

Case C-400/10 PPU

J. McB.

v

L. E.

(Reference for a preliminary
ruling from the Supreme Court)

(Judicial cooperation in civil matters — Matrimonial matters and matters of parental responsibility — The Hague Convention of 25 October 1980 on the civil aspects of international child abduction — Regulation (EC) No 2201/2003 — Children whose parents are not married — Father's rights of custody — Interpretation of "rights of custody" — General principles of law and Charter of Fundamental Rights of the European Union)

View of Advocate General Jääskinen delivered on 22 September 2010 . . . I - 8969

Judgment of the Court (Third Chamber), 5 October 2010 I - 8992

Summary of the Judgment

1. *Fundamental rights — Right to respect for private and family life*
(*Charter of Fundamental Rights of the European Union, Art. 7*)
2. *Judicial cooperation in civil matters — Jurisdiction, recognition and enforcement of decisions in matrimonial matters and in the matters of parental responsibility — Regulation No 2201/2003 — Rights of custody*
(*Charter of Fundamental Rights of the European Union, Arts 7 and 24; Council Regulation No 2201/2003, Art. 2(11)*)

1. It follows from Article 52(3) of the Charter of Fundamental Rights of the European Union 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, their meaning and scope are to be the same as those laid down by the latter. However, that provision does not preclude the grant of wider protection by European Union law. The wording of Article 7 of the Charter, according to which everyone has the right to respect for his or her private and family life, home and communications is identical to that of Article 8(1) of the Convention, except that it uses the expression ‘correspondence’ instead of ‘communications’. That being so, Article 7 contains rights corresponding to those guaranteed by Article 8(1) of the Convention. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the Convention, as interpreted by the case-law of the European Court of Human Rights.

(see para. 53)

2. Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation No 1347/2000, must be interpreted as not precluding 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 of custody to him, on the basis of which the removal of the child by its mother or the retention of that child may be considered wrongful, within the meaning of Article 2(11) of that regulation.

Regulation No 2201/2003 does not determine which person must have such rights of custody as may render a child’s removal wrongful within the meaning of Article 2(11), but refers to the law of the Member State where the child was habitually resident immediately before its removal or retention the question of who has such rights of custody. 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, within the meaning of Article 2(9) of that regulation, 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. Consequently, Regulation No 2201/2003 must 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.

Articles 7 and 24 of the Charter of Fundamental Rights of the European Union do not preclude such an interpretation.

While, for the purposes of applying Regulation No 2201/2003 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, 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 Article 2 of that regulation does not affect the essence of his right to private and family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union, provided that his right to apply to the court with jurisdiction for rights of custody is safeguarded.

That finding is not invalidated by the fact that, if steps are not taken by such a father in good time to obtain rights of

custody, he finds himself unable, if the child is removed to another Member State by its mother, to obtain the return of that child to the Member State where the child previously had its habitual residence. Such a removal represents the legitimate exercise, by the mother with custody of the child, of her own right of freedom of movement, established in Article 20(2)(a) TFEU and Article 21(1) TFEU, 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 to that child. Accordingly, to admit the possibility that a natural father has rights of custody in respect of his child, under Article 2(11) of Regulation No 2201/2003, 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 others, within the meaning of Article 52(1) of the Charter of Fundamental Rights of the European Union, in this case those of the mother. Such an outcome might, moreover, infringe Article 51(2) of the Charter.

Further, having regard to the great variety of extra-marital relationships and consequent parent-child relationships, which is

reflected in the variation among Member States of the extent of parental responsibilities and their attribution, Article 24 of the Charter of Fundamental Rights of the European Union, with which Article 7 of the Charter must be read, does not preclude a situation where, for the purposes of applying Regulation No 2201/2003, rights of custody are granted, as a general rule, exclusively to the mother and a natural father possesses rights of custody only as the result of a court judgment. Such a requirement enables the national court with jurisdiction to take a decision on custody of the child, and on rights of access to that child, while taking into account all the relevant facts, and in

particular the circumstances surrounding the birth of the child, the nature of the parents' relationship, the relationship of the child with each parent, and the capacity of each parent to take the responsibility of caring for the child. The taking into account of those facts is apt to protect the child's best interests, in accordance with Article 24(2) of the Charter.

(see paras 43-44, 55, 57-59, 62-64, operative part)