

When parental interests come first

Rupert Butler comments on a landmark discrimination ruling in Strasbourg on the future of children from mixed-faith parents

- *Palau-Martinez v France*—unlawful interference with right to respect for family life
- an awkward precedent creates conflict with the English courts



Illustration: Henning Lohlein

A mother, who is a Jehovah's Witness, has won a landmark discrimination ruling in Strasbourg undermining the principle that "the welfare of the child" shall be the paramount consideration in determining its future. This will affect the way English courts decide residence, contact, care and adoption cases.

The case: interests of the child

On 16 December 2003, the European Court of Human Rights (ECtHR) published its decision, in French, in the case of *Palau-Martinez v France* (64927/01).

In 1996, in French divorce proceedings, Mrs Palau-Martinez, a practising Jehovah's Witness, was granted custody of her two children. Her ex-husband, who did not share her religious conviction, was given unlimited

visiting rights and the right to remove the children from their mother's care for the entirety of the school holidays. The mother appealed, wanting to spend time with her children during holidays but, before the case came to court, her ex-husband refused to return the children following contact and enrolled them in a school close to his home.

The father argued that he was acting in the children's best interests, by allowing them to escape the harmful effect of their mother and the people around her, who forced them to follow the beliefs of Jehovah's Witnesses. There was evidence from one of the children expressing his desire to live with his father, and a report from a psychiatrist stating that the children were suffering distress caused by the prohibitions of their mother's beliefs.

Mrs Palau-Martinez confirmed that the two children received an education in keeping with the tenets of her religion. The father did not deny the maternal qualities of the mother, but restricted himself to criticising the education that the children received.

The French Court of Appeal held that the rules of education imposed by Jehovah's Witnesses on the children of their followers were worthy of criticism because of their harshness, intolerance and the obligation imposed on children to proselytise. It held that it was in the interests of the children to escape from the constraints and prohibitions of a religion structured as a sect. They reversed the original order and switched the residence of these children to their father.

Appeals: interference with family life?

The mother appealed to the Court of Cassation, pleading that the decision was based on abstract criticisms of the rules of Jehovah's Witnesses and failed to establish whether, in fact, the education of the children was disturbing them to the point of justifying a switch of residence. In dismissing her appeal in 2000, it was held that it was not contrary to the mother's liberty of conscience to decide that the interests of the children were best

served by living with their father.

The mother then applied to the ECtHR on the grounds that ordering her children to reside with her ex-husband was contrary to her right to respect for her family and private life (Art 8) and discriminated against her freedom of thought, conscience and religion (Arts 9 and 14). She argued that the French courts had examined the situation *in abstracto*, and made a decision based upon social prejudices and a lack of understanding of her way of life.

The French government argued that, in the context of a divorce, the "intervention" of a judge was necessary and does not constitute "interference with family life" within the meaning of Art 8(2). However, if this was an interference with a parent's rights, then it should be allowed—it served the legitimate goal of promoting the interests of the children, and was proportionate since their interests could, and sometimes must, take precedence over those of the parents.

Discriminatory

In a majority decision (6:1), the ECtHR decided that the determining factor in the decision of the French courts was the mother's religion. It was an unlawful interference with her right to respect for her family life and thus discriminatory, to switch the residence of the children to their father while delivering a verdict on the conditions in which the mother and father would raise their children by reference to the mother's religious beliefs. The ECtHR was of the view that the goal pursued—the protection of children—was legitimate, but that the French courts expressed themselves in generalities in respect of Jehovah's Witnesses, and without direct demonstration of the influence of the religion of the mother on her two children. The comparison made between the respective lifestyles lacked objective and reasonable justification and did not pursue a legitimate goal.

It is hard to reconcile this decision with the ECtHR's usual proposition that the guiding principle in decisions concerning children is their own interest—to which, if necessary, the interests of the parent must be subjugated. Necessarily, when a court intervenes after a divorce or family breakdown in questions concerning a child, a distinction is created between the two parents (for instance, financial means, housing conditions, and where