the internal market. It is in this perspective that the Court considered that the ban on advertising of tobacco products in periodicals, magazines and newspapers could be based on Article 95. The Commission is currently working on proposals for a new Directive in that sense.

Hence, by emphasising the limits of the Community's scope of action by reference to the principle of attributed competence, the Court seems to uphold "the constitutional division of powers between the Community and the Member States" (AG Opinion, para. 4). At the same time, it preserves the Community's ability to adopt harmonisation measures touching upon various fields of prima facie national competence, provided two conditions are fulfilled: the measure is genuinely necessary to promote the internal market, and—although it is not yet clear if the Court makes it a formal obligation—the measure must expressly ensure free movement of products which conform to its provisions.

Thirdly, the judgment highlights the schizophrenic attitude of the Member States towards the principle of attributed powers. The process leading to the adoption of the Directive illustrates how, on the one hand, Member States increasingly choose to deal at the Community level with various social demands to the point of being sometimes overzealous, while, on the other hand, they remain essentially focused on their national interests in other circumstances, particularly in the context of Treaty reforms. The judgment underlines the tension between Member States *qua* States negotiating international treaties in Intergovernmental Conferences and Member States *qua* essential parts of the daily Community legislature developing the *acquis communautaire* (see De Burca, CELS Occasional Paper No. 5). The judgment can therefore be seen as an appeal to Member States and Treaty institutions for a more coherent approach to Community mechanisms and *raison d'être*.

CHRISTOPHE HILLION

TAKING CHILDREN ABROAD: HUMAN RIGHTS, WELFARE AND THE COURTS

ONE of the more drastic results of marital breakdown can occur where a mother decides to leave the country permanently and relocate with a child. Such cases can pose an acute dilemma where, as in *Payne* v. *Payne* [2001] 1 F.L.R. 1052, the father has enjoyed substantial contact with the child which is bound to be severely curtailed (if not entirely destroyed) by the mother's relocation on

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the other side of the world. Here the mother, a New Zealander, had been ordered by a New Zealand court to return the child to England, following her "wrongful retention" there, under the Hague Convention which governs international child abduction. In the present proceedings she sought leave to return home to her original family with her four-year-old daughter. The father had substantial staying contact, which was sufficiently extensive that it might almost be termed "time-sharing", and he countered with an application for a residence order. It was not in dispute that the child had an exceptionally good relationship with the father and with the paternal relatives in Newmarket. The mother, who by this time had grown to loathe her home in London, was adamant that she could only provide the child with a happy and secure upbringing if allowed to return to New Zealand. The father unsuccessfully opposed her application in the Cambridge County Court but appealed on the basis that the settled principle applied by the courts was in breach of the European Convention on Human Rights and in conflict with the Children Act 1989. The essence of the argument was that the Convention enshrined a right of contact between parent and child as an aspect of respect for family life under Article 8 and that the Children Act also required much greater significance to be attached to the preservation of such contact.

The principle under attack dates back to the decision of the Court of Appeal in *Poel* v. *Poel* [1970] 1 W.L.R. 1469 and has been applied consistently ever since. At its most basic, it is that leave should generally be granted where the mother's proposal to relocate is genuine, practical and reasonable and not a surreptitious attempt to cut off the father's contact with the child. The application of the principle has usually resulted in the mother obtaining leave, even where the result is very harsh from the father's perspective (as it was, for example, in *Re H (Application to Remove from Jurisdiction)* [1998] 1 F.L.R. 848), though there have also been some noteworthy cases where leave has been refused (see, for example, *Tyler* v. *Tyler* [1989] 2 F.L.R. 158 and *MH* v. *GP (Child: Emigration)* [1995] 2 F.L.R. 106).

Mr. Payne argued that the effect of this case law was to create an unwarranted *presumption* in favour of leave which was in breach of the father's right of contact. Dismissing his appeal, the Court of Appeal emphasised that the overriding and determining factor in these cases was the welfare of the child. It had never been the courts' intention to elevate the "reasonable proposal" principle into a *legal* presumption though it remained, quite properly, a factor of "great weight". In the Court's view there was nothing in the

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jurisprudence of the European Court which prevented the application of the welfare principle in these cases. Particular reliance was placed on the European Court's decision in *Johansen* v. *Norway* (1996) 23 E.H.R.R. 33 in which it held that "particular weight should be attached to the best interests of the child ... which may override those of the parent". Thorpe L.J. also drew attention to the *mother's* own right of mobility protected by Article 2, Protocol 4 to the Convention, yet to be ratified by the UK.

The Court acknowledged that it was necessary to engage in a balancing exercise attaching appropriate weight to adult interests. It recognised, however, the danger of creating a presumption that the interests of the primary carer were compatible with the child's best interests. It also found it necessary, in the light of the recent decision of the European Court in *Glaser* v. *United Kingdom* [2000] 1 F.L.R. 153, to revise the earlier view of Buxton L.J. in *Re A (Permission to Remove from Jurisdiction)* [2000] 2 F.L.R. 225 that it was doubtful whether private law children cases fell within the purview of the Convention at all. On the facts it concluded that the child's welfare demanded that leave be upheld. The judge had rightly found that the effect of the mother being forced to stay in England would be devastating and that "her unhappiness, sense of isolation and depression would be exacerbated to a degree that could well be damaging to the child".

This is a decision which will incense some fathers' pressure groups but which, it is argued, is correct—at least in its conclusion if not in its reasoning. The mistake which is sometimes made is of assuming that rights are absolute and that interference with them is simply not allowed. On the contrary, all "Convention rights" are *qualified* and are susceptible to being displaced by other rights and interests with which they conflict. In essence such interferences with rights need only be proportionate to be lawful (see especially Article 8(2)). It is therefore not inconsistent with the notion that fathers have contact rights, arising from respect for family life, for the Court to conclude that the combined claims represented by the mother's Convention rights (to mobility and, although not articulated by the Court, respect for her private life under Article 8) and the child's best interests outweighed any right this particular father might have. It should also be remembered that this was a case of a mother wishing to return to her original home. The outcome of the balancing exercise may well be different where the mother has no previous connection with the proposed country of permanent residence. Such a case would be likely to provide more of a test of the impact of the Convention on current judicial practice than did *Payne*.

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Less satisfactory is the Court's obvious reluctance (demonstrated in other cases such as that of the conjoined twins (*Re A. (Conjoined Twins: Medical Treatment)* [2001] 1 F.L.R. 1)) to engage with the issues in terms of rights, rather than through the traditional balancing of interests, and its insistence that the Human Rights Act 1998 has left untouched the supremacy of the welfare principle. One aspect of this approach is the apparent assumption by the Court that any Convention rights which the *child herself* might have had were subsumed in, or coterminous with, the notion of welfare or best interests as determined by the Court itself. Thorpe L.J. wholly fails in his judgment to recognise that there might be a distinction between the two concepts. Dame Elizabeth Butler-Sloss P. does recognise that the child has Convention rights but makes no attempt to define what these might be.

Defining the content of children's Convention rights is not likely to be an easy matter. Yet there would be something approaching unanimity among theorists that the notion of "rights", whatever it may mean, is not synonymous with the notion of "welfare". Indeed, some have gone so far as to draw a sharp distinction between protecting children and protecting their rights. Is it too fanciful to suggest that one of the child's own Convention rights here might have been a right of contact with her father? If so, the Court's treatment of the contact issue leaves something to be desired. It is not clear on the face of the report what provision, if any, was made for future contact between the father and child, save that it was found that "the father who has a close relationship with his daughter would be able to afford to visit her or have her to visit him two or three times a year". It is worth pondering whether this is an adequate response to what is described in the United Nations Convention on the Rights of the Child, Articles 7 and 8, as the child's right "to know and be cared for by his or her parents" and "to preserve his or her ... family relations". Article 9(3) of that Convention also provides that States parties must "respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests". It is regrettable that the Court of Appeal did not address the question of continuing contact between the father and the child with greater urgency in the light of these international obligations.

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