed that the right of the children to inherit from Mr and Mrs Mennesson was compromised and that uncertainty existed as to the obtention of French citizenship.
- Furthermore, it underlined the importance of the fact that one of the parents was also the child's biological father. This element was considered (as) important since the biological link is a component of each individual's identity.
- Therefore, it would be hard to claim that the best interests of the child would be served by depriving him or her of a legal tie of this nature, while the biological reality of such a tie was, already, established and both the child and the parent concerned sought its full recognition.

Mennesson and Labassée c. France –
Appreciation

- Crucial elements for *Mennesson* and *Labassée* cases
- The apparent contradiction between the reasoning of the *French* courts and the factual reality.
- French authorities refused to enter the parentage of intended parents on the birth certificate but at the same time the family was able to develop a *de facto* family relationship.
- French courts explicitly stated that parentage established by foreign courts was not denied within the French Legal Order.
- The French Government never appealed against the judgment of the ECHR.

Paradiso and Campanelli v. Italy

- **Facts and procedure:**
- Couple have had access to a surrogacy in Russia.
- Both husband and wife were mentioned in the birth certificate as the parents of the child.
- Once they tried to return to Italy the authorities imposed a DNA test which proved lack of genetic link between the child and the father.
- The custody was removed from the intended parents and the child became available for adoption.

Friday Session 3: The EU & ECHR Cases

Paradiso and Campanelli v. Italy

- Penal proceedings were initiated against the couple.
- The court initially found (27 janvier 2015, n° 253358/12) that the removal of the child from the parents constitutes a violation of article 8 ECHR but it specified that this conclusion would not result in the decision for removal of custody being revoked.

Paradiso and Campanelli v. Italy- Solution

- The Grand Chamber found, by eleven votes to six, that there had been no violation of Art. 8 (right to respect for private and family life).
- The decision was based on that **no family life existed** given the absence of any biological tie between the child and the applicants, the short duration of their relationship with the child and the uncertainty of the ties between them from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional bonds.

Paradiso and Campanelli v. Italy- Solution

- The right to private life was concerned by the contested measures but the court found that these measures had pursued the legitimate aims of preventing disorder and protecting the rights and freedoms of others.
- Therefore, the Italian authorities' wish to reaffirm the State's exclusive competence to recognise a legal parent-child relationship – and this solely in the case of a biological tie or lawful adoption – with a view to protecting children was considered as legitimate.
- The Court also accepted that the Italian courts had struck a fair balance between the different interests at stake and thus did not overstepped their margin of appreciation by having concluded in particular that the child would not suffer grave or irreparable harm as a result of the separation.

Differences and Conclusions

- The basic difference between the French cases dealing with the parentage issue following surrogacy and the Italian case of *Paradiso and Campanelli* consists in the difference in the way Italian and French authorities acted when confronted with a couple that had recourse to surrogacy.
- Whereas in France several elements indicated that a legal relationship was recognised with the intended parents, in Italy it was not possible to claim such a contradiction in light of how the authorities acted. Although, the reaction of Italian authorities was more harsh and difficult to understand in terms of the best interests of the child, at the same time it could be justified in light of ECHR reasoning.

Differences and Conclusions-2

- In Italy: Impossible to create a *de facto* family link and the risk of uncertainty as to the identity of the child could be considered as less significant since the Italian authorities do not allow from the very beginning any contact of the intended parents with the children.
- Thus, the Italian approach was much more **consistent** than the French one. This parameter in combination with the theory of Margin of appreciation explain the decision of the Grand chamber.

Final Conclusion

- The ECHR can be a valuable tool in family law litigation. It can reinforce the procedural position of a party and provide for substantial arguments that would have been inconceivable in the context of domestic law.
- In the aforementioned cases the element which is central in the resolution of the problems is the element of *Time*. In the cases of contact rights, timely intervention is a precondition for the respect for the right to family life. In the cases of surrogacy, time is a precondition for the existence of family life, necessary to claim a violation of the right to family life.

Final Conclusion

- In the first case applicants must try not to let the time pass, whereas in the second the applicants must show that time has elapsed, in order to claim the existence of family life which should be protected under article 8 ECHR.
- Finally, a crucial element to defend a case before the European Court of Human Rights is to demonstrate clearly contradictions and inconsistencies in the policies adopted by the State.

Konstantinos A. Rokas
Athens Bar Association
Admitted to the Supreme Court of Greece

- **For ECHR case:**
 - [https://hudoc.echr.coe.int/eng#{"documentcollectionid":\["GRANDCHAMBER","CHAMBER"\]}](https://hudoc.echr.coe.int/eng#{)
 - <http://www.echr.coe.int/Pages/home.aspx?p=home>
- **For any question:**
 - konstantinosrokas@yahoo.com
 - +30 6972 17 27 88
 - +41 76 779 71 08
