



Press and Information

Court of Justice of the European Union

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Judgment in Case C-400/10

J. McB. v L. E.

The removal of a child by a parent to another Member State is wrongful only if it is in breach of custody rights granted by national law

National legislation under which the acquisition of rights of custody by a father who is not married to the mother of the child is dependent on his obtaining a court judgment is not in breach of the right to respect for private and family life protected by the Charter of Fundamental Rights of the EU

The regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility¹ provides that the removal of a child is wrongful where it is in breach of 'rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal'.

Under Irish law, a natural father, who is not married to the mother, does not automatically have rights of custody. Such rights may be granted to him by an agreement entered into by the parents or by a court judgment. On the other hand, the mother automatically has such rights.

Mr McB., an Irish national, and Ms E., of British nationality, an unmarried couple, lived together for more than 10 years and, from November 2008, lived with their three children, born in 2000, 2002 and 2007, in Ireland.

After the couple's relationship deteriorated, the mother left the family home with the children on 11 July 2009 to live in a women's refuge. On 25 July, she took a flight to England, taking with her the three children. In the interim, on 15 July 2009, the father took steps to bring proceedings before an Irish court, in order to obtain rights of custody in respect of his three children. However, since his application had not been served on the mother before her departure, the action had not been validly brought in accordance with Irish procedural law, and the Irish court had therefore not been seised.

In November 2009 Mr McB. sought from the appropriate English court an order for the return of his children to Ireland. That court requested that he obtain a decision from the Irish authorities declaring that the removal of the children was wrongful. Accordingly, in December 2009 Mr McB. made an application to the High Court (Ireland) for such a decision. In April 2010, that application was dismissed on the ground that the father had no rights of custody in respect of the children on the date of their removal, and consequently that removal was not 'wrongful'.

Mr McB brought an appeal before the Supreme Court (Ireland) and on 6 August 2010 that court asked the Court of Justice whether the regulation, in the light of Article 7 of the Charter of Fundamental Rights of the EU ('the Charter') concerning respect for private and family life, precludes a Member State from providing by its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on his obtaining a judgment from a national court with jurisdiction awarding such rights of custody to him, on the basis of which the removal of the child by its mother may be considered wrongful.

¹ Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1))

The Court, ruling two months after receipt of the reference, states that the regulation does not determine who must have such rights of custody as may render a child's removal wrongful, but refers to the law of the Member State where the child was habitually resident immediately before its removal the question of who has such rights. Accordingly, it is the law of that Member State which determines the conditions under which the natural father acquires rights of custody in respect of his child, and which may provide that his acquisition of such rights is dependent on his obtaining a judgment from the national court with jurisdiction awarding such rights to him. The regulation must therefore be interpreted as meaning that **whether a child's removal is wrongful for the purposes of applying that regulation is entirely dependent on the existence of rights of custody, conferred by the relevant national law, in breach of which that removal has taken place.**

Then, the Court finds that **that interpretation is compatible with the Charter, and in particular with Article 7 thereof (on the respect for private and family life) and Article 24 thereof, (on the protection of the rights of the child).**

In that regard, the Court observes that, under Article 6 of the EU Treaty, the European Union recognises the rights, freedoms and principles set out in the Charter, 'which shall have the same legal value as the Treaties'. However, according to the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. It follows that, in the context of this case, the Charter should be taken into consideration by the Court solely for the purposes of interpreting the regulation, and there should be no assessment of the compatibility of national law with the Charter. Further, the Court states that, in so far as the Charter contains rights which correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), their meaning and scope are to be the same as those laid down by the ECHR. Since the content of Article 7 of the Charter and Article 8 of the ECHR is the same, Article 7 of the Charter must be given the same meaning and the same scope as Article 8 of the ECHR, as interpreted by the case-law of the European Court of Human Rights.

In that context, the Court notes that the European Court of Human Rights has already ruled² that national legislation granting, by operation of law, parental responsibility for a child of an unmarried couple solely to the child's mother is not contrary to Article 8 of the ECHR, provided that it permits the child's father, not vested with parental responsibility, to ask the national court with jurisdiction to vary the award of that responsibility.

It follows that, for the purposes of applying the regulation in order to determine whether the removal of a child, taken to another Member State by its mother, is lawful, that child's natural father must have the right to apply to the national court with jurisdiction, before the removal, in order to request that rights of custody in respect of his child be awarded to him, which, in such a context, constitutes the very essence of the right of a natural father to a private and family life. On the other hand, provided that he has that right, the fact that, unlike the mother, the natural father is not a person who automatically possesses rights of custody in respect of his child within the meaning of the regulation does not affect the essence of his right to private and family life.

That finding is not invalidated by the fact that a father such as Mr McB. might find himself unable, if the child is removed by its mother, to obtain the return of that child. Such a removal represents the legitimate exercise, by the mother with custody of the child, of her own right of freedom of movement, and of her right to determine the child's place of residence, and that does not deprive the natural father of the possibility of exercising his right to submit an application to obtain rights of custody thereafter in respect of that child or rights of access. Accordingly, to admit the possibility that a natural father has rights of custody in respect of his child, under the regulation, notwithstanding that no such rights are accorded to him under national law, would be incompatible with the requirements of legal certainty and with the need to protect the rights and freedoms of the mother.

² *Guichard v. France* ECHR 2003-X 714, 2 September 2003.

In those circumstances, the Court concludes that **the regulation does not preclude a Member State from providing by its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court with jurisdiction awarding such rights to him**, on the basis of which the removal of the child by its mother may be considered wrongful.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355