



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Briefing: Contact and Residence Proceedings

Please note that this briefing is written in plain English and is not meant to be legal advice. We provide information on human rights but other laws, rules and more up-to-date information may apply. We recommend that you seek further advice.

Introduction

In this briefing we talk about disagreements between parents over where their child/children live and who they have contact with. It will cover issues such as the right to family life, discrimination and delay. This briefing does not deal with children who are in the care or supervision of a Health Trust.

The law in Northern Ireland

The law dealing with contact and the residence of children is the Children (Northern Ireland) Order 1995 (CO). This gives the court the power to make decisions about where a child will live and who they have contact with when the parents cannot agree. The court also has the power to make decisions about a child's day to day life; such as which school they attend, changing their name or whether to receive certain medical treatment.

When a court has to make a decision about a child's upbringing, the child's best interests must be at the heart of the decision. This is a legal duty and is often called the welfare principle. The court must consider a number of factors when making decisions about children. This is called the welfare checklist, and includes:

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;

- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant;
- (g) the range of powers available to the court under this Order in the proceedings in question.¹

The wishes and feelings of the child, at point (a) above, is an important principle which allows the child to participate in decisions that are being made about them. The weight given to these views depends upon the age and maturity of the child.

Types of court order

When making the decision about where your child lives, the court may make an order called a 'residence order'. This will set out where the child will live; either with one parent or shared between the two.

When making decisions about who your child can have contact with, the court may make an order called a 'contact order'. This will set out how often contact will happen, who with and where the contact should take place. Contact may be in the form of telephone calls and letters (indirect contact) or visits (direct contact). The contact order may require contact to be supervised by a third person or be held in a contact center. The court can make a 'no contact' order which would stop all contact from taking place. This is only ever done if it is in the child's interests not to have contact with a certain person.

Residence and contact orders can be made for a child under the age of 16. The court can only make an order for an older child if there are exceptional circumstances.

One of the principles of the CO is the 'no order' rule.² This means that the court will only make an order if it is in the best interests of the child. The court encourages parents to reach agreement on residence and contact between themselves if possible. Therefore, no action by the court may be the best option.

The Human Rights Act 1998

The Human Rights Act 1998 (HRA) became law in October 2000. It covers most of the rights of the European Convention on Human

¹ Article 3(3), Children (NI) Order 1995

² Article 3(5), Children (NI) Order 1995

Rights (ECHR) and means that that you can rely on ECHR rights in the local courts.

All public authorities must respect human rights. A public authority is an organisation that carries out a public function, such as a nursing home or a school or a health trust. The courts are also public authorities and so must consider your human rights when deciding your case.

The following rights may be relevant in contact or residence cases:

Right to a fair trial:

Article 6 of the ECHR protects the right to a fair trial. Article 6(1) reads:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 6 means that the courts will have to decide your case fairly and in a reasonable length of time. The European Court of Human Rights (ECt.HR) has recognised that custody cases should be dealt with speedily because of the importance of what is at stake.³

In the case of *Cengiz Kiliç v. Turkey*⁴ a father was unable to have contact with his son during his divorce proceedings, even though the courts had allowed him access. The ECt.HR decided that the length of the legal proceedings was unreasonable because of the impact on his relationship with his son. This was a breach of his right to have a fair hearing within a reasonable time (Article 6(1)).

³ Neiderboster v. Germany, no. 39547/98, 27 February 2003, para 39

⁴ Cengiz Kiliç v. Turkey, no. 16192/06, 6 December 2011

Right to respect for private and family life:

Article 8 of the ECHR protects the right to respect for private and family life. Article 8 reads:

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 8 is not an absolute right and in some situations restrictions to your privacy or your family life are acceptable. Any restrictions must be allowed in law and must be for one of the reasons listed in paragraph 2 of Article 8 (above). In all the circumstances of the case, it has to be reasonable for these restrictions to be made.

Article 8 is relevant to contact and residence as the ECt.HR has recognised that “the mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life”.⁵

The protection of Article 8 is not restricted to biological family relationships and ‘family life’ may apply to other arrangements where there is a close personal tie.⁶ If a relationship does not amount to family life, it may still fall under ‘private life’ as a relationship with a child would form part of an individual’s personal identity.⁷

In disagreements over contact and residence, both parents may have a claim to family life and/ or private life and the child will also have Article 8 rights. The court will have to balance the rights of everybody in the case when making a decision.

The ECt.HR notes that courts must strike a fair balance between the rights of the child and those of the parents. The best interests of the child will be an important factor and may override the rights of the parents.⁸

⁵ K. and T. v. Finland [GC], no. 25702/94, para 151

⁶ as above, para 150

⁷ Backlund v. Finland, no. 36498/05, 6 July 2010, para 37

⁸ Dmitriy v. Ryabov v. Russia, no. 33774/08, 1 August 2013, para 48

In *Anayo v. Germany*,⁹ a biological father was refused access to his children who were living with their mother and her husband. The German courts refused contact because the biological father did not have a relationship with the children, favouring the legal father (the mother's husband). The ECt.HR did not believe that the German courts had looked at whether a relationship with their biological father would have been in the twins' best interest. The German courts had not properly balanced the rights of all parties involved, which was a breach of Article 8.

In *Cengiz Kiliç v. Turkey*¹⁰ (mentioned above) the ECt.HR also looked at Article 8, as the father complained that the authorities had not helped him to maintain contact with his son. In this case the father had a number of court orders allowing contact but this was being blocked by his ex-wife. The ECt.HR concluded that the national courts had failed to take all measures to ensure contact between father and son, in breach of Article 8(1).

Non-discrimination:

Article 14 of the ECHR bans discrimination in the enjoyment of another human right. This means that to bring a claim under article 14 you have to connect it to another right in the ECHR. For example, you would have a claim under Article 14 and under Article 8 if your right to family life was breached because of your sex, race, colour or any of the other grounds listed in Article 14. Article 14 reads:

The enjoyment of the 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 ECt.HR has looked at discrimination in childcare decisions in a number of cases. In *Salquero da Silva Mouta v. Portugal*¹¹, a father was stopped from seeing his daughter by his ex-wife because he was in a same-sex relationship. The ECt.HR decided that the decision of the Portuguese court was based upon the father's sexual orientation. This difference in treatment was not acceptable and a breach of his Article 14 rights (taken with Article 8).

⁹ *Anayo v. Germany*, no. 20578/07, 21 December 2010

¹⁰ *Cengiz Kiliç v. Turkey*, no. 16192/06, 6 December 2011

¹¹ *Salquero da Silva Mouta v. Portugal*, no. 33290/96, 21 December 1999

In *Vojnity v. Hungary*¹², a father lost his contact with his son because of his religious beliefs. The ECt.HR noted that an absolute ban on contact can only be justified in exceptional circumstances. The Hungarian courts had not considered if it was in the child's best interests to have all ties with the father cut. This was a breach of the father's rights under Article 14 (taken with Article 8).

In *P.V v. Spain*¹³, the Spanish courts placed restrictions on the contact arrangements of a male-to-female transsexual. So the child could become familiar with his father's gender reassignment, the Spanish courts ordered that contact would be reviewed every two months and gradually increased. The ECt.HR decided that there was no breach of Article 14 (taken with Article 8) as the restrictions were based on the child's well-being and not the father's transsexualism.

UN Convention on the Rights of the Child

The UN Convention on the Rights of the Child (UNCRC) is an international treaty which protects the human rights of children. A child under the UNCRC is anyone under the age of 18.

The UNCRC is not part of our local law but the UK Government has signed the treaty and agreed to the rights contained in it. The UK courts and ECt.HR will often use the UNCRC to interpret domestic law¹⁴ and the ECHR.¹⁵ In cases involving children it can be helpful to be aware of these rights.

Some of the rights of the UNCRC which are relevant to contact with children are as follows:

Article 3 outlines the best interests' principle, requiring that this be the basis for any decision made about or in relation to a child. This is similar to the best interests' principle, under the CO, that was discussed at the beginning of this briefing.

Article 9(3) recognises the right of the child to have direct contact with both parents when separated or removed from their care. However, this may be not be permitted where it is not in the child's best interests to have such contact.

¹² *Vojnity v. Hungary*, no. 29617/07, 12 February 2013

¹³ *P.V v. Spain*, no. 35159/09, 30 November 2010

¹⁴ See *Smith v. Secretary of State for Work and Pensions* [2006] UKHL 35, para 78

¹⁵ See *V v. the United Kingdom*, no. 24888/94, 16 December 1999

Article 12 requires that a child is able to participate when decisions are about them. Their participation means that they are able to give their wishes and views about a particular decision. The degree to which the child's wishes and views will be taken into account by the authorities and the courts will depend on the child's age and maturity. The right to participate, in line with their age and maturity, is also protected by the CO as mentioned in the earlier section.

Summary

The court has the power to make decisions about where your child lives and who they have contact with. Any decisions will be made in your child's best interests.

Any restrictions on your family rights must follow the law and be balanced and fair. The court must balance your rights with the rights of the other parent and your child. Any restrictions must fall within one of the reasons listed in Article 8(2) ECHR, for example, the protection of the rights of another person.

If you feel that your rights have been breached or that the court has not properly considered your rights, you should speak to your solicitor. You may be able to appeal the court's decision.

End.