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

[2008] UKHL 64; (2008) 3 WLR 931 : (2009) 1 All ER 559 : (2008) 2 FLR 2067 : (2009) HRLR 6 : (2009) UKHRR 22 : Times, October 24, 2008

22/10/2008

Barristers
Teertha Gupta QC

Court
House of Lords

Summary
The removal of a Lebanese asylum seeker and her 12-year-old son to Lebanon would give rise to a breach of the European Convention on Human Rights 1950 art.8 given that she would be compelled to transfer custody of her son to his father, who had been violent towards her and who had not seen the son since his birth; removal would so flagrantly violate their art.8 rights as to completely deny or nullify those rights.

Facts
The appellant (M) appealed against a decision ((2006) EWCA Civ 1531, (2007) 1 FLR 991) that her removal to Lebanon would not give rise to a breach of the European Convention on Human Rights 1950 art.8. M, a Lebanese national, had come to the United Kingdom in 2004 with her son (S), who was now 12. She was Muslim and married in Lebanon according to Muslim rites. M divorced her husband in Lebanon because of his violence. Under the prevailing law the father retained legal custody of S, but the divorce court ruled that he should remain in M's care until he reached the age of seven. There was unchallenged evidence before the lower courts of Islamic law as applied in Lebanon in custody cases where the husband or both parties were Muslim. Even during the seven-year period when a child was cared for by the mother, the father retained legal custody and could decide where the child lived and whether the child could travel with the mother. In the absence of the father's consent, the transfer to him at the stipulated age was automatic. 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 evidence was that in this situation the mother might, or might not, have contact with the child. The parent with physical custody could not be compelled to send the child to the other parent's home on visits but, if ordered by the court, had to bring the child to a place where the mother could see him or her. A custody hearing, if held in Lebanon, would not consider whether custody should remain with the mother but only the appropriateness of allowing M to have access to S during supervised visits. The Court of Appeal held that although M's right to enjoyment of family life with her son under art.8

would be severely restricted if they were returned to Lebanon, it would not be completely denied or nullified.

Held

HELD: (1) The Attorney General had correctly set out the test to be applied when stating that it would require a flagrant breach of the relevant right, such as would completely deny or nullify the right in the destination country, R (on the application of Ullah) v Special Adjudicator (2004) UKHL 26, (2004) 2 AC 323 applied and Mamatkulov v Turkey (46827/99) (2005) 41 EHRR 25 ECHR (Grand Chamber) considered. Any attempt to paraphrase the test risked causing confusion. In the context of art.8, as in most Convention contexts, the facts of the particular case were crucial. The question therefore was whether, on the particular facts of the case, the removal of M and S to Lebanon would so flagrantly violate their art.8 rights as to completely deny or nullify those rights there. The answer to that question was yes. S had never seen his father since the day he was born, nor had he had any contact with any of his father's relatives. Thus, realistically, the only family which existed now consisted of M and S. It was the life of that family that was in issue. It was no doubt a feature of their family life together that M rendered for S the sort of services which a mother ordinarily did render for a growing adolescent. But it would be wrong to regard the relationship between M and S as simply one in which the mother rendered services for the son. The evidence made plain that the bond between the two was one of deep love and mutual dependence. It could not be replaced by a new relationship between S and a father who had inflicted physical violence and psychological injury on M, who had been sent to prison for failing to support S, whom S had never consciously seen and towards whom S understandably felt strongly antagonistic. Nor could it be replaced by a new relationship with an unknown member or members of the father's family. In no meaningful sense could occasional supervised visits by M to S 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 M and S as it was now lived. (2) The Court of Appeal and the courts below had been disadvantaged by the absence of representations on S's behalf. The hearing before the House had underscored the importance of ascertaining and communicating to the court the views of a child such as S. In the great majority of cases the interests of the child, although calling for separate consideration, were unlikely to differ from those of an applicant parent. If there was a genuine conflict separate representation might be called for, but advisers should not be astute to detect a conflict where the interests of parent and child were essentially congruent.

Permission