Report on ERA conference on Recent case law of the ECtHRs in Family law matters

Guest post by Asma Alouane, PhD candidate at Panthéon-Assas (Paris II) University on *Private international law to the test of the right to respect for private and family life.*

On February 11 and 12 2016, the Academy of European law (ERA) hosted in Strasburg a conference on *Recent Case law of the European Court of Human Rights in Family law matters.* The Court's evolutive interpretation of the notion of family life combined with its controversial understanding has created a long series of new challenges in the field of Family law. The conference participants discussed these issues, as well as the difficulties that States may face in complying with their obligations under the Convention.

The purpose of this post is to give a succinct overview of the presentations, which were of interest from a conflicts-of-law perspective.

1. **Evgueni Boev, Setting the scene: Private and family life under the Convention**

Setting the scene of the conference, Evgueni Boev's presentation provided an answer to the question of *What is a family according to Court Cases?* Whereas the term *family* is mentioned in several provisions (art 8, art 12, art 5 of Protocol 7…), most of the cases are examined under the concept of family life of art 8. Article 12 and Protocol 7's article 5 appear as the *lex specialis* regarding marriage and equality within a married couple. Thus, article 8 is the pillar of the case law of the Court regarding family matters.

From the broad perspective of the ECtHR cases, Boev demonstrated that the concept has expanded in two different directions: in a horizontal way between partners and in a vertical way between parent and child. In both directions, only the substantive reality matters. For instance, in the relationship between

partners, family life exists regardless of whether there is legal recognition of the situation (e.g. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*). The extension of the concept of family life to same-sex *de facto* couples in the *Schalk and Kopf v. Austria* case is another illustration of the broad scope of the family life. In the other direction, between parent and child, what matters most is not the biological link and in these cases too the Court emphasises the substantive relationship (e.g. *Nazarenko v. Russia)*.

Thus, only the substantive situation is relevant. However, the recognition of family life does not necessarily lead to a right to respect such family life. The questions of whether there is an interference with or a failure to comply with art 8 obligations are linked to the particular circumstances of the case, especially through the proportionality test.

As pointed out by Boev, the broad understanding of what is a family gives rise to new trends regarding for instance the recognition of non-traditional forms of family life or the international dimension of family ties, especially as in matters of child care. The following presentations focused on these two broad topics.

2. **Thalia Kruger, International Child Abduction**

Thalia Kruger showed in her presentation how the goals of the international child abduction instruments are disturbed when put to the test of the human rights perspective. Following the assumption that it is in the interest of the child not to be abducted, the 1980 Hague Child Abduction Convention and the Brussels II bis Regulation (No. 2201/2003) aim to facilitate the return of the child to his or her habitual residence. A return order must be issued within a period of six weeks. Only exceptional circumstances allow the State of the retention of the child not to order the return. Moreover, article 11 of Brussels II bis permits a second chance procedure to obtain return. Looking at the situation from the perspective of human rights, the Court considered that national authorities have to look into the particular situation of the child (see *Neulinger v. Switzerland*). Thus, the Court makes the best interests of the child the leading principle. The Court shifts from an *in abstracto* conception of the best interests of the child to an *in concreto* appreciation. Even though the Court explained later that it is possible to read the Hague Convention and the ECHR as aligned (*X. v. Latvia*), Kruger noted that the

ECHR cases create sensitive dilemmas for the contracting States, for instance how to comply with the speedy proceeding obligation while taking into account all issues raised with respect to the best interests of the child.

According to Kruger, the Court's interpretation also shows that the Brussels II bis enforcement rules may not be compatible with the best interests of the child.

The *Bosphorus* doctrine assumes compatibility of EU law with the ECHRs, but this applies only when courts have no discretionary power (for instance the abolition of exequatur; see *Povse v. Austria*). The application of the *Bosphorus* doctrine in the current context is problematic. Kruger concluded by noting that the on-going recast of Brussels II bis and the continuing efforts of the Hague Conference, such as its promotion of mediation, may provide a way to ensure the compatibility of the child abduction goals and the human rights standard.

3. **Marilisa D'Amico and Costanza Nardocci, LGBT rights and the way forward:**

From the perspective of the *Oliari v. Italy* case and the specific Italian experience, Costanza Nardocci presented an overview of the LGBT family rights. The last step in a long series of cases, *Oliari* illustrates the long path of same-sex couples before the ECtHR. A significant step was accomplished in 2010 with *Schalk and Kopf v. Austria*, when the Court recognized that same-sex couples are just as capable of enjoying family life as opposite-sex couples. The Court found that article 12 could be applicable to same-sex couples, but that at this stage the question of whether same-sex couples can marry is left to regulation by national law. However, referring to the large margin of appreciation of contracting States, it considered that there is no positive obligation to introduce same-sex marriage. Then, in 2013, embracing this new interpretation, the Court considered in *Vallianatos and Others v. Greece* that opening civil unions to opposite-sex couples only was a violation of articles 8 and 14. In the *Oliari* case, the Court held that there was a violation of article 8. It considered that Italy had violated its positive obligation to grant legal protection to same-sex couples. Recalling the specific situation of LGBT rights in Italy, Nardocci emphasized the contrast between the lack of legislative activity and the judicial and administrative activism for the

recognition of same-sex couples, if only in a symbolic way. Thus, the condemnation of the Italian government in the *Oliari* case was not unexpected considering the previous warnings of by the Constitutional Court, which had urged the legislator to intervene. Although *Oliari* is specific to the Italian situation, it has to be considered an important step for same-sex couples in their pursuit of legal recognition. In other words, since the *Oliari* case the contracting States are now compelled to ensure a core legal protection for same-sex couples in a stable committed relationship.

However, as pointed out by Nardocci, the progress of same-sex couples' right to family life has not gone hand in hand with similar advances for transgender persons. Even though the recognition of a positive obligation to provide legal protection is a huge step forward compared to past cases, the absence of a positive obligation to enact same-sex marriages could adversely affect transgender persons' right to family life. As in *Hämäläinen v/ Finland*, transgender individuals still have to choose between their former marital life and the legal recognition of the new gender. Nardocci considered that a better use of the distinguishing technique between positive and negative obligations could provide more flexibility and lead to better protection of transgender persons.

4. **Michael Wells-Greco, Spectrum of Reproductive Rights and the Challenges**

Reproductive rights are one of the most sensitive and challenging topics the Court has had to deal with. The increasing use of medical technology in Europe has led to the emergence of a discussion as to their influence on reproductive choices The spectrum of reproductive rights is wide: it encompasses such issues as abortion (*A.B. C; v. Ireland*), home birth (*Ternovszky v. Hungray; Dubskà and Krejzovà v. Czech Republic*), embryo donation for scientific research (*Parrillo v. Italy*) and surrogacy (*Mennesson and Labassée v. France*; *Paradiso and Campanelli v. Italy*). In the ECHR, reproductive rights fall within the right to respect of private life. Considering the diversity of national policies and the ethical and moral issues these questions may raise, there is no consensus between contracting States. As a result, the Court generally leaves States a wide margin of appreciation.

Surveying each of these topics in turn, Michael Wells-Greco considered the existence of emerging trends. He showed that the Court has made a gradual evolution: an isolated national position regarding one issue does not necessarily come into conflict with the ECHR, as reproductive rights are deeply connected to national identities. However, once a contracting State takes the step to grant more rights in this field, it has to respect certain procedural guaranties (e.g. *A.B.C. v. Ireland*). Wells-Greco criticized this "all or nothing approach" that leaves no room for a potential future consensus and widens even more the divisions between contracting States. Conversely, it appears that the margin of appreciation is smaller when it comes to cross-border situations (e.g. *Mennesson and Labassée v. France*). However, as the PIL response may not take into consideration the human rights response, Wells-Greco advocates resorting to soft law to address the diversity of reproductive rights.

5. **Klaudiuz Ryngielewicz, Contents of an individual application**

Concluding the Conference, Klaudiuz Ryngielewicz explained the correct way to lodge an application (see the video) especially with regards to the new formalistic article 47 of the Rules of the Court (see the Report on the revised rule). The increasing number of applications have forced the Court to set strict criteria. After explaining how to fill in the application form, Ryngielewicz insisted on the fact that only a valid application can interrupt the 6-month time-limit set in article 35 of the Convention.