

'Everyone has the right to respect for their family life.'

Introduction

In this essay I am going to discuss the statement above in relation to Art.8 of the European Convention on Human Rights (enacted into UK law via the Human Rights Act 1998) and the case of EM (Lebanon) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) (2008). To do this it is necessary for me to look at Art.8 as well as Art.14 and the case facts and judgements of EM. Afterwards, I will be able to discuss the statement above.

The European Convention on Human Rights

The European Convention on Human Rights (ECHR) was created to protect human rights and fundamental freedoms which all humans are believed to be entitled to. Art.8 of the ECHR stipulates one's 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."

Clearly Art.8 is a qualified right, i.e. the state can lawfully interfere with them in certain circumstances. However, generally, the state will not do so unless necessary where there is some form of harm or to prevent harm. In the case of Sheffield and Horsham v United Kingdom (1998) it was held that the state had a positive duty to act to protect the private life of citizens and not simply to 'not' interfere.

Art. 8 also includes positive obligations, this means that a state may have to do something in order for a right to be fulfilled. An example of this is the case of R (Bernard) v Enfield London Borough Council (2003) where the court held that the Council had a duty to provide assistance to a disabled woman so that she could maintain basic physical and psychological integrity.

Art.14 of the ECHR contains the 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."

Art.14 provides the prohibition from discrimination of the rights and freedoms established under the ECHR. Protocol 12 extends this prohibition to cover discrimination in any legal right, even if it is not protected under the ECHR, so long as it is provided for in national law.

In the case of EM (Lebanon) v Secretary of State for the Home Department (2008) the appellant EM argued that her rights under Art.8 and 14 of the ECHR would be breached if the United Kingdom were to deport her back to her home country of Lebanon. It is important to look at the facts of this case and the judgments given in it to be able to discuss the statement that 'everyone has the right to respect for their family life'.

EM (Lebanon) v Secretary of State for the Home Department (2008)

The facts of the case state that EM is a Lebanese national who came to the UK with her now 13 year old son AF on the 30th December 2004 claiming asylum. It is accepted that she suffered from domestic violence within her marriage. Her husband was beating her, tried to throw her off a balcony and at least once tried to strangle her. As a result of the violence EM suffered a mental breakdown. Her first pregnancy was ended by her husband hitting her stomach after stating that he did not want children. After AF's birth, the husband and his family tried to take the boy but were stopped and since then he has not seen his son. The couple divorced in Lebanon as a result of the violence. Lebanese law states that the father had legal custody of AF but the courts decided that the AF would remain in EM's care until the age of seven. After the age of seven, as per Sharia law, AF's custody would go to his father or another male member of his family.

Near to AF's seventh birthday EM made attempts to leave Lebanon. After AF's birthday she moved from her parent's house into hiding so AF's father would not be able to take him. The husband took the matter to a Lebanese Court. EM and AF left Lebanon on the 20th December 2004. If she were to return to Lebanon she could face a kidnapping charge and imprisonment for kidnapping AF as he was no longer in her care but his father's. The change in custody is automatic and the courts have no discretion on the matter and cannot consider whether or not a transfer in custody is in the child's best interests. Consequently, women often remain in abusive marriages to prevent losing their child. Even if the father were deemed to be an unfit parent, custody would not go to the mother but to the paternal grandfather or some other member of the father's extended family.

EM argued that if she and AF were deported from the UK to Lebanon by the Secretary of State, her right to respect for family life (Art.8) would be infringed on a discriminatory basis as she was a woman which would be a violation of (Art.14). Thus her claim was that if the UK deported her from its territory to Lebanon there would be a violation of her rights under the European Convention.

The Secretary of State refused EM's application for asylum on the 21st February 2005 and her claim under Art.8 rejected. She appealed the decision but was again rejected by an immigration judge on the 8th June 2005 who said that she could not decide where she wished to lead her life and that her removal would not engage Art.8. A senior immigration judge ordered the case to be reconsidered but her appeal before three judges at the Court of Appeal was dismissed. 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.

Again EM appealed to the House of Lords adamant that her removal to Lebanon would constitute a breach of Art.8 and 14 of the Convention. On the 21st-22nd July 2008 her hearing took place before a panel of five judges consisting of Lord Hope of Craighead, Lord Bingham of Cornhill, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood.

Francis Webber on behalf of EM put forward that domestic, European and international law recognised the right of a mother to participate in the upbringing of her child was a fundamental right, any legal system which denied EM that right, after AF turned seven, solely on the grounds of her 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.

Monica Carss-Frisk for the Secretary of State said that although EM would lose custody of her son, it did not necessarily mean that she would lose all contact with him, therefore EM's enjoyment of family life with her child, although severely restricted, would not be "completely denied or nullified".

The House of Lords Judgments

On the 22nd October 2008 the Law Lords delivered their judgement and allowed EM's appeal. It is important to look at the reasoning and crux of the judgements given; therefore it is necessary to look at each judge's judgement.

Lord Hope of Craighead's Judgement

In his judgement, Lord Hope of Craighead discussed the outcome of EM and AF's relationship and family life if they were to be removed from the UK and sent back to Lebanon. He stated that:

"The appellant came to this country as a fugitive from Shari'a law. Her son had reached the age of seven when, under the system that regulates the custody of a child of that age under Shari'a law in Lebanon, his physical custody would pass by force of law to his father or another male member of his family. Any attempt by her to retain custody of him there would

be bound to fail. This is simply because the law dictates that a mother has no right to the custody of her child after that age. She may or may not be allowed what has been described as visitation. That would give her access to her son during supervised visits to a place where she could see him. But under no circumstances would his custody remain with her. The close relationship that exists between mother and child up to the age of custodial transfer cannot survive under that system of law where, as in this case, the parents of the child are no longer living together when the child reaches that age. There is a real risk in all these cases that the very essence of the family life that mother and child have shared together up to that date will be destroyed or nullified."

For EM and AF *"the very essence of the family life that mother and child have shared together up to that date will be destroyed or nullified."* It has clearly been stated that there is a possibility that if AF were to go into the custody of his father that EM would not be able to see AF again. This would clearly create a breach of Art.8 as EM and AF will not be allowed to continue their family life, thus it would not be respected.

Lord Hope concluded his judgement giving a summary of why he would allow the appeal saying that:

"As I said at the outset of this opinion, the case for allowing the appellant and her son to remain in this country on humanitarian grounds is compelling. This is particularly so when the effects on the child are taken into account. His mother has cared for him since his birth. He has a settled and happy relationship with her in this country. Life with his mother is the only family life he knows. Life with his father or any other member of his family in Lebanon, with whom he has never had any contact, would be totally alien to him. This enables me to conclude that this is a very exceptional case and that there is a real risk of a flagrant denial of their article 8 rights if the appellant and her child were to be returned to Lebanon. I would allow the appeal."

It is clear from Lord Hope's judgment that 'everyone has the right to respect for their family life'. In EM's case, AF's only family is his mother and the only family life he has ever had is with her. To allow her removal from the UK to Lebanon would result in the breakup of this family and therefore a breach of Art.8.

Lord Bingham of Cornhill's Judgement

Lord Bingham of Cornhill discussed the right to respect for family life in depth in his judgement.

"The importance of the right to respect for family life has been recognised in Strasbourg and domestic jurisprudence. The Strasbourg case law has recognised the bond which arises at birth between child and parent (Ahmut v Netherlands (1996) 24 EHRR 62, para 60) and reference has been repeatedly made to "the mutual enjoyment by parent and child of each other's company" as "a fundamental element of family life" (McMichael v United Kingdom

(1995) 20 EHRR 205, para 86; Johansen v Norway (1996) 23 EHRR 33, para 52; Bronda v Italy (1998) 33 EHRR 81, para 51; P, C and S v United Kingdom (2002) 35 EHRR 1075, para 113). Judge Martens, in a dissenting judgment, has described the right to care for one's own children as "a fundamental element of an elementary human right" (Gül v Switzerland (1996) 22 EHRR 93, 120, para 12). More general statements are found in the domestic case law. In M v Secretary of State for Work and Pensions [2006] UKHL 11, [2006] 2 AC 91, para 5, reference was made to "the love, trust, confidence, mutual dependence and unconstrained social intercourse which are the essence of family life".

Clearly the courts have put a great emphasis on family life and thus the right to respect for family life. In EM's case the question was a matter of would the removal of EM and AF to Lebanon "flagrantly" violate their rights under Art.8 to the point where their rights would be completely denied or nullified? To answer this question it is necessary to look at the family in question, Lord Bingham did this:

"It seems likely that, following her marriage, the appellant's immediate family consisted of herself and her husband. It would have been the life of that family which would have fallen within the purview of article 8 had the Convention applied in Lebanon, which it did (and does) not. But there has been no familial contact between the appellant and her husband since the birth of AF, and AF has never seen his father since the day he was born. Nor has he had any contact with any of his father's relatives. Thus, realistically, the only family which exists now or has existed for the last five years at least consists of the appellant and AF. It is the life of that family which is in issue: Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39, [2008] 3 WLR 166...The evidence makes plain that the bond between the two is one of deep love and mutual dependence. It cannot be replaced by a new relationship between AF and a father who has inflicted physical violence and psychological injury on the mother, who has been sent to prison for failing to support him, whom he has never consciously seen and towards whom AF understandably feels strongly antagonistic. Nor can it be replaced by a new relationship with an unknown member or members of the father's family."

Evidently, it can be seen that AF's right to respect for his family life would be infringed if he were deported to Lebanon to be in the custody of his father. AF's family appears to consist of him and EM, his father played no part in his life and neither did his father's family. To AF these people are strangers, not family. Therefore the family in question, EM and AF, would have their right to respect of their family life violated as they would be separated and AF would be forced into a new family which is not truly his and EM would be deprived of her family.

Lord Bingham made clear his answer to the question of whether or not the removal of EM and AF to Lebanon would "flagrantly" violate their rights under Art.8 to the point where their rights would be completely denied or nullified stating that:

“...it is in my opinion clear that on return to Lebanon both the appellant’s and AF’s right to respect for their family life would not only be flagrantly violated but would also be completely denied and nullified. In no meaningful sense could occasional supervised visits by the appellant to AF at a place other than her home, even if ordered (and there is no guarantee that they would be ordered), be described as family life. The effect of return would be to destroy the family life of the appellant and AF as it is now lived.”

Lord Bingham’s decision reiterates the general consensus of the fact that ‘everyone has the right to respect for their family life’.

Baroness Hale of Richmond’s Judgement

In her judgment, Baroness Hale of Richmond also looked at the specific family in question who are at risk of a breach of Art.8 to establish if the removal of EM and AF to Lebanon would result in a breach of Art.8.

“In this case, the only family life which this child has ever known is with his mother. If he were obliged to return to a country where he would inevitably be removed from her care, with only the possibility of supervised visits, then the very essence of his right to respect for his family life would be destroyed. And it would be destroyed for reasons which could never be justified under article 8(2) because they are purely arbitrary and pay no regard to his interests. The violation of his right is in my view of greater weight than the violation of his mother’s right. Children need to be brought up in a stable and loving home, preferably by parents who are committed to their interests. Disrupting such a home risks causing lasting damage to their development, damage which is different in kind from the damage done to a parent by the removal of her child, terrible though that can be.

That is what makes this case so different from the general run of child abduction cases. In the general run of such cases, a family life of some sort has been established in the country of origin and it is the abduction rather than the return which has interfered with that family life. In this case there was no family life established in the Lebanon between this child and his father or his father’s family. A family lawyer in this country might raise an eyebrow at the fact that the mother was able to keep her child entirely away from his father. But the evidence is that, not only was he extremely violent towards her, but also that he had little or no interest in his own child. Be that as it may, from the child’s point of view, we have to deal with the situation as it now is. To deprive him of his mother’s care and place him in the care of people who are complete strangers to him and who have shown so little concern for his welfare would be to deprive him of the only family life he has or has ever had. The discriminatory laws of Lebanon are the reason why that is a real risk in this case. They are also the reason why the interference cannot be justified. But it is the effect upon the essence of the child’s right with which we have to be concerned.”

Like Lord Bingham, Baroness Hale also notes that AF's family consists of himself and his mother. If they were deported to Lebanon, this family in question would have their right to respect for their family life would be infringed. Putting AF into the care of his father or his father's family would be the same as putting him in the care of strangers. This would deprive AF of his right to what is his family life while depriving EM of her family life as her family would be taken from her. Baroness Hale's decision to allow the appeal and her reasoning for it shows that 'everyone has the right to respect for their family life'.

Lord Carswell's Judgement

Lord Carswell agreed with Lord Bingham's reasons and conclusions stating that:

"...I have no hesitation in reaching the conclusion, for the reasons summarised by Lord Bingham in paras 39 and 40, that the appellant's article 8 rights would be flagrantly violated if she were removed to Lebanon. The facts of the case are very exceptional and, as my noble and learned friend Lord Brown of Eaton-under-Heywood says, provide compelling humanitarian grounds against removal. I should be prepared so to hold even without taking into account the effect upon the child AF, but when that is added into the scale -- as it is now clear that it should be taken into account - the conclusion is even more clear."

Lord Brown of Eaton-under-Heywood

Like Lord Carswell, Lord Brown of Eaton-under-Heywood also accepted the appeal saying:

"I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Bingham of Cornhill and Lord Hope of Craighead. I agree with them entirely and for the reasons they give I too would allow this appeal and make the order proposed...in the jurisprudence both of Strasbourg and the UK courts, qualifies this particular "foreign" case as one for protection under article 8. Rather it is the highly exceptional facts of the case (as set out in my Lords' opinions) which in combination provide utterly compelling humanitarian grounds against removal."

Was the House of Lord's Decision Right and Was it Consistent with the View that Everyone Has the Right to Respect For Their Family Life?

It is evident that the judges were unanimous in agreement that 'everyone has the right to respect for their family life' as I have demonstrated while discussing their judgements. I agree with the Law Lords decision and believe that the removal of EM and AF from the UK to Lebanon, and consequently the removal of AF from the care of his mother, would result in a breach of Art.8 of the ECHR. As has been stated in the judgements, it is clear that EM and AF are a family, the extradition of EM and AF would break up their family, thus, preventing them from being able to exercise their right to respect for their family life. In addition to this, AF's father was never an active member in his life and was not in his family. If AF is sent to Lebanon, he would have to leave what is his family and family life to live with strangers who are not his family or part of his family life. To me this would constitute a clear violation of the right to respect for one's family life. Although there was a possibility that EM

could visit AF while he was in the custody of his father, I agree with the view that was held by Baroness Hale of Richmond which was that it would still be a breach under Art.8. This is because EM and particularly AF would still not have their family life respected and left to remain the way they want it, it would be under a different circumstances and situation. It would not be their family life as they know it to be.

It could be argued that AF's father has had his right to respect for his family life; however, it is important to note that he was never a part of AF's family/family life. It is important to look at Lord Bingham's judgement where he discusses families and AF's family:

"Families differ widely, in their composition and in the mutual relations which exist between the members, and marked changes are likely to occur over time within the same family. Thus there is no pre-determined model of family or family life to which article 8 must be applied. The article requires respect to be shown for the right to such family life as is or may be enjoyed by the particular applicant or applicants before the court, always bearing in mind (since any family must have at least two members, and may have many more) the participation of other members who share in the life of that family. In this context, as in most Convention contexts, the facts of the particular case are crucial."

*"It seems likely that, following her marriage, the appellant's immediate family consisted of herself and her husband. It would have been the life of that family which would have fallen within the purview of article 8 had the Convention applied in Lebanon, which it did (and does) not. But there has been no familial contact between the appellant and her husband since the birth of AF, and AF has never seen his father since the day he was born. Nor has he had any contact with any of his father's relatives. Thus, realistically, the only family which exists now or has existed for the last five years at least consists of the appellant and AF. It is the life of that family which is in issue: *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2008] 3 WLR 166."*

It is clear that AF's father was not a part of his family therefore can be no breach of his right to respect his family life. Therefore I believe the House of Lords' decision was right and was consistent with the view that 'everyone has the right to respect for their family life'.

Conclusion

It would appear that everyone has the right to respect for their family life. The courts have upheld this view and it is a right under Art.8 of the European Convention on Human Rights. In the case of EM (Lebanon) v Secretary of State for the Home Department (2008) emphasis was put on the right to respect for family life and the judgments of the Law Lords reflected this. In conclusion I believe that everyone does have the right to respect for their family life.

'Everyone has the right to respect for their family life.'

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