

The Right to Family Life in Custody Proceedings - Lessons from the Strasbourg Court

By **James Netto**

30 Jan 2023



iFLG in the European Court of Human Rights

The European Court of Human Rights has now handed down its decision in the matter of *Agarwal v Czech Republic* (Application no. 44870/19). Our client, Mr Pallav Agarwal, claimed a breach of his human rights following custody proceedings in the Czech courts. Partner James Netto, instructing Alexander Laing of Coram Chambers, represented the applicant in this case.

The father alleged that the Czech Republic violated his Article 8 (right to respect for private and family life, home and correspondence) and 14 (protection from discrimination) rights under the Convention during Czech proceedings in relation to his daughter (aged 7), which concluded in February 2019 at domestic appellate level with the child's mother being awarded sole custody.

Background

The father is a UK national originally from India. The mother is a Czech national. The mother and father met in December 2012. They commenced a relationship in the UK and in or around July 2014, the child was conceived. The mother and father married in August 2014 and the child was born in March 2015. Prior to the child's birth, the father spent some time in Czech Republic with the mother whilst working in the UK and travelling to India and the USA.

The relationship quickly broke down and in May 2015 the father signed a divorce petition. This petition was later withdrawn in July 2015. In June 2015 the mother applied for sole custody of the child in the Czech Republic. This application was later withdrawn in August 2015.

The father returned to live in the UK in August 2015 and the mother joined with the child later on that month. In November 2015, the mother and the child returned to the Czech Republic for medical appointments and to visit family. They did not return to the UK, and the father stated that he did not give his permission for the child to relocate to the Czech Republic.

In November 2015, the mother issued another application for sole custody of the child for the periods until and after the divorce. This application was dismissed by the Czech District Court. It is the father's case that the District Court exceeded their bounds and pre-empted the final custody decision without any evidence being presented and without hearing from him. In December 2015, the mother filed a motion for an interim measure granting custody of the child to her. This was rejected by the District Court.

In May 2016, the father issued a child abduction application for summary return under the Hague Convention via ICACU. This application was rejected by Brno Municipal Court in July 2016, which held that the child was not habitually resident in the UK. The father did not appeal this decision, in part as his relationship with the mother had started to improve. This soon changed after the deadline for issuing an appeal passed. The father later applied for sole custody of the child.

In January 2018, the District Court denied the father's motion for alternating or his sole custody of the child and concluded that sole custody should be awarded to the mother for the period until and after the divorce of the parents based on the

instability of the father's situation, communication between the father and the child, and contact between the father and the child.

In February 2018, the father filed an appeal against the District Court's judgment with the Municipal Court. He sought alternating custody rather than sole custody. The Municipal Court upheld the District Court's judgment of January 2018 that awarding the mother custody was in the child's best interests.

The father then lodged a constitutional appeal in January 2019 against the District Court's judgment of January 2018 in conjunction with the Municipal Court's judgment of October 2018. The Constitutional Court dismissed the constitutional appeal in February 2019.

The father's case

In terms of instability, it was the father's case that the District Court placed emphasis on the father's previous intentions not to live in Czech Republic. He alleged that the short-term instability referenced in the Court's judgments was in fact caused by the mother in her unilaterally deciding to relocate with the child to the Czech Republic.

It was also the father's case that he had repeatedly raised concerns about the child's languages with the District Court; he stated that the mother had caused and permitted communication difficulties to develop between him and the child, in that she did not promote the child's use of English and Hindi.

The father then appealed to the European Court of Human Rights. On 14 February 2020, the Court concluded that his application in respect of alleged violation of Article 6 rights was inadmissible, but went on to give notice of the remainder of the application to the Government of the Czech Republic.

The decision of the Strasbourg Court

The Court handed down its decision on 19 January 2023. The Court was tasked with determining:

- Firstly, relying on Article 8 of the Convention, if the decision not to grant sole or alternating custody was a breach of the father's human rights; and
- Secondly, relying on Article 14 of the Convention, if the father had been subject to discrimination on the grounds of his nationality on account of the allegedly discriminatory nature of the reasons given to refuse to grant him custody.

The Court was keen to highlight that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has broken down, with any hindrance of that amounting to an interference of the right protected by the Convention.

The Court went on to hold that the decision to grant custody was an interference with the father's right to respect for his family life. The question was then one of whether this interference was "*necessary in a democratic society*". However, the Court highlighted that the domestic courts have a wide margin of appreciation, which in this case was not overstepped by their decision to grant the mother custody.

In so far as the discrimination complaint was concerned, the Court notably agreed with the father that "*stereotyping and prejudice against foreign fathers must be avoided in any situation*", but concluded there was no difference in treatment as opposed to a Czech father in a similar case.

Whilst the Strasbourg Court declared the application inadmissible, the case serves as a pertinent reminder of the challenges involved in any international children case. Cases involving custody across borders are often some of the most complex matters that come before the courts at home and abroad. The utmost care must be taken to ensure that parties and children alike are afforded a balanced, properly safeguarded, and safe vehicle for the determination of their cases.

Reported decision here: [https://hudoc.echr.coe.int/eng#{%22appno%22:\[%2244870/19%22\]}](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2244870/19%22]})

James Netto
james.netto@iflg.uk.com
The International Family Law Group LLP
www.iflg.uk.com
© January 2023

iFLG
Hudson House
8 Tavistock Street,
London WC2E 7PP

Contact
+44 (0) 203 178 5668
enquiries@iflg.uk.com