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J.Mc.B v. L.E.: The Intersection of European Union Law and Private International Law in Intra-European Union Child Abduction

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Abstract

The certified question and the legal impact of the Court of Justice's preliminary ruling on that question are the subject of this Comment. Part I explains the relevant provisions of the Hague Abduction Convention, Brussels II bis, and the implicated European human rights laws, and discusses the case in chief before the Irish High and Supreme Courts. Part II examines the Court of Justice's opinion on the certified question. Finally, Part III analyzes the impact of the opinion on J.McB. and his family, Brussels II bis and its interpretation, and the jurisprudence the Court of Justice regarding the protection of family life.

J.MCB. v. L.E.: THE INTERSECTION OF EUROPEAN UNION LAW AND PRIVATE INTERNATIONAL LAW IN INTRA-EUROPEAN UNION CHILD ABDUCTION

*Claire Dekar **

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INTRODUCTION

L.E., a thirty-one-year-old woman, left Ireland in July 2009 with her three children and relocated to her childhood home in

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England.¹ J.McB., the thirty-four-year-old father of these three children, was left behind with no knowledge of their whereabouts.² Prior to her abrupt departure from Ireland, L.E. had been in an eleven-year relationship with J.McB., and at one point was engaged to be married to him.³ J.McB. searched for his family, eventually locating them in England.⁴ In November 2009, he began legal proceedings to have his children returned to Ireland.⁵ In these proceedings, J.McB. was confronted with an abstruse legal problem: did Ireland or England have the authority to decide what rights he had to his children?⁶ The answer is crucial to his family because it determines which country's laws will apply when determining the custody rights of each parent and, therefore, which parent will be able to choose the children's place of residence.⁷

As the case between J.McB. and L.E. demonstrates, the answer to this simple question is surprisingly complex. For twenty-seven years, the Convention on the Civil Aspects of International Child Abduction ("Hague Abduction Convention" or "Convention") has governed this legal conundrum.⁸ The

1. See *J.McB. v. L.E.*, [2010] IEHC 123, ¶¶ 3, 5, 11, 26 (H. Ct.) (Ir.), available at <http://www.bailii.org/ie/cases/IEHC/2010/H123.html>.

2. See *id.* ¶¶ 3, 26 (noting that in 2010, J.McB. had to "trace" his family after their departure from Ireland).

3. *Id.* ¶¶ 3, 17.

4. See *id.* ¶ 26 (implying that J.McB. located his family in England in September 2009).

5. See *id.* ¶¶ 2, 26 (discussing the legal proceedings in England).

6. See Convention on the Civil Aspects of International Child Abduction art. 1, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 [hereinafter *Hague Abduction Convention*] ("The objects of the present Convention are . . . to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."); see also ANNE-MARIE HUTCHINSON & HENRY SETRIGHT, *INTERNATIONAL PARENTAL CHILD ABDUCTION* 4 (1998) (noting that the Hague Abduction Convention enables courts in a child's traditional place of residence to decide custody matters).

7. See HUTCHINSON & SETRIGHT, *supra* note 6, at 4 (noting that the Hague Abduction Convention seeks to have the courts in the state where the child is habitually resident decide custody matters); ELISA PÉREZ-VERA, *EXPLANATORY REPORT ON THE 1980 HAGUE CHILD ABDUCTION CONVENTION* 18 (1982), available at http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=2779 (noting that debates on custody matters should take place in the state where the child is a habitual resident).

8. *Status Table*, HAGUE CONF. ON PRIVATE INT'L L., http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last updated Apr. 19, 2011) [hereinafter *Hague Conference Status Table*] (stating the Hague Abduction Convention entered into force December 12, 1983).

Hague Abduction Convention facilitates one contracting state promptly returning a child wrongfully removed from, or retained in, another contracting state so that the first state may exercise jurisdiction over custody matters.⁹ On March 1, 2005, however, a European Union ("EU") regulation known as Brussels II bis ("Regulation") came into effect.¹⁰ Designed to "complement" the Hague Abduction Convention, the Regulation also governs interstate child abductions.¹¹ Because both share the founding principle that the courts in the country where the child is habitually resident¹² are the most appropriately suited to decide custody matters, the Hague Abduction Convention and Brussels II bis work together in cases of intra-EU child abductions.¹³ Additionally, the interplay of these two documents is influenced by European human rights law,¹⁴ which affects the application of all EU law.¹⁵

The case between J.McB. and L.E. raised questions on the manner in which Brussels II bis, the Hague Abduction Convention, and European human rights law interact in intra-EU child abductions. J.McB. v. L.E. is important because it is the first

9. See PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 28 (1999) (noting that securing the prompt return of a child wrongfully removed or retained is an objective of the Hague Abduction Convention); see also NIGEL LOWE ET AL., *INTERNATIONAL MOVEMENT OF CHILDREN: LAW PRACTICE AND PROCEDURE* 248 (2004) (noting that the Hague Abduction Convention works by returning children who have been wrongfully removed or retained from their state of habitual residence).

10. Council Regulation 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, 2003 O.J. L 388/1 [hereinafter Brussels II bis].

11. *Id.* pmbl., at 2 ("In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation . . .").

12. "Habitual residence" is a flexible concept, used by the Conference to enable a fact-sensitive decision on where a child or family resides. For a full discussion of the term's use and history see BEAUMONT & MCELEAVY, *supra* note 9, at 88–113.

13. See *id.* at 88 (stating that habitual residence is a primary consideration when determining if a child should be sent to another contracting state); see also EUROPEAN JUDICIAL NETWORK, *PRACTICE GUIDE FOR THE APPLICATION OF THE NEW BRUSSELS II REGULATION* 12 (2005), available at http://ec.europa.eu/civiljustice/parental_resp/parental_resp_ec_vdm_en.pdf; *id.* at 28 (noting that all Member States of the EU are contracting states to the Hague Abduction Convention).

14. For the purpose of this Comment, the term "European human rights law" will include the human rights law of the EU, Council of Europe, and Irish domestic law.

15. See generally JEAN-CLAUDE PIRIS, *THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS* 146–66 (2010) (discussing the general status of human rights law in Europe).

case that addresses the question of whether an unmarried father has automatic rights of custody for purposes of intra-EU child abduction since the EU's principal human rights document—the Charter of Fundamental Rights of the European Union (“Charter”)—became binding in 2009 with the passage of the Lisbon Treaty.¹⁶ Because he filed his case in Ireland merely twenty-two days after the Charter became binding,¹⁷ J.McB. had the opportunity to make the innovative argument that Ireland was compelled to recognize that a father who is not married to the mother of his children can compel the return of his children to Ireland under Brussels II bis and thus under the Hague Abduction Convention.¹⁸

J.McB. originally filed suit in England, asking the English court to order his children returned to Ireland so that the Irish courts could determine his rights of guardianship and custody.¹⁹ Unfortunately, the case involved a number of complicated legal questions that were not easily resolvable.²⁰ As this Comment explains, the English court requested that J.McB. bring another suit in the High Court of Ireland to determine the status of his custody rights under Irish law.²¹ The High Court determined that J.McB. did not have rights in Irish law that would enable him to compel his children's return to Ireland. J.McB. appealed the

16. See PIRIS, *supra* note 15, at 159 (“[T]he Charter of Fundamental Rights has become legally binding upon the EU institutions and upon Member States when they are implementing Union law.”); see also RAYMOND BYRNE & PAUL MCCUTCHEON, *THE IRISH LEGAL SYSTEM* 748 (5th ed. 2009) (noting that ratification of the Lisbon Treaty would elevate the Charter of Fundamental Rights of the European Union (“Charter”) to the status of the treaties).

17. See PIRIS, *supra* note 15, at 7–70 (noting that the Charter was made binding by the Lisbon Treaty and discussing the series of treaties establishing and refining the European Union (“EU”) as it is today).

18. See *J.McB. v. L.E.*, [2010] IESC 48, ¶¶ 21–22 (Ir.) (outlining J.McB.'s argument before the Irish Supreme Court); *J.McB. v. L.E.*, [2010] IEHC 123, ¶ 2 (H. Ct.) (Ir.); PIRIS, *supra* note 15, at 63 (noting the Lisbon Treaty became effective December 1, 2009); see also Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] (“Everyone has the right to respect for his private and family life.”); Charter of Fundamental Rights of the European Union art. 7, 2010 O.J. C 83/389, at 393 [hereinafter Charter of Rights] (“Everyone has the right to respect for his or her private and family life.”).

19. *J.McB.*, [2010] IESC, ¶ 6.

20. See *supra* notes 15–18 (explaining that the legal landscape for human rights in the EU was altered by the coming into effect of the Lisbon Treaty and that the rights of unmarried fathers had not been judicially tested).

21. *J.McB.*, [2010] IESC, ¶ 7.

High Court's decision to the Irish Supreme Court.²² The Supreme Court required an interpretation of both Brussels II bis and the Charter's protection of family life before it could decide whether, for the purposes of an intra-EU child abduction, a father who is not married to the mother of his children has automatic rights of custody that enable him to compel the court in the Member State in which his children had been taken to return the children to their resident Member State.²³ The Supreme Court, therefore, certified a question to the Court of Justice of the European Union asking whether the Charter required Ireland to recognize such rights of custody for unmarried fathers.²⁴

The certified question and the legal impact of the Court of Justice's preliminary ruling on that question are the subject of this Comment. Part I explains the relevant provisions of the Hague Abduction Convention, Brussels II bis, and the implicated European human rights laws, and discusses the case in chief before the Irish High and Supreme Courts. Part II examines the Court of Justice's opinion on the certified question. Finally, Part III analyzes the impact of the opinion on J.McB. and his family, Brussels II bis and its interpretation, and the jurisprudence the Court of Justice regarding the protection of family life.

I. *THE LEGAL BACKDROP*

In order to better understand the legal framework within which the Court of Justice opined, this Part introduces the Hague Abduction Convention and Brussels II bis and uses cases to illustrate the operation of the Hague Abduction Convention and the Regulation. Section A presents the Hague Abduction Convention, demonstrating the treaty's relevance by discussing Irish case law on the Convention and custody rights. Section B reviews the development of the Regulation and explains how it interacts with the Hague Abduction Convention. Section C explains the relationship of European human rights law to child abductions by one parent when the parents are not married. Finally, Section D outlines the arguments of both J.McB. and L.E

22. *Id.* ¶ 10.

23. *Id.* ¶¶ 39–42 (outlining the legal issues on which the court required clarification).

24. *Id.* ¶¶ 42–44.

before the Irish High Court and Supreme Court, thereby explaining why a determination by the Court of Justice was required.

A. *The Hague Convention*

In the 1970s, the newfound ease of global travel and the resulting number of multinational marriages brought international child abduction to the forefront of private international law.²⁵ Responding to this concern, the topic was added to the agenda of the Fourteenth Session of the Hague Conference on Private International Law ("Conference").²⁶ After noting that many international abductions followed similar patterns, the Conference developed the Hague Abduction Convention.²⁷

The Conference rejected the traditional provision of international cooperation: having countries recognize and enforce each other's judgments.²⁸ Instead, the Conference focused on returning the child to her place of habitual residence for the courts in that state to handle the matter entirely.²⁹ Preferring to facilitate administrative cooperation rather than

25. See BEAUMONT & MCELEAVY, *supra* note 9, at 2 (citing an increase in individual mobility and international marriages as factors contributing to international child abductions); Lawrence N. Stotter, *Histry*, in INTERNATIONAL CHILD ABDUCTIONS: A GUIDE TO APPLYING THE HAGUE CONVENTION WITH FORMS 9 (Gloria F. DeHart ed., 2d ed. 1993) (noting that international child abductions were prevalent worldwide); *see also id.* at 9 n.23 (discussing the history of Hague Conferences on private international law).

26. See Stotter, *supra* note 25, at 11 (noting that discussions on the Hague Abduction Convention were held from October 6–24, 1980, and that the Conference voted on October 25, 1980); PÉREZ-VERA, *supra* note 7, at 14 (noting that the Fourteenth Session on the Hague Conference on Private International Law ("Conference") was held from October 6–25, 1980); *see also* BEAUMONT & MCELEAVY, *supra* note 9, at 3 (discussing problems created by international child abductions such as drawn out court proceedings); Stotter, *supra* note 25, at 9 (crediting the Canadian expert, Mr. T. Bradbrooke, as the first to raise the issue at the Hague Conference in 1976).

27. See BEAUMONT & MCELEAVY, *supra* note 9, at 3 (listing discovery, cost, and investigations into the best interests of the child as characteristic problems); Stotter, *supra* note 25, at 9 (discussing patterns in child abduction).

28. See HUTCHINSON & SETRIGHT, *supra* note 6, at 4 (stating that the Hague Abduction Convention was not designed to enforce custody decisions); Stotter, *supra* note 25, at 9–11 (noting that the drafters chose to omit provisions on recognition and enforcement).

29. Stotter, *supra* note 25, at 9–11 (noting that the drafters focused on returning the child to her habitual place of residence); PÉREZ-VERA, *supra* note 7, at 23 (noting that the Hague Abduction Convention is not a treaty on recognition and enforcement of judgments).

asking states to recognize another state's judicial determination, the Conference sought the speedy return of the child.³⁰ Requiring the prompt return of the child also prevents the child from becoming too integrated into her new environment, another goal of the Convention.³¹

Today, the Hague Abduction Convention is widely ratified, and the forty-five states that responded to the Conference's 2003 survey handled 1259 Hague Abduction Convention applications.³² The number of applications, however, understates the number of children involved both because a discrete number of contracting states responded to the survey and because multiple children can be named in a single application.³³ Of these applications, eighty-four percent requested the child be returned to her place of habitual residence so that a court in that state could exercise jurisdiction over the matter.³⁴

30. See BEAUMONT & MCELEAVY, *supra* note 9, at 22–23 (discussing the interests of child as the exception to mandatory return); Stotter, *supra* note 25, at 10–11 (“The thrust of the [Hague Abduction Convention] was to force the abductor to return the child to its traditional place of residence for resolution of the issues in dispute between parents. . .”).

31. Stotter, *supra* note 25, at 10 (noting that the drafters sought prompt return of the child to avoid integration in a new environment); PÉREZ-VERA, *supra* note 7, at 23 (citing the potential for abducted children to suffer psychological problems as the reason to ensure prompt return of the child); see also Hague Abduction Convention, *supra* note 6, pmbl. (“The States signatory to the present Convention, [f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody, [d]esiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access, [h]ave resolved to conclude a Convention to this effect . . .”).

32. See NIGEL LOWE ET AL., A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2003 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 7 (2006) (noting that in 2003, forty-five contracting states responded to the Hague Conference on Private International Law's survey); *Hague Conference Status Table*, *supra* note 8 (stating that there are presently eighty-five contracting states to the Hague Abduction Convention); see also BEAUMONT & MCELEAVY, *supra* note 9, at 241–42 (observing that the Hague Abduction Convention is successful when the contracting states comply with the cooperation requirements laid out in the text).

33. See LOWE ET AL., *supra* note 32, at 7, 10–11 (noting that there were 1259 applications, and at least 2102 children affected). J.McB.'s request to the English Court falls into this category. See *J.McB. v. L.E.*, [2010] IESC 48, ¶ 6 (Ir.).

34. LOWE ET AL., *supra* note 32, at 84 (stating that eighty-four percent “of applications made in 2003 under the 1980 Convention concerned return applications.”).

By their nature, Convention applications will always involve, at a minimum, two states³⁵: the state to which the alleged abductor took the child and the state in which the other parent or guardian resides. Under the Hague Abduction Convention, every contracting state is required to set up a “Central Authority” to “discharge the duties which are imposed by the Convention.”³⁶ The non-abducting parent or guardian can apply to any contracting state’s Central Authority for assistance in obtaining a child’s return.³⁷

When a Central Authority receives a Hague Abduction Convention application, the judicial or administrative authority in that state is obliged to return the child if it finds that the child was wrongfully removed.³⁸ A child is wrongfully removed if the person making the application has custody rights under the domestic law of the state of the child’s habitual residence and was actually exercising these rights at the time of removal.³⁹ The Convention provides a definition of “rights of custody” that the applicant’s custody rights under domestic law must also satisfy: “‘rights of custody’ shall include rights relating to the care of the person of the child and, in particular, the right to determine the

35. See BEAUMONT & MCELEAVY, *supra* note 9, at 28 (stating that the Hague Abduction Convention is only concerned with international situations); HUTCHINSON & SETRIGHT, *supra* note 6, at 3 (defining international child abduction as a child moving across an international border and noting that the Hague Abduction Convention applies to these situations).

36. Hague Abduction Convention, *supra* note 6, art. 6; see also BEAUMONT & MCELEAVY, *supra* note 9, at 228 (noting that the Hague Abduction Convention deliberately omits particulars about structure and capacity of the Central Authorities, causing “considerable diversity” in form, personnel, and resources from state to state).

37. Hague Abduction Convention, *supra* note 6, art. 8 (“Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.”).

38. *Id.* art. 12 (“Where a child has been wrongfully removed . . . the authority concerned shall order the return of the child forthwith . . .”).

39. *Id.* art. 3 (“The removal or the retention of a child is to be considered wrongful where—a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”).

child's place of residence."⁴⁰ This definition has an autonomous meaning, that is, the definition stands on its own and is independent of its usage in any contracting state's domestic law.⁴¹ Additionally, under Convention Article 15, a Central Authority that has received an application may request that the applicant obtain a declaration from the child's state of habitual residence that the child was wrongfully removed, thereby preventing a contracting state from having to interpret another state's domestic law in situations where the applicant's rights are uncertain.⁴²

Analysis of Hague Abduction Convention applications is solely within domestic law because the Hague Convention is not a self-executing treaty.⁴³ Therefore, whenever a parent or guardian makes an application, she actually applies through that state's domestic law.⁴⁴ By nature of the Convention, the implementing legislation works closely with domestic legislation on custody rights because applications involve analyzing the applicant's rights under a contracting state's law.⁴⁵

In Ireland, the implementing legislation for the Hague Convention is known as the Child Abduction and Enforcement

40. *Id.* art. 5.

41. See BEAUMONT & MCELEAVY, *supra* note 9, at 74 (noting that Hague Abduction Convention custody rights have a semi-autonomous meaning); PÉREZ-VERA, *supra* note 7, at 24 (discussing the autonomous nature of the Convention).

42. See Hague Abduction Convention, *supra* note 6, art. 15 ("The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention . . ."); see also BEAUMONT & MCELEAVY, *supra* note 9, at 63 (stating that Article 15 should only be used in cases in which the applicant's rights are unclear because of the delay in seeking such verification); LOWE ET AL., *supra* note 9, at 281 (noting that Article 15 allows a state to ask for clarification of another state's laws if the law's application is uncertain).

43. See Hague Abduction Convention, *supra* note 6, art. 2 ("Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention.").

44. See, e.g., *H.I. v. M.G.*, [2000] I.R. 110, 132 (Ir.) (referencing Irish implementing legislation of the Hague Abduction Convention); see also *In re D.*, [2007] 1 A.C. 619 (H.L.) (appeal taken from Eng.).

45. See PÉREZ-VERA, *supra* note 7, at 24 ("The Convention must necessarily coexist with the rules of each Contracting State on applicable law and on the recognition and enforcement of foreign decrees . . .").

of Custody Orders Act.⁴⁶ Further, the primary Irish legislation on custody rights is the Guardianship of Infants Act,⁴⁷ which was amended by the Status of Children Act, and together these two acts define custody rights in Irish domestic law.⁴⁸ The Guardianship of Infants Act, as amended, grants to the mother sole custody rights of her children if she is not married to the father.⁴⁹ If the couple is married, however, the parents share guardianship.⁵⁰ Under Irish law, guardians have rights of custody that satisfy the definition of “rights of custody” found in Article 3 of the Hague Abduction Convention.⁵¹ An unmarried father does not have rights of custody automatically; he merely has a right to apply for custody.⁵²

46. Child Abduction and Enforcement of Custody Orders Act 1991 (Act No. 6/1991) (Ir.), *available at* <http://www.irishstatutebook.ie/1991/en/act/pub/0006/print.html>.

47. *See* HUTCHINSON & SETRIGHT, *supra* note 6, at 119; *see also* Guardianship of Infants Act 1964 (Act No. 7/1964) (Ir.) *available at* <http://www.irishstatutebook.ie/1964/en/act/pub/0007/print.html>.

48. *See* HUTCHINSON & SETRIGHT, *supra* note 6, at 119 (noting that the Guardianship of Infants Act, as amended by the Status of Children Act, is the primary law on child custody in Ireland). *See generally* Status of Children Act 1987 (Act No. 26/1987) (Ir.), *available at* <http://www.irishstatutebook.ie/1987/en/act/pub/0026/print.html>; Guardianship of Infants Act 1964 (Act No. 7/1964).

49. *See* Guardianship of Infants Act § 6(4). Section 6(4) has been amended by Status of Children Act §§ 11–12 (“Where the mother of an infant has not married the infant’s father, she, while living, shall alone be the guardian of the infant . . .”).

50. *Compare* Guardianship of Infants Act § 6(1) (“The father and mother of an infant shall be guardians of the infant jointly.”), *with id.* § 6(4) (“The mother of an illegitimate infant shall be guardian of the infant.”).

51. *See* Hague Abduction Convention, *supra* note 6, art. 5 (defining rights of custody for purposes of the Convention); *G.T. v. K.A.O.*, [2007] 3 I.R. 567, 615 (Ir.) (Murray, J.) (implicitly acknowledging that a mother who was not married to the father of her children had rights satisfying the definition of rights of custody found in Article 3 of the Hague Abduction Convention).

52. *See* *McD. v. L.*, [2009] IESC 81, ¶ 76 (Ir.) (Fennelly, J.) (summarizing relevant precedent and concluding that a father who is not married to the mother of his child does not have natural or constitutional rights to the child, and that section 6A of the Guardianship of Infants Act merely granted a father the right to apply to be a guardian); *W.O’R. v. E.H.*, [1996] 2 I.R. 248, 269–70 (Ir.) (Hamilton, J.) (concluding that a father who is not married to the mother of his children, but is in a long-term and stable relationship, has extensive rights to his children, but those rights are not triggered until he applies under the Guardianship of Infants Act); *J.K. v. V.W.*, [1992] I.R. 437, 446 (Ir.) (Finlay, J.) (“Section 6A [of the Guardianship of Infants Act] . . . does not give [an unmarried father] a right to be guardian, and it does not equate his position vis-à-vis the infant as a matter of law with the position of a father who is married to the mother of the infant.”).

The Irish Supreme Court commented on the relationship between the Convention and inchoate rights of custody in *H.I. v. M.G.*⁵³ The plaintiff-father in that case, H.I., was an Egyptian citizen.⁵⁴ He met the defendant-mother, M.G., a citizen of Great Britain, in the United States.⁵⁵ The couple lived together for five years, but never married under New York law.⁵⁶ When the couple's relationship deteriorated, M.G. applied for, and was granted, temporary custody of their child by New York.⁵⁷ She then took the child to Ireland.⁵⁸ The question before the Irish Supreme Court was whether this removal was wrongful under the Hague Abduction Convention.⁵⁹ The applicant argued that Article 3 of the Convention "ought to be interpreted as applying to inchoate rights of custody . . . [g]iven that the objective of the Hague Convention was to spare children the adverse effects resulting from arbitrary removal."⁶⁰ The respondent submitted that because the applicant was not the primary caregiver and had neither sought nor had been granted any right of custody, he was not entitled to compel the child's return to the United States.⁶¹ The Irish Supreme Court ultimately concluded that the father had no rights of custody that could satisfy the Convention.⁶² Thus, the precedent established in this case is that a father who is not married to the mother of his children and has not obtained a legally enforceable right of custody under Irish law does not have rights of custody under the Hague Abduction Convention: Ireland does not recognize a father's inchoate rights of custody.⁶³

53. See *H.I. v. M.G.*, [2000] I.R. 110, 132 (Ir.) (Keane, J.).

54. *Id.* at 113.

55. *Id.*

56. *Id.* (stating that the couple was married under Muslim law, but the marriage was not valid in New York).

57. *Id.*

58. *Id.* at 114.

59. *Id.* at 117.

60. *Id.* at 121.

61. *Id.* ("She submitted that . . . [she] was the primary carer and hence her action in taking the child to Ireland was not a typical case of abduction [She] further submitted that . . . the plaintiff had neither sought nor been granted any right of custody: he had confined his application to the court to access.").

62. *Id.* at 133–34 (concluding that the plaintiff did not have rights under New York law that could prevent the removal of the child to Ireland). In coming to its conclusion, the court commented that "the appropriate method of addressing difficulties of that nature . . . is through the machinery of [the Conference] . . . rather than by innovative judicial responses." *Id.* at 133.

63. *Id.* at 133–34 (concluding and summarizing the opinion).

B. *Brussels II bis*

Brussels II bis, like the Hague Abduction Convention, is an international law, but only applies between EU Member States.⁶⁴ Brussels II bis expands upon an earlier piece of EU legislation regarding family law⁶⁵ commonly known as Brussels II, which was only in force from March 2001 to March 2005.⁶⁶ Prior to its enactment, the presumption was that family law lay outside the EU's competence because it is value laden, culturally unique, and outside the EU's economic objectives.⁶⁷ That there was no regulation of families prior to Brussels II is not, however, completely true: as early as the 1960s there were laws that provided free movement and residents' rights to migrant worker's families, thereby helping to achieve economic objectives.⁶⁸

The major expansion of the EU's competence in family law came as a result of the Amsterdam Treaty in 1999, which gave it the power to regulate cross-border recognition and enforcement

64. See Consolidated Version of the Treaty on the Functioning of the European Union art. 288, 2010 O.J. C 83/47, at 171 [hereinafter TFEU] ("A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.").

65. See NIGEL LOWE ET AL., *THE NEW BRUSSELS II REGULATION: A SUPPLEMENT TO INTERNATIONAL MOVEMENT OF CHILDREN* 15 (2005) (noting that much of Brussels II bis was taken from its predecessor); Peter McEleavy, *Brussels II bis: Matrimonial Matters, Parental Responsibility, Child Abduction and Mutual Recognition*, 53 INT'L & COMP L.Q. 503, 503 (2004) (stating that Brussels II bis is an expanded version of its predecessor, Brussels II).

66. Council Regulation 1345/2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses, art. 46, 2000 O.J. L 160/19, at 29 [hereinafter Brussels II] (stating Brussels II came into force on March 1, 2001); Brussels II bis, *supra* note 10, art. 72, at 19 (noting that Brussels II bis became effective on March 1, 2005, repealing Brussels II).

67. See CLARE MCGLYNN, *FAMILIES AND THE EUROPEAN UNION: LAW, POLICIES AND PLURALISM* 165 (2006) (positing that family law arguably remains outside EU competence because the legality of regulating families has to be derived from other declared EU objectives such as greater European integration); Frederik Swennen, *Atypical Families in EU (Private International) Family Law*, in *INTERNATIONAL FAMILY LAW FOR THE EUROPEAN UNION* 389, 390 (Johan Meeusen et al. eds., 2007) ("The [EU] has no competence in family law . . . because of its purely economic objectives.").

68. See MCGLYNN, *supra* note 67, at 46 (noting that from early on the European Community granted families rights to facilitate movement of economic actors); Helen Stalford, *EU Family Law: A Human Rights Perspective*, in *INTERNATIONAL FAMILY LAW*, *supra* note 67, at 101, 107 (noting that many families still use these laws to move to another Member State with their family member who is a migrant worker).

of judicial judgments, including those involving family matters.⁶⁹ Promulgated with a number of other measures following this expansion in power, Brussels II's foray into family law was uneventful, despite its potential for broad reaching effects in the EU.⁷⁰ As evidenced by the drafting and implementation of Brussels II, the EU realized that the free movement of people necessitated a regulation on the recognition and enforcement of marriages and divorces.⁷¹ Brussels II takes the stance that there can be only one Member State with original jurisdiction over any given action, and once jurisdiction is exercised, it cannot be challenged in another Member State's courts.⁷² Brussels II accomplishes this by applying strict theories of *lis pendens* and *prior temporis*: if the same cause of action is filed in two Member States, the state in which the matter was first filed has jurisdiction to adjudicate the matter and the other state must not exercise jurisdiction.⁷³ Unlike the Hague Abduction Convention, both Brussels II and Brussels II bis focus on the recognition and

69. Michael Bogdan, *The EC Treaty and the Use of Nationality and Habitual Residence as Connecting Factors in International Family Law*, in *INTERNATIONAL FAMILY LAW*, *supra* note 67, at 303–04 (noting that the Amsterdam Treaty gave the European Community the power to regulate interjurisdictional recognition and enforcement of judgments). See generally Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1 [hereinafter Treaty of Amsterdam].

70. MCGLYNN, *supra* note 67, at 152 (noting that virtually no one realized EU law had reached into family law because the focus was on other measures that were promulgated concurrently); Peter McEleavy, *Brussels II Regulation: How the European Community Has Moved into Family Law*, 51 *INT'L & COMP. L.Q.* 883, 883 (2002) (noting that the EU's step into family law went largely unnoticed, at least in the United Kingdom).

71. See Dieter Martiny, *Objectives and Values of (Private) International Law in Family Law*, in *INTERNATIONAL FAMILY LAW*, *supra* note 67, at 69, 84 (noting that harmonizing international family law will reduce forum shopping); McEleavy, *supra* note 70, at 888 (noting that uniform jurisdictional rules would ease problems associated with marital property and remarriage).

72. See Brussels II, *supra* note 66, art. 27(1), at 9 ("Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established."); see also Brussels II bis, *supra* note 10, art. 19(3), at 9 ("Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.").

73. See *supra* note 72 (quoting Brussels II and Brussels II bis); McEleavy, *supra* note 70, at 886 ("To ensure that no conflicts of jurisdiction arise, [Brussels II] employs a *lis pendens* provision based on the strict application of the *prior temporis* formula.").

enforcement of judgments and judicial trust between Member States.⁷⁴

Work on Brussels II bis began shortly after Brussels II had taken effect.⁷⁵ Now that mutual enforcement and recognition had become the basis for regulating civil matters, the European Council and Commission began drafting a regulation that would encompass all children (whether born in or out of wedlock) and child abductions.⁷⁶ The Regulation furthered the EU's general goals of enforcement and recognition of judicial decisions between Member States.⁷⁷

Like all regulations promulgated by the EU, Brussels II bis has direct effect in the Member States and needs no implementing legislation to be enforceable in national courts.⁷⁸ Despite this fact, the Regulation is not always a stand-alone provision. Some Member States, including Ireland,⁷⁹ have

74. Compare *supra* note 30 and accompanying text (explaining that the Hague Abduction Convention rejected a model based on recognition and enforcement); with Alegría Borrás, *From Brussels II to Brussels II bis and Further*, in *BRUSSELS II BIS: ITS IMPACT AND APPLICATION IN THE MEMBER STATES* 3, 7 (Katharina Boele-Woelki et al. eds., 2007) (noting the EU's "preference" for encouraging mutual trust between Member States); and MCGLYNN, *supra* note 67, at 162 (commenting that the regulations were not necessarily advantageous because they only apply between Member States, whereas the Hague Conventions have the potential to be a global solution).

75. See Borrás, *supra* note 74, at 23 (remarking on the four-year lifespan of Brussels II and the potentially short lifespan of Brussels II bis); McEleavy, *supra* note 70, at 503–12 (noting the short duration of Brussels II's effectiveness).

76. See LOWE ET AL., *supra* note 65, at 15 (noting that Brussels II could only be applied to children of both parents during matrimonial proceedings, and that Brussels II bis is not so confined); see also Brussels II bis, *supra* note 10, pmbl., at 1 ("In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.").

77. See Bogdan, *supra* note 69, at 304 (explaining that conflict of law and jurisdictional problems have an indirect effect on the proper functioning of the European Community's internal market).

78. See TFEU, *supra* note 64, art. 288, 2010 O.J. C 83/47, at 171 (quoting the portion of the Consolidated Version of the Treaty on European Union that states all regulations are directly effective and applicable between Member States); Brussels II bis, *supra* note 10, at 19 ("This Regulation shall be binding in its entirety and directly applicable in the Member States . . ."); see also BYRNE ET AL., *supra* note 16, at 780 ("A Regulation . . . has legal force in the Member States without the need for any further domestic legislative act.").

79. See *infra* notes 92–95 and accompanying text (discussing Ireland's statutory instrument).

developed statutory instruments augmenting the Regulation to make it consistent with domestic law.⁸⁰

The Irish Minister for Justice, Equality, and Law Reform promulgated Statutory Instrument 112/2005 with Brussels II bis.⁸¹ This statutory instrument changed Section 15 of the Child Abduction and Enforcement of Custody Orders Act (the statute implementing the Hague Abduction Convention in Ireland).⁸² Under Statutory Instrument 112/2005, when Ireland is presented with an Article 15 Hague Abduction Convention request from a Member State, it must make the determination based on Brussels II bis.⁸³ Thus, a judge would have to determine whether the removal of the children was “wrongful” as defined by the Regulation, which is different than the previous practice of determining whether the removal was “wrongful” as defined by the Convention.⁸⁴

80. See LOWE ET AL., *supra* note 65, at 1 (mentioning the statutory instrument promulgated in Great Britain); Borrás, *supra* note 74, at 27 (listing Belgium, Estonia, Germany, Lithuania, the Netherlands, Sweden, and the United Kingdom as countries that have enacted laws clarifying the relationship between the Regulation and domestic law).

81. See European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005 (S.I. No. 112/2005) (Ir.), *available at* <http://www.irishstatutebook.ie/2005/en/si/0112.html> [hereinafter S.I. No. 112/2005]; see also European Communities Act 1972 (Act No. 27/1972), §§ 1–3 (Ir.), *available at* <http://www.irishstatutebook.ie/1972/en/act/pub/0027/print.html> (giving effect to the treaties of the European Community and all supplemental treaties in Irish law, and authorizing Irish ministers to create statutory instruments, such as S.I. No. 112/2005, allowing European law to be binding in domestic law).

82. See IR. CONST., 1937, art. 13.1.2 (granting the president the power to appoint, inter alia, ministers upon the nomination of the Taoiseach); S.I. No. 112/2005, *supra* note 81; Child Abduction and Enforcement of Custody Orders Act 1991 (Act No. 6/1991) (Ir.), *available at* <http://www.irishstatutebook.ie/1991/en/act/pub/0006/print.html>; see also J.McB. v. L.E., [2010] IESC 48, ¶ 20 (Ir.) (noting the change and reciting the new language); J.McB. v. L.E., [2010] IEHC 123, ¶ 46 (H. Ct.) (Ir.) (quoting the new statutory language).

83. See S.I. No. 112/2005, *supra* note 81, § 8(d) (“The Court may, on an application made for the purposes of Article 15 of the Hague Convention by any person appearing to the Court to have an interest in the matter, make a declaration that the removal of any child from, or his retention outside, the State was—(a) in the case of a removal to or retention in a Member State, a wrongful removal or retention within the meaning of Article 2 of the Council Regulation, or (b) in any other case, wrongful within the meaning of Article 3 of the Hague Convention.”).

84. *Id.* Compare Brussels II bis, *supra* note 11, art. 2(9), at 4 (“[T]he term ‘rights of custody’ shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child’s place of residence”), with *supra* note 39

Brussels II bis has an explicit relationship to the Hague Abduction Convention.⁸⁵ Recital 17 of the preamble and Article 62 of the Regulation state that the Hague Convention is still valid between Member States.⁸⁶ Article 60, however, clarifies that the Regulation takes precedence over the Convention.⁸⁷

C. European Convention on Human Rights and the Charter of Fundamental Rights of the European Union

The modern concept of human rights in Europe today originates from World War II.⁸⁸ In 1950, the Council of Europe developed the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").⁸⁹ The ECHR remains the "bedrock of human rights debates" in Europe, and is a "commonly agreed statement of the rights to be given primacy within Europe."⁹⁰ Actual protection of these human rights, however, is left to the Member States' constitutions, and individual citizens are permitted to appeal to the European Court of Human Rights ("ECtHR").⁹¹ Because all

and accompanying text (quoting the definition "custody rights" under the Hague Abduction Convention).

85. See Brussels II bis, *supra* note 10, art. 62(2), at 17 ("The conventions mentioned in Article 60, in particular the 1980 Hague Convention, continue to produce effects between the Member States which are party thereto . . ."); *id.* art. 60, at 16 ("[T]his Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation: . . . the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.").

86. See Brussels II bis, *supra* note 10, art. 62(2), at 17.

87. See *id.* art. 60, at 16.

88. See NOELINE BLACKWELL ET AL., HUMAN RIGHTS LAW 48 (Brid Moriarty et al. eds., 2d ed. 2008) (noting that a group of nations "appalled by the atrocities" of World War II ("WWII") came together to form the Council of Europe and draft the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")); Elizabeth F. Defeis, *Human Rights and the European Court of Justice: An Appraisal*, 31 FORDHAM INT'L L.J. 1104, 1106 (discussing the ECHR as one of many post-WWII European treaties).

89. See Defeis, *supra* note 88, at 1105 ("[T]he European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") was signed in 1950"); BLACKWELL ET AL., *supra* note 88, at 48 ("[I]n 1950, the Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms . . ."); see also ECHR, *supra* note 18.

90. MCGLYNN, *supra* note 67, at 14.

91. BLACKWELL ET AL., *supra* note 88, at 51 (observing that the European Court of Human Rights ("ECtHR") was the first international court to give individuals "automatic direct access for alleged breaches of a state's international obligations"); Defeis, *supra* note 88, at 1107 (noting that every Member State has ratified the ECHR).

ECHR contracting states must accept the jurisdiction of the ECtHR, and the court's decisions are final and binding, this remedy is significant.⁹²

The ratification of the Maastricht and Amsterdam Treaties furthered the impact of the ECHR by formally including ECHR rights in European Community law.⁹³ Article F of the Maastricht Treaty provided that "[t]he Union shall respect fundamental rights, as guaranteed by the [ECHR]."⁹⁴ Further, the Amsterdam Treaty added, "[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms."⁹⁵ Neither treaty, however, actually made the rights binding upon the actions of the EU.⁹⁶ Thus, individual remedy remained solely with the ECtHR.⁹⁷

In 2000, the European Council (not to be confused with the Council of Europe, which developed the ECHR) organized the drafting of the Charter.⁹⁸ This document "explicitly reaffirm[ed]" the rights specified in the ECHR and enumerated more rights.⁹⁹ Despite the Charter's nonbinding status, the Court

92. See BLACKWELL ET AL., *supra* note 88, at 48 (noting that contracting states can be held accountable to individual citizens by the ECtHR); BYRNE ET AL., *supra* note 16, at 797–98 (stating that cases brought by individuals are final and binding).

93. URSULA KILKELLY, *ECHR AND IRISH LAW* 47 (2004) (discussing the two treaties' provisions regarding the ECHR). The Maastricht and Amsterdam Treaties are two steps in a series of treaties that establish and govern the EU as it exists today. See PIRIS, *supra* note 15, at 7–70 (providing a brief overview of the treaty developments creating the EU).

94. Treaty on European Union (Maastricht text), July 29, 1992, tit. I, art. F, 1992 O.J. C 191/1 [hereinafter Maastricht TEU].

95. Treaty of Amsterdam, *supra* note 69, art. 1(8).

96. BLACKWELL ET AL., *supra* note 88, at 151–52 (noting that because the European Community is not a party to the ECHR, its institutions may not be brought before the ECtHR); Defeis, *supra* note 88, at 1115 (noting that the Court of Justice is not bound by the ECtHR and therefore there is a potential for differing interpretations of the ECHR).

97. See *supra* notes 89–90 and accompanying text (discussing individual remedy available from the ECtHR).

98. See BYRNE ET AL., *supra* note 16, at 768–69 (stating that the European Council is the "main decision-making body of the European Community and Union" and is almost exclusively comprised of the Member State's heads of government); *id.* at 746 (noting the drafting conference was comprised of representatives of the European Parliament, national parliaments, national governments, and the European Commission); see also BLACKWELL ET AL., *supra* note 88, at 166–67 ("The Charter was drafted by a unique body composed of 62 representatives of the Member State governments, the Commission, the European Parliament and the national parliaments."); *supra* notes 15–18 (noting the relationship between the Charter and the rights of an unmarried father to his children).

99. KILKELLY, *supra* note 93, at 50 ("In terms of its catalogue of rights, the Charter contains all the rights contained in the ECHR, and many more."); Defeis, *supra* note 88,

of Justice of the European Union integrated the provisions (and the decisions of the ECtHR on the ECHR) into its jurisprudence and, therefore, into “the fabric of the Union.”¹⁰⁰ These two sources of human rights, however, remain legally distinct and operate in parallel.¹⁰¹

Wherever the Charter contains rights that correspond to the ECHR, the meaning and scope of the Charter must be the same as the ECHR.¹⁰² This is, however, paradoxical because the Charter also states that it can be interpreted to provide greater protections than the ECHR.¹⁰³ The relationship between the Court of Justice and the ECtHR continues to develop and overlap with the advance of each court’s jurisprudence, but the paradox remains unresolved.¹⁰⁴

The Lisbon Treaty, effective December 2009, made the Charter, and the rights it protects, legally binding for the first time.¹⁰⁵ This elevation, as one scholar has noted, however, is not as groundbreaking as it may seem.¹⁰⁶ The Charter’s provisions are irrelevant when Member States apply their domestic law because the provisions are applicable only when Member States are

at 1108, 1111 (mentioning that the Court of Justice uses the term “fundamental rights” because it is broader than “human rights”).

100. See, e.g., *Varec SA v. État belge*, Case C-450/06, [2008] E.C.R. I-581, ¶ 48 (deferring to the ECtHR’s interpretation of “private life”); Defeis, *supra* note 88, at 1108, 1113–14.

101. KILKELLY, *supra* note 93, at 50 (noting that Article 53(2) of the Charter was added specifically to ensure parallelism); see Charter of Rights, *supra* note 18, art. 52(3), 2010 O.J. C 83, at 402 (“In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”).

102. See *supra* note 101 (quoting Article 52(3) of the Charter of Rights).

103. See *supra* note 101 (quoting Article 52(3) of the Charter of Rights).

104. See BLACKWELL ET AL., *supra* note 88, at 153–55 (providing an overview of pre-Lisbon Treaty Court of Justice jurisprudence on accession); PIRIS, *supra* note 15, at 163–67 (describing the process by which the Lisbon Treaty permits the Court of Justice to accede to the ECtHR and noting that the process is complicated and has not yet been realized).

105. See *supra* notes 93–97 and accompanying text (discussing the nonbinding nature of the Charter pre-Lisbon Treaty); *supra* note 16 and accompanying text (noting that the Charter became binding under the Lisbon Treaty).

106. See PIRIS, *supra* note 15, at 159–60 (explaining that elevating the Charter to binding status does not “fundamentally alter[] the pre-existing legal situation”).

applying EU law.¹⁰⁷ Additionally, the Charter explicitly does not “establish any new power or task for the Community or the Union, or modify powers and tasks as defined by the Treaties.”¹⁰⁸ Thus, while the Charter was the EU’s first formal recognition that the EU plays an important role in the way families are regulated within Europe, its provisions concerning family law have been used to “entrench the status quo,” favoring the traditional marriage as the basis of family life.¹⁰⁹

Brussels II bis, nevertheless, explicitly affirms the Charter in Recital 33 of the preamble: “This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union.”¹¹⁰ Additionally, both documents affirm that the child’s interests are paramount in all matters.¹¹¹

During intra-EU Hague Abduction Convention cases, a party may invoke her right to respect for family life, as embodied in Article 8 of the ECHR and Article 7 of the Charter.¹¹² The ECtHR interprets “family life” as an autonomous concept, and the threshold for establishing it is quite low.¹¹³ In *Lebbink v. the Netherlands*, the ECtHR reiterated its position: “A child born out of [wedlock] is *ipso jure* part of that ‘family’ unit from the

107. Charter of Rights, *supra* note 18, art. 51(1), 2010 O.J. C 83, at 402 (“The provisions of this Charter are addressed . . . to the Member States only when they are implementing Union law.”).

108. *Id.* art. 51(2).

109. See MCGLYNN, *supra* note 67, at 18, 21; *see also* D. & Kingdom of Sweden v. Council, Joined Cases 122 & 125/99 P, [2001] E.C.R. I-4319 (*declining to extend ECHR Article 8 right to private and family life to a homosexual couple*).

110. Brussels II bis, *supra* note 10, pmbl., at 3

111. Compare Charter of Rights, *supra* note 18, art. 24(2), 2010 O.J. C 83, at 396 (“In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.”), with Brussels II bis, *supra* note 10, pmbl., at 3 (“In particular, [the Regulation] seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the [Charter]. . .”).

112. See *supra* note 18 and accompanying text (noting the Charter’s provision on the right to respect for family life).

113. See, e.g., *Lebbink v. The Netherlands*, 2004-IV Eur. Ct. H.R. 183, 193 (“The Court reiterates that the notion of ‘family life’ under Article 8 of the Convention is not confined to marriage-based relationships and may encompass other *de facto* ‘family’ ties . . .”); *Keegan v. Ireland*, 290 Eur. Ct. H.R. (ser. A) at 44 (1994) (“There . . . exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer co-habiting or if their relationship has then ended.”); *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 330, 341-42 (1979) (reiterating that a state cannot define or interfere with the existence of family life as defined by the ECHR).

moment, and by the very fact, of its birth. Thus there exists between the child and the parents a relationship amounting to family life.”¹¹⁴

As evidenced by *Guichard v. France*, the degree of “respect” guaranteed is also low.¹¹⁵ Mr. Jean-Luc Guichard was never married to the mother of his son.¹¹⁶ After years of living together, the mother unilaterally took their son to Canada, her native country.¹¹⁷ Under French law, unmarried mothers have automatic custody of their children and fathers have a right to apply for custody.¹¹⁸ Guichard thus did not have rights to his child, nor had he exercised his right to apply prior to the mother’s removal of their son to Canada.¹¹⁹ Guichard argued that it was a violation of his rights under Articles 8 and 14 not to recognize inchoate rights of custody because he had a right to enjoy family life and a right not to be discriminated against for his choice not to marry.¹²⁰ In this case, the ECtHR did not find a violation of Article 8 or of Article 14 of the ECHR.¹²¹ The ECHR determined that securing the father’s right to apply for custody was sufficient respect for family life and protection from discrimination.¹²² Thus the refusal of France to recognize automatic rights of custody for the purposes of a Hague Convention application was not a violation of Guichard’s right to respect for family life or guarantee against discrimination.¹²³

J.McB. found himself in a similar position as Guichard. J.McB. had no prior notice of the move nor did he know to

114. *Lebbink*, 2004-IV Eur. Ct. H.R. at 193.

115. *See* *Guichard v. France*, 2003-X Eur. Ct. H.R. 423.

116. *Id.*

117. *Id.*

118. *Id.* at 427 (explaining that French statutory law states that parental responsibility lies with the mother in circumstances such as Guichard’s).

119. *Id.* (noting that the parents did not apply for joint parental responsibility as allowed for under French law).

120. *Id.* at 434; *see also supra* notes 15–18 and accompanying text (noting that J.McB. also made this argument, which had been decided under the pre-Lisbon EU treaties).

121. *Guichard*, 2003-X Eur. Ct. H.R. at 434 (“[T]he applicant’s complaint based on Article 8 of the Convention must be dismissed as manifestly ill-founded . . .”); *id.* (“It follows that [the complaint based on Article 14] is manifestly ill-founded and must be dismissed . . .”).

122. *See supra* note 116 (quoting the ECtHR’s holdings).

123. *Id.*

where his family had gone.¹²⁴ After locating his family in L.E.'s childhood hometown, he petitioned the English court for an originating summons ordering his children returned to Ireland pursuant to the Hague Abduction Convention.¹²⁵ In accordance with Convention Article 15, the English court asked J.McB. to obtain a declaration that the children were wrongfully removed from Ireland before it would order the children returned.¹²⁶ Article 15 of the Hague Abduction Convention refers to Article 3, which defines the conditions under which a removal is "wrongful."¹²⁷ In essence, J.McB. must have had rights under Irish law that satisfy the Convention's definition of "rights of custody" and been exercising those rights before the English court would order the children be returned to Ireland.¹²⁸

Only if the Convention was applicable would the Irish courts have determined that L.E. lawfully took the children out of Ireland because, under the Convention, unmarried fathers do not have automatic rights of custody.¹²⁹ The Irish courts looked at the Guardianship of Infants Act, as amended, compared it to the definition of custody in Article 5 of the Convention, and concluded that because J.McB. was not married to L.E. and had not applied for custody, domestic law did not recognize custody rights as defined by the Convention.¹³⁰ The English court, therefore, would not have ordered that the children be returned because the Irish courts determined that J.McB. did not have rights under Irish law that satisfied the definition of custody

124. See *supra* note 2 and accompanying text (reiterating that J.McB. did not know where his family had gone).

125. See *supra* notes 4, 21, and accompanying text (explaining the events leading up to J.McB. filing suit in Ireland).

126. See *J.McB. v. L.E.*, [2010] IESC 48, ¶ 7 (Ir.) (stating that the English court asked J.McB. for a Hague Abduction Convention Article 125 declaration); see also *supra* note 42 and accompanying text (discussing Article 15 declarations).

127. See *supra* note 39 (quoting Article 3 of the Hague Abduction Convention).

128. See *supra* notes 38–40 and accompanying text (discussing wrongful removal and custody rights under the Hague Abduction Convention).

129. See *supra* notes 38–40 and accompanying text (discussing wrongful removal and custody rights under the Hague Abduction Convention).

130. *Id.*; see *supra* notes 39–41 and accompanying text (explaining "rights of custody" under the Hague Abduction Convention); *supra* notes 48–52 and accompanying text (noting that, in Irish domestic law, the mother of a child who is not married to the father has sole guardianship of the child, and therefore sole rights of custody for the purposes of the Hague Abduction Convention).

rights found in the Convention.¹³¹ J.McB., however, sought relief additional to the Hague Abduction Convention Article 15 determination requested by the English court.¹³² He sought, *inter alia*, a declaration that the removal was wrongful under Brussels II bis.¹³³

In arguing that the Regulation changed the analysis the High Court was required to do, J.McB. forced Justice John Mac Menamin to address how the Regulation and the Hague Abduction Convention interact in Irish law.¹³⁴ Statutory Instrument 112/2005 was implemented in Ireland to try to conform Irish law with Brussels II bis and states that the Regulation supersedes the Hague Abduction Convention.¹³⁵ The thrust of J.McB.'s argument centered on Statutory Instrument 112/2005 and its impact on the analysis of a Hague Abduction Convention Article 15 request. Justice Mac Menamin had to consider whether he was confined to traditional Convention analysis because the English court had *only* asked for a determination under Hague Abduction Convention Article 15 or if the Regulation, and therefore the Charter, also applied.¹³⁶ This was a question of first impression in Ireland.¹³⁷

L.E. argued that the High Court was confined to consider the matter solely pursuant to the Hague Abduction Convention

131. *J.McB.*, [2010] IESC 48, ¶¶ 28–34 (summarizing the Irish statutory and case law, and applying it to J.McB.'s situation).

132. *J.McB. v. L.E.*, [2010] IEHC 123, ¶ 2 (H. Ct.) (Ir.) (listing guardianship, rights of access, and determinations under the Hague Abduction Convention and Brussels II bis as reliefs requested by J.McB.); *see also supra* note 42 (discussing Hague Abduction Convention Article 15 requests).

133. *J.McB.*, [2010] IEHC 123, ¶ 2.

134. *See id.* ¶¶ 75–76 (explaining J.McB.'s submissions on this point).

135. *See supra* notes 81–84 and accompanying text (discussing Statutory Instrument 112/2005 and its enactment, and explaining that it changes the language of the implementing legislation for the Hague Convention in Ireland to accommodate the Regulation).

136. *See J.McB.*, [2010] IEHC 123, ¶¶ 36–53 (analyzing whether the High Court was confined to analysis under Hague Abduction Convention Article 15); *supra* note 16 (noting that after the entering into force of the Lisbon Treaty, the Charter applies whenever a court is applying EU law).

137. *J.McB.*, [2010] IEHC 123, ¶ 49 (“I must reject the submission that the statutory remit of this Court should be confined to determine whether the removal was wrongful within the meaning of the Hague Convention, as opposed to [Brussels II bis]. No authority was cited on this question. It appears not to have been previously decided elsewhere.”).

because the only basis for its jurisdiction was the Article 15 request from the English court.¹³⁸

Justice Mac Menamin instead accepted that the Irish courts must determine its jurisdiction under its national laws, and that Irish law did not limit him to merely consider the Convention when hearing an Article 15 request.¹³⁹ Justice Mac Menamin came to this conclusion by quoting Section 8(2)(iii) of Statutory Instrument 112/2005.¹⁴⁰ It reads: “References in [the Child Abduction and Enforcement of Custody Orders] to the Hague Convention shall, where the context requires in relation to applications under the Hague Convention to which [Brussels II bis] relates, be deemed to include references to [Brussels II bis].”¹⁴¹

Moving forward in his reasoning, Justice Mac Menamin then looked at Brussels II bis to see how it affected an Article 15 analysis.¹⁴² He determined that the language found in Recital 17 of the preamble and Article 60 of the Regulation required all inconsistencies between the Regulation and the Hague Abduction Convention to be resolved in favor of the Regulation.¹⁴³ Thus, Justice Mac Menamin held that the definitions in Article 2 of Brussels II bis completely replaced those in Article 3 of the Convention.¹⁴⁴

Based on this analysis, Justice Mac Menamin concluded that he must determine whether L.E.’s removal of the children to England was wrongful under Brussels II bis.¹⁴⁵ To reiterate,

138. *Id.* ¶ 47 (“[L.E.] submitted that the jurisdiction of a court in Hague Convention proceedings to request an applicant to obtain a determination from the authorities in the State of a child’s habitual residence is contained *only* in Article 15 of the Hague Convention . . .”).

139. *Id.* ¶ 48 (“It is a matter for the court in [the State that received the Article 15 request] to determine whether it has jurisdiction to entertain an application for a determination on foot of an Article 15 request under its own national law.”).

140. *Id.* ¶¶ 82–87 (discussing how S.I. 112/2005, Brussels II bis, and the Hague Abduction Convention overlap).

141. S.I. No. 112/2005, *supra* note 81, § 8(a)(iii).

142. *See J.McB.*, [2010] IEHC 123, ¶¶ 75–89 (discussing how *Brussels II bis* affects Hague Abduction Convention analysis).

143. *Id.* ¶ 62 (finding Brussels II bis to be supreme); *see supra* note 85 and accompanying text (quoting recital 17 of the preamble and Article 60 of Brussels II bis).

144. *See J.McB.*, [2010] IEHC 123, ¶¶ 58–63 (explaining his reasoning).

145. *See id.* ¶ 63 (“[T]he text of the Regulation is explicit—the role of this Court is to make a determination pursuant to Article 2 of [Brussels II bis]; not Article 3 of the Convention as it stood previously.”). *Compare* Brussels II bis, *supra* note 10, art. 2(11), at 4 (“[T]he term ‘wrongful removal or retention’ shall mean a child’s removal or

Justice Mac Menamin's analysis leads to the conclusion that the traditional Hague Abduction Convention Article 15 analysis does not apply because the interaction between Statutory Instrument 112/2005 and Brussels II bis supersedes Article 15.¹⁴⁶ In other words, Statutory Instrument 112/2005 does two things: first, according to Mac Menamin's interpretation, it permits a judge confronted with a Convention Article 15 request to apply the Regulation as well; and then it replaces Convention Article 15 analysis with analysis under the Regulation. Because an EU law, Brussels II bis, was now applicable to the *J.McB.* case, the Charter also applied—and rights given in the Charter added a layer of complexity to the question of whether L.E.'s removal of the children from Ireland was wrongful.¹⁴⁷

Human rights formed the crux of *J.McB.*'s rationale for why L.E. wrongfully removed his children from Ireland.¹⁴⁸ The right to respect for private and family life, embodied in Article 8 of the ECHR and Article 7 of the Charter, was the most highly relevant provision to *J.McB.*'s case.¹⁴⁹ According to the ECtHR's jurisprudence, respect for family must harmonize individual autonomy and community interests.¹⁵⁰ The ECtHR continually

retention where: (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and (b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.”), *with supra* note 39 (quoting Article 3 of the Hague Abduction Convention).

146. *See supra* note 145 and accompanying text (restating Justice Mac Menamin's analysis).

147. *See supra* note 16 (noting that the Charter applies whenever courts are applying EU law).

148. *See J.McB. v. L.E.*, [2010] IESC 48, ¶¶ 21–22 (Ir.) (outlining *J.McB.*'s submissions to the Supreme Court).

149. *See id.* ¶¶ 21–22 (summarizing *J.McB.*'s arguments on Article 8 of the ECHR and Article 7 of the Charter); *supra* note 18 and accompanying text (quoting the provisions); *see also* the European Convention on Human Rights 2003 (Act No. 20/2003) (Ir.), available at <http://www.irishstatutebook.ie/2003/acts.html> (enacting the ECHR in Ireland, giving Irish nationals recourse at the ECtHR); *McD. v. L.*, [2007] IESC 28, ¶ 88 (Ir.) (clarifying that the ECHR does not have direct effect in Irish law, and stating that Irish courts should look to the ECtHR for interpretive guidance).

150. *See Kroon v. Netherlands*, 297 Eur. Ct. H.R. (ser. A) 46, 56 (1994) (noting that Article 8 places positive and negative obligations on a state and stating that, in both circumstances, “regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole”); *Guichard v. France*, 2003-X Eur. Ct. H.R. 419, 431.

works to find the appropriate balance.¹⁵¹ While the ECtHR has technically freed the definition of family in Article 8 from the anchor of marriage, the ECtHR has not moved it much beyond relationships that resemble traditional marriages.¹⁵² Additionally, due to the dramatic increase in the number of children born out of wedlock, declining to expand the concept of family in human rights law has left many people, including children, and relationships outside the protections of the ECHR.¹⁵³

Before the Irish High Court, J.McB. argued that failing to recognize his “inchoate rights” of custody in Irish domestic law was a violation of Article 8 of the ECHR as enacted by Ireland.¹⁵⁴ J.McB. further argued that his Article 7 Charter rights were violated by the same failure because an EU law, Brussels II bis, was applicable to his case.¹⁵⁵ In sum and substance, J.McB. contended that Ireland had a positive obligation under Article 8 of the ECHR and Article 7 of the Charter to ensure that his family life was respected, and that Ireland’s refusal to recognize his inchoate rights of custody was a breach of that obligation.¹⁵⁶

151. See MCGLYNN, *supra* note 67, at 16 (citing *Kroon v. Netherlands*, 297 Eur. Ct. H.R. at 56); Stalford, *supra* note 68, at 103–05 (discussing the relationship between collective rights of the family and individual rights and summarizing the ECtHR’s position on “family life”).

152. See MCGLYNN, *supra* note 67, at 16–17 (discussing ECtHR case law finding families sufficiently similar to traditional marital families deserving of respect); Stalford, *supra* note 72, at 105 (listing a few ECtHR cases that have begun to expand the definition of family to include relationships not based on traditional marriages); *see also* J.McB. v. L.E., [2010] IEHC 123, ¶ 134 (H. Ct.) (Ir.) (noting that the Court of Justice has yet to use its power to expand the scope of “family life” beyond ECtHR jurisprudence).

153. See MCGLYNN, *supra* note 67, at 23 (discussing the dangers of basing family law on traditional nuclear families and noting that failing to protect the relationships between parents and children born out of wedlock as vigorously as ones based on traditional marriages makes the latter comparatively more difficult to sustain); Stalford, *supra* note 68, at 105 (listing children, homosexuals, transsexuals, and unmarried fathers as groups that were not protected by the ECHR).

154. J.McB., [2010] IEHC 123, ¶ 75 (outlining J.McB.’s submissions).

155. *See id.* ¶ 77 (explaining that J.McB.’s argument is based on the fact that the language used in both articles is substantially the same and that the Lisbon Treaty gave the Charter binding authority on EU law).

156. *See id.* (“[J.McB.] submits that, as a matter of ECHR jurisprudence, the obligation devolving on a State is positive, i.e. to ensure that a tie or bond of a family nature develops[;] . . . that a State cannot discriminate purely on marital status on matters of this kind; and that a failure to attribute to a father in a ‘de facto relationship’ the same status as a married father is in breach of Article 14 of the Convention . . . in conjunction with Article 8 . . . is discriminating under ECHR.”); *see also* BYRNE ET AL.,

J.McB. also argued that the Irish domestic law giving married fathers automatic custody rights while denying unmarried fathers the same recognition violated the Article 14 ECHR right to be protected from discrimination on the basis of marital status.¹⁵⁷

As noted above, J.McB. had the opportunity to renew these settled points because he fortuitously filed his case in Ireland just twenty-two days after the Lisbon Treaty took effect.¹⁵⁸ The Charter leaves the Court of Justice with the power to expand the protections afforded by the ECHR.¹⁵⁹ J.McB. attempted to capitalize on this power by arguing that the Court of Justice's interpretation of the Charter should break away from the ECtHR's jurisprudence and extend automatic rights of custody to unmarried fathers.¹⁶⁰ According to J.McB., if the Charter mandated the extension, the Irish courts would be forced to recognize that, under Brussels II bis, J.McB. did have custody rights and, therefore, L.E. wrongly removed the children from Ireland.¹⁶¹ Consequently, the English court would have to order that the children be returned to Ireland.¹⁶²

Conversely, L.E. submitted that, even if the Irish courts were not confined to traditional Article 15 Hague Abduction Convention analysis, J.McB. still did not have "rights of custody" for purposes of Brussels II bis because Brussels II bis was never

supra note 16, at 316 (noting that the Court of Justice's opinions are binding precedent in Member States).

157. See ECHR, *supra* note 18, art. 14 ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."); see also J.McB., [2010] IEHC 123, ¶ 75 (noting that J.McB. made arguments under both Articles 8 and 14 of the ECHR, contending that marital status was included in "other status" of Article 14); *Guichard v. France*, 2003-X Eur. Ct. H.R. 419, 434 (implying that marital status is included in "other status" for the purposes of Article 14 ECHR analysis).

158. See *supra* note 18 and accompanying text (stating that J.McB. filed in Ireland on December 23, 2009 and the Lisbon Treaty came into effect on December 1, 2009); see also *supra* notes 115–22 (discussing *Guichard*, the precedent on these arguments).

159. See *supra* note 101 and accompanying text (noting that the ECHR sets a minimum level of protection).

160. See J.McB. v. L.E., [2010] IESC 48, ¶¶ 21–22 (Ir.) (outlining J.McB.'s arguments to the Irish Supreme Court).

161. Compare *supra* note 39 (quoting the definition of "rights of custody" found in the Hague Abduction Convention), with *supra* note 84 (quoting the definition of "rights of custody" found in Brussels II bis).

162. See *supra* note 38 and accompanying text (explaining that a Central Authority is obliged to return a child if the child was wrongfully removed).

intended to create a unique definition of “rights of custody” diverging from the Hague Abduction Convention’s definition.¹⁶³ She further contended that accepting J.McB.’s argument would mean that establishing “family life,” which is easily accomplished, would also establish “rights of custody” under the Regulation and the Convention.¹⁶⁴ L.E. argued that such an interpretation would undercut the Convention altogether because the Convention was meant to work in conjunction with domestic law, and this interpretation would supplant domestic laws on custody.¹⁶⁵ She also cautioned against conflating Brussels II bis and the Hague Abduction Convention because it could result in divergent interpretations of “custody rights,” one interpretation solely under the Convention and another under the Regulation.¹⁶⁶

Unfortunately for J.McB., the Irish High Court found an ECtHR case to be dispositive of the human rights question.¹⁶⁷ Relying on *Guichard*, Justice Mac Menamin held that the amended Guardianship of Infants Act, as applied to J.McB., does not violate his right to respect for family life, or his right to be

163. See *J.McB.*, [2010] IESC 48, ¶ 24 (“It was never intended that the provisions of [Brussels II bis] would have the effect of establishing two separate, albeit interlinked, strands of law governing the removal or return of a child.”).

164. See *id.* ¶ 25 (“[G]iven the low threshold required to establish family life the vast majority of parents who have access to their children would reach that threshold. The use of the threshold of family life as the threshold to establish ‘rights of custody’ would blur and undermine the distinction between ‘rights of custody’ and ‘rights of access’ in the Hague Convention.”).

165. See *id.* ¶ 24 (“[I]t was never intended that the coming into effect of [Brussels II bis] would have the effect that a removal or retention of a child could be lawful for the purposes of Article 3 of the Hague Abduction Convention but unlawful for the purposes of Article 2 of [Brussels II bis].”).

166. *J.McB. v. L.E.*, [2010] IEHC 123, ¶¶ 52–53 (H. Ct.) (Ir.) (noting that to conclude that references to the Hague Abduction Convention should not include references to the Regulation when two Member States are involved could “give rise to an anomaly where, in the absence of fully expressing and giving effect to the Regulation, provisions or decisions of Member States might give rise to divergent interpretations of what is to be an *autonomous* code. This, clearly, would be at variance from the intent of the Regulation which governs the situation regarding two or more Member States.”); *id.* ¶¶ 62–64 (noting the problem with divergent interpretations of the definitions and expressing that all Member States should consider themselves bound by the definitions in Brussels II bis in all cases because of the supremacy of EU law over nation law implementing the Hague Abduction Convention).

167. *Id.* ¶ 88 (“[I]t emerged that there was [ECtHR] jurisprudence which directly addressed a set of facts almost identical to this case. *Guichard v. France* . . . is, I consider, a case directly on point.”).

free from discrimination in enjoying that right.¹⁶⁸ Justice Mac Menamin therefore concluded that J.McB. did not have rights of custody in Irish law and that the English court should therefore handle the question of custody rights because the children had been legally removed from Ireland.¹⁶⁹

J.McB. appealed the Irish High Court's decision to the Supreme Court of Ireland.¹⁷⁰ The Irish Supreme Court¹⁷¹ affirmed Justice Mac Menamin's determination that J.McB. had no rights of custody under Irish law and therefore did not have rights of custody for the purposes of a Hague Abduction Convention Article 15 request.¹⁷² The Supreme Court did not make determinations on Brussels II bis or the human rights arguments because it incorporated those issues into a question it certified to the Court of Justice.¹⁷³ The Irish Supreme Court asked whether the Charter, or any other EU provision, precluded

168. *Id.* ¶ 89 ("Insofar . . . as the applicant seeks to rely on [ECtHR] jurisprudence, I do not consider . . . that it is of assistance to his case."); see *supra* notes 115–22 (discussing the facts and holding of *Guichard*).

169. *J.McB.*, [2010] IEHC 123, ¶ 160 ("[T]he English Courts should exercise jurisdiction on the substantive issue and not the Irish Courts."); see also Children Act, 1989, c. 41, §§ 1, 3 (*as amended by* Adoption and Children Act, 2002, c. 38, § 111) (Eng.) (stating that, in England, fathers registered on the birth certificate of the child have automatic "parental responsibility," defined as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property"). The Children Act is the main law governing custody in England. See HUTCHINSON & SETRIGHT, *supra* note 6, at 178.

170. *J.McB.*, [2010] IESC 48, ¶ 10 ("[J.McB.] has appealed to the Supreme Court against the judgment of the High Court."); see IR. CONST., 1937, art. 34(4)(3) ("The Supreme Court shall . . . have appellate jurisdiction from all decisions of the High Court . . ."); BYRNE ET AL., *supra* note 16, at 299 (noting that Ireland does not have an intermediate appellate court for civil matters, and cases are appealed from the High Court directly to the highest court in Ireland, the Supreme Court).

171. The Supreme Court sat as a panel of five justices: Justices Susan Denham, Nial Fennelly, Joseph Finnegan, Fidelma Macken, and Donal O'Donnell. See *J.McB.*, [2010] IESC 48.

172. *Id.* ¶ 34 ("[A]s a matter of Irish national law, [J.McB.], having failed to secure or even apply for an order granting him custody, on 25th July 2009, had no rights of custody in respect of the three children. This Court would so hold for the purposes . . . of the Hague Convention independently of the effect of [Brussels II bis]. It would accordingly respond to the proceedings brought at the request of the English Court by saying that the children were not wrongfully removed from Ireland on 25th July 2009.").

173. See *id.* ¶¶ 39–41 (discussing Brussels II bis and explaining the law giving rise to the Supreme Court's need for interpretation); see also TFEU, *supra* note 64, art. 267, 2010 O.J. C 83, at 164 (requiring a court of final appeal in a Member State to certify any question of Community law that the court considers necessary to enable it to give a judgment). See generally BYRNE ET AL., *supra* note 16, at 315–17 (discussing the Court of Justice's appellate jurisdiction).

Ireland from requiring an unmarried father to apply for custody rights before he could qualify as having custody rights as defined by Brussels II bis.¹⁷⁴

This Part has provided an overview of the provisions of the Hague Abduction Convention, Irish domestic law on rights of custody, Brussels II bis, the ECHR, and the Charter that were relevant to J.McB.'s case. This Part then outlined J.McB.'s case in chief before the Irish High and Supreme Courts, summarizing the arguments of both J.McB. and L.E. Next, Part II examines the Supreme Court's certified question to the Court of Justice.

II. *THE QUESTION BEFORE THE COURT OF JUSTICE*

The Court of Justice received the Supreme Court's question under a new urgent certification procedure.¹⁷⁵ The procedure allows the Court of Justice to hear cases quickly if there are both factual circumstances and statutory provisions that warrant an expedited hearing of the matter.¹⁷⁶ J.McB.'s case satisfied these requirements because there was factual urgency in that J.McB.'s relationship with his three children was jeopardized and statutory urgency in that Brussels II bis states that "return of the child should be obtained without delay."¹⁷⁷ Under this urgent procedure, the Court of Justice was able to give a clear opinion in less than two months, an exceedingly short period of time.¹⁷⁸

174. *J.McB.*, [2010] IESC 48, ¶ 44 ("Does [Brussels II bis], whether interpreted pursuant to Article 7 of [the Charter] or otherwise, preclude a Member State from requiring by its law that the father of a child who is not married to the mother shall have obtained an order of a court of competent jurisdiction granting him custody in order to qualify as having 'custody rights' which render the removal of that child from its country of habitual residence wrongful for the purposes of Article 2.11 of that Regulation?").

175. *J.McB. v. L.E.*, Case C-400/10, [2010] E.C.R. I___ (delivered Oct. 5, 2010) (not yet reported), ¶ 26 ("The [Irish Supreme Court] requested that this reference for a preliminary ruling be dealt with under the urgent procedure provided for in Article 104b of the Court's Rules of Procedure.").

176. See Amendments to the Rules of Procedure of the Court of Justice, 2008 O.J. L 24/39, at 40–41 (adding Article 104b to Court of Justice's rules of procedure).

177. *J.McB.*, [2010] E.C.R. I___, ¶¶ 27–29 ("The reason stated by the referring court for [requesting the urgent procedure] is that, according to recital 17 in the preamble to [Brussels II bis], in cases of wrongful removal of a child, the return of the child should be obtained without delay. . . . Given that the children concerned, and especially the youngest, are young children, the continuation of the current situation might seriously harm their relationships with their father.").

178. See *id.* (dating the opinion October 5, 2010); Reference for a Preliminary Ruling from the Supreme Court (Ireland) made on 6 August 2010—*J. McB. v L. E.*, 2010

This Part examines the Court of Justice's response to the Irish Supreme Court's question in three sections: Section A reviews the Court of Justice's jurisdiction to answer the certified question; Section B examines the Court of Justice's interpretation of Brussels II bis and its conclusion that the Regulation is autonomous; and Section C discusses the Court of Justice's analysis of J.McB.'s human rights argument and its holding that requiring a father to apply for guardianship did not violate his rights as guaranteed by the Charter.

A. *Court of Justice's Jurisdiction*

The first hurdle the Court of Justice encountered in answering the Supreme Court was whether the Court of Justice had jurisdiction to issue a preliminary ruling on the certified question.¹⁷⁹ The Court of Justice only has jurisdiction over cases in which EU law is at issue.¹⁸⁰ The European Commission¹⁸¹ raised the concern that the question was inadmissible because the English court had asked only for a determination pursuant to Hague Abduction Convention Article 15, meaning that no question of EU law was raised.¹⁸² This is a similar argument to the one L.E. made before the Irish High Court.¹⁸³ The Court of Justice, however, determined that it must rule on a certified question unless it is "quite obvious" that the interpretation the certifying court requests "bears no relation to the actual facts of the main action or to [the law's] purpose."¹⁸⁴ Thus, the Court of Justice generally defers to the discretion of the national courts

O.J. C 260/13 (reporting that the Irish Supreme Court certified the question on August 6, 2010).

179. See *J.McB.*, [2010] E.C.R. I____, ¶¶ 30–38 (reviewing the Court of Justice's jurisdiction).

180. See *BYRNE ET AL.*, *supra* note 16, at 774 ("[T]he binding nature of Community law only applies to the areas of law with which the European Community and Union is concerned.").

181. See *J.McB.*, [2010] E.C.R. I____ (noting that submissions were given by Irish counsel for both parents, Ireland, the German government, and the European Commission).

182. See *id.* ¶ 30 (discussing the European Commission's concern as to whether EU law was implicated and whether the Court of Justice had jurisdiction over the question referred).

183. See *supra* note 139 and accompanying text (summarizing L.E.'s argument).

184. See *J.McB.*, [2010] E.C.R. I____, ¶¶ 32–34.

and, if a national court finds it needs an interpretation of EU law, the Court of Justice provides a ruling.¹⁸⁵

The Court of Justice accepted that the Irish Statutory Instrument changed the language of an Article 15 request under the Hague Abduction Convention as it functions in Ireland.¹⁸⁶ In effect, the Court of Justice accepted that in responding to the English Court's request on the Convention's Article 15, the Irish courts had to determine whether the removal was wrongful under Brussels II bis Article 2, and not whether it was wrongful under Convention Article 3.¹⁸⁷ The Court of Justice, therefore, determined that the question was admissible because Brussels II bis, an EU regulation, was at issue.¹⁸⁸

B. *Interpreting Brussels II bis*

Having determined that the question was admissible, the Court of Justice then ruled on the interpretation of "rights of custody" under Brussels II bis and the effect of the Charter on that interpretation.¹⁸⁹ The Supreme Court's inquiry centered on the definition of "rights of custody" and the Court of Justice addressed this first.¹⁹⁰ It found the definition contained in Brussels II bis to be autonomous, of consistent interpretation throughout the EU, and not constrained by domestic law.¹⁹¹ The Court held that the Regulation must be interpreted as meaning

185. *See id.* ¶¶ 32–33 (“[A]ccording to the Court’s case-law, it is solely for the national courts . . . to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court . . .”).

186. *Id.* ¶ 35 (“It is evident . . . from the relevant national legislation, namely Section 15 of the Child Abduction and Enforcement of Custody Orders Act 1991, as amended by [Statutory Instrument 112/2005] that, in cases of removal of a child to another Member State, the issue on which the national court must rule . . . is whether the removal is lawful under [Brussels II bis].”).

187. *See id.*; *see also supra* notes 81–84 and accompanying text (discussing Statutory Instrument 112/2005 and its promulgation in Ireland).

188. *See J.McB.*, [2010] E.C.R. I____, ¶¶ 35–38 (concluding that the question is admissible).

189. *See id.* ¶¶ 39–64 (interpreting Brussels II bis).

190. *See id.* ¶¶ 39–41 (discussing the definition of “rights of custody”).

191. *See id.* ¶ 41 (“It follows from the need for uniform application of Community law and from the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union . . .”).

that “whether a child’s removal is wrongful for the purposes of applying that regulation is entirely dependent on the existence of rights of custody, conferred by the relevant national law, in breach of which that removal has taken place.”¹⁹² In other words, when the Irish courts apply the Regulation, they must determine whether the father has rights in Irish domestic law that satisfy the autonomous definition of “rights of custody” found in the Regulation.¹⁹³

C. Addressing *J.McB.*’s Human Rights Argument

The Court then addressed the question of whether the Charter, as made binding by the Lisbon Treaty, precludes a Member State from requiring an unmarried father to apply for custody rights before the Member State must recognize his custody rights under Brussels II bis.¹⁹⁴ Recalling that Article 52(3) of the Charter states that where the Charter and the ECHR overlap, the Charter’s meaning and scope is to be the same as the ECHR, the Court declared that Article 8 of the ECHR is the same as Article 7 of the Charter and that the ECtHR’s interpretation of Article 8 defines the minimum scope of Article 7 of the Charter.¹⁹⁵ In other words, the Court deferred to the ECtHR.¹⁹⁶ In deferring, the Court also considered *Guichard v. France*, which held that respect for family life was not violated by giving sole custody to unmarried mothers and providing the father the right to apply for custody.¹⁹⁷

192. *Id.* ¶ 44.

193. *See id.*

194. *See supra* note 15 and accompanying text (noting that the Lisbon Treaty gave the Charter binding status).

195. *See J.McB.*, [2010] E.C.R. I ___, ¶ 53 (“[I]t follows from Article 52(3) of the Charter that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. . . . [I]t is clear that [the Charter’s] Article 7 contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the [ECtHR]”); *see also supra* notes 101–04 and accompanying text (discussing the Charter’s relationship to the ECHR).

196. *See J.McB.*, [2010] E.C.R. I ___, ¶¶ 53–54 (adopting the ECtHR’s interpretation of ECHR Article 8 as the interpretation of Charter Article 7).

197. *Id.* ¶ 54 (referring to *Guichard* and reiterating the facts and holding); *see supra* notes 115–22 and accompanying text (discussing *Guichard*); *see also supra* notes 168–69 and accompanying text (discussing the Irish High Court’s application of *Guichard*).

The Court concluded that providing an application process for the unmarried father of a child to gain custody rights was adequate protection of a natural father's right to private and family life.¹⁹⁸ In coming to this conclusion, the Court of Justice reiterated that the Charter only applies when EU law is at issue.¹⁹⁹ The Court definitively stated that domestic law is not to be assessed according to the Charter.²⁰⁰

The Court further noted three major problems with holding that the Charter forces a Member State to recognize rights of custody under Brussels II bis, regardless of whether the father had rights of custody under national law.²⁰¹ First, it would infringe upon the mother's right of free movement, an outcome that the Charter itself prohibits.²⁰² Second, such a holding would be "incompatible with the requirements of legal certainty."²⁰³ The Court of Justice, however, does not detail the specific issues of legal certainty with which it is concerned.²⁰⁴ Third, the Court of Justice states that such a holding might violate Article 51(2) of

198. *J.McB.*, [2010] E.C.R. I____, ¶ 55 (stating that Member States providing for an application process was the "very essence of the right of a natural father to a private and family life").

199. *See id.* ¶ 51 ("[The Charter's] provisions are addressed to the Member States only when they are implementing European Union law.").

200. *See id.* ¶ 52 ("[T]he Charter should be taken into consideration solely for the purposes of interpreting [Brussels II bis], and there should be no assessment of national law as such.").

201. *See id.* ¶ 59 ("[T]o admit the possibility that a natural father has rights of custody in respect of his child, under [Brussels II bis] notwithstanding that no such rights are accorded to him under national law, would be incompatible with the requirements of legal certainty . . .").

202. *Id.* ¶ 58 (explaining that, under the treaties of the EU, a mother has rights of free movement that would be abridged if a father who had not applied for custody rights could prevent her from moving with their child); *see also* Charter of Rights, *supra* note 18, art. 45(1), 2010 O.J. C 83, at 400 ("Every citizen of the Union has the right to move and reside freely within the territory of the Member States.").

203. *See J.McB.*, [2010] E.C.R. I____, ¶ 58 (noting that the mother's Charter Article 52(1) rights to free movement would be infringed by finding that Brussels II bis granted automatic rights of custody to fathers who are not married to the mothers of their children); *see also* Charter of Rights, *supra* note 18, art. 52(1), 2010 O.J. C 83, at 402 ("Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.").

204. *J.McB.*, [2010] E.C.R. I____, ¶ 58 (limiting its discussion to merely mentioning "legal certainty").

the Charter, which states that the Charter does not extend or change the EU's powers.²⁰⁵

In addition to asking whether Article 7 of the Charter prohibited a Member State from requiring a father to apply for rights of custody before he could qualify as having them under Brussels II bis, the Irish Supreme Court asked if any of the EU provisions prohibited such a requirement.²⁰⁶ The Court of Justice thus addressed the question of whether Article 24 of the Charter, "the rights of the child," prohibited requiring the father to apply for rights.²⁰⁷ The Court noted that there was a "great variety of extra-marital relationships and consequent parent-child relationships" throughout the EU.²⁰⁸ This variety, the Court reasoned, did not specifically warrant extending automatic rights of custody to unmarried fathers.²⁰⁹ According to the Court, forcing unmarried fathers to apply for rights allowed the courts of Member States with jurisdiction over the custody matter to take account for the specific factual circumstances of the parents' relationship with each other and with the child.²¹⁰ The Court, therefore, held that Article 24 of the Charter does not prohibit a Member State from requiring the father to apply for rights of custody before he can qualify as having them under Brussels II bis.²¹¹

III. EFFECTS OF THE COURT OF JUSTICE'S OPINION

The Court of Justice's decision will influence both the lives of J.McB.'s family and the legal landscape of Brussels II bis, the Hague Convention, and European human rights. This Part

205. *Id.* ("Such an outcome might, moreover, infringe Article 51(2) of the Charter."); *see also supra* note 108 and accompanying text (quoting the text of Article 51(2)).

206. *See supra* note 175 (quoting the Supreme Court of Ireland's question for the Court of Justice).

207. *See J.McB.*, [2010] E.C.R. I____, ¶¶ 60–63 (discussing whether Article 24 of the Charter prohibits requiring an unmarried father to apply for rights of custody); *see also* Charter of Rights, *supra* note 18, art. 24(1), 2010 O.J. C 364, at 396 ("Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.").

208. *J.McB.*, [2010] E.C.R. I____, ¶ 62.

209. *Id.*

210. *Id.*

211. *Id.* ¶ 63.

considers the effects of *J.McB. v. L.E.* Section A comments on the intricacies of Irish law that facilitated this case reaching the Court of Justice. Section B analyzes what will likely happen in *J.McB.*'s search for custody rights of his three children and suggests that *J.McB.* will continue to have a relationship with his children. Section C assesses the legal implications of the opinion on Brussels II bis and potential changes in Hague Abduction Convention jurisprudence generally. Section C concludes that the definition of custody in both the Convention and the Regulation should be coextensive. Finally, Section D considers the opinion's impact on European human rights law, noting that the decision will have both positive and negative impacts on human rights jurisprudence.

A. *Irish Domestic Law*

Brussels II bis creates complications for the courts of Member States by grafting itself onto the Hague Abduction Convention because it makes an underlying, widely accepted international treaty the base for an EU law.²¹² The latter cannot properly function without the former.²¹³ The courts of the Member States have the unenviable job of sorting out when and how the Regulation supersedes the Convention.²¹⁴

As this Comment demonstrates, this sorting proved a labyrinthine task for the Irish courts and Justice Mac Menamin's finding that he was not confined to a traditional Article 15 Hague Abduction Convention analysis had implications in EU law because it led the Court of Justice to issue an opinion on Brussels II bis.²¹⁵ If Justice Mac Menamin had found the other way (i.e., that he *was* confined to a traditional Article 15 Hague Abduction Convention analysis), the English court's authority to handle the question of custody would have easily been established.²¹⁶ As

212. See *supra* notes 85–87 and accompanying text (discussing the relationship between the Hague Abduction Convention and Brussels II bis).

213. See *supra* note 86 and accompanying text (noting that the Hague Abduction Convention is still effective between Member States).

214. See *supra* notes 143–45 and accompanying text (outlining Justice Mac Menamin's analysis on this point).

215. See *supra* notes 134–44 (explaining how the one determination caused the Court of Justice to hear a case).

216. See *supra* note 132 and accompanying text (explaining custody rights under Irish law and reiterating that the Irish courts found *J.McB.* had none).

already noted, L.E.'s removal of the children was not wrongful under the Hague Abduction Convention.²¹⁷ Therefore, if Justice Mac Menamin had decided the other way, Brussels II bis would never have come into play, and this case would never have required certification to the Court of Justice. Justice Mac Menamin's finding seems a bit odd because one Irish Minister, who was appointed by the president on the recommendation of the Taoiseach (the Irish prime minister), created Statutory Instrument 112/2005, which ultimately required the Irish Supreme Court to certify a question to the Court of Justice.²¹⁸ The process seems undemocratic for two reasons. First, the minister is appointed, not elected.²¹⁹ Because this question gets certified to the Court of Justice and the Court issued an opinion that is binding on all Member States, the minister makes rules that ultimately affect the application of EU law throughout the EU.²²⁰ Second, the minister's law-making capabilities seem unchecked; neither the Irish High Court nor Irish Supreme Court explicitly considered whether Statutory Instrument 112/2005 is a prudent law.²²¹ It may very well be that both courts approved of Statutory Instrument 112/2005, but there is a lack of discussion on the subject in the opinions of both courts.²²²

217. See *supra* note 173 (quoting the Irish Supreme Court's affirmation of the High Court's determination that L.E.'s removal of the children was not wrongful within the meaning of the Hague Abduction Convention).

218. See *supra* notes 134–44 (explaining how Justice Mac Menamin's determination that Statutory Instrument 112/2005 triggered Brussels II bis, as opposed to determining that he was confined to traditional Article 15 Hague Abduction Convention analysis, lead to the Court of Justice hearing a case).

219. See *supra* note 82 (noting that the Irish Constitution grants the Irish president the power to appoint ministers). This power would include appointing the Minister for Justice, Equality and Law Reform who was responsible for promulgating the Statutory Instrument 112/2005. See *supra* note 81 and accompanying text.

220. See *supra* note 157 (noting that the Court of Justice's opinions are binding precedent in all Member States).

221. See *supra* notes 134–41 and accompanying text (discussing Justice Mac Menamin's reasoning); *supra* note 172 and accompanying text (noting that the Supreme Court of Ireland affirmed Justice Mac Menamin's analysis).

222. The Irish Supreme Court has not issued an opinion on the case since the Court of Justice opined, therefore this issue may yet be addressed.

B. *The Immediate Effect of the Court of Justice's Decision on J.McB.*

The Supreme Court of Ireland is bound by the opinion of the Court of Justice.²²³ It will, with all likelihood, rule that J.McB.'s children were not wrongfully removed because the Court of Justice did not preclude Ireland from requiring J.McB. to have applied for custody rights.²²⁴ The case will then be sent back to the English Court, which will refuse to return the children to Ireland because the Irish courts did not find that L.E. wrongfully removed them.²²⁵ J.McB. will therefore have to apply to the English courts for guardianship, custody, or access under English law because, under the Hague Convention and the Regulation, the children are habitually resident in England.²²⁶ One of the great ironies of this case is that J.McB. may have an easier time procuring custody rights in England than in Ireland, as England, unlike Ireland, does not have the prohibition on automatic rights for fathers who are not married to the mothers of their children.²²⁷

C. *Impact of the Court of Justice Ruling on the Brussels II bis and the Hague Convention*

Arguably the most important pronouncement in the Court of Justice opinion is that Brussels II bis does not interfere with substantive laws of the Member States. The Court of Justice strongly stressed that the Charter is only applicable to Brussels II bis and not to Irish domestic law, even though this particular question goes right to the line between procedural EU law and substantive national law.²²⁸ Thus, any argument that substantive custody rights should be decided at the supranational level is

223. See *supra* note 157 (noting that Court of Justice opinions are binding).

224. See *supra* notes 195–01 and accompanying text (reiterating the Court of Justice's holding that EU law, specifically the Charter, does not compel Ireland to recognize automatic rights of custody for a father who is not married to the mother of his child for purposes of Brussels II bis).

225. See *supra* note 133 (explaining what would happen if the Irish courts declared that J.McB. did not have rights of custody to his children).

226. See *supra* note 170 and accompanying text (quoting Justice Mac Menamin's conclusion that England should decide the issue of custody rights).

227. See *supra* note 170 and accompanying text (quoting the English statute on child custody).

228. See *supra* note 201–202 and accompanying text (discussing the Court of Justice's opinion on this point).

foreclosed.²²⁹ Because the Court of Justice firmly establishes that the EU is not going to interfere with substantive domestic family law, this case has the potential to be an important precedent. It delineates issues that are within the purview of the Member States and those that are within the Court of Justice's purview.

The secondary fallout of this case involves its indirect impact on Hague Convention jurisprudence because the question whether Hague Abduction Convention applications will have different outcomes between Member States than as between non-Member States or a Member State and a non-Member State remains open.²³⁰ Article 2 of Brussels II bis adds the term "and duties" to the Convention's Article 3 definition of "custody rights."²³¹ The addition could become problematic in international law. For example, if Brussels II bis defines custody rights uniquely from the Hague Abduction Convention, there would be a lack of uniformity in Convention analysis.²³² To clarify, a parent who meets the definition of "custody rights" under Brussels II bis would be able to compel her child's return if the abductor took the child to a Member State. But, if this same parent does not meet the definition of "custody rights" under the Hague Abduction Convention, and the abductor went to a non-Member State, the parent would not be able to compel the child's return.

When a Member State is faced with the problem the Irish courts faced—that a domestic law brought the Hague Abduction Convention and the Brussels II bis into conflict—the jurisprudence on the resolution of that conflict could follow three possible paths.²³³ Each Member State faced with such a conflict will make its own choice between paths because there is no supranational court that can unify the law for the Hague

229. See *supra* note 202 and accompanying text (noting that the Court of Justice declined to discuss rights of custody under national law).

230. See *supra* notes 164–66 and accompanying text (outlining L.E.'s argument on this point).

231. See *supra* note 84 and accompanying text (comparing the definitions).

232. See *supra* note 166 and accompanying text (noting that L.E. foresaw problems with such an interpretation).

233. See *supra* notes 83–87 and accompanying text (summarizing the interplay of Irish national law, Brussels II bis, and the Hague Abduction Convention).

Abduction Convention.²³⁴ First, the Member States could accept the interpretation that Hague Abduction Convention analysis is different if the child was removed to a non-Member State than if the child was removed to a Member State.²³⁵ This is a dangerous solution because it could result in abductors “shopping” for a state that is not within the EU in order to take advantage of the Hague Abduction Convention’s narrower definition of “custody rights,” thereby preventing the other parent from compelling the child’s return.²³⁶

Justice Mac Menamin proposed an alternative for resolving the disparity in definitions between the Hague Abduction Convention and Brussels II bis. Member States could apply Brussels II bis definitions regardless of where the abductor took the child.²³⁷ This option is also problematic, however, because Brussels II bis would essentially override the Hague Abduction Convention when a Member State is involved in a Convention application, which could be a major break from Convention jurisprudence.

Finally, as L.E. submitted to the Irish courts, Brussels II bis and the Hague Abduction Convention could be interpreted as having co-extensive definitions.²³⁸ In other words, the Member States could use their Convention jurisprudence to define the scope of the Regulation. The Regulation can apply as intended between Member States, and a radical change in Hague Abduction Convention jurisprudence is prevented. Additionally, this solution leaves open the possibility for the most logical solution: a revision of the Hague Abduction Convention itself.²³⁹

234. See *supra* note 28 and accompanying text (noting that the Hague Abduction Convention deliberately sought to avoid this problem by writing a procedural convention that allows contracting states to apply their own substantive law).

235. See *supra* note 140–143 and accompanying text (explaining Justice Mac Menamin’s reasoning).

236. See *supra* notes 149–52 and accompanying text.

237. See *supra* note 156 and accompanying text (discussing the alternative).

238. See *supra* note 156 (outlining her argument).

239. See *H.I. v. M.G.*, [2000] I.R. 110, 133 (Ir.) (stating that judicial opinions are not the place for inventing legal solutions to problems with the Hague Abduction Convention).

D. Impact on European Human Rights Law

The important human rights conclusion in the Court of Justice's decision is that the Court remains unwilling to expand the meaning of "respect for private and family life" beyond that accorded by the ECtHR.²⁴⁰ The positive consequence of the holding is that it continued the trend of deferring to the ECtHR, thereby reducing the opportunity for divergent interpretations between the ECHR and the Charter.²⁴¹ A negative consequence is that the decision continues the family law jurisprudential focus on the heterosexual marital family as the source of rights.²⁴² Additionally, the Court of Justice offered only weak justifications for declining to extend the protections to nontraditional families, citing the mother's right to exercise her rights and freedoms guaranteed by the Charter as the primary justification.²⁴³

If the Court of Justice had extended rights to the father, the mother's freedom of movement would indeed have been infringed. The mother would be able to unilaterally move the child within the Member State so long as the move was consistent with domestic law, but not to another Member State because Brussels II bis would accord rights of custody to the father that would prevent such a move.²⁴⁴ The Court of Justice's analysis of Article 7, therefore, is sound. Unfortunately, however, the Court of Justice has thus taken the position that restricting a mother's movement with one Member State is inappropriate, even when it would help children stay in contact with both parents.

240. See *supra* notes 196–99 and accompanying text (observing that the Court of Justice did not extend automatic rights of custody to unmarried fathers).

241. See *supra* notes 98–04 and accompanying text (explaining the potential for differing interpretations of the human rights protections found both in the ECHR and the Charter due to the parallel nature of the ECtHR's and Court of Justice's jurisdiction).

242. See *supra* notes 153–54 and accompanying text (explaining that the ECtHR continues to base relief in relationships that resemble traditional marriages).

243. See *supra* notes 202–05 and accompanying text (summarizing the Court of Justice's justifications).

244. See *supra* note 78 and accompanying text (noting that Brussels II bis applies when two Member States are involved); see *supra* notes 200–01 and accompanying text (noting that the Court of Justice will not interfere with substantive domestic law).

The Court's analysis of Article 24 of the Charter leaves itself open to further criticism.²⁴⁵ Considering that the Charter, Brussels II bis, and the Hague Abduction Convention all affirm the primacy of the child's interest, it seems like the child's right to have family life with both parents should trump the mother's right to free movement.²⁴⁶ While it is not always in the interest of the child to be raised by both parents, the Court of Justice's opinion prevents a court from considering what is actually in the interests of the child. This, however, was not how the Court of Justice viewed the situation.²⁴⁷ The Court of Justice opined that the complicated nature of extra-marital relationships and the relationships with the resulting children are best dealt with by the Member State court with jurisdiction over the custody matters.²⁴⁸ Simply because it is rational for the court handling the actual custody proceeding to consider factors such as the parents' relationship to the child and aptitude for parenting does not necessarily mean that these considerations should not play a role in determining whether the father has inchoate rights of custody under Brussels II bis. If these factors are relevant for one consideration of custody rights, they should be relevant for all considerations. It is illogical to deny a father who has been directly involved in raising his child input over which country the child lives in merely because he never made an application to the court in his state, but this is precisely the result of the Court of Justice's opinion.

Additionally, declaring that Brussels II bis does recognize inchoate rights of custody would require the Court of Justice to hear more cases. Because the Court is responsible for the ultimate interpretation of EU laws, it would have to determine

245. See *supra* notes 207–11 (summarizing the Court of Justice's conclusion that requiring an unmarried father to apply for rights of custody before he can qualify as having them under Brussels II bis does not violate Article 24 of the Charter).

246. See *supra* note 111 and accompanying text (referencing the portion of both documents that identifies the child's interest as the primary concern). As further justification, the Court of Justice vaguely implied that there would be issues of "legal certainty" and that recognizing an unmarried father's right of custody might establish or modify the EU's powers. See *supra* notes 203–06 (quoting the Court of Justice's statement on this concern). Without the Court of Justice specifically articulating its concern, it is impossible to analyze the prudence of these justifications without speculation.

247. See *supra* note 210 and accompanying text (restating the Court of Justice's conclusion that Article 24 was not violated).

248. See *supra* note 211 (listing the factors the Court of Justice found to be best considered by the Member State court with jurisdiction over the issue of custody).

exactly where the line is between a father whose relationship with his child was close enough to establish inchoate rights of custody and a father whose relationship was not close enough.²⁴⁹ In short, the Court of Justice seems to have based its decision on reluctance to generate an increased caseload and a disinclination to appear to be interfering with substantive domestic law, rather than protecting familial relationships or the interests of the child as Brussels II bis and the Charter require.

CONCLUSION

While J.McB. will, in all legal likelihood, continue to have a relationship with his children, the Court of Justice's opinion leaves the family law field with mixed results. On the one hand, the Court of Justice provided beneficial clarification of Brussels II bis by interpreting it as an autonomous code. Additionally, the interpretation results in a closer connection between the ECtHR and the Court of Justice. By deferring to the ECtHR, the Court of Justice prevented divergent interpretations of Article 8 of the ECHR and Article 7 of the Charter.

On the other hand, however, the opinion left uncertain the status of the Hague Convention within Europe. Further, the Court of Justice missed an opportunity to extend human rights protections to nontraditional, non-marital families. There was great potential to move the jurisprudence on the rights of unmarried fathers beyond the existing precedents because the Lisbon Treaty made the Charter binding, thereby creating a logical justification for shifting the interpretation of Article 7. A father who is not married to the mother of his children, however, remains without the automatic rights granted to married fathers.

249. See *supra* note 181 and accompanying text (noting the Court of Justice's jurisdiction).

Notes & Observations