***Private children law update: cases published in October 2014***

***Re Y (Children)*** [**[2014] EWCA Civ 1287**](http://www.familylawweek.co.uk/site.aspx?i=ed134064)

**Summary:** The Court of Appeal (surprisingly) seems to suggest that the Family Court in private law proceedings does not need to balance article 8 rights.

**Facts:** The parents had two children, one of whom had been born in the United States. In November 2011, the father was granted a residence order in respect of the children. Following separation, the father remarried and had another child. He then applied to remove the children from his first relationship from the jurisdiction and move to Missouri in the United States where his new wife’s family were based.

**Decision under appeal:** In December 2013, the judge refused the application. In refusing the application, the judge found that the father’s application was genuine and realistic and that the mother’s opposition was genuine and reasonable. He found that the harm caused by the relocation and its effect on the children’s relationship with their mother was greater than the harm caused by the pressure on the new family unit that would be created by the refusal of the application.

**The appeal:** One of the grounds of appeal was that the judge failed to consider the article 8 rights of all the children (including the child of the father and his new wife). Ryder LJ (with whom Patten LJ and Longmore LJ agreed) said at [43]:

“What does the submission made by [counsel for father] amount to? It can only be an attempt to impose the concept of 'horizontality' into private law children cases where the agency of the state is not the principal actor seeking to interfere in the family or the private life of those concerned. If that is right, the submission is misguided. In private law applications it is a person with parental responsibility who seeks to interfere with the Article 8 rights of the other relevant persons, be they other adults with parental responsibility or the children themselves. Parliament has provided a legislative mechanism for such a decision [i.e. the Children Act 1989] that is human rights compliant. It is neither necessary nor appropriate for the Family Court in ordinary private law applications where there are no public law consequences to undertake a separate human rights proportionality evaluation balancing the effects of the interference on each person's Article 8 rights so as to evaluate whether its decision is proportionate. [Counsel] could point to no jurisprudence to suggest otherwise. That position is quite distinct from public law applications where such an evaluation is required by reason of the fact that a local authority applicant is a public authority seeking itself to interfere in the rights that are engaged.”

**Commentary:** *Re Y* has been subject to much discussion online and most family lawyers think that paragraph 43 as read is wrong and suspect that Ryder LJ’s comments will be clarified in a future Court of Appeal judgment. The blog posts of [Laura Vickers](http://www.llfjb.com/human-rights-private-law-is-re-y-right/), [David Burrows](https://dbfamilylaw.wordpress.com/2014/10/17/forget-convention-rights-in-private-children-proceedings-ryder-lj/), [Sarah Phillimore](http://www.pinktape.co.uk/cases/the-curious-incident-of-article-8-in-the-night-time/) and [Lucy Reed](http://www.pinktape.co.uk/cases/understanding-re-y-and-pondering-horizontality-or-why-i-need-a-lie-down/) on *Re Y* are strongly recommended.

***VP v Russia* (**[**application no 61362/12**](http://www.familylaw.co.uk/news_and_comment/case-of-vp-v-russia-application-no-61362-12#.VFYn2lOsV-N)**)**

**Summary:** European Court of Human Rights finds that Russia had violated a father’s article 8 rights by not taking adequate measures to enforce a residence order made by a Moldovan court when the mother abducted the child to Russia.

**The facts:** During the course of Moldovan child arrangements proceedings, the mother left Moldova with the child and settled in Russia. The Moldovan court subsequently ordered that the child should live with the father. The mother did not return the child to the father and the father issued enforcement proceedings in Russia. The first set of enforcement proceedings resulted in the Moscow City Court refusing the application concluding in September 2010 that it had no competence to examine the father’s enforcement application as under a bilateral treatment the Moldovan judgment was self-executing and did not oppose any obligation on the mother; the Russian Supreme Court quashed that decision. The second set of enforcement proceedings was successful at first instance; this time the mother successfully appealed to the Supreme Court due to the father’s failure to comply with the procedural requirements of the bilateral treaty. The third set of enforcement proceedings, concluding in August 2011 was successful and not appealed. However, in October 2011, the Russian Bailiffs’ Service refused to execute a warrant saying that there was no obligation on the mother to enforce (an argument already rejected by the Supreme Court in the first set of enforcement proceedings). In June 2012, the father’s judicial review of that decision was successful. The mother eventually returned the child to the father in 2013. (It should be noted that the Hague Convention was not in force in Russia at the time of the father’s application).

**The law:** The European Court of Human Rights confirmed at [125] that “Where one parent unlawfully prevents another from enjoying the latter’s parental rights, the Court has repeatedly held that Article 8 includes a right for parents to have measures taken that will enable them to be reunited with their children and an obligation on the national authorities to take such measures”. At [142]-[147] the court re-iterated the applicable principles for non-enforcement of return order cases. There is a positive obligation on states to take swift action to reunite the child and the parent. This requires urgent handling and may require coercive measures and sanctions. That obligation is interpreted in light of the child’s best interests and the Hague Convention. The measures taken must be “adequate and effective” taking into account all of the circumstances (including to what extent the left behind parent had contributed to delays and the possibility of different state bodies coordinating their efforts). A factual change may “exceptionally” justify non-enforcement but not if the factual change was as a result of the state’s failure to comply with its positive obligation.

**The decision:** The time taken by Russia to enforce the decision was excessive and the measures taken by the Russian authorities to achieve reunification were not adequate and effective. Russia had therefore violated the father’s article 8 rights and the father was awarded €7000 in non-pecuniary damages.

***Re E (A Child)*** [**[2014] EWFC B136 (23 May 2014)**](http://www.bailii.org/ew/cases/EWFC/OJ/2014/B136.html)

**Summary:** Final hearing where the actions of the father in filing a falsified letter from a GP resulting in referrals to the DPP (for the father) and to the GMC (for the GP).

**Findings of fact:** Both parents made allegations that the other had lied and ill-treated the child physically and/or emotionally. On day four of the final hearing, the father withdrew his allegations against the mother and accepted many of the allegations against him. Of the remaining allegations, HHJ Hernandez preferred the evidence of the mother. The judge found that the father had “pursued his own agenda with a degree of ruthlessness rarely seen in these courts” (at [102]) including: taking the child for unnecessary medical appointment to manufacture evidence; encouraging the child to make false allegations against the mother; and publishing material in the press. The father’s actions had caused great distress and significant emotional harm to the child.

**Orders:** The judge made an order for indirect contact only and a section 91(14) order. A three-year non-molestation order and an injunction preventing further publication of material, which could lead to the identification of the child, were also made.

**Dr C and the falsified documents:** The father had taken the child to see Dr C in order to gather evidence for the proceedings. Dr C wrote letters setting out his concerns to the father’s solicitor to assist in the proceedings and eventually made a referral to social services. Dr C prepared two statements for the proceedings. After consultation with a senior partner, Dr C felt that his first statement was too subjective and he did not sign it; he instead prepared and signed a second statement. The father however forged Dr C’s signature on the first statement and submitted that to the court. The judge therefore reported the father’s potentially criminal actions to the DPP. The judge found that Dr C had been manipulated by the father, failed to follow safeguarding guidelines and failed to keep an open mind. Dr C further failed to inform the court that he was aware that the father had filed a falsified document. The judge therefore agreed that the judgment and a transcript of Dr C’s evidence should be sent to the GMC so that they could investigate the matter.

***Also published in October 2014***

***E v B*** [**(Case C-436/13)**](http://www.familylaw.co.uk/news_and_comment/e-v-b-case-c-436-13#.VFYo-1OsV-N)**:** Following a referral by the Court of Appeal in this jurisdiction, the Court of Justice of the European Union considered jurisdiction under BIIR. Under article 12(3) a member state will have jurisdiction over proceedings in relation to parental responsibility where: the child has a substantial connection with that member state; the parties accept that member state’s jurisdiction; and it is in the child’s best interests. The CJEU confirmed that that jurisdiction ceases following a final judgment in those proceedings.

***Re H*** [**[2014] EWFC B127 (14 August 2014)**](http://www.bailii.org/ew/cases/EWFC/OJ/2014/B127.html)**:** This short but damning seven paragraph judgment of HHJ Hallam offers yet another stark example of the effects of LASPO and the potential injustice that would have occurred but for pro bono representation. The mother had difficulties in hearing and in speech, had intellectual difficulties and was unable to read or write. She was not eligible for legal aid and was refused exceptional funding. The judge rejected the Legal Aid Agency’s suggestions that, without legal aid, the mother would have effective access to the court and would not have her Convention rights breached.

***Re A and B*** [**[2013] EWHC 2305 (Fam)**](http://www.bailii.org/ew/cases/EWHC/Fam/2013/2305.html)**,** [**[2013] EWHC 4150 (Fam)**](http://www.bailii.org/ew/cases/EWHC/Fam/2013/4150.html) **and** [**[2014] EWHC 818 (Fam)**](http://www.bailii.org/ew/cases/EWHC/Fam/2014/818.html)**:** These final three judgments of Cobb J tell the tragic tale of A and B and “illustrates all too clearly the immense difficulties which can be unleashed when families are created by known-donor fertilisation … [where] a very high psychological price can be paid” [2014 judgment at [117]]. A and B were the biological children of F1 and M1. F1 and M1 were in long-term relationships with F2 and M2 respectively. The fathers first issued proceedings for contact in 2008. The children were exposed to the strong hostile views of the mothers towards the fathers and contact was not taking place. In the July 2013 judgment, an urgent psychiatric assessment of the general well-being of the children was ordered. That assessment confirmed the judge’s view that the children were suffering significant harm and a section 37 report followed. In the December 2013 judgment, the children were made subject to interim supervision orders. By the final hearing in March 2014, both children were continuing to refuse to see the fathers (although B had had one contact session which had gone well). In his final judgment, Cobb J had cause to be critical not only of the parents but also of the social worker (at [48]-[67]) and, unusually, the style and manner in which the final hearing had been conducted (“the examination of some of the witnesses was hostile, occasionally sarcastic, and at least in one notable respect highly insensitive” [109]). The final orders were: a 12 month supervision order; 8 contact sessions a year with B; indirect contact with A; and a section 91(14) order preventing all four parents making applications under Part II of the Children Act for a period of 15 months.

***Re C (Children)*** [**[2014] EWFC B130 (26 February 2014)**](http://www.bailii.org/ew/cases/EWFC/OJ/2014/B130.html) **and** [**[2014] EWFC B131 (17 June 2014)**](http://www.bailii.org/ew/cases/EWFC/OJ/2014/B131.html)**:** In these two cases HHJ Hudson considers applications in relation to both external and internal relocation. In both cases L and J’s special guardians were seeking to relocate. In the first case relocation to Australia is refused and the judge finds at [70] that “the proposed emigration is motivated, if not entirely, then substantially, by the [special guardian’s] desire to exclude the birth family from L and J's lives.” The special guardians did not take that decision well (going so far as to consider placing the children in foster care) and sought to internal relocate from Sunderland to Northampton (where they had family). The mother, supported by the children’s guardian, opposed this internal relocation by issuing an application for a prohibited steps order. In her second judgement, the judge again reached the conclusion that “the move has been motivated at least in part by the [special guardian’s] desire to distance themselves from the birth family and from their contact with the children. I have no confidence that contact would be actively promoted by them.” The judge felt that it was necessary and in the children’s best interests for proceedings to continue for a further three months in the hope that issues of contact could be addressed. The judge also did not rule out a variation to the special guardianship order or a section 37 report if things did not improve.

***King's College Hospital NHS Foundation Trust v T & Ors*** [**[2014] EWHC 3315 (Fam) (30 September 2014)**](http://www.bailii.org/ew/cases/EWHC/Fam/2014/3315.html)**:** 17 month old ZT was born prematurely at 26 weeks. In December 2013, he went into a coma. The NHS Trust applied for permission to withdraw ventilation, which would inevitably result in ZT’s death. ZT’s parents accepted the medical evidence but opposed the application due to their belief that God may work a miracle. Russell J, after drawing up a balancing sheet, was driven to conclude that ZT’s ventilation was only just sustaining life with no benefit and she reluctantly granted the application.

**Ricky Seal**

**No5 Chambers**