Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Adjudicating Parental Religious Beliefs in accordance with "Secular Standards of Society"

Question(s) at stake:

Whether the State can intervene where there is parental refusal on religious grounds to consent to a blood transfusion for a critically ill child.

Outcome of the ruling:

The court has a jurisdiction and duty to override the religious objections of parents where adherence to those religious beliefs would threaten the life and general welfare of their child.

Topic(s):

- Hospitals and Healthcare

Keywords:

- Balancing act
- Blood transfusion
- Freedom of thought, conscience and religion
- Parents
- Right to life

Tag(s):

- Jehovah's Witnesses
- Conscience and religion

Author(s):

- Flynn, Michelle (Max Planck Institute for Social Anthropology, Department Law and Anthropology, Germany)

Country:

Ireland

Official citation:

Children’s University Hospital Temple Street v C.D. and E.F. [2011] IEHC 1

Link to the decision:

http://www.courts.ie/acc/alfresco/bf4292a6-1f6d-4d2f-86df-fe0bfc024e8e/2011_IEHC_1_1.pdf/pdf#view=fitH

ECLI:

No ECLI number / ECLI number unknown

Date:

12 January 2011

Jurisdiction / Court / Chamber:

High Court

Remedy / Procedural stage:

Injunction

Previous stages:

None

Subsequent stages:

None

Branches / Areas of law:

Constitutional law, Human rights law

Facts:

As a result of becoming critically ill, three-month-old baby AB required an urgent blood transfusion. AB’s parents refused to provide consent for AB to receive a blood transfusion on the basis of their religious beliefs as Jehovah’s Witnesses.

The hospital made an application to the High Court seeking an order to permit the blood transfusion and, within hours, an emergency hearing took place.

Ruling:

Orders were made allowing the hospital to perform a blood transfusion. Further orders were made to prohibit disclosure of the identity of AB and his family.

Regarding freedom of religion and belief:

-Article 44.2.1° was deemed to protect traditional and minority religions and religious denominations whose beliefs may be regarded as unconventional.

-The Court affirmed that it was neither within the remit of a secular court to determine, nor a State to prescribe, which religious views were conventional or orthodox.

-The Court affirmed that the right of a properly informed adult with full capacity to refuse medical treatment, for religious or other reasons, was constitutionally protected and referred to the decision of the High Court in *Fitzpatrick and Ryan v F.K. and the Attorney General* [2008] IEHC 104.

-The Court affirmed that in the case of minors the State had a vital interest in ensuring that children were protected, and this interest could prevail even in the face of express and fundamental constitutional rights.

Regarding family autonomy and the position of children:

-Based on Articles 41.1 and 42.1, the Judge acknowledged that parents have the constitutional right to raise their children by reference to their own religious and philosophical views. However, that right is not absolute (per Article 42.5 as it then was) and the State has a vital interest in ensuring that children are protected.

-The State can intervene in “exceptional” situations and the intervention must be proportionate with due regard to the circumstances. Additionally, there must also have been a failure of duty on the part of the parents. Judge Hogan stated that it was indisputable that a court could intervene in a case such as this where the child’s life, general welfare and other vital interests were at stake. Reliance was

placed upon the decision of the Supreme Court in *North Western Health Board v H.W. and C.W.* [2001] IESC 90 and the High Court decision in *Re Baby B* (Unreported, High Court, 28 December 2007).

-The test of whether parents have failed for the purposes of Article 42.5 (as it then was) is an objective test judged by the secular standards of society in general and of the Constitution in particular, irrespective of subjective religious views.

-The Court affirmed that it has a jurisdiction and a duty to override the religious objections of the parents where adherence to these beliefs would threaten the life and general welfare of their child.

-Based on expert medical evidence presented during the hearing which confirmed the clinical necessity of the treatment, the Judge granted a declaration to the effect that it would be lawful in these particular circumstances for the hospital to administer a blood transfusion (along with other associated blood products) to AB. The declaration was limited and did not grant an entitlement into the future to administer such treatment to AB.

Main quotations on cultural or religious diversity:

- “As already indicated, the parents, CD and EF, were also present. They said that it had not been possible to obtain professional representation given the time constraints. They are the parents of a large family and it appears that this Court has also sanctioned a blood transfusion in respect of another child of theirs, so that they were to some extent familiar with the issues which would arise in such an application. While they wanted the best for their child and were delighted with the quality of the medical care which he had received, they explained that given the tenets of their religious faith they could not possibly consent to a blood transfusion. They also said that they understood their religious objections would be overridden by this Court and they seemed resigned to this fact.” (para. 9)

- “There is no doubt as to the sincerity of the religious beliefs of the parents. They struck me as wholesome and upright parents who were most anxious for the welfare of their child, yet steadfast in their own religious beliefs. An abhorrence of the administration of a blood transfusion is integral to those beliefs. Mr. McEnroy S.C. for the Hospital very fairly acknowledged that it would be unreasonable to ask the parents to compromise their strongly held religious beliefs and it was for this reason that this application was thus made.” (para. 10)
- “Article 44.2.1 protects not only the traditional and popular religions and religious denominations - such as, for example, Roman Catholicism, the Church of Ireland and the Presbyterian Church - but perhaps just as importantly, it provides a vital safeguard for minority religions and religious denominations whose tenets are regarded by many as unconventional.” (para. 27)
- “If one may be permitted to speak bluntly, the antipathy of the Jehovah Witnesses to the taking of blood products may well come within the latter category. Most Irish people would, I suspect, express unease and even disdain for a religious belief which required its faithful to abjure what is often a life saving and essential medical treatment. The Witnesses, on the other hand, regard the blood prohibition as one which is not only scripturally ordained in view of the admonition in Acts 15:29 requiring Christians to ‘abstain from meats offered to idols, and from blood, and from things strangled, and from fornication’, but is one which also poses - when it arises - a practical test of faith.” (para. 28)
- “A secular court cannot possibly choose in matters of this kind and, of course, a diversity of religious views is of the essence of the religious freedom and tolerance which Article 44.2.1 pre-supposes.” (para. 29)
- “There is thus no doubt at all but that parents have the constitutional right to raise their children by reference to their own religious and philosophical views. But, as Article 42.5 makes clear, that right is not absolute. The State

has a vital interest in ensuring that children are protected, so that a new cohort of well-rounded, healthy and educated citizens can come to maturity and are thus given every opportunity to develop in life. This interest can prevail even in the face of express and fundamental constitutional rights. No one would suggest, for example, that the right of the State to protect children against possible exploitation and abuse would not, for example, enable the Oireachtas [the Irish legislature] to enact legislation prohibiting the involvement of children in street preaching and the distribution of religious literature on the street at night, even if such activities were thought by some to be scripturally mandated or that the children were being directed in such religious activities for religious reasons by their parents." (para. 35)

- "Of course, the right of the State to intervene and thus to override the constitutional right of the parents is expressly circumscribed by the language of Article 42.5. The circumstances must be 'exceptional' and the intervention proportionate ('.....with due regard') to the circumstances. There must also have been a 'failure' of duty on the part of parents. But there is absolutely no doubt but that the court can intervene in a case such as this where the child's life, general welfare and other vital interests are at stake." (para. 36)
- "[T]he use of the term 'failure' in this context is perhaps a somewhat unhappy one, since there is no doubt but that CD and EF, acting by the lights of their own deeply held religious views, behaved in a conscientious fashion *vis-à-vis* Baby AB. The test of whether the parents have failed for the purposes of Article 42.5 is, however, an objective one judged by the secular standards of society in general and of the Constitution in particular, irrespective of their own subjective religious views." (para. 37)
- "Given that Article 40.3.2 commits the State to protecting by its laws as best it may the life and person of every citizen, it is incontestable but that this Court is given a jurisdiction (and, indeed, a duty) to override the religious objections of the parents where adherence to these beliefs would threaten the life and general welfare of their child." (para. 38)

Main legal texts quoted in the decision:

Relevant provisions of the Irish Constitution:

- Article 40.3.2
- Article 41.1
- Article 42.1
- Article 42.5
- Article 44.2.1

Cases cited in the decision:

Relevant Irish case law:

- *Fitzpatrick and Ryan v F.K. and the Attorney General* [2008] IEHC 104
- *North Western Health Board v H.W. and C.W.* [2001] IESC 90
- *Re Baby B* (Unreported, High Court, 28 December 2007)

Relevant US case law:

- *Prince v Massachusetts* (1944) 321 US 158
- *West Virginia Board of Education v Barnette* (1943) 319 US 624

Commentary

Adjudicating Parental Religious Beliefs in accordance with "Secular Standards of Society"

Due to exceptional circumstances, this emergency hearing could not take place in open court. The medical emergency arose on the evening of 26 December 2010 when the critically ill infant required an urgent blood transfusion, however his parents refused to consent to such treatment based on their religious beliefs as Jehovah's Witnesses. The hospital contacted the Duty Registrar of the High Court seeking an order permitting them to administer a blood transfusion to the critically ill infant. Judge Hogan was contacted shortly after 10pm and it was agreed that an emergency hearing would be held in his own home at midnight or as soon thereafter as the parties could assemble. As the Judge succinctly

explained: “Given the time constraints, the time of year and the fact that the application had to be heard in the early hours of the morning, I concluded that the most practicable venue for the hearing was in my own private residence. In passing, I should also add that a further consideration in that regard was that heavy snowfalls had blanketed the Dublin region, making travel at that time very difficult”. (para. 14)

The hearing commenced shortly before 1am on the morning of 27 December and concluded at about 2.30am. The hospital was legally represented and the parents appeared in person with the Judge noting that “While the parents were present, it was simply not possible in the circumstances for them to be legally represented or to have members of Hospital Liaison Committee of the Jehovah Witnesses present”. (para. 8) The treating medical consultant, who was also the Clinical Director of Intensive Care at the hospital, confirmed that there were no medical alternatives to a blood transfusion in the case of AB, and that the situation was urgent and required medical intervention within a matter of hours. At the conclusion of the hearing, the Judge granted the orders sought and indicated that he would subsequently deliver a judgment in open court with the dual purpose of outlining the reasons for his decision, and to mitigate the effect of not holding the hearing in open court and thereby providing a record of the case. Notwithstanding these unusual circumstances, the Judge nevertheless made an order pursuant to s 27 of the Civil Law (Miscellaneous Provisions) Act 2008 prohibiting the publication or broadcast of any matter that would be likely to identify the infant.

The Judge noted the requirements of Article 34.1 of the Constitution which requires that: “Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public”. Judge Hogan referred to s 45(1) of the Courts (Supplemental Provisions) Act 1961 which provides exceptions to this requirement and concluded that this application came within the ambit of s 45(1)(a) as it was urgent and the relief sought was by way of injunction. Additionally, the matter also fell within the ambit of s 45(1)(c) as it concerned a minor.

With these practical and procedural matters addressed, Judge Hogan thereafter focused on the substantive legal issues at the centre of this case. The case involved the balancing of a number of constitutional rights, in particular Article 40.3.2 (protection of the life and person of every citizen), Article 41 (protection of the family), Article 42.5, as it then was, (allowing for State intervention in exceptional cases where parents have failed in their duty to a child), and Article 44.2.1° (the right to freedom of religion). Precedent case law of the Irish superior courts was considered including the relevant cases of *North Western Health Board v H.W. and C.W.* [2001] IESC 90 [INSERT LINK to CUREDI021IE003]; and *Re Baby B* (Unreported, High Court, 28 December 2007). Judge Hogan referred to the case of *Fitzpatrick and Ryan v F.K. and the Attorney General* [2008] IEHC 104 [INSERT LINK to CUREDI021IE002] as authority for confirming the constitutionally protected right of a properly informed adult with full capacity to refuse medical treatment, whether for religious or other reasons, and noted that the present case differed as the patient was an infant. The Court also noted various decisions of the US Supreme Court including *West Virginia Board of Education v Barnette* (1943) 319 US 624, and *Prince v Massachusetts* (1944) 321 US 158.

The Judge reiterated at various points in the judgment that he was of the view that the parents were sincere in their religious beliefs and indeed their concern for the welfare of their child. There was also an acknowledgement by legal counsel for the hospital that it would be “unreasonable to ask the parents to compromise their strongly held religious beliefs and it was for this reason that this application was thus made.” (para. 10) The Judge addressed the prescriptive practices of the parents’ faith relating to the use of blood products even for life-saving treatment. Indeed, Judge Hogan explicitly referred to the scriptural text in the New Testament upon which the parents of the infant regarded the prohibition of blood products even in medical treatment; Acts 15:29 which requires Christians to “abstain from meats offered to idols, and from blood, and from things strangled, and from fornication”.

Whilst Judge Hogan confirmed the constitutional right of parents to raise their children in accordance with their religious beliefs, such a right is not absolute.

Judge Hogan noted that in exceptional circumstances, where the parents have failed in their duty to protect the child's life and welfare, the State is permitted to intervene. The test to be employed in determining whether a failure has occurred is an objective test based on "the secular standards of society" and the Constitution. Whilst the judgment refers explicitly to the necessity for the application of an objective test, it remains silent as to the precise parameters of such a test. The judgment equally neglects to add any clarity with regard to the ambit of "secular standards of society". It is therefore to be anticipated that such matters will require clarification in subsequent cases which may come before the Irish courts in due course.

It is worth noting that at the time of this decision Article 42.5 of the Constitution allowed for State intervention in exceptional cases where parents failed in their duty to a child. In 2015, Article 42.5 was replaced by Article 42A.2.1° which provides for the constitutional rights of the child. Article 42A.2.1° states that: "In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child". Thus, the ambit of the constitutional right continues to limit State intervention to only "exceptional cases" of a failure in parental duty towards a child.

More broadly, it should be noted that the Health Service Executive (HSE), which is responsible for the provision of health and personal social services in Ireland, has drafted *Essential Practice Points* concerning the medical treatment of Jehovah's Witnesses. The seven identified Practice Points are as follows: 1. Profile of Jehovah's Witnesses in Ireland; 2. Religious contacts and religious practices; 3. Food and the content of medicine; 4. Blood transfusion and organ transplantation; 5. Death-related religious rituals; 6. Cleaning and touching the body; and 7. Initiation ritual/infant baptism. Each of these Practice Points provide essential guidance to healthcare staff in the provision of treatment to patients who are

adherents of the Jehovah's Witness faith. There are also eight Hospital Liaison Committees in Ireland which provide support and guidance to a Jehovah's Witness undergoing a medical procedure, and assist or mediate in the event of an emergency or challenging situation. The Hospital Liaison Committees comprise of specially trained Church ministers ("elders") who advise on the delivery of healthcare in a manner consistent with the beliefs of the faith, in addition to arranging for educational presentations for healthcare staff concerning the provision of medical treatment for Jehovah's Witness patients. Furthermore, the Hospital Liaison Committees provide information on the use of alternative non-blood medical management strategies, in addition to providing peer-reviewed medical research papers concerning such treatments. The Hospital Liaison Committees can also play a vital role in facilitating communication between medical staff and patients, including parents of a child patient of the Jehovah's Witness faith.

The HSE has also drafted *Additional Notes on Maternity and Paediatric Care – Jehovah's Witnesses* to provide guidance on specific issues arising in pediatric care in the context of the Jehovah's Witness faith, such as approaches to child welfare and views on infant baptism. Guidance such as that provided by the HSE through the *Essential Practice Points* and *Additional Notes on Maternity and Paediatric Care – Jehovah's Witnesses* is of immense value for healthcare workers and faith adherents alike. Engagement and dialogue between the national healthcare provider and representatives advocating on behalf of faith adherents is to be welcomed as it is conducive to creating a framework that seeks to ensure that the provision of healthcare does not unnecessarily infringe upon the constitutionally protected right to freedom of religion, in addition to other constitutional rights.

Literature related to the main issue(s) at stake:

General legal literature on the topic:

- Davidson, Hope and Jennifer Schweppe. 2015. “Time for Legislative Clarity on Consent to Medical Treatment: Children, Young People and the ‘Mature Minor’”. *Medico-Legal Journal of Ireland* 21 (2): 65-75.
- Enright, Máiréad. 2007. “Whither White Western Values? Comparative Perspectives on Culturally Motivated Decision-making for the Child”. *Hibernian Law Journal* 7 (1): 1-16.
- Ma’ayeh, Marwan and Nikhil Purandare, Michael Flanagan, Simon Ash, Michael Geary, Fionnuala Breathnach. 2013. “Ruptured Broad Ligament Ectopic Gestation in a Jehovah’s Witness with a Negative Pregnancy Test”. *Medico-Legal Journal of Ireland* 19 (1): 37-39.
- Ranton, Duncan. 2013. “Parental religious beliefs when making decisions for terminally ill children”. *Family Law* 684-692.

Materials relevant to the case:

- Health Service Executive. “Additional Notes on Maternity and Paediatric Care – Jehovah’s Witnesses”. <www.hse.ie/eng/services/publications/socialinclusion/interculturalguide/jehovahswitn
- Health Service Executive. “Essential Practice Points: Jehovah’s Witnesses”. <www.hse.ie/eng/services/publications/socialinclusion/interculturalguide/jehovahswitn

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