

HOUSE OF LORDS CASE STUDY

EM (Lebanon) v Secretary of State for the Home Department

Background facts

EM is a Lebanese national aged 36 years old. She came to the United Kingdom on 30 December 2004 with her son, AF, who was born on 16 July 1996 and is now aged 12. She claimed asylum.

EM was Muslim and married in Lebanon according to Muslim rites. Her evidence, accepted as true, is that during her marriage her husband subjected her to violence, beating her, trying to throw her off a balcony and trying, on one occasion at least, to strangle her. She had a mental breakdown. He ended her first pregnancy by hitting her on the stomach with a heavy vase, saying he did not want children. On the day EM's son AF was born he came to the hospital with his family to take the child away to Saudi Arabia, but was prevented from doing so. He has not seen AF since.

The appellant divorced her husband in Lebanon because of his violence. Under Lebanese law, the father retained legal custody of AF, but the divorce court ruled that the child should remain in EM's care until he reached the age of 7. Thereafter, Islamic law (as applied in Lebanon) entitled the father to require that physical custody of AF should be transferred to him or to a male member of his family.

After the divorce, EM supported herself and AF by running a hairdressing salon. When AF was approaching the age of 7 she began trying to leave the country to avoid having AF taken from her. After AF's birthday, she moved out of her parents' house and lived in hiding to prevent his removal from her care. Her former husband issued proceedings in a Lebanese court. The police attended at her parents' house and her former husband harassed them. EM and her child left Lebanon with the assistance of an agent, leaving the country on 20 December 2004. If she returned to Lebanon, she was possibly at risk of imprisonment on a charge of kidnapping AF.

Islamic law as applied in Lebanon meant that even during the 7 year period when a child is cared for by the mother, the father retains legal custody and may decide where the child lives and whether the child may travel with the mother. In the absence of consent by the father, the transfer to the father at the stipulated age is automatic; the court has no discretion in the matter and may not consider whether transfer is in the best interests of the child. As a result, women are often constrained to remain in abusive marriages for fear of losing their children. If the father were found to be unfit as a parent, the child would be passed to the paternal grandfather or some other member of the father's extended family, *not* to the mother.

The Claim

Everyone in the UK has the right to respect for their family life, which may be the subject of interference by a public authority only if the interference is lawful, proportionate and directed to a legitimate end. The enjoyment of this right is, by article 14, to be secured without discrimination on any ground.

EM claimed that if she and her son, AF, were removed from the UK to Lebanon on the direction of the Secretary of State, her right to respect for family life would be infringed and would be so on a discriminatory basis attributable to her being a woman. In other words, it was not claimed by EM that the UK had violated her European Convention rights within its own territory but that the conduct of the UK in removing EM from its territory to Lebanon would lead to a violation of her European Convention rights in Lebanon.

EM's application for asylum was refused by the Secretary of State on 21 February 2005. EM's claim under article 8 was rejected as, in the view of the Secretary of State, she had not demonstrated a real risk of mistreatment sufficient to engage article 8. EM appealed that decision.

On 8 June 2005, an immigration judge also rejected EM's claim. The judge held that EM could not decide where she wished to lead her life and that her removal would not engage article 8. A senior immigration judge ordered the case to be reconsidered.

EM's appeal was unanimously dismissed by a panel of three judges in the Court of Appeal. The court concluded that the risk of breaches of EM's human rights in respect of her right to care for her son, AF, were not sufficient to be categorised as "flagrant". EM's rights of visitation/contact with AF had to be taken into account and set against the denial of the right to custody/residence of AF.

EXTRACT FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS (INCORPORATED INTO UK LAW BY THE HUMAN RIGHTS ACT 1998)

ARTICLE 8 RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

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

2 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.

ARTICLE 14 - PROHIBITION OF DISCRIMINATION

The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The appeal to the House of Lords

EM appealed to the House of Lords arguing that her removal to Lebanon would breach Articles 8 and 14 of the European Convention.

A hearing took place on 21st and 22nd July 2008 before five Law Lords: Lord Hope of Craighead, Lord Bingham of Cornhill, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood.

EM (represented by Francis Webber) put forward the following argument:

The right of a mother to participate in the upbringing of her child was a fundamental right, recognised by domestic, European and international law; and a legal system which denied EM that right, after AF has reached 7 years, solely on the grounds of EM's sex, also bearing in mind the violence of the father and the fact that the father had not participated in the child's upbringing, was a "flagrant denial or gross violation" of that right.

The Secretary of State (represented by Monica Carss-Frisk QC) put forward the following argument:

Although EM would lose custody of her son, this did not establish that she would lose all contact with him. Thus EM's enjoyment of family life with her child, AF, though severely restricted, would not be "completely denied or nullified".

Judgment of the Law Lords

The Law Lords delivered their judgment on 22 October 2008 and allowed the appeal of EM.

The threshold test to be applied

Lord Bingham of Cornhill explained that the words "flagrant breach" or "gross invasion" or a "complete denial or nullification" did not indicate different tests (as the Court of Appeal had thought) but were simply various ways of expressing the same (very high threshold) test to be applied in deciding whether a qualified right (in this case, article 8) would prevent removal of EM to Lebanon.

Article 8 - Right to respect for private and family life

The question to be determined was whether, on the particular facts of this case, the removal of EM and AF to Lebanon would so flagrantly violate his, her and their article 8 rights as to completely deny or nullify those rights there. This was a very hard test to satisfy - having never been found to have been satisfied in respect of any of the qualified European Convention rights in any reported decision of the European Court of Human Rights. Nevertheless, all of the Law Lords agreed that this question should be answered in the affirmative.

Baroness Hale of Richmond stated that the only family life which AF had known was with his mother, EM. If AF were obliged to return to a country where he would

inevitably be removed from EM's care, with only the possibility of supervised visits, then the very essence of his right to respect for his family life would be destroyed.

Lord Bingham of Cornhill stated that in no meaningful sense could occasional supervised visits by EM to AF at a place other than her home, even if ordered (and there was no guarantee that they would be ordered), be described as family life. The effect of return would be to destroy the family life of EM and AF as it was now being lived. The case for allowing EM and AF to remain in the UK on humanitarian grounds was compelling.

Article 14 - prohibition of discrimination

Considerable emphasis was laid in argument on behalf of EM on the arbitrary and discriminatory character of family law applied in Lebanon. However, a majority of the Law Lords (Lords Bingham, Hope, Carswell and Brown) rejected EM's claim under article 14.

Lord Hope of Craighead stated that the return of a woman, who arrives in the UK with her child simply to escape from the system of family law of her own country, however objectionable that system may seem in comparison with our own, would not violate article 8 read with article 14. It was not the intention of the European Convention to provide protection against disparities in social and economic rights.

Lord Hope stated that the cases decided by the European Court of Human Rights demonstrated that, *in the absence of very exceptional circumstances*, aliens could not claim entitlement under the European Convention to remain in the UK and escape from the discriminatory effects of the system of family law in their country of origin.

Lord Bingham of Cornhill remarked that Lebanon is not a party of the European Convention and that the UK had no general mandate to impose its own values on other countries who do not share them. The family law of Lebanon reflects a religious and cultural tradition which, in one form or another, is respected and observed throughout much of the world.

Lord Brown of Eaton-under-Heywood emphasised that it was not the arbitrary and discriminatory character of the rule of Sharia law dictating that at the age of 7 a child's physical custody automatically passes from the mother to the father (or another male member of the family) which qualified this case as one for protection under Article 8. It was the highly exceptional facts of this case which, in combination, provided utterly compelling humanitarian grounds against removal.

Baroness Hale of Richmond disagreed with the majority, stating that the discriminatory laws of Lebanon were the reason why there was a real risk [that the removal of EM would destroy the very essence of her family life with AF and violate articles 8 and 14] in this case and these laws were also the reason why the interference could not be justified.