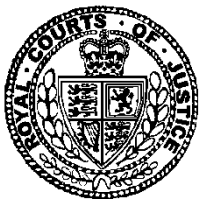
Neutral Citation Number: [2025] EWHC 484 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION



No. FD24P00491

Royal Courts of Justice
Strand
London, WC2A 2LL

27 February 2025

Before:

Mr Justice Harrison

Re A (A Child) (Abduction: Adjournment following Refusal of Legal Aid)

APPROVED JUDGMENT

Mr Frankie Shama (instructed by **Dawson Cornwell Solicitors**) appeared on behalf of the **Applicant father**

The **Respondent mother** appeared in person assisted by a McKenzie Friend

Hearing dates: 26 and 27 February 2025

Mr Justice Harrison :

1. This is a perfected version of an *ex tempore* judgment I delivered on 26 February 2025.

2. I am concerned with proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the 1980 Hague Convention'), which have been listed before me as a final hearing. The subject of the proceedings is a boy, A, who is now aged 5 ½. In circumstances which I set out below, the mother, who is the respondent in the proceedings, applies for an adjournment.

3. Until today (26 February 2025), Messrs Duncan Lewis solicitors were on record as acting for the mother. This morning, they filed a notice that the mother would be acting in person. She had made an application for legal aid on 7 February 2025. Duncan Lewis were informed by the Legal Aid Agency ('LAA') at just after 7 am this morning that the application had been refused. The refusal appears to have been on the basis of the 'merits' of the mother's case as opposed to her means.

4. A and his parents are Polish nationals. On 20 September 2024 the mother removed A from Poland and brought him to England without the knowledge or consent of the father. The father responded by making an application under the 1980 Hague Convention for A to be returned to Poland. This was issued in the High Court on 15 October 2024. More than 19 weeks have elapsed since then, over three times the six-week target length for proceedings enshrined in Article 11 of the Convention.

5. The removal from A from Poland was undoubtedly 'wrongful' for the purposes of Article 3 of the 1980 Hague Convention. The mother opposes the father's application on the basis of Article 13(b), asserting that there is a grave risk that A's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

6. The father has been represented before me by Mr Frankie Shama. I am grateful to him for providing the court with a very helpful skeleton argument, chronology and

schedule of protective measures. I am also grateful to his instructing solicitors for the preparation of the bundle.

7. As I have already recorded, the mother was previously represented by Duncan Lewis solicitors. At previous hearings she was also represented by counsel. She was instructing her lawyers on a private basis, but there came a stage when she could no longer afford to do so. An application was made by her solicitors for legal aid on 7 February 2025, which application was refused this morning.

8. We thus have a situation where the father, without any assessment of his finances or the merits of his case, has been provided with legal aid by the State to bring proceedings against the mother. This has enabled him to secure representation from solicitors and counsel who are specialists in international family law. By contrast, the mother has been left to fend for herself. It is difficult for any litigant to represent themselves, but even more so when they are facing an application where the law is highly complex and in circumstances where English is not their first language.

9. In this case, the mother has made allegations that she has suffered domestic abuse from the father. The single joint expert, Dr Kolkiewicz, an eminent consultant psychiatrist, has identified that she is suffering from 'a Mild Depressive Episode'. The mother completed a PHQ9 questionnaire and gave answers which, in the opinion of Dr Kolkiewicz, '*reflect the understandable emotional distress she is currently experiencing as a direct response to the impending court proceedings*'.

10. Upon reading the papers, I came to the preliminary view – I emphasise, without hearing argument - that the mother may find it difficult to resist a return on the basis of Article 13(b), on the assumption that adequate protective measures are in place. To that extent, I can understand why the LAA may have assessed her case as lacking sufficient merit. As any judge knows, however, the outcome a case can turn out very differently from what appears likely at first glance. It is, moreover, wrong in my view for the merits of a respondent's position in 1980 Hague Convention proceedings to be assessed in purely binary terms of whether a return can be resisted or not.

11. In the majority of cases where a respondent relies solely upon Article 13(b), the outcome is that an order for return is made. Before making a return order, however, the court needs to be satisfied that there exist adequate protective measures to ensure that any potential risks to the child are sufficiently mitigated so as to ensure that the return will not give rise to the grave risk contemplated by Article 13(b). Additionally, the court has jurisdiction to determine the manner by which any return should take place and may be required to consider what are sometimes referred to as 'soft landing' provisions, intended to limit the distress and disruption to the child which a sudden requirement to move to another jurisdiction will often create.

12. The detailed mechanics of a child's return should not be regarded as a peripheral matter. On the contrary, in a jurisdiction where the court is mandated to treat the interests of the child as a primary consideration, they are of crucial importance to the smooth operation of the 1980 Hague Convention.

13. Thus, even in cases where it may seem inevitable to a judge or to a case worker at the LAA that a respondent's ultimate position in the proceedings may lack merit in the sense that they are unlikely to be able to resist a return, in my judgment legal representatives have a vital role to fulfil in arguing their client's case as to the adequacy of proposed protective measures and steps that may need to be taken in the overseas jurisdiction before any return order is implemented. Given the complex nature of international family law, it may be very difficult for a lay person adequately to represent themselves in this type of case, let alone a litigant for whom English is not their first language and for whom – as consequence of the abuse they are alleged to have experienced – the proper articulation of their case may present real difficulties. One matter of particular difficulty which faces the mother in this case is whether to return to Poland with the child, in the event that a return order is ordered. She has an older child who lives in this jurisdiction.

14. It strikes me as anomalous that in private law proceeding under the Children Act 1989, a party making allegations of domestic abuse is generally entitled to means-tested legal aid, whereas in proceedings under the 1980 Hague Convention (which are usually more complicated than domestic law proceedings) this may not be the case. This is so, despite the imperative requirement in Convention proceedings to ensure

that, as part of the court's determination, the child who is the subject of the proceedings is adequately safeguarded from any risks arising from the allegations of abuse.

15. In this case, the decision of the LAA to refuse the mother legal aid on the merits has placed the court in an invidious position. Her former solicitors have communicated to the court that she has 14 days to appeal the decision and that they believe there would be merit in such an appeal. Whether or not that is so, I am not in a position to say.

16. In support of her application for an adjournment, in addition to her lack of legal representation, the mother also relies upon the fact that she will be unable to challenge the report of Dr Kolkiewicz at this hearing through cross-examination. She has said that her former solicitors did not make it clear to her that she has a right to challenge the report and that she did not appreciate that this was the case until yesterday when she was preparing to come to court today.

17. The dilemma I face can be shortly stated. In order to achieve a gold standard of fairness, the mother should be represented. On the other hand, if I adjourn the case there is no guarantee that this will occur. The LAA, on any appeal, may simply reaffirm the decision it has already made, in which case the mother's only remedy would be to pursue a judicial review of their decision – which is likely to be a lengthy process. Mr Shama therefore makes the point that granting an adjournment will simply defer the problem which exists today 'down the road'.

18. Any adjournment would not be consequence-free. The father and his legal team have prepared for the hearing and are expecting a decision to be made. He has taken the time to travel from Poland in order to be at court in person. His resources are limited and it will not be straightforward for him financially to come back to England.

19. Any delay would also have an adverse impact upon the child. This principle is enshrined in section 1(2) of the Children Act 1989; although I am not concerned with proceedings under that Act it seems to me that it is a principle of universal application whenever the interests of a child are engaged even if, as here, they are not the court's paramount consideration.

20. It is widely acknowledged that delay can be particularly serious in 1980 Hague Convention proceedings. The very object of the proceedings is to achieve the prompt return of a child to the country of habitual residence to enable long-term welfare decisions to be made by the courts of that jurisdiction. For so long as the proceedings remain unresolved, the child is left in limbo, his parents living in a state of uncertainty as whether he will be returned or not. Proceedings are stressful for all concerned, but perhaps especially so for the taking parent who is facing the prospect of an unwelcome return to a country from which, in their perception, they may have escaped. That strain is likely to be communicated to the child in their care.

21. I have considered the authorities which address the principles relevant to grant or refusal of an adjournment. These were examined by Peter Jackson LJ in *Re P (A Child: Fair Hearing)* [2023] EWCA Civ 215. He identified the following cases of relevance to the issue:

> *Re B and T (Care Proceedings: Legal Representation)* [2001] 1 FLR 485
> *P, C and S v the United Kingdom* (2002) 35 EHRR 31
> *Re G-B (Children)* [2013] EWCA Civ 164
> *Re A (Withdrawal of Treatment: Legal Representation)* [2022] EWCA Civ 1221, [2022] 3 FCR 439
> *Terluk v Berezovsky* [2010] EWCA Civ 1345
> *Solanki v Intercity Technology* [2018] EWCA Civ 101
> *Bilta (UK) Ltd v Tradition Financial Services Ltd* [2021] EWCA Civ 221

22. Peter Jackson LJ then proceeded to summarise the relevant principles at paragraph 45 as follows:

> "The question of whether proceedings should be adjourned can arise at different stages in proceedings and for a variety of reasons. When it does, the authorities contain a range of propositions:
>
> 1) The court must strike a fair balance, having regard to all the interests at stake, and not merely the interests of one party. In a case involving

children, their interests (though not paramount) must be considered, as must the effects of delay.

Re B and T at [21]; *Re L* at [9]; *Re G-B* at [52] and [54]

2) There can be more than one right answer to this evaluative exercise; the question is whether the decision was a fair one, not whether it was "the" fair one.

Terluk at [19]

3) These are classic case management decisions, and as such an appeal court will be slow to interfere.

Re TG (A Child) [2013] EWCA Civ 5, [2013] 1 FLR 1250 at [24-38]

4) However, the question on appeal is not whether the decision lay within the broad band of judicial discretion but whether, in the judgement of the appeal court, it was unfair in the circumstances identified by the judge.

Terluk [18]; *Solanki* at [32-34]; *Re A* at [43]

5) The assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist.

Re G-B at [49]; *Bilta* at [30]

6) The starting point is the common law principle of natural justice, reflected in the overriding objective, which ensures compliance with the requirements of Article 6 ECHR. In this area, domestic and Convention requirements march hand in hand.

Re B and T at [28]; *Re A* at [26-28]

7) The question is whether the proceedings as a whole are fair. It is not appropriate to extract a part of the process and view it in isolation.

Re B and T at [21]; *Re G-B* at [50]

8) The right of access to a court is not absolute and any limitation will only be incompatible with Article 6 where it impairs the very essence of the right and where it does not pursue a legitimate aim in a proportionate manner.

P, C and S at [90]

9) However, Article 6 contains certain minimum requirements. An obvious example is the right and ability of those concerned in the proceedings to put their case effectively. The appearance of fairness is also important and the seriousness of what is at stake will be relevant.

Re B and T at [22]; *P, C and S* at [91]; *Re A* at [30-31]

10) The principle of equality of arms under Article 6 and the overriding objective do not require all parties to be legally represented.
Re B and T at [23]; *P, C and S* at [90]; *Re G-B* at [53]

11) When considering whether to adjourn, the court will be cautious before taking account of the strength or weakness of a party's case, mindful that forensic fortunes may change at trial, but the realistic consequences of any lack of representation may be considered.
Re A at [29]; *Re G-B* at [51]

12) Fairness may be achieved by the manner in which the court hearing is conducted.
Re G-B at [55]"

23. Peter Jackson LJ added at paragraph 46:

> "I emphasise that these propositions are a selection and not a checklist, still less an exhaustive one. The essential touchstone is fairness and the weight to be given to any individual proposition or other relevant factor must be a matter for the judgement of the court in the case before it."

24. In determining the mother's application for an adjournment, there are a number of factors which stand out which pull in different directions.

25. If I grant an adjournment, the next available two day hearing will be on 10 and 11 April 2025, which will comprise a further delay of approximately six weeks. This is a significant period of time, but in the context of a case which has already been ongoing for 19 weeks it is not one which should carry overriding weight. Unlike many Hague Convention cases, this is one in which the child has been able to maintain a relationship with the left behind parent during the course of the proceedings by having direct contact, including most recently a period of staying contact for five days.

26. As the summary in *Re P* makes clear, and as Mr Shama submitted, principles of fairness and equality of arms do not require that all parties to proceedings should be separately represented. The court should not aim to achieve what I have described as the gold standard of fairness as long it can be satisfied that each side is able fairly to

put their case effectively. It is relevant to note in this context that the mother speaks English fluently to the extent that she told me that she has worked as an interpreter.

27. In response to the mother's suggestion that she should be able to challenge the psychiatrist, Mr Shama makes the point that the order made on 14 December 2024 laid out a timetable within which Part 25 questions were to be asked. The clear expectation was that usual procedural route would be followed; any application for Dr Kolkiewicz to give evidence would only be made following receipt of answers to those questions. Despite the mother having been represented, questions were never asked.

28. In Hague Convention proceedings it is unusual for the court to hear oral evidence. There is certainly no entitlement for a party to require an expert witness to be cross-examined. Having considered the content of Dr Kolkiewicz's report, I find it difficult to conceive how the mother could realistically have advanced her case through cross-examination. The professional assessment of the psychiatrist was that the mother fell a long way short of establishing that she would come within the type of exceptional case where the effect of a return on the mental health of the taking parent will give rise to an Article 13(b) situation. Accordingly, I do not consider the mother's inability to cross-examine Dr Kolkiewicz at this hearing to be a valid reason for an adjournment.

29. As for the failure of the mother to secure legal aid, Mr Shama submits that she has brought the situation upon herself by leaving it until late in the day to make the application. The mother's explanation for the application only having been made on 7 February 2025 was that she did not appreciate that it would take several weeks for her application to be determined and that her solicitors did not chase her to provide the information necessary to advance the application. In circumstances where she was represented by experienced legal aid solicitors, I find this proposition difficult to accept. I am not in a position to conclude, however, that the mother deliberately delayed making the application for legal aid for tactical advantage in these proceedings.

30. It is relevant in my view that, by contrast with some of the reported authorities, this is not a case where the mother has sought to change lawyers in the middle of a hearing. Until yesterday she was legally represented. I do not know what representations were made on her behalf to the LAA, but in circumstances where her former solicitor has informed the court that there is merit in her proposed appeal of the LAA's decision, it seems to me that the mother will have had at least reasonable expectation that she would secure representation for this hearing.

31. The mother is supported today by a McKenzie Friend, but in making her application for an adjournment, the strain of being unrepresented was apparent; she broke down in tears in the middle of her submissions.

32. I consider the application for an adjournment to be finely balanced. Ultimately, however, I have decided to grant it. The decisive factor, in my view, is that the decision of the LAA to refuse legal aid has only come through at the last minute. The mother therefore had very limited time to prepare to represent herself. Given the complexities of the case and her own vulnerability as an alleged victim of domestic abuse having to litigate in person, I am not satisfied that she can present her case effectively at such short notice.

33. I very much hope that the mother will be successful in her appeal over the grant of legal aid. If the appeal is unsuccessful, I would not regard that as a reason to grant a further adjournment. She now has six weeks to prepare for the hearing and should proceed on the assumption that she may again have to act in person.

34. For the avoidance of doubt, the preliminary views as to the merits of the mother's case which I have articulated in this judgment are not intended to bind the trial judge in any way. I have expressed the hope that the mother will be legal represented next time. Whether she is or whether she is acting in person she will have the opportunity to persuade the court that my preliminary assessment is wrong.

35. I also consider it vital in A's interests to ensure that during the period of any adjournment, his relationship with his father is not compromised. During the course of submissions, the mother made clear to me that there was no reason why A could not

stay in Poland with his father for a period in addition to having regular indirect contact and direct contact in England. I propose to direct this. The independent evidence all suggests that A has a close relationship with both of his parents. The father, as much as the mother, has been greatly involved in his day to day care and the Polish court determined that it was in A's interests for there to be a shared care regime in place between the parents.

36. Although my assessment of the merits of the parties' respective cases is not binding upon the trial judge, it does have some relevance to the interim position. In circumstances where I have determined that the mother should be granted an adjournment despite the fact that – upon a consideration of virtually the totality of the evidence which will be before the trial judge - I consider she is unlikely to be able to resist a return order, it is appropriate in my view that in the interim A should be able to spent time with his father in Poland. I will hear further submissions as to any safeguards which should be in place to enable the trip to happen.