Neutral Citation Number: **[2020] EWHC 2784 (Fam)**

Case No: **FD20P00399**

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE MATTER OF A (A Child)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 October 2020

Before:

MR RICHARD HARRISON QC

Sitting as a Deputy High Court Judge

- -

Between:

RI	**Applicant**
- and -	
FA	**Respondent**

A (A Child) (Abduction: Exercise of Rights of Custody)

- -

Mr Mark Jarman (instructed by A L Law Solicitors) for the **Applicant**
Mr Jacob Gifford Head (instructed by All Family Matters solicitors) for the **Respondent**

Hearing date: 7 October 2020

Covid-19 Protocol: This judgment was handed down by the judge remotely by email. The date and time for hand-down will be deemed to be 2pm on 16 October 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was delivered in private. 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, must

ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MR RICHARD HARRISON QC:

1. These proceedings concern a boy, A, who is now aged 11. A was born in Italy and is an Italian national.

2. The applicant ('the mother') is A's mother; she too is an Italian national. She is represented by Mr Mark Jarman. The respondent ('the father') is A's father. He has dual nationality: he is partly Italian, although he originates from another jurisdiction. He is represented by Mr Jacob Gifford Head. I am very grateful to both counsel for the helpful submissions they have made to the court.

3. The mother seeks an order for the summary return of A to the jurisdiction of Italy pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the 1980 Hague Convention'). Her case is that A was wrongfully removed from Italy to England by (or on behalf of) the father on or about 16 October 2019.

4. The father resists the mother's application. First, he argues that his removal of A from Italy was not wrongful. Mr Gifford Head submits that such rights as were held by the mother under Italian law did not amount to rights of custody under the Convention. He also contends that the mother was not 'actually exercising' any rights of custody she may have had at the time. Alternatively, it is the father's case that the court has a discretion to refuse to make a return order on the basis of the following exceptions under Article 13 of the 1980 Convention:

   (a) he again relies on his assertion that the mother was not 'actually exercising' her rights of custody at the relevant time (Article 13(a)); and

   (b) he asserts that A objects to returning to Italy and has attained an age and degree of maturity at which it is appropriate to take account of his views (Article 13(2)).

   For completeness I should say that in his statement the father also sought to defend the application on the basis that A is '*settled*' in this jurisdiction. Although he did not go so far as to concede the point, it was quite rightly not pursued by Mr Gifford Head. In circumstances where the proceedings were issued less than a year after the date of the relevant removal, the issue of settlement for the purposes of Article 12 does not arise. The extent to which A is settled (in a non-technical sense) in this jurisdiction remains relevant, however, to any jurisdiction I may have to exercise under Article 13.

5. The case had been listed for a two-day final hearing on 5 and 6 October 2020. However, the previous week the parties were notified that the hearing would need to be adjourned to late November as there was no judge available. The parties then requested that the case should remain in the list on 5 October for a short PTR; it was in those circumstances that on that day it came before me. After being informed by the Clerk of the Rules that it would be possible for me to hear the case on 7 October 2020, I agreed to do so. I also dealt with various case management issues on 5 October: I refused an application to join A to the proceedings; I refused an oral application by the father for permission to instruct an unidentified expert in relation to Italian law; I refused an application by the father for permission to file a further statement. I also determined that the application should proceed on the basis of submissions without oral evidence from the parties.

6. Although I heard no oral evidence from the parties, I did have the benefit of hearing from the Cafcass officer, Ms Allison Baker. She met with A at her offices on 20 August 2020 for approximately an hour and prepared a report dated 15 September 2020. She gave evidence for slightly more than an hour, during which she was mainly cross-examined by Mr Gifford Head on behalf of the father. I would like to extend my gratitude to Ms Baker for making herself available to attend court at very short notice. As she was already committed to attend another hearing at 10.30 am, she agreed to appear before me at 9.30am and to conclude her evidence at 1pm. I found her evidence to be insightful. I deal with it in greater detail below.

7. I am also very grateful to Ms Baker for agreeing to facilitate a meeting between A and me after I acceded to an application on behalf of the father that I should adopt such a course. The meeting took place on 8 October 2020 at the Cafcass Offices in Bloomsbury. A was brought to the meeting by the father. I met with A for some 20 to 25 minutes together with Ms Baker; the father himself was not present during the meeting. Ms Baker took a note and prepared a summary of the meeting which was circulated to the parties; they then made further brief written submissions in relation to its content and other matters which I had raised with them. The overriding impression I gained from the meeting was that A is a charming boy. I was impressed with his fluency in English. He was very polite and well-mannered. He is a credit to his parents in this respect.

8. I explained to A my function as a judge and that I would need to take into account his views as well as what I was being told by various other people including his parents, Ms Baker and his school. A nodded politely when I was explaining this to him. By contrast with the first time he met Ms Baker, he did not become upset during this meeting. He did emphasise (albeit briefly) his wish not to return to Italy as he said considered his educational prospects to be better in England (as I set out more fully below). Ms Baker and I listened to what A had to say but did not question him about it.

9. I believe that it was useful for me to meet with A and I hope that he found the meeting of some benefit. However, for the purposes of my evaluation I do not attach significant weight to what A told me during the meeting, as: (a) it was not an occasion for information gathering, and (b) although Ms Baker prepared a summary she has not undertaken a further *analysis* of what was said by A let alone been cross-examined about it. I attach far greater weight to the content of Ms Baker's main report and to the oral evidence she gave.

Background

10. The mother was born in Italy. The father was born in another European country, but raised in Italy. The parents are both in their late thirties. The parties were married in Italy in 2009.

11. A few days before the marriage, A was born in Italy.

12. I was told by counsel for both parties that during the marriage the family lived in a rented house in X Street in a city in Italy. This was a small one-bedroom property. The paternal grandparents and the father's sister lived in the same street, virtually opposite the matrimonial home, in a significantly larger property (it has five bedrooms).

13. The father's case is that he was A's main carer during the marriage. He says that the mother preferred to work and to go out socialising. By contrast, her case is that his characterisation of the position gives a misleading impression; she had a job working in a bar and the nature of her work meant that she was unable to return home sometimes until the early hours of the morning. On her case, when she was not at work she would care jointly for A with the father or sometimes on her own.

14. Unfortunately, the marriage ran into difficulties which led to the parties separating in 2014. The father brought proceedings for divorce and separation which have a '2014' case number suggesting that they were commenced that year. The father says in his statement that he obtained a 'custody' order for the full-time care of A in 2015, but I think he must be mistaken about the year.

15. It is common ground (based upon what I was told by both counsel) that following the separation the parties continued to live in the same street. The mother remained in the former matrimonial home, the father moved to live with his family[1] in the larger property opposite.

16. The parties disagree strongly as to the amount of time which A spent with the mother from the time of their separation onwards. The mother's case is that A would spend time '*equally*' with the two of them. The father's case is that A lived with him and spent time with the mother sporadically.

17. The proceedings came before came before the Italian Court on 13 January 2017. The court decision records that the mother was '*in absentia*'. It is her case that she did not know about the hearing; however, the judgment appears to record that she was served with notice of the proceedings. The court '*pronounced the separation*' of the spouses and went on to make the following decision in relation to A:

    (a) It 'entrusts' [A] to both parents;
    (b) 'Parental placement' of [A] to the father;
    (c) The mother could 'see and keep with her' [A] on two evenings a week plus an overnight stay on alternate weekends as well as for longer periods during holidays.

    Although the word '*entrusts*' is used in the translation of the judgment I have seen, Mr Gifford Head accepts in his written submissions prepared for this hearing that pursuant to that order that '*the legal position is that "custody" of [A] is granted "to both parents with his physical placement to the father"*'.

18. The mother's case that is that she was not made aware of the judgment and that, despite the decision, A continued to divide his time roughly equally between his parents. The father's case, by contrast, is that A continued to see the mother infrequently as she had little interest in seeing him more often. He says that she spent time with A for only '*a fraction*' of that which the order provided, the general pattern being that she would visit A approximately once every three months at Easter, Christmas and on his birthday.

[1] The paternal grandfather and the father's sister have lived in the property throughout. I understand that there was also a period of time when the paternal uncle lived there. The paternal grandmother also lived at the property until she died (the date on which she passed away is not clear to me).

19. The chronology of events from 2018 onwards is far from clear from the statements which the parties have filed in these proceedings. I therefore invited counsel for both parties take instructions in order to clarify the position. It now appears that, apart from the controversial issue concerning the amount of time which A spent with the mother, the sequence of the events I recite below is essentially common ground.

20. In January 2018 (as I was told by Mr Gifford Head[2]) – i.e. approximately a year after the 2017 order was made - the father left Italy by himself and came to England. He works in the hospitality sector and had found a job in London. In either July or August 2018, the father was joined in London by his brother. Mr Gifford Head told me, on instructions, that A remained living with the paternal family in Italy; the father would fly back to stay with them roughly once every three months. A did not travel to England in 2018[3].

21. In 2019, as I was told, the father continued to come to Italy to stay with A every three months or so. In addition, in May 2019 A came to London to stay with the father for a week[4]. The mother agreed to the trip and A was brought to England by his aunt ('PA'), the father's sister. The father's case is that A was very much taken with England during that visit (he '*loved the UK and has dreamed of living in England and learning English*'). I get the impression from reading the father's statement that it was during this trip that he decided he should bring A over to London to live with him. He says '*I felt that the UK was close enough for us to travel back to Italy when we needed to and close enough to [the mother] as well*'. If A was to live with him in London, the mother '*could continue [to have] the same frequency [of contact] either by travelling to the UK or seeing him in Italy when we travel back to see family.*' He considered that the education which A could receive in the part of Italy where he was living was inferior to that available in England which has, in his view, an education system that is '*probably the best in the world*'.

22. After a week in London, A returned to Italy with PA. I was told by Mr Gifford Head that the father then made a two-week trip to Italy in the summer in order to stay with A around his birthday; I was also told that the next time he came to Italy was in early October 2019, roughly two weeks before the date upon which A was unilaterally removed to England.

23. During the period of 21 months between January 2018 and October 2019 when the father was living in England, A continued to live in Italy. It is common ground that for much of the time he was living in the paternal family home and that he also spent some of his time with the mother. The precise division of time between the two households is heavily in dispute. The mother's case is that at this stage it was *at least* equal (on her case by October 2019 A was living with her alone). The father's case – as I have set out above – is that A saw the mother infrequently.

24. I am not in a position to make a finding as to the amount of time A spent with the mother as I have not heard oral evidence from the parties. Based upon the limited evidence presented to me for the purposes of these summary proceedings, I consider the father's account is more likely to reflect the reality of the situation than the mother's. I reach this conclusion for the following reasons:

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[2] The father's written evidence refers to the move having been in 2018 but does not mention the month.
[3] Mr Gifford Head told me that the reference in the father's statement to his having done so in 2018 was a typographical mistake; the correct date was May 2019. I understand that this is accepted by the mother.
[4] See footnote 2 above

(a) The father has adduced evidence (in the form of 'Testimony Interviews' or 'depositions'[5]) from various supporting witnesses which generally corroborate his account, although I need to be cautious about attaching too much weight to these depositions as they have not been tested through oral evidence and the witnesses are friends or relatives of the father.

(b) More significantly, however, the father's case is consistent with the way in which A described his living arrangements to Ms Baker, the Cafcass officer. I accept her evidence when she agreed that had the mother been A's main carer, it would have been very difficult for him to have concealed from her the plan (about which he knew, but kept hidden from her) to leave Italy and come to England.

(c) It also seems to me to be likely A would have preferred to stay for the majority of his time in the larger paternal home, where he had his own bedroom, than in the mother's one-bedroom house.

(d) Finally, I do not think it is likely that the father would have gone to the trouble of obtaining an order in 2017 which provided for A to live with him, if the reality was that A was dividing his time equally between the parents and he intended that to continue.

25. Although I consider the father's account of A's living arrangements in Italy is more likely to reflect the true position, it is also my view that he has probably understated the amount of time that A spent with his mother. Given the proximity of the two homes, I think it is most likely that there was a fluid arrangement which enabled A to see the mother irregularly but either often or reasonably often (precisely how often, I am not in a position to say); he spent the bulk of his time living with his father until January 2018 and thereafter with his paternal family. That this was the case is consistent, in my view, with the fact that following the removal A had daily contact with the mother by video or telephone for some nine months until the commencement of proceedings in July 2020 (see below).

26. It is also of some significance, in my view, that in her deposition, PA (who, unlike the father, was living with A throughout the whole of the relevant period) stated that '*Only in the last months before [A]'s departure [to England]… [the mother] come more often to see and take her son with her.*' Although for the reasons I give above I need to be cautious about attaching much weight to her deposition generally, I consider that I can rely upon this concession (made in a statement relied upon by the father) as supporting the proposition that for at least a significant period leading up to A's departure in October 2019, A was seeing the mother more frequently than the father suggests. It is inconsistent with his evidence that the amount of time A spent with the mother in his final year in Italy was '*perhaps even less*' than previously.

27. That A had a fuller relationship with the mother than the father seeks to depict is also, in my view, consistent with Ms Baker's impression (based on her interview with A) that he has an '*established*' relationship with her. The conversations he described having with his mother in May and September 2019 about a proposed move to England also tend to

[5] These were referred to as 'depositions' by counsel during the course of submissions and, for convenience, I adopt that term – in a non-technical sense – to describe them.

indicate, in my view, that this was the case; her repeated opposition to A moving to England is not consistent with the notion that she was a largely absent and disinterested parent. Moreover, the mother's prompt action in contacting the Italian police as soon as she learned that A was missing suggests that, far from being disinterested, she took an *active* interest in A's well-being.

28. In her evidence, the mother states that she was first made aware of the 2017 judgment by her Italian Solicitors on 10 October 2019 (a few days before the removal). She does not explain why she was in touch with her solicitors at that time. It suggests that a disagreement may have arisen about A (or that she felt that one was about to arise) as to which she needed legal advice. It is consistent with the other evidence I have recited above that she was taking an active interest in A's life and was not, as the father suggests, a disinterested parent.

The removal of A to England

29. It is common ground that in the middle of October 2019 A was removed by or on behalf of the father to England without the knowledge or consent of the mother. There is (or may be) a small discrepancy about the date of the removal: the father says in his statement that it took place on 14 October; the mother says the 16th. I consider that the date given by the mother is correct, as it fits more easily with the sequence of events to which I refer below, although nothing turns on this issue. There is also a discrepancy between the father's account (he says that it was he who brought A to London) and what A told Ms Baker (that he was brought to London by his aunt PA). I do not consider that anything turns on this point.

30. As I have recited above, the mother's evidence is that by October 2019 A was *living* with her. For the reasons set out above, I am unable to accept this. I do, however, consider it probable that immediately prior to A's removal to England he was either *staying* with the mother or at least spending significant time with her. She gives an account in her statement of how she took him to school on the morning of the removal, expecting him to return to her at some point after school that day; on her account A had told her that before coming home he was going to go shopping with his aunt. This account seems plausible to me. It is consistent with the fact that after A failed to return to her home, the mother immediately made a report to the police; it is unlikely that she would have done so – at least not on the same day - unless she had been expecting him to come home.

31. The mother's case (not disputed by the father) is that later on 16 October 2019 she received a text message from the father informing her that he had brought A to London.

32. On 19 October 2019 the mother received a document which had been sent by the father by registered post on 15 October 2019. This appears to be a somewhat formal notification which looks as though it may have been drawn up by, or had input from, a lawyer. The translation of the message is in the following terms:

> Hereby, I [the father] that since our separation occurred more than 5 years ago I raised and taken care of our son [A] by myself and as I explained to you several times in our brief conversations that I found a job in England, motivated mainly by an economic improvement, all of it in the interest of our son, that [A] will come to stay with me at my rented flat in London – [address in North London]. As always told you face to face, you

can see him whenever you want and that I will take care of all the expenses, this in the best interest of [A].

[Name of city], 15.10.2019

It is notable that whereas the father suggests in this document that he has previously *told* the mother something about his desire to move to England, he does not assert that this is something to which she agreed.

Events following the move to England

33. By the time of A's removal to England the father had started renting a two-bedroom flat in North London (the other occupant was his brother). Accordingly, A began living with his father and uncle at that property, where he remains living today.

34. Approximately three weeks following the move (after half-term) A was enrolled at a local primary school, starting in Year 6. He completed half a term at the school in 2019. In 2020 he attended the school in person for most of the Winter term; the consequence of the Covid-19 pandemic was that, in common with schools across England, his school had to close on or about 20 March 2020. The school will have remained shut until June 2020; as a pupil in Year 6 he was able to attend school in person for at least some of the time from about the middle of June until the end of the summer term. I was informed by Mr Gifford Head, on instructions, that the during period of closure, the school offered some online teaching using Zoom; in the main, however, pupils were simply set tasks by their teachers to accomplish at home.

35. The school has provided information to the Cafcass officer which she has sent to the parties and the court. It records, amongst other matters, the following:

    (a) When he started at the school [A] was '*fairly new to English, but had quite a wide vocabulary, so it was hard to tell whether there were learning issues (particularly in Maths) or whether he simply didn't always understand instructions*.'

    (b) A's attendance was good and he was nearly always on time. His uniform was '*neat and tidy*' and he remembered his PE kit regularly.

    (c) A settled in very quickly to the class and made some friends, though he was often on his own in the playground. When asked, he always said he didn't mind this.

    (d) He was liked in class, although the school did not get much of a chance to get to know him and so he did not really have the opportunity to make close friends.

    (e) Although A joined the school with '*glowing reports of academic ability*' he was in fact of quite low ability. The school acknowledged that one reason for that may have been that he was fairly new to English. He struggled in maths.

    (f) A focused well in class and needed no particular strategies to help him focus – he presented as quite mature for his age.

(g) The father was always polite, interested and knowledgeable about [A]'s work. He attended parents' evenings and on a couple of occasions telephoned the school to ask how A was doing.

36. A finished at the primary school in July 2020. In September 2020 started Year 7 at a secondary school. It can thus be seen that over the past year he has suffered enormous disruption to his education. He has attended three different schools, been educated in two different languages (including one with which he initially struggled) and experienced the prolonged period of lockdown between March and June during which the educational provision he received will have been limited.

37. Since A was brought to England in October 2019 he has not seen his mother at all and the indirect contact he has had with her has become limited. Whereas previously the father had been returning to Italy every three months or so, he has not done so once in the last year. I accept the point made by Mr Gifford Head that his ability to travel has been impeded for a number of reasons: first, by the Covid-19 situation which (as is a matter of public record) begun having a serious impact in Italy some time before the start of the English lockdown; secondly, by the travel restrictions which were imposed in the United Kingdom until the beginning of July 2020; and thirdly by the removal of his passport pursuant to the location order made on 3 July 2020. However, this does not, in my view, adequately explain why he did not travel back to Italy over the 2019/20 Christmas holidays or over the February 2020 half-term.

38. So far as indirect contact is concerned, the mother's case is that in the initial period following the removal she had regular video or telephone calls with A on an almost daily basis. On her case, he informed her that he did not wish to be in England and was missing both her and his school friends. He told her that he was struggling at school and finding it difficult to communicate with her peers. Her evidence in this respect is consistent with the information that has been provided by the school. She describes that over time her contact gradually reduced as A would not respond to her messages; despite that, she continued to call every day. The mother says in her statement that '*for the past two months*' (i.e. since the proceedings were commenced in early July) she has had no contact at all with A. This is so, despite the father having agreed – as is clearly recorded on the face of the order dated 8 July 2020 - '*to the daily telephone, skype and/or facetime contact between [the mother] and [A] and that he will not prevent such contact* ***continuing***'. I emphasise the last word as I infer from it that it was the agreed position that this level of contact had been taking place up until that point.

39. As I indicated above, following the removal, the mother reported the matter to the police on 16 October 2019. This was supplemented with a further complaint on 17 December 2019. So far as I can tell from the papers, apart from those two complaints, she did not take any active steps to secure A's return to England for nearly six months.

40. On 2 April 2020 the mother signed a request to the Italian Central Authority to initiate proceedings under the 1980 Hague Convention. The Italian Central Authority transmitted the application to the International Child Abduction and Contact Unit (ICACU), the Central Authority for England and Wales, by letter 26 May 2020. On 23 June 2020 ICACU instructed the mother's solicitors to initiate proceedings under the Child Abduction and Custody Act 1985. At a without notice hearing on 3 July 2020

Cohen J made a location order and listed a return date. At that return date, on 8 July 2020, Roberts J gave directions and listed the matter for a final hearing.

41. Mr Jarman was unable to explain the delay of some five and half months before the mother took the initial step in the Hague process. He made the general point that it is often the case that left behind parents are disadvantaged by a lack of legal advice and/or inadequate legal advice. While I accept that general proposition, and also take into account the additional difficulties likely to have been caused by the Covid-19 situation, I am not convinced that it provides an adequate explanation for this delay. It easy to accept that the mother may not have received timely advice about the 1980 Hague Convention, as it is often the case that the Convention is unfamiliar even to specialist family lawyers. It is more difficult to understand why seemingly *no* steps were taken by the mother; for example, she did not seek to restore the case urgently before the Italian court (bearing in mind that she was in touch with her Italian solicitors a few days before the removal). While I accept that her contact with her lawyer on 10 October 2019 supports her case that she was playing an active role in A's life, her failure to take active steps post removal is, in my view, inconsistent with the notion that A was living with her even for half of his time.

The law

Overview of the 1980 Hague Convention

42. The aims and objectives of the 1980 Hague Convention are recorded in its preamble and in Article 1. They can be summarised as follows:

    (a) To protect children from the harmful effects of being subject to a wrongful removal or retention.
    (b) To ensure the prompt return of abducted children to the country of their habitual residence.
    (c) To respect rights of custody and rights of access held in one Contracting State in other Contracting States.

    One of the ways in which the Convention is intended to secure its objectives is by deterring would-be abductors from wrongfully removing or retaining children.

43. The welfare of the child is not 'the paramount consideration' in proceedings under the 1980 Hague Convention. However, the preamble records the general principle that '*the interests of children are of paramount importance in matters relating to their custody*'. In *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 it was held by the Supreme Court that each of the following is '*a primary consideration*' in Convention proceedings:

    (a) The best interests of the children subject to the proceedings;

    (b) The best interests of children generally.

44. The Supreme Court explained at paragraph 18 of that decision that a faithful application of the provisions of the Convention will ensure compliance with Article 3.1 of the United Nations Convention on the Rights of the Child (which provides that in all actions concerning children, the best interest of the child shall be a primary consideration).

45. The 1980 Hague Convention applies to any child under the age of 16 who is habitually resident in a Contracting State. The mechanism of the Convention operates when a child is subject to 'a wrongful removal' or 'a wrongful retention', concepts which are partially defined in Articles 3 and 5 (to which I refer further below).

46. Where a child is subject to a wrongful retention and an application for the return of the child is lodged within a year of the date of the retention, the position is governed by the first paragraph of Article 12. This provides that the court must order the return of the child forthwith. The return in question will almost always be to the state in which the child was habitually resident at the time of the retention.

47. Despite the mandatory terms of Article 12, it has to be read in conjunction with Article 13. This provides (so far as relevant to this case) that:

(h) 'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

(i) *a)* the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or *b)* ...

(j) The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.'

48. The two exceptions under Article 13 relied upon by the father in this case can be conveniently referred to as 'no actual exercise of rights of custody' and 'child objections'. Before considering them, I shall first deal with the issues raised under Article 3.

Wrongful removals under Article 3

49. Article 3 of the Hague Convention provides as follows:

(k)

(l) The removal or the retention of a child is to be considered wrongful where -

(m) *a)* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and *b)* at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

(n) The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

50. It can thus be seen that a person seeking the return of the child based upon an alleged wrongful removal must satisfy the court of two things: first, that the removal was in

breach of their rights of custody (held as described in Article 3(a)); secondly, that at the time of the removal those rights were either (i) actually exercised, or (ii) would have been so exercised but for the removal (Article 3(b)).

Rights of custody

51. The 1980 Hague Convention does not contain a comprehensive definition of the expression 'rights of custody'. Article 3, as can be seen above, sets out non-exhaustively some of the ways in which such rights may arise. Article 5(a) provides that for the purposes of the Convention '*"rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.*'

52. As Cobb J recently recorded in *NT v LT* [2020] EWHC 1903 (Fam) '*In many places in our domestic case law, judges have maintained that the meaning of the term is established by the 'autonomous' law of the Convention, that is to say its definition is not governed by differing national laws on the topic*.' By way of example of this principle, Cobb J cited the judgment of Lord Donaldson in *C v C (Abduction: Rights of Custody)* [1989] 1 FLR 403 where he said at 412:

"I wish to emphasise the international character of this legislation. The whole purpose of such a code is to produce a situation in which the courts of all contracting states may be expected to interpret and apply it in similar ways, save insofar as the national legislatures have decreed otherwise. Subject then to exceptions…the definitions contained in the Convention should be applied and the words of the Convention, including the definitions, construed in the ordinary meaning of the words used and in disregard of any special meaning which might attach to them in the context of legislation not having this international character."

53. Despite Lord Donaldson's reference to construing the expressions in the Convention according to '*the ordinary meaning of the words used*' it is in fact the case that the courts, both in England and Wales and in other jurisdictions, have construed rights of custody as having a far wider meaning than would be apparent to a lay person. The expression extends beyond notions of physical custody of a child and has been held to encompass rights akin to parental responsibility under English domestic law. As Butler-Sloss LJ explained in *In Re F (A Minor)(Abduction: Custody Rights Abroad)* [1995] 3 WLR 339, [1995] Fam 224:

> "It is the duty of the court to construe the Convention in a purposive way and to make the Convention work. It is repugnant to the philosophy of the Convention for one parent unilaterally, secretly and with full knowledge that it is against the wishes of the other parent who possesses "rights of custody," to remove the child from the jurisdiction of the child's habitual residence. "Rights of custody" within the convention are broader than an order of the court and parents have rights in respect of their children without the need to have them declared by the court or defined by court order. These rights under the Convention have been liberally interpreted in English law."

54. The liberal or wide interpretation of the expression reflects the intention of those who drafted the 1980 Hague Convention. This is apparent from paragraph 71 of the Explanatory Report, where Professor Eliza Pérez-Vera stated:

(o) '…it should be stressed now that the intention is to protect *all* the ways in which custody of children can be exercised. Actually, in terms of article 3. custody rights may have been awarded to the person who demands that their exercise be respected, and to that person in his own right or jointly. It cannot be otherwise in an era when types of joint custody, regarded as best suited to the general principle of sexual non-discrimination, are gradually being introduced into internal law. Joint custody is, moreover, not always custody *ex lege*, in as much as courts are increasingly showing themselves to be in favour, where circumstances permit, of dividing the responsibilities inherent in custody rights between both parents. Now, from the Convention's stand- point, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise.' (emphasis in italics in the original text)

55. Although the courts have been astute to maintain a distinction between rights of custody and rights of access, it has been held where a parent has the right to veto the removal of a child from the jurisdiction, even if that is the extent of their parental rights, it will amount to a right of custody: *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619. Where as a matter of English law, two parents share parental responsibility for a child, each of them has a right of custody under the Convention (even if there is a 'lives with' order in favour of one parent and not the other). Although there are some Contracting States in which there exists a clear division of the bundle of parental rights between two parents, in other states parental rights of 'custody' (in the wider sense of the term) is vested jointly in both parents. As Baroness Hale explained at paragraph 26 of *Re D (A Child)*:

> ''States' laws differ widely in how they look upon parental rights. They may regard the whole bundle of rights and responsibilities which the law attributes to parents as a cake which can be sliced up between the parents: one parent having the custody slice, with the package of rights which that entails, and the other having the access slice, with the different package of rights which that entails. This is by no means an unusual way of looking at the matter. Alternatively, the state may regard the whole bundle of parental rights and responsibilities as inhering, and continuing to inhere, in both parents save to the extent that they are removed or qualified by the necessary effect of a court order or an enforceable agreement between them.'

56. England and Wales, where parents now typically share parental responsibility, is an example of the second category of case there described by Baroness Hale.

57. Mr Gifford Head submits that in this case the requirement by the mother to demonstrate that she has rights of custody '*is not made out*'. This is an ambitious submission given that in his written submissions he quite rightly accepted that under the 2017 order the '*legal position*' was that custody was granted to both parents. In my judgment, quite apart from the express terms of the relevant part of the 2017 order (as summarised above), the evidence provided by the Italian Central Authority clearly establishes that the mother had rights of custody. The letter from the Italian Ministry of Justice dated 26 May 2020

refers first to the fact that the parties were awarded '*joint custody*' under the 2017 order. It goes on to state in unequivocal terms that:

> 'Father's unilateral and arbitrary conduct may be qualified as an international abduction since the transfer occurred unbeknownst to, and without the consent of, the mother who – being co-holder of custody right – should have been informed to give her consent.'

58. The letter then sets out the terms of Section 316 of the Italian Civil Code which provides that: '*Both parents are entitled [to] parental responsibility and they shall exercise it by mutual agreement, taking into account their child's abilities, predispositions and expectations. Parents shall decide their child's habitual residence by mutual agreement*.'

59. It can thus be seen that the Italian parental responsibility is similar to the concept under the domestic law of England and Wales. As the Ministry of Justice explained in their letter, as a result of the removal, the mother has been prevented from having regular contact with A (although I observe that as a right of *access* this is not strictly relevant to the issue under consideration), and from taking part in his upbringing and education.

60. I therefore have no hesitation in concluding that (a) the mother's rights under Italian law amounted to rights of custody for the purposes of the 1980 Hague Convention, and (b) the removal of A was in breach of those rights.

61. That is not, however, the end of the matter.

Actual exercise of rights of custody

62. In order for the removal to be 'wrongful' it is necessary for the mother to satisfy the second limb of Article 3 relating to the actual exercise of rights of custody. Mr Gifford Head contends that she has failed to do so.

63. Article 3(b) is unusual in that, by contrast with the majority of the key concepts under the Convention, there a very few authorities in which it has been considered. To repeat, it requires the applicant to establish that a removal or retention was not only in breach of rights of custody but that those rights were *actually exercised* at the time or would have been but for the removal or retention.

64. Apart from Article 3(b), the 1980 Hague Convention also contains reference to the actual exercise of rights of custody in Article 13(a). The latter provides that the court has a discretion to refuse to order a return if it is established that '*the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal*'.

65. Both parties referred me to the decision of the House of Lords in *Re H (Minors) (Abduction: Custody Rights)*; *Re S (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476. In that case, the court conducted an analysis of the concepts of a wrongful removal and retention and in particular, as Lord Brandon put it, '*whether removal or retention means removal from or retention out of the care of the parent having custodial rights, or removal from or retention out of the jurisdiction*'. It was argued that the terms of Article 3(b) were '*difficult to reconcile*' with the notion that removals and retentions were

confined the latter proposition. In rejecting that argument, Lord Brandon made the following observation:

> 'In my view, art. 3(b) must be construed widely as meaning that the custodial parent must be maintaining the stance and attitude of such a parent, rather than narrowly as meaning that he or she must be continuing to exercise day-to-day care and control. If the narrow meaning was adopted, it could be said that a custodial parent was not actually exercising his or her custodial rights during a period of lawful staying access with the non-custodial parent. That, as it seems to me, cannot be right.'

66. It is important to remember that in so stating, Lord Brandon was not purporting to conduct a full analysis as to the meaning of Article 3(b); he was explaining why he considered the reliance of upon that article in support of a different proposition to be misplaced. The example he offered to illustrate his point concerned the position of a parent who has the physical care of the child. He did not consider in terms the position where the relevant 'right of custody' does not include caring physically for a child but involves being a holder of parental responsibility. Nevertheless, it seems to me that the broad point he was making – that the Article must be construed widely – is plainly correct and consistent with the purpose and philosophy of the Convention.

67. In *Ryan v Phelps* [1999] NZFLR 865, the New Zealand court was concerned with an application for the return of the children to Australia under the 1980 Hague Convention, the children having been taken to New Zealand by the father without the mother's consent. The mother, who shared parental responsibility with the father as a matter of Australian law, had moved to the United States of America. The judge at first instance found that she had to a very large extent '*washed her hands*' of the children; he held that it would be '*unreal*' to regard her as actually exercising any right of custody within the meaning of the Convention at the time of removal, commenting that were he to hold otherwise '*it is difficult to conceive of any situation where a parent could not invoke the Hague Convention where a custodial parent has removed a child overseas*'. The Court of Appeal overturned his decision. Keith J, delivering the judgment of the court, held that it was not sufficient to find that the mother had largely washed her hands of the children. As a holder of parental responsibility, she retained the right to determine the children's place of residence. Had she been asked, it is highly likely that she would have exercised her right of veto over a move (as had been held at first instance). After holding that the judge had erred in failing to take account of the relevant provisions of Australian law, Keith J went on to say:

> 'That particular error of law (essentially a failure to take express account of the relevant Australian law) is to be related to the general one: the failure to give effect to the fact that the Convention is concerned with "rights of custody" and not with "custody". **A breach of any one of the bundle of distinct rights involved with custody may provide a basis for a finding of wrongful removal.** The distinct, precisely recognised, right of custody in issue in this case is, of course, the mother's right to determine her children's place of residence.' (my emphasis)

68. In *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515, it was argued at first instance that, pursuant to Article 13(a) of the Convention, the father was not actually exercising his rights of custody in relation to two of the children in circumstances where

he had not seen them for some nine or ten years prior to the date of the removal. Singer J followed the decision in *Ryan v Phelps* and rejected this argument. It was clear that the mother had kept the move secret from the father deliberately lest he took steps to delay or frustrate it. Thus, there was every reason to suppose that had he known of her plans, he would have exercised his right to prevent the removal. As Hale LJ recorded in her dissenting judgment in the Court of Appeal (at paragraph 15), there was no appeal against this aspect of his decision.

69. In *JS v SS* [2003] SLT 344 the Scottish courts were concerned with a case in which following the breakdown of the parties' relationship the father had self-harmed to such an extent that he had to be removed to hospital. While he was in hospital the mother, without informing him, removed the children to Scotland. Lord Clarke, sitting in the Outer House of the Court of Session, rejected the contention that the father had not actually been exercising his rights of custody at the time of the removal. He held that:

> 'Having regard, however, to the overall purpose of the Convention, very little is needed, in my judgment, to be shown by an applicant to satisfy the provisions of Art 3(1)(b) where a breach of rights in terms of Art 3(a) is established.'

Then, after citing the passage from the speech of Lord Brandon to which I have referred above, Lord Clarke continued:

> 'The purpose of the test in Art 3(b) can be said, I consider, to be simply to prevent applications being made by persons who have not played any reasonably meaningful role in the life of the children before their removal. Having regard to the spirit and purpose of the convention looked at as a whole it would, in my opinion, be wrong, for example, by taking too narrow and technical an approach to the provisions of Art 3(b), to hold that a person who is in hospital and has left the custody of the children to one of his or her relatives during the time in hospital was not actually exercising his or her rights of custody.'

70. In *Re A (Abduction: Rights of Custody: Imprisonment)* [2004] 1 FLR 1, Dame Elizabeth Butler-Sloss, P was concerned with an issue as to the actual exercise of rights of custody for the purposes of Article 3(b) (as opposed to Article 13(a)). An Australian court had made an apprehended violence order ('AVO') against the father. The AVO was the equivalent of a non-molestation order. It included prohibitions on the father approaching within 100m of the mother's home or from contacting her save for the purposes of exercising any access agreed in writing or ordered by the court (there was no agreed access and none had been ordered). The father breached the order and was sentenced to a two-month term of imprisonment. While he was in prison the mother removed the child to England. The President followed the decision in *Ryan v Phelps*. She held that although the terms of the AVO and the father's incarceration had inhibited his ability to exercise his parental rights, he retained the right to give or withhold consent to a removal of the child from the jurisdiction. She went on to conclude:

> 'The mother, by her secret removal of the child from the jurisdiction – and it is significant in such a case that she very, very carefully departed without letting the father know about it – was, in my judgment, in breach of the rights of custody

> which would have been exercised but for the removal of A from the jurisdiction of the Australian family court.'

In *H v H* [2003] IR 390, the Supreme Court in the Republic of Ireland similarly concluded that the fact that a parent was serving a term of imprisonment could not be said to divest them of a legally established right of custody.

71. In *Re L (A Child)* [2006] 1 FLR 843, Bennett J considered the decisions in *JS v SS* and *Re A*. He held that '*the mere fact that the father was incarcerated in a Spanish prison would not and does not have the effect of establishing any proposition that he could not exercise or was not exercising his rights of custody*' in circumstances where he continued to have parental authority under Spanish law.

72. Mr Gifford Head submits that it is clear that the mother has not established that she was actually exercising any rights of custody before his removal to the UK. He contends that this is demonstrated by numerous factors including (a) her failure to engage with Italian proceedings, (b) the effect of the 2017 Italian order, (c) the evidence of the father and the witnesses who have made depositions on his behalf setting out the limited role played by the mother in A's life, (d) the letter (which I have cited above) written by the father immediately prior to the removal which was received by her shortly afterwards, (e) A's '*lack of connection*' with his mother and his limited involvement with her. He seeks to persuade me that in combination these factors establish that, in the words of Lord Clarke, the mother has not played '*any reasonably meaningful role*' in A's life.

73. I reject Mr Gifford Head's submission. First, I do not consider that the words used by Lord Clarke represent the test which I need to apply. The words of the Convention are plain, in my view, and to apply a slightly different test would be an unnecessary elaboration or gloss. Secondly, and more importantly, it is clear on that on the facts of this case the mother was actually exercising her rights of custody at the time of the removal, even if one considers the position in terms of the test urged upon me by Mr Gifford Head. As will be apparent from my evaluation of the facts, I consider it clear that the mother was playing a role in A's life which was more than '*reasonably meaningful*'. I consider that she was important figure in his life and that she continues to be so. In making my determination that the mother was actually exercising her rights of custody, I have regard to the following matters in particular:

    (a) By contrast with the position in *Ryan v Phelps* and *Re A*, in this case there is evidence (see paragraph 14 of the Cafcass report) that the mother was asked by A about the possibility of moving permanently to England shortly before his visit here in May 2019. She made it clear that she opposed the idea. He raised the issue a second time in September 2019 in front of one of his friends when the mother gave him the impression that she believed he was just joking.

    (b) The removal was undertaken in a clandestine fashion. The reason for this can only have been that the father knew that the mother would take steps to prevent the move had she been alerted to his plans. As a consequence, A left Italy without even having the opportunity to say goodbye to his mother. He believes that, as he put it to Ms Baker, had he sought to do so '*she would have just denied [sic] and grabbed [him]*'.

(c) The mother's extremely prompt action in reporting the matter to the police is further evidence, in my judgment, that she would have taken steps to prevent the move had she been told about it in advance.

74. Neither counsel was able to refer me to any case in which a parent with rights of custody has been found by the court to be '*not actually exercising*' those rights. It is of course possible to conceive that such a case may arise. However, that such a finding has yet to be made in the 35 years since the Convention was incorporated into English law, reflects perhaps that a parent who could be said to be '*not actually exercising*' any rights of custody is inherently unlikely to react to the removal or retention of their child by bringing a Hague Convention application.

75. I therefore have no hesitation in concluding that the removal of A from Italy on or about 16 October 2019 was 'wrongful' under Article 3 of the 1980 Hague Convention. The consequence of that finding is that I am bound to order his return to the jurisdiction of Italy forthwith unless I the father can establish one of the exceptions in Article 13.

Article 13(a): no actual exercise of rights of custody

76. The father relies upon the failure by the mother to exercise her rights of custody both under Article 3 and under Article 13(a). I have to confess that I find it very difficult to conceive of a case in which a parent could be held to be actually exercising rights of custody under Article 3 but not under Article 13(a) (notwithstanding the fact that Article 3, but not Article 13(a), contains reference to what the position would have been but for the wrongful removal or retention).

77. On the facts of this case, for the reasons set out above, I think it is clear that the mother was actually exercising her rights of custody. Therefore, the exception in Article 13(a) is not established.

Child objections

78. The leading authority on the child objections defence – at least so far as the so-called 'gateway' stage is concerned - is *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26. As to the exercise of discretion, the leading authority is the House of Lords decision, *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55.

79. In *Re Q & V (1980 Hague Convention and Inherent Jurisdiction Summary Return)* [2019] EWHC 490 (Fam) at paragraph 50 Williams J summarised the relevant principles to be derived from both of the *Re M* cases as well as the later decision of *Re F (Child's Objections)* [2015] EWCA Civ 1022 as follows:

> i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.
>
> ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Article 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.

iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.

iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.

v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.

vi) Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention considerations.

The same summary appears in the judgment of MacDonald J in *B v P* [2017] EWHC 3577 (Fam), [2018] 1 WLR 3657, to which I was referred by Mr Gifford Head. I respectfully agree with the summary and adopt it.

80. As Williams J also pointed out at paragraph 51 of *Re Q & V*, in some cases an objection to a return to one parent may be indistinguishable from a return to a country.

Does A object?

81. In my judgment, A's expressed opposition ('*opposes*' was the word used by Ms Baker in her oral evidence) to returning to Italy amounts to an objection for the purposes of Article 13 of the Convention. Ms Baker described it at paragraph 22 of her report as '*a clear wish not to return to Italy to live*'. She maintained that position in her oral evidence. I do not consider that the views A expressed can be classified as a mere preference. He told Ms Baker that he was '*really happy*' living in the UK and that if he was forced to return this is something he would '*try to deny*' and avoid thinking about. Significantly, A reacted with visible shock and tears when he learned from Ms Baker that his expressed views would not necessarily prevail. This demonstrates, in my view, a strength of feeling indicative of the fact that he holds a genuine objection and was not merely parroting a rehearsed script.

Age and degree of maturity

82. I have no hesitation in concluding that A has attained an age and degree of maturity at which it is appropriate to take account of his views. The authorities make clear that '*taking into account*' in this context does not mean '*upholding*'. There are cases in which the objections of children as young as six have been taken into account for the purposes of Article 13. In those circumstances it would be extremely difficult to argue that the objections of eleven year old boy of reasonable maturity did not meet the threshold.

Discretion

83. Having found that A objects and that he has attained the requisite age and degree of maturity, I have a discretion as to whether or not he should be returned. My discretion is 'at large'. I must weigh up his objections alongside the policy of the Convention and wider welfare considerations.

84. I begin with the policy of the Convention. I accept the submission made by Mr Jarman that in cases such as this, where a removal has been procured by a deception in full knowledge that a parent would object if made aware it was to happen, the policy of the Convention carries substantial weight. On the other hand, the weight to be attached to this factor is diminished, in my view, by the delay on the mother's part in initiating the Hague process. Her delay of five and half months in completing the necessary paperwork meant that eight and a half months had elapsed before proceedings were issued in this jurisdiction. Although I bear in mind the points made by Mr Jarman about the difficulties applicants sometimes encounter in obtaining legal advice, it is difficult in my view to describe this as a 'hot pursuit' case. From A's perspective the reasons for the delay are irrelevant; the consequence of the delay is that I am now considering the application in circumstances where he has lived in London for a year and has become accustomed to living here. In all of the circumstances, in my judgment the policy of the Convention should carry a significant degree of weight; but it is not necessarily decisive of the outcome.

85. I next turn to consider the nature and strength of A's objections. As Baroness Hale put it at paragraph 47 of *Re M* I need to consider, amongst other matters '*the extent to which they are "authentically [his] own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to [his] welfare'.*

86. In my judgment, A's objections are genuinely held and so, in that sense, they are '*authentically his own*'. I consider it likely that his wish to live in England will have started to develop from early 2018 onwards when his father came to live here. He told Ms Baker that the father first spoke to him about the prospect of living in England towards the end of 2017. If, as I consider probable on the evidence, A had been living mainly in the paternal home, it is likely that he will have missed his father when they started living substantially apart from 2018 onwards. According to what A told his Ms Baker there were two occasions on which he raised with his mother his wish to live in England. This cannot have been easy for him to do and indicates, in my view, a degree of conviction on his part.

87. I also consider that the physical and tearful reaction shown by A when Ms Baker informed him his views might not prevail is a further indicator that his views are genuinely held (although – as Ms Baker suggested in her oral evidence – one possible explanation is that it is important for children to be clear about what is to happen next; she was not able to offer him that clarity). Mr Gifford Head suggested that the likely cause of A's upset was a feeling on his part that his autonomy was not being respected. Although this is possible, I consider it more likely that he was upset at the prospect of having to live permanently with his mother in Italy while his father remained in England (which, at that time, he believed to be at least a real possibility if a return order were to be made).

88. On the other hand, in my judgment A's objections are the product of significant influence on the part of his father. Apart from the week he spent in England in May 2019, A had no knowledge of what it might be like to live in England. His wish to do so at that time will have been based only partly on the fact that he was missing his father; it will also have been because, over a prolonged period of time, his father was selling to him the idea of an exciting new life in another country; a life where he could '*master his English*' and where he would have access to an education system which the father considers to be '*probably the best in the world*'. In my judgment, the father acted irresponsibly and contrary to A's interests in seeking to influence him in favour of a move to London, knowing (as he must have done) that the mother opposed it. It was also seriously disrespectful to the mother, and a strong indicator that the father has no proper appreciation of her importance as a parent for A.

89. Worse, the father recruited A as a co-conspirator in the wrongful removal. A told Ms Baker that the removal '*was planned a long time ago…It was my decision to come*' and that he had failed to say goodbye to his mother as she would have stopped him from leaving had he done so. As Ms Baker said in her oral evidence, A had known he was leaving and had said goodbye to the city in which he lived. In my judgment, this all demonstrates a degree of manipulation on the father's behalf which was seriously harmful to A's emotional interests. It has placed A in a position where he no doubt feels partly responsible for what occurred. By putting A in a situation where he had to maintain a secret from his mother about the anticipated removal (although it is not clear for how long he was placed in that position), the father cast her in the role of the enemy: she was the roadblock to the promise of a new exciting life in London and to the better future that lay ahead for A.

90. The father moved to England in search of a better life for himself. He wanted also to achieve a better life for A. His belief is that A will have far better prospects in his adult life if he grows up in London. The father places a high premium on ensuring that A's educational needs (as he sees them) are met; he fails to recognise, however, A's greater need for emotional balance in his life. He needs to be able to enjoy the love and support of *both* his parents; he needs to have a good relationship with each of them.

91. The degree to which A has been manipulated by the father is apparent from his interview with Ms Baker. Although I have concluded that A does genuinely object to returning to Italy, his reasons for objecting are largely his father's reasons. His views about the mother lack balance, as Ms Baker has stated; he speaks about her in unequivocally negative terms. He has aligned himself with his father's dismissive opinion of her. It is striking that he was unable to find anything good to say about her (although he did, at least, acknowledge that he would miss her '*only moderately*' if he remained in England). I do not accept Mr Gifford Head's submission that A's expressed views are *likely* to reflect his genuine experience of life with his mother. Although I cannot dismiss this as a *possibility* (and Ms Baker acknowledged that it was a possibility), it seems to me that were that the case it is unlikely that he would have enjoyed the frequent level contact by video and/or telephone which continued from the time of the removal until these proceedings were initiated in July 2020. Moreover, as the parent with primary care it was, in my view, incumbent upon the father to promote A's relationship with his mother and to ensure that he held a positive view of her. Instead of acting as a responsible parent, it is apparent from what A told Ms Baker (see paragraph 15 of her report) that the father

has been sharing information with A about these proceedings and using it to portray the mother as a liar.

92. It seems to me that A's main reason for wishing to live in England is his desire to remain living with his father. When he spoke to Ms Baker, he clearly believed that if he returned to Italy he would either be forced '*by the government*' to live with his mother or alternatively that he would be living with the paternal family without the father. He was clearly anxious about either prospect (Ms Baker explained in her oral evidence that he viewed them as long-term prospects). Notably, in this context, A told Ms Baker '*so I feel sad for my dad, he waited to have this opportunity for me to live with him*'. This again suggests that the father has placed him a position where he feels burdened by the decision which I have to make. That said, it is very much to the father's credit that he has agreed to return to Italy with A, if that is what I order. A told Ms Baker that were the father to do so permanently A would feel better about living there again (although he remained anxious that the father would have to give up his job in England). In her oral evidence Ms Baker expressed the view that the father's agreement to return would '*clearly help [A]*'.

93. A's other expressed reason for wanting to live in England – articulated when he met with me - is his belief that his educational prospects are better here than in Italy. This reflects his father's view. Neither Ms Baker nor I asked him any follow up questions when he said during his meeting with me that '*the school systems [in the city where he lived in Italy] are kinda weak. It's much better here, better options, you have Oxford here… good English here.*' However, I find it difficult to accept that at the age of eleven A could have formed a reasoned view about the competing merits of the Italian and English educational systems. I do, though, accept that after a difficult start to his education in England, A has now become more settled since recently starting at secondary school and that he has made some friends. Ms Baker agreed in her evidence with the proposition that the problems A encountered at primary school were '*erased*' by his fresh start at secondary school and by the good progress he has made with his spoken English.

94. Leaving aside the question of the degree to which A's views coincide with wider welfare considerations (which I address further below), I have come to the conclusion that A's objections are such that they should carry some degree of weight. He is aged eleven: not an age where a child's views are necessarily considered decisive; but equally not a young child whose views might more easily be dismissed. He has maintained his view consistently; in part, it is likely to reflect a wish to be living in London with his father which dates from well before the removal. On the other hand, A's views are substantially tainted by serious manipulation on the part of the father and are (or, at least, were) based to a significant upon his belief that returning to Italy may result in a long-term separation from his father.

95. Overall, therefore – before turning to issues of welfare – my conclusion is that the views expressed by A carry similar weight to the policy considerations to which I have referred above. Neither is decisive of the outcome.

96. I turn now to consider the wider welfare considerations. There are four aspects of A's welfare that are especially significant, in my view. The first of these, of course, are his expressed views which I have analysed above.

97. Secondly, I consider it to be clearly in A's interests that welfare decisions should be made by the Italian courts. They are far better placed than the English courts to conduct the evaluation that is necessary. A's mother is Italian; his father is half-Italian. A himself is Italian born and bred. He has lived in the same city in Italy from birth until the age of ten. Each party would require an interpreter if the litigation were conducted here (the mother speaks no English; the father's English is reasonable but not at a level where he could litigate without an interpreter). The relevant witnesses are in Italy. Both parties are represented there by lawyers. Proceedings are well advanced in that jurisdiction: there is a hearing listed in 12 November 2020; Mr Gifford Head informs me that the court will encourage the lawyers to negotiate with a view to reaching agreement, ideally by 5 November 2020. The father has instructed his lawyer to make an urgent application for permission to remain in England on an interim basis which he expects to be heard on or before 12 November 2020.

98. Thirdly, in my view A's emotional needs are not being met. Since coming to England he has been deprived of a proper relationship with his mother. Wherever the fault for this may lie, it is a matter that needs to be given significant priority. I agree with Ms Baker's assessment that A lacks the maturity to consider the long-term impact of not having a balanced relationship with each of his parents and that '*he is unable to appreciate the growing importance of the role a mother plays in a child's minority when their psycho-emotional needs will evolve*'. For the reasons I have set out above, I have concerns about the father's willingness and ability to promote A's relationship with his mother at the present time. I find it difficult to see how it can be properly repaired unless A is able to experience face-to-face contact with her.

99. These welfare considerations would point clearly and decisively in favour of an immediate return order were it not for the fourth aspect of welfare I regard as significant. This concerns A's education. The father behaved irresponsibly in bringing A to England in the middle of a school term and his education will have suffered for it (which is ironic given the importance the father attaches to education). After attending a new English school for two incomplete terms, his school was the shut down for nearly three months as a result of the pandemic. A returned to primary school briefly at the end of the summer term. He has now been at secondary school for just over a month and appears to have made friends there and to be reasonably settled. I am told that if he returns to Italy, A will be able to return to his old school but that he will be placed in the year below as he will need to repeat the year that he has missed. I do not imagine that this would be easy for him or that he would welcome it.

100. Mr Gifford Head makes the important submission that if I were to return A to Italy and the Italian court were then to sanction him remaining in England on an interim basis this would mean two further changes of school for A. It would be a further blight on an education that has already suffered serious disruption over the past year. As Mr Gifford Head says, Ms Baker considered that this has the potential to be destabilising for A. In those circumstances, it is submitted that I should either refuse to make a return order altogether or, alternatively, delay the implementation of any return until the end of November to allow Italian court to come to an interim determination on the issue and thereafter to give the father an opportunity to seek such orders from the English court as may be required in the light of that determination.

101. I have reached the conclusion, after weighing up the various factors I have set out above, that in the exercise of my discretion I must order A's return to Italy. But should I delay or suspend the implementation of the order?

102. This issue has given me pause for thought. There is a parallel between the situation with which I am concerned and that which arose in *F v M and N (Abduction: Acquiescence: Settlement)* [2008] 2 FLR 1270. Black J there had to balance her clear view that far-advanced welfare proceedings should be concluded in Poland against the potential for disrupting the life and education of a child who had been in England for two years and was settled here. Her solution was to make a suspended return order. A similar approach was adopted by Sir Mark Potter, P in *JPC v SLW and SMW (Abduction)* [2007] 2 FLR 900 (a case involving the objections of a thirteen year old boy).

103. The ability of the court to make a suspended or delayed return order has since been considered by Ryder J in *R v K (Abduction: Return Order)* [2010] 1 FLR 1456 and by MacDonald J in *BK v NK* [2016] EWHC 2496 (Fam). In both those cases, this was described as an 'exceptional' course to take. However, in contrast to *F v M and N* and *JPR v SLW and SMW*, these two cases where concerned with situations in which none of the exceptions to a mandatory return had been established and therefore the court was obliged to order a return 'forthwith'.

104. Whether or not making a delayed return order in the context of an Article 13 discretion is quite so exceptional may be a matter for debate; although I have not heard full argument on the point, I am inclined to the view that in circumstances where the discretion is '*at large*' there is scope for greater flexibility. In the end, however, I am not persuaded that it is appropriate to adopt that course in this case. I have reached this conclusion for the following reasons:

    (a) The last week of October will be half-term week in England. In my view, this presents a good opportunity for A to return to Italy and for the parties to start taking steps to repair his relationship with his mother. As well as being essential from A's perspective, I hope the father will recognise that it is in his own interests to demonstrate that he is capable of promoting that relationship. The Italian court may well feel more comfortable about permitting the father's relocation application if it can feel confident that the maternal relationship will not be harmed if it does so.

    (b) There will be other benefits for A in returning to Italy over half-term. He will be returning with his father to his former home and will be able to spend time with his wider family. He may also be able to see some of his friends from his old school.

    (c) Once that half-term week has concluded it will then only be a matter of days before the Italian court will be in a position to reach an interim decision, if indeed it needs to do so. As I recorded above, the court will expect the lawyers to negotiate in order to reach an overall agreement if possible. In my view, the potential for agreement will be enhanced if both parties are back in Italy and if the mother has been able to spend some time with A. As matters stand, there is a high level of mistrust which is likely to hinder the potential for compromise.

(d) There is a possibility that, before making a decision on an interim basis, the Italian court will wish to ensure that A's views have been independently canvassed (either through a welfare officer or by addressing the court directly). This will be more easily achieved if he is already in Italy when such a decision is made.

(e) The matters set out above outweigh, in my view, the potential for there being a disruption to A's education resulting from a return followed be a relocation. If the Italian court does decide that A should come back to London on an interim basis, such a decision is likely to be made quickly; thus any disruption, in such circumstances, would only be for a matter of days. From A's perspective he will have been able to spend that time in the city where he has grown up for almost all of his life and to enjoy the acquaintance of his Italian family.

Conclusion

105. For the reasons set out above, I order that A should be returned forthwith to the jurisdiction of Italy. The order should be implemented by A being accompanied to Italy by his father during the early part of the English half-term week. To allow some flexibility about flights I will say that the return should take effect by no later than Monday 26 October.

106. I will only add that this is a case which cries out for a consensual solution to be reached. It will be very much in A's interests if his parents can find a long-term solution upon which they both agree. A has had a very disrupted year. It will benefit him greatly knowing that his parents have reached agreement and that the period of uncertainty is at an end. I hope that the parents embrace the opportunity offered by the Italian court to negotiate a welfare solution for A.