after the parent application and original priority date. There is also a risk, as Jacob L.J. pointed out, that a challenger might stand by whilst the registered proprietor invests money in the risky and expensive development work of bringing the patented product to market. In response, Lord Hoffmann suggested that registered proprietors might invoke proprietary estoppel as a defence. In light of these considerations *Yeda* might yet prove as awkward as the *Markem* ruling it overruled.

KATHLEEN LIDDELL

REMOVING BABIES AT BIRTH: A MORE THAN QUESTIONABLE PRACTICE

DESPITE the sensational media headlines which accompanied the decision of Munby J. in *R (G)* v. *Nottingham City Council* [2008] EWHC 152 (Admin), the practice of taking babies away from their mothers at birth is neither a new, nor rare, phenomenon (see Michael Freeman, "Removing Babies at Birth: A Questionable Practice" (1980) 10 Family Law 131). The fact that this particular "snatch" came to light at all owes much to the entirely fortuitous circumstance that the case was heard in public, in the Administrative Court, and not in the more usual private environment of the Family Division.

G, the young mother, had just left the care of the local authority. She had had a troubled life, a history of alcohol and drug abuse and self-harm. Although (just) an adult, the authority was under a statutory duty to assist her on leaving care with the transition to independent living in the community. It was required to prepare to this end a "pathway plan". This plan was challenged and permission was sought for judicial review on the basis that it was so deficient and inadequate as to be unlawful. Before the hearing came on, G went into labour. The authority, in accordance with a so-called "Birth Plan" which it had devised, removed the baby boy from his mother at about 4.00 a.m., two hours after his birth. They sought no prior court order, although it was clearly their intention to follow up this removal with an application for either an emergency protection order or an interim care order. Munby J. made a peremptory order requiring the authority and the hospital to reunite G and her baby. Later that day the authority successfully obtained an interim care order in the County Court, giving them authority to remove the baby into their care.

No local authority or social worker has lawful authority to remove a child, or take a child into care, without either the consent of the parent or a court order or, as Munby J. put it during the hearing, "as the result of a decision taken by officials in some room". That this fundamental, indeed sacrosanct, principle of child protection law

https://doi.org/10.1017/S0008197308000615 Published online by Cambridge University Press

should have been either misunderstood or ignored by Nottingham is profoundly worrying. Even where a child is summarily removed under an emergency protection order (Children Act 1989, s.44), such removal is to be regarded as a "draconian" and "extremely harsh" measure, requiring "exceptional justification" and "extraordinarily compelling reasons" (per Munby J. in *X Council* v. *B* [2004] EWHC 2015 (Fam), [2005] 1 F.L.R. 341). This is the ethos not just of the children legislation but more particularly of human rights. How many other authorities up and down the land may also have failed to grasp the imperative demands of the Human Rights Act 1998 is a matter of speculation, but it was a question which clearly worried Munby J. in the *X Council* case. The concern is accentuated by the knowledge that younger children and babies are entirely dependent on the intervention of others for the protection of their most basic rights, a conundrum which troubled the House of Lords in *Re S (Minors) (Care Order: Implementation of Care Plan); Re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10, [2002] 2 A.C. 291 but to which the House could provide no easy answer. The problem is further compounded, in the case of emergency intervention, by empirical evidence that at least some local authorities may be deliberately dodging the exacting requirements of human rights and resorting to police protection in the first instance, rather than the courts (Judith Masson, "Emergency Intervention to Protect Children: Using and Avoiding Legal Controls" [2005] 17 C.F.L.Q. 75). The police alone have power to remove a child from objecting parents, or prevent them from removing a child from hospital, without a prior court order, albeit for only up to 72 hours (Children Act 1989, s.46). At least, that is what everyone thought. But Munby J.'s judgment in this case also reveals that there are two important qualifications to this position.

First, there is the uncontroversial principle that anyone with the *de facto* "care" of a child has lawful authority to protect a child from immediate violence at the hands of a parent. But, secondly, there is the much more debateable question of the scope of section 3 (5) Children Act 1989. This provides that anyone who has the "care" of a child may "do what is reasonable in the circumstances of the case for the purpose of safeguarding or promoting the child's welfare". The authority here could not rely on this since they did *not* have the "care" of G's child. But the hospital *did* and, in the opinion of Munby J., "doctors, midwives and nurses do not have to stand idly by waiting for a court order" but are "entitled to separate the child from the mother if medical necessity dictates, and even if she objects". It cannot surely be the case that hospitals are uniquely privileged in being able to rely on this provision. The view of Munby J. is therefore welcome affirmation of a more general principle, which commentators have asserted for

https://doi.org/10.1017/S0008197308000615 Published online by Cambridge University Press

many years, that section 3 (5) would allow *anyone* with physical care of a child, notably a foster parent, to repel an intoxicated or emotionally disturbed parent demanding the immediate return of a child, perhaps in the middle of the night. Ward J. (as he then was) had cast doubt on the existence of any such rule in *Nottinghamshire County Council* v. *J* (26 November 1993, unreported). He saw it as fundamentally contradictory to the "voluntary principle" which governs the accommodation of children by local authorities with the agreement of their parents. Section 3 (5) of course allows the carer of the child to act in an emergency but what now seems to be accepted, at least by Munby J., is that action may also be taken where it is *the parent herself* who represents the emergency.

There was no suggestion here of course that this young mother posed an immediate threat to her child, either of violence or of medical neglect. The case is as good an example as we are likely to find of the deficiencies of the view that parents do not possess rights, a position which has become increasingly difficult to defend in the light of human rights obligations. Could anyone seriously suggest that this young woman did not have *independent* rights when the state unceremoniously took her child away from her? But then, as Michael Freeman pointed out nearly thirty years ago, "taking away children is a lot easier than solving their parents' problems".

ANDREW BAINHAM

SOCIAL DUMPING OR DUMPING SOCIALISM?

WHILE the accession to the EU of the ten former Communist states was greeted with enthusiasm by those who saw the potential in these new and underdeveloped markets, the trade union movement in the West was concerned that Eastern European workers would flood into their labour markets, undercutting Western European wage rates. Therefore, a number of the "EU-15" states (but not the UK) imposed transitional restrictions on the right of individuals to come to work. However, these restrictions did not extend to employers – in particular service providers – coming from the new Member States, bringing with them low paid Eastern European labour to fulfil the contract, nor did the restrictions extend to preventing employers in the "EU-15" from re-establishing themselves in the new Member States to take advantage of the cheaper labour there. These two situations were at issue in Case C-341/05 *Laval un Partneri Ltd.* v. *Svenska Byggnadsarbetareförbundet* [2007] ECR I-000 and Case C-438/05 *Viking Line ABP* v. *The International Transport Workers' Federation, the Finnish Seaman's Union* [2007] ECR I-000 respectively.

https://doi.org/10.1017/S0008197308000615 Published online by Cambridge University Press