the child will go to school). Any distinction that excludes one parent from the daily life of a child may be resented as unjust but, if the religious beliefs of the parties do not coincide, then it will now be seen as discriminatory.

**An awkward precedent**

The approach of the ECtHR in *Palau-Martinez* is that when national courts determine the residence of children, they should have regard only to the facts and circumstances demonstrated by the evidence available. Any consideration of the religious beliefs of a parent is discriminatory where such a consideration is based upon the general characteristics of adherents to that religion. Family courts, unlike most other branches of the law, have to crystal-ball gaze in order to predict the influence that the lifestyle of one parent may have on the future development of a child. When cases come to court there is, very often, no evidence of actual harm, or of the impact of a person's religion having been felt by the child, because the child has not reached a critical developmental stage, or the religion of a parent has not yet been influential. In the absence of evidence of actual harm, it is impossible to determine which is the more suitable home without consideration of the lifestyles generally associated with the religion. It is, therefore, impossible not to be discriminatory, and the ECtHR has created an awkward precedent.

**Conflicts with English courts**

*Palau-Martinez* was decided on the principle that parents in residence hearings have rights under Art 8 that ought to be respected and taken into account. This is significantly different from the approach of the English courts following s 1(1) of the Children Act 1989, where the child's welfare must be the court's paramount consideration in any question with respect to the upbringing of the child. The conflict between the ECtHR and the English courts is highlighted by a comparison of the *Palau-Martinez* decision with the judgment of Lord Hobhouse in *Dawson v Wearmouth* [1999] 1 FLR 1167 at 1178: "The parents are liable to see the question raised as reflecting upon their own rights… They are mistaken. Once the dispute has arisen, the paramount consideration is the welfare of the child… There is nothing in the Convention which requires the court of this country to act otherwise than in accordance with the interests of the child."

In *Payne v Payne* [2001] 2 WLR 1826, Dame Elizabeth Butler-Sloss P adopted a diluted view of the paramountcy of the "welfare of the child" test and followed a "fair balance" approach. She held that all those immediately affected by the proceedings—the mother, the father and the child—had rights to respect for family life under Art 8(1). Those rights are inevitably in conflict and, under Art 8(2), have to be balanced. However, the welfare of the child is of crucial importance and, where in conflict with a parent, will be overriding.

The English courts have in the past expressed themselves in forthright terms about the religious beliefs of parents. In *Re B and G (minors) (custody)* [1985] Fam Law 127, scientology was declared as "corrupt, sinister and dangerous" and while the language was described as "trenchant" upon appeal, the decision to deny residence to the scientologist parent was confirmed.

**Judicial dishonesty?**

In an attempt to avoid being discriminatory there is a risk that the problem may be reduced to how the courts express themselves. In future, notwithstanding the evidence presented, general observations about a party's religion in judgments will have to be avoided and replaced with specific assertions about how a parent's lifestyle has impacted upon the upbringing of the child and may continue to do so in the future. However, this will create judicial dishonesty if the true objection, the parent's religion, is not alluded to in the judgment. Worse still, the quality of decisions may be compromised by having to look back at past behaviour and not forward. This creates a risk of the courts becoming clogged with repeat applications by disgruntled parents as the religious persuasion of the caring parent impacts on a child's life at different stages. Uncertainty and resentment will reign supreme in a culture where parents feel their conduct is under constant scrutiny, which cannot be good for a child's development.

So far, the decided cases involve religions that may be regarded as holding extreme positions on education and upbringing. However, in relationships with parents of mixed mainstream religions, the issue of discrimination against one parent may be more difficult to avoid or disguise. For instance, while an English court may feel that the treatment of Muslim girls is harsh or demeaning compared to Anglican girls, it cannot prefer the parenting of the Anglican parent to the Muslim without being dubbed discriminatory.

**Power to the parents**

An unavoidable consequence of the *Palau-Martinez* case is that it shifts the balance away from the child's interests in favour of parental rights. By drawing attention to a parent's faith, it will encourage challenges to decisions based upon religious discrimination by mothers and fathers who feel that their beliefs have been used against them. By increasing such challenges and so building a body of case law, there is also a danger of creating a hierarchy of comparative religions so that they become ranked in terms of their harmfulness to children.

Furthermore, if the courts currently decide that certain lifestyles bring children into risk of such significant harm that justifies taking them into care, they will have to be careful that they do not allow the religious beliefs of any parent or guardian to influence that decision. If that religion happens to be different from another family member, or foster parent, adoptive parent, or the child itself, then there could be a claim of discrimination. Every adoption will have to be scrutinised too, so that its grant or refusal is not based upon a comparison of religious beliefs.

**Further implications**

While *Palau-Martinez* concerned religion, it must be borne in mind that the European Convention on Human Rights does not just safeguard citizens against religious intolerance, but also provides protection against racial and sexual discrimination. By analogy, therefore, courts will have to be careful not to make any discriminatory comparison of lifestyles between mixed race couples or heterosexual and homosexual parents. In the case of *Salgueiro da Silva Mouta v Portugal* [2001] 31 EHRR 47, the ECtHR found that a father's rights had been infringed where he had been refused residence of his child on the grounds that he was homosexual.

It remains to be seen how the bombshell dropped by the *Palau-Martinez* decision will be treated in the English courts. Dame Elizabeth Butler-Sloss, in *Payne v Payne*, was keen to pass off the differences between the ECtHR jurisprudence on the "welfare principle" and our own statute law as mere matters of linguistics. However, it is now clear that the need to respect the religious, racial and sexual sensitivities of all European citizens, even in matters concerning their children's upbringing, is beyond the elasticity of linguistic interpretation, and has created an irreconcilable conflict in the past approach of English courts and the ECtHR.

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