Neutral Citation Number: [2025] EWHC 468 (Fam)

Case Nos: FA-2024-000319
FA-2024-000330

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 February 2025

Before :

MR JUSTICE CUSWORTH

- -

Between :

P	**1st Appellant**
- and -	
L	**2nd Appellant**
- and –	
S	**1st Respondent**
- and –	
T	**2nd Respondent**

- -
- -

Ms Joy Brereton KC and **Mani Singh Basi** (instructed by **Cartwright King**)
for the **appellant child**, 'P'
Mr Stefano Nuvoloni KC and **Mr Baldip Singh** (instructed by **Nelsons Law**)
for the **second appellant mother**, 'L'
The **first respondent father** in-person, 'S'
Mr Basharat Hussain for the **second respondent children**, 'P' and 'T', via their guardian (instructed by **Childcare LLP**).

Hearing date: 19 February 2025

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Judgment on Permission Application

This judgment was handed down remotely at 10.30am on 4 March 2025 by circulation to the parties or their representatives by e-mail and by release to The National Archives.

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This judgment was delivered in public. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Cusworth :

1. This is an application for permission to appeal the order of HHJ Cole made in the Worcester Family Court on 5th November 2024, made by both the 1st Respondent mother ('the mother') and the 2nd Respondent child, 'P', who is aged 14 ½ and is separately represented by leading counsel, Ms Brereton KC, for the purposes of this appeal. I have also heard submissions from leading counsel for the mother, Mr Nuvoloni KC, and briefly for counsel of the r.16.4 Guardian, Mr Hussain. The guardian was appointed by the court at the hearing when the order now under appeal was made. The father, who is the respondent to the potential appeal but the applicant in the proceedings before the Family Court, was present at the hearing by video link, but not represented before me, and made only brief factual observations at the hearing.

2. I have considered the bundle, which contains Skeleton Arguments from the appellants, and Grounds documents which are similar but not identical from each of them. I have also received during the course of the hearing a position statement produced by the guardian, to which I will make reference later, and a bundle of the authorities referred to in the written arguments.

3. On 28 October 2024, I made an order on the papers by which I rejected as being totally without merit an earlier appeal made by the mother against the order of HHJ Cole made on 4 October 2024, by which he had directed P's return to this jurisdiction from Slovakia, where he had been left by the mother in the care of the maternal grandmother, without consulting the father. That order was made under the auspices of the Children Act 1989, in circumstances where the mother had returned to the UK and was at court, and the matter was being restored before the same judge on 5 November 2024, for further consideration. I was satisfied, and remain so, that the court had jurisdiction to make that order under that provision. I am told that there was no reference to the Hague Convention 1980 at the hearing before HHJ Cole on 4 October.

4. The order which he then made was, however, not complied with, and P remains in Slovakia, notwithstanding that a further return order was made by the judge at the hearing on 5 November 2024. At that hearing, in addition to directing the appointment of a r.16.4 guardian, he also permitted P's separate representation, on the basis of his age and accepted *Gillick* competence, and heard what he described as 'forceful' submissions from counsel instructed on his behalf to the effect that P did not wish to return to this jurisdiction. Counsel for the mother, and for P, both argued in effect that rather than continuing with the Children Act 1989 proceedings whilst P remained in Slovakia, the 'better course' (to use the words of Moylan LJ in *Re: S (Abduction: Hague Convention or BIIa)* [2018] EWCA Civ 1226 at [47], would have been for Hague Convention 1980 proceedings to be commenced in Slovakia to seek to secure a return order.

5. I am of course very aware that the reason why that course was urged on HHJ Cole, and is being urged on me now as the primary ground of appeal, is that both prospective appellants hope that the 'child's objection' defence available under Art.13 of the 1980 Convention can be deployed to persuade the Slovakian court to decline to make a return order in P's case. I do not know whether that might be the outcome of such proceedings. I can see, having now latterly had sight of the guardian's position statement for this hearing, that there are genuine concerns in this case about whether the children's voices are 'currently their own', and about 'possible elements of alienating behaviour'. T is also expressing reasons for wishing to leave the UK which do not appear to tally with her school's report, and about which the guardian is not yet convinced. It is also the case that the father's relationship with the children appears to have been significantly interrupted now for over 2 years. This is not, therefore, on any view a straightforward case.

6. However, as Moylan LJ accurately observed in *Re S* (above) at [48]: '*The making of a summary return order does not necessarily lead to the expeditious return of a child'*. That has not happened in this case. When the matter was before HHJ Cole in October, the retention in Slovakia was very recent, a return date in England imminent, and both parents before him in court. Had the mother complied with his summary order, welfare decisions could have been taken calmly in light of the status quo, and I am clear that the judge had good reason to make the order which he did, under the 1989 Act.

7. Later however, and particularly now some 4 months later, the most expeditious basis for seeking a return order would appear to be the route offered by the Hague Convention 1980. Again, as Moylan LJ made clear of the Convention in *Re S* at [48]:

   'Apart from this being the "expected" route, it has certain real advantages. First, a higher degree of direct assistance is likely to be provided by the authorities in the requested state to a party bringing an application under the 1980 Convention than in respect of an application for the enforcement of an order. Secondly, there is a specific obligation on states to determine applications under the 1980 Convention within 6 weeks. There is no such specific requirement in respect of the enforcement of parental responsibility orders. Thirdly, Article 11 provides what is to happen if a non-return order is made. There is, therefore, a tailor-made procedure through which the courts of the respective Member States engage with the case and engage with each other. Additionally, any subsequent return order has an expedited enforcement procedure under Chapter III, Section 4 and, to repeat, "without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with" Article 42(2).'

8. Consequently, in the circumstances which obtained before HHJ Cole on 5 November 2024, there were significant grounds for the court to reconsider whether the order for a summary return made in October should be repeated:
    a. The previous order had not been complied with, and the most effective method compliance would likely be through some form of Slovakian proceedings; and
    b. P was now separately represented and, albeit subject to the caveat that the just appointed guardian had not yet had the opportunity to report, was certainly voicing objections through his counsel which indicated that his return without an application under the Hague Convention 1980 would be difficult to achieve.

9. It is also said by Mr Nuvoloni for the mother that she has been deprived of her 'essential statutory protection' by the court's proceeding under the Children Act, rather than under the Hague Convention. I remind myself that a child's objections are not an absolute defence under Art.13, but merely a gateway to the court exercising a discretion in relation to whether a return order is mandated in any particular case. P's wishes and feelings are a relevant concern under either scheme, upon which both he and his mother can rely, and which the court can weigh, and I am not persuaded that the appeal has a real prospect of success on that ground.

10. I have also been urged by Ms Brereton for P to consider whether HHJ Cole's order might be challenged on the basis that insufficient weight was given by him to P's expressed views and wishes in coming to his conclusion on 5 November. Whilst the note that I have of his judgment is brief, and his reasoning is given shortly, it is nevertheless clear that the judge did perform the balancing exercise required of him when exercising his discretion under the 1989 Act, and I am not persuaded that the appeal has a reasonable prospect of success on that ground. He considered the risk of harm to P as he was required to do, and expressly weighed his wishes and feelings, giving them 'significant weight'.

11. Further, the 'allocation' issue added by the mother is not on its own a sufficient or proportionate basis for allowing an appeal to proceed, and would in any event require reconsideration once the outcome of any appellate proceedings on other grounds are known.

12. However, I am satisfied that there are significant questions about the utility and propriety of ongoing Children Act 1989 proceedings in this jurisdiction whilst any application for a summary return order is made in Slovakia. I am clear that any application for such a return order is very likely to be better and more effectively pursued under the Hague Convention 1980, rather than by an attempt at reciprocal enforcement of a specific issue order in the Slovakian Courts. I am, therefore, persuaded that the appeal under Grounds 1 and 3 of the mother's

appeal, that are headlined '*Improper Application of the Children Act in Place of the Hague Convention'* and '*Failure to Consider Practicalities of Enforcing the Return Order'*, do have a real prospect of success, and I will give permission for the appeal under those grounds to proceed. These grounds are also essentially comprised within Grounds 1 and 2 of P's appeal. I do not grant permission under any of the other grounds advanced.

13. Finally, as I indicated in court during the hearing, and to the father who was listening but not represented, it seems to me now very clear that an application under the Hague Convention 1980 in Slovakia for the return of P does need to be made with some urgency. That would seem to be the best route to enable the short-term issues in relation to his circumstances to be determined, regardless of the court's previous orders in this jurisdiction. If that process is now begun, then a full hearing of this appeal may become unnecessary.

14. HHJ Cole's return order will remain stayed pending the determination of these appeals, which should now be listed at the earliest opportunity with a time estimate of 2 days, before a Judge in the Family Division, which should be me if such listing does not cause any significant delay in the process.

15. That is my judgment.