



Neutral Citation Number: [2023] EWHC 2617 (Fam)

Case No: FD22P00712

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2023

Before:

MS. JUSTICE HENKE

Between:

The Mother

Applicant

- and -

The Father

Respondent

(Re L and S (Application to Set Aside Return Order))

Emma Colebatch (instructed by Duncan Lewis (Solicitors) Limited) for the Applicant
Cliona Papazian (instructed by A L Law Associates) for the Respondent

Hearing date: 13 October 2023
Judgment date: 10 November 2023

JUDGMENT

MS JUSTICE HENKE

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.

Henke J:**Decision**

1. In the circumstances of this case and on the facts as I find them to be, the mother has not established a fundamental change of circumstance which undermines the basis on which the return order was made. The application to set aside is dismissed.
2. The facts as I have found them to be, and my reasoning, is set out in the paragraphs that follow.

Introduction

3. The children at the heart of this case are L and S. L is now aged 12 and S is aged 6. Their mother removed them from Italy on 7 September 2022. In response, their father applied for their summary return by an application dated 31 October 2022. That application came before Mr Alex Verdun KC sitting as a Deputy High Court Judge on 13 and 14 February 2023. At the conclusion of that hearing the learned judge ordered their summary return to Italy.
4. The application before me is the mother's application to set aside the return order.

Relevant Background

5. Both the mother and the father are originally from west Africa. The father moved to Italy to join his family in 2001 and he acquired Italian citizenship in 2009. The mother moved to Italy in 2006. They met in Italy in about 2010 and married there in August 2015. Thereafter the mother became an Italian citizen. Both L and S were born in Italy.
6. The relationship between the mother and father came to an end in January 2020. By 26 June 2020, the mother and father had reached an agreement about the care of the children. They agreed that both parents would have custody of the children and their primary residence would be with their mother. The deed was made into an order by an Italian court on 18 November 2020.
7. In late November 2020, the mother relocated to England, leaving the children in their father's care. The mother asserts that she would travel back to Italy frequently to spend time with the children. The father's case is that the mother only returned once to see the children. On 24 August 2022, the mother went to Italy to see the children. The father says the children were to be returned to his care on 9 September 2022. However, on 7 September 2022 the mother travelled to the UK with the children. The same day their father reported their abduction to the police in Italy. The police contacted the mother by telephone. The mother confirmed to the police that the children were with her in England.
8. On 18 October 2022, the father applied to the Italian Central Authority seeking the immediate return of the children to Italy under the 1980 Hague Convention.

History of the Proceedings in this Jurisdiction

9. By application dated 31 October 2022, the father applied under the Child Abduction and Custody Act 1985 for the immediate return of the children to Italy. The application was issued in this court on 4 November 2022. Within the application the father sought a location order, an order to secure the mother and the children's travel documents and a prohibited steps order to prevent the mother removing the children from this jurisdiction whilst the application was determined.
10. The first hearing of the father's application was before Mrs Justice Arbuthnot on 7 November 2022. It was without notice to the mother. Mrs Justice Arbuthnot made the location order, the order to secure the mother and children's travel documents and the prohibited steps order to prevent the children being removed from the jurisdiction of this court. The mother was directed to attend the next court hearing on 10 November 2022. However, by 7 November 2022, the mother and children had not been found. Accordingly, the court made disclosure orders and directed the mother to attend the next hearing listed on 17 November 2022.
11. The location and passport orders were executed on 15 November 2022.
12. The hearing on 17 November 2022 was before Mr Justice Newton. Both the mother and father attended and were represented at that hearing. At that hearing the court determined that it was necessary to consider the mother's defence before determining whether it was necessary for Cafcass to prepare a report on the children's wishes and feelings. Hence the court directed the mother to file her defence by 4pm on 24 November 2022 and listed the application for a further hearing on 25 November 2022.
13. The hearing on 25 November 2022 was before Deputy High Court Judge David Lock KC. The father was legally represented at this hearing and the mother had the assistance of a McKenzie Friend. The order records that the mother had filed a statement indicating that she sought to oppose the father's application for summary return on the basis of:
 - Art 3 Habitual residence
 - Art 13(a) Consent/ acquiescence
 - Art 13 Child's objections
 - Art 13(b) grave risk of harm/intolerable situation.
14. The father's application for summary return was listed for hearing on 13 February 2023 with a time estimate of 2 days. There was to be a PTR on 16 January 2023.
15. The order of 25 November 2022 directed the mother to file a narrative statement of the basis of her defence in relation to habitual residence and consent as well as the protective measures or undertakings she sought from the father in the event the court ordered return to Italy. The father was given permission to reply to that statement and direction was given for the provision of a report from the Cafcass High Court Team in respect of both children as to:
 - The child's views, wishes, feelings and objections in respect of summary return to Italy.

- The child’s maturity, and
 - Whether the child wishes to meet the trial judge.
16. In accordance with the direction given on 25 November 2022, on 9 December 2022 the mother made a statement in which she stated at paragraph 39:
- “Should the court decide to make a return order, I would like the following measures in place:*
- *That the children reside with me. As I will be willing to relocate back to Italy for the sake of my children and to avoid for them to go back to living in a toxic environment*
 - *The applicant is allowed to see the children under supervision in a contact centre*
 - *The applicant’s grandmother is not allowed to see the children and is always under supervision and in contact centre only.”*
17. The Cafcass report is dated 11 January 2023. I have a copy of it before me. I have read it in detail. It reports that the mother had stated that if the court ordered the children’s return to Italy, she would accompany them. She also told the reporter that the children had told her that their father and paternal grandmother had physically chastised them with a belt and that the children did not want to go back to Italy.
18. The views, wishes and feelings of the children were ascertained by the Cafcass reporter when she met the children on 5 January 2023. L told her that she did not like living with her father and his mother in Italy as they hit her and S with a belt on the legs. L emphasised that she wanted to remain in the UK. She would be sad if the judge ordered return. She thought her mother would be sad too. If the mother accompanied them, she would not feel as sad, but she still would not want to return. S did not want to talk about her father or her paternal grandmother or her life in Italy, she said she would be scared if she saw her father but would not say why. S wanted the judge to say that she and her sister can stay in the UK.
19. In the Cafcass report it is stated that both children *“expressed a strong preference to remain in”* the UK. *“They both found it difficult to expand on the answers they provided. this may have been because they are worried about saying the wrong thing to me or they are experiencing a conflict of loyalties. Furthermore, they were at times contradictory in whether or not they wished to spend time with their father.”* The reporter wrote that she had been left with the sense that L and S were cautious in not presenting life in Italy in anything other than negative terms, lest that undermine their wish to remain in the UK. The reporter properly acknowledged that it was for the court to determine whether the views expressed by the children amounted to an objection to a return to Italy.
20. In terms of the age and maturity of L and S, the reporter suggested that their cognitive maturity was on a par with most children of their respective ages. L has reached the stage *“where her views, while not determinative, need to be considered.”* S has not gained the maturity to comprehend the longer-term implications of the decisions that need to be made or the *“capacity to make decisions in her best interests and is likely to express views that will meet his [sic] emotional need to remain close to the parent who is providing her care.”*

21. On 16 January 2023, the PTR came before Mr Justice Hayden. Both parties were in attendance, and both were represented. The order records that the Cafcass reporter was not available to give oral evidence at the final hearing and that *“the parties and the court agreed that [the reporter] is not required to attend the final hearing and it should remain listed.”*
22. The order of 16 January 2023 also records that at the final hearing the defences the mother sought to rely upon at final hearing were: -
- Habitual residence
 - Consent
 - That the paternal grandmother was exercising custody rights not the father
 - Father's acquiescence
 - Art13(b)
23. However, the order also states that *“the court observed that the only potentially arguable issue emerging from the evidence filed is the question of the children’s objections. The respondent is strongly encouraged to evaluate and focus the way this case is pursued. In particular, the court has not been able to identify any coherent argument in respect of habitual residence.”*

The hearing on 13 and 14 February 2023

24. The final hearing came before Alex Verdan KC sitting as a Deputy Judge of the High Court. Although the mother had had problems obtaining legal aid and thus representation, funding was available by the time of the final hearing and the mother was able to secure legal representation the day before the hearing. Accordingly, both the mother and father were legally represented at the hearing. The hearing proceeded on the papers. Oral submissions were made on behalf of both parties.
25. I have had the opportunity to read the skeleton argument filed on behalf of the mother for the final hearing. The document requested time to take instructions and give advice before the hearing began but it did not ask for the hearing to be adjourned.
26. On the face of the skeleton argument for the mother, it is also stated that it is accepted that as a matter of law that prior to their removal the children were habitually resident in Italy. The issue of the paternal grandmother exercising custody rights rather than the father was not to be pursued. The defences actively in play on the face of the skeleton argument were: -
- The father’s consent to removal
 - The father’s acquiescence to removal
 - The children’s objections and
 - Art 13(b)

The defences were further narrowed at the beginning of the hearing.

27. The recitals to the order made by Mr Verdan KC on 14 February 2023 capture the issues that were in contention at the hearing and the reasons for the learned judge’s conclusion as follows:

“3. At the outset of this hearing the mother confirmed that she no longer sought to pursue the defences of consent and acquiescence and accepted that the children were habitually resident in Italy prior to the wrongful removal.

4. The Court handed down judgment on 14 February 2023 wherein it was determined:

- The children were habitually resident in Italy immediately before their removal by the mother from Italy to England on 7th September 2022;
- The children’s removal by the mother from Italy to England was wrongful and in breach of the father’s rights of custody;
- The defence of the child’s objections was not made out and in any event the court would have exercised its discretion to order a return of the children to Italy;
- In light of the undertakings offered by the father, which included not to have unsupervised contact with the children pending the first hearing of any application regarding the children’s welfare in Italy, the defence under Article 13(b) was not made out and in any event the court would have exercised its discretion to order a return of the children to Italy.

5. For the avoidance of doubt, the court did not make any determination of fact about whether what L had said to the Cafcass officer (i.e. that the children had been hit by their father and paternal grandmother with a belt) was true.

6. Undertakings have been given by the applicant as set out in Annex A and the respondent as set out in Annex B attached to this order.

7. The undertakings given constitute binding and enforceable obligations in this jurisdiction and it is intended that the said undertakings should also constitute binding and enforceable obligations in Italy.

8. The undertakings constitute ‘measures’ for the purpose of article 23 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

9. Nothing in the undertakings referred to above shall constitute any admission by either party as to any allegation made by the other or shall be intended to bind or otherwise influence the courts of Italy in any future determination of matters of welfare concerning the children, other than a hearing prior to the first on notice hearing.”

28. The undertakings given by the father and by the mother read as follows:

“ANNEX A

The applicant undertakes as follows:

- a. *To pay for an economy air ticket for the children only (to include one hold-luggage suitcase per child, up to 20kg), to travel to Italy pursuant to paragraph 10 of this order;*
- b. *Not to attend the airport when the children land in Italy pursuant to this order;*
- c. *Not to institute or voluntarily support any criminal proceedings against the respondent arising out of the removal of the children to England and Wales on 7th September 2022 and the subsequent retention of the children in England and Wales since 7th September 2022 to date;*
- d. *Not to seek to separate the respondent and children, pending the first on notice hearing in a Family Court in Italy seized of welfare issues relating to the children, except for the purpose of contact provided for below.*
- e. *Not to have (or attempt to have) any unsupervised contact with the children pending an interim decision by the competent Italian Court about whether the father's contact with the children should be supervised (provided such decision follows an on notice hearing before the Italian Court). [For avoidance of doubt, nothing in this undertaking prevents the father having supervised contact with the children.]*
- f. *Not to allow the paternal grandmother to spend time with the children unsupervised pending a determination of whether the paternal grandmother should be able to spend unsupervised time with the children by an Italian court seized of the issues about the children's welfare;*
- g. *To pay the respondent 600 Euros per month, to be paid in monthly instalments directly to the mother's bank account, as financial support for a maximum period of 6 months pending any application for financial maintenance made to the Italian Court. The respondent shall pay the applicant 600 Euros on 28th February 2023 and in addition will pay for the children's tickets as per paragraph 11 of the order above. Thereafter monthly payments of 600 Euros shall commence on 1st April 2023.*
- h. *To secure, as a matter of urgency, the registration in the Family Court in Italy a mirror order to implement undertaking (g), and to meet the costs of obtaining that order.*
- i. *To not make any applications without notice to the respondent, pending the first on notice hearing in a Family Court in Italy seized of welfare issues relating to the children.*
- j. *Not to remove the children from Italy without an order of the Italian Court pending the first on notice hearing before the Family Court in Italy;*
- k. *To instruct his lawyers in Italy not to disclose to him the address provided to them by the respondent, pending the first hearing in the Italian Family Court.*

l. Not to attend at the property at which the mother and children are living or instruct anyone else to do so on his behalf.

ANNEX B

The respondent undertakes as follows:

a. To inform the applicant's Italian lawyers at least 12 hours before the return of the children, in accordance with paragraph 10 of this order, as to where she and the children will be residing once there has been a return, together with a contact number on which she can be reached.

b. Not to remove the children from Italy without an order of the Italian Court pending the first on notice hearing before the Family Court in Italy;

c. To make the children available for contact with the applicant every day, via video call, for up to one hour, to take place at 6pm (UK time) and for such further or other contact as the parties may agree between themselves in writing (including by text message and email), pending the first on notice hearing in a Family Court in Italy seized of welfare issues relating to the children;

d. To not make any applications without notice to the applicant, pending the first on notice hearing in a Family Court in Italy seized of welfare issues relating to the children.”

29. Based on the findings he made, and the undertakings given, Mr Verdan KC ordered the children to be summarily returned to Italy forthwith and no later than midnight (Italian time) on 7 March 2023. There has been no application for permission to appeal the order of Mr Verdan KC.

30. At 7pm on 14 February 2023 the father attended the police station in Italy and withdrew the child abduction complaint he had made on 7 September 2022. He was informed that his withdrawal could only be accepted regarding offenses for which prosecution is not ex officio. The documentation confirming that position was sent to his solicitors the same day. They did not send a copy to the mother's solicitors until the middle of June 2023.

Events since 14 February 2023

31. Arrangements were made for the mother and the children to return to Italy by air from Stanstead airport on 5 March 2023. However, by reason of the late arrival of the agent taking the relevant travel documents to the mother, the mother was unable to board her flight.

32. On 14 March 2023, the mother had an appointment with her GP to obtain a *fit to fly* certificate. The GP advised that the mother should not travel by air or make long land journeys. By this stage, the mother was beyond 28 weeks pregnant.

33. On 21 March 2023, the mother applied to vary the order of Mr Verdan KC to permit her to return the children to Italy after she had recovered from her elective C-section.

The application was heard on 23 March 2023 by which time the mother was 35 weeks pregnant. The position statement filed on behalf of the mother for that sets out how the mother's legal representatives learned during the February 2023 hearing that the mother was pregnant. It accepts that the court and the father's legal representatives at the hearing in February 2023 were informed. The February hearing had proceeded on the basis that there was no reason the mother could not travel to Italy with the children. The judge rejected arguments for delaying return based on the mother's lack of support in Italy after the birth of her child and the fact it would leave her unable to care for L and S. The position statement makes it clear (see paragraph 21) that the mother was not then seeking to set aside the return order rather she was seeking an extension of the time by which the children were to be returned. Given the advance stage of the mother's pregnancy the father took a pragmatic stance and agreed to extend the time for the children's return to 14 June 2023.

34. On 14 April 2023, the mother gave birth to her third child. The same day the father filed a statement setting out what steps he had taken to comply with his undertakings g and h, namely a mirror order to secure the maintenance he had promised to pay. From the papers, it appears that his non-compliance with those undertakings caused the mother to question whether he would comply with all his other undertakings, in particular that in relation to non-prosecution. Consequently, the case was returned to court by the mother without formal application under the liberty to apply provisions.
35. That hearing came before Mr Lock KC sitting as a Deputy High Court Judge on 8 June 2023. It was shortly before 8th June hearing (at about 9.30 am) that the father disclosed to the mother documentary evidence that he had withdrawn his complaint to the Italian police on 14 February 2023 but that the investigation was still proceeding because the matter was *ex officio*.
36. At paragraphs 21-23 of the mother's position statement for the hearing on 8 June 2023, it was stated that:

“21. Pursuant to the extant return orders, she is going to have to travel into Italy with L and S, but also with her two-month-old son. She has no idea what will happen when she returns. Will it turn out that the father has breached the non-prosecution undertaking as well? If he has, will she be arrested on arrival? If that happens, will she be separated from her baby? How long would she be detained for? Who would care for her baby in those circumstances? What would happen to S and L?”

22. It is submitted that this is an intolerable set of circumstances for any parent to be expected to return to. Understandably, mother is not prepared to return to them.

23. This leaves the court with three options:

i. Set directions for the father to demonstrate that he has complied with undertakings (c) and (h). If compliance with these undertakings is demonstrated, the mother may change her mind and return.

ii. Set directions to consider setting aside the return orders,

iii. Set directions directed to investigation as to whether the children could return to Italy without their mother, without giving rise to an Art 13(b) situation. That would likely require some involvement from the relevant child protective services in Italy either prior to or immediately upon return. Alternatively, further work from Cafcass may help to quantify the magnitude of the risk.”

37. On 8 June 2023 having heard argument on behalf of the mother and father, both of whom were represented, Mr Lock KC set the 30 June 2023 as the date by which the children should return to Italy. The recital to the order includes the following:

“3. The court recorded that a return order had been made and accordingly, unless that order is overturned by a decision of the Court of Appeal or a decision of the High Court, the children were required to return to Italy and that, whilst the parties may have agreed to suspend performance of that order for a short period, that the court had made a return order and both parties were therefore required to work to ensure that the children are returned to Italy as soon as possible.

4. The court was informed that the applicant father has withdrawn his complaint to the Italian police and thus this factor should not prevent the mother returning the children to Italy.

5. The court noted the respondent mother’s concerns regarding payment of maintenance but considered that this was not a good reason for the mother to fail to return the children to Italy.”

38. However, the children were not returned to Italy on 30 June 2023. Instead on that day the case came before Mrs Justice Morgan. The order captures within its recitals that the mother indicated at that hearing that she intended to apply for an order to set aside the return order of 14 February 2023 on the basis that she now refuses to return to Italy even if the order for the children to return to Italy remains. Mrs Justice Morgan acceded to the mother’s application to permit the reconsideration of the return order on the basis that the mother was now arguing that she refuses to return to Italy and gave directions to enable the parties to gather evidence from an expert in Italian law and from the Italian social services. The deemed application for set aside was to be heard on 18 September 2023 with a time estimate of 1 day.

39. In accordance with the order of Mrs Justice Morgan, the mother filed her actual Part 18 application for set aside on 7 July 2023. The reason for the application is stated to be that *“new information has come to light which fundamentally changes the basis on which the order was made.”* In her witness statement dated 19 July 2023 in support of her Part 18 application, the mother put her case this way:

- Stated at paragraph 6 that as there was no submission on my behalf that I would not return to Italy with the children and as the father was offering an undertaking not to have or attempt to have unsupervised contact with the children, the judge did not consider whether the Art 13(b) defence was made out.

- She had, on 10 June 2023, received a Service Abroad Notice from the Direction of Public Prosecutions at the Courts in Lecco dated 26 May 2023 relating to criminal proceedings no. 2310/22 of General Criminal Records Registry Form no 21 against me for the offence within the meaning of section 574 of Criminal Code (LC) (child abduction and detention abroad) on 7 September 2022. She asserted that because criminal proceedings in Italy are ex officio, the withdrawal of the complaint by the father, even if validly made, does not have any effect on or apply to criminal proceedings. She alleged that the father would have known this since 14 February 2023 and that his failure to disclose the information amounts *to a material non-disclosure*. She claimed within her statement that if she returned to Italy, she would be faced with a *serious risk that* she will be arrested and separated from L, S and her third child. She is anxious that L and S will be placed into State care as would her third child.
- She was no longer prepared to return to Italy and the children cannot return without her because *they will be in potential danger from their father and paternal grandmother*.

40. On 14 July 2023, the parties extended the timetable set by Mrs Justice Morgan by consent and on 1 September 2023 the mother and father vacated the hearing listed on 18 September 2023, again, by consent. The adjourned hearing came before me on 13 October 2023.

The hearing on 13 October 2023

41. The hearing before me was confined to stage c of *Re W (Abduction: Setting Aside Return Order)* [2018] EWCA Civ 1904, namely whether to set aside the existing order for return.
42. At the hearing before me the mother and the father were represented by counsel. I had the benefit of the full bundle which was before Mr Verdan KC and the bundle which had been prepared for this hearing. I have read both bundles.
43. I should record that the bundles before me did not contain the transcript of the judgment of Mr Verdan KC. At the beginning of the hearing, I asked whether either party sought an adjournment to obtain the transcript of Mr Verdan KC's judgment. Counsel for both parties very clearly told me that they did not seek any such adjournment and that the words in the recital of his order of 14 February 2023 were sufficient for the task before me. Similarly, although mother's counsel raised concerns about the absence of the Art 32 report, neither counsel asked me to adjourn for its receipt. In relation to the children's current wishes and feelings, counsel for the mother in her skeleton argument at paragraphs 38 and 39 highlighted a lacuna in the evidence but then stated that it "*may be necessary in order for the court to re-determine the substantive application*" in the event that the substantive order is set aside. In my judgment, Counsel was correct to caveat her submission in that fashion. Such evidence would be relevant to stage d of *Re W* (above). This judgment is confined to stage c.
44. Within my bundles, I had the report from the jointly instructed Italian lawyer, Avv Achironpaola Cortazzo. Within that report, she explained that because of notice to

return letter that the mother had received on 10 June 2023, the mother had been invited by the Italian Prosecuting authority to declare an address in Italy at which she would receive all further communications in relation to the criminal proceedings. If she had not done so, then the notice stated that the mother should proceed to appoint defence counsel to assist her in the proceedings. The mother should declare that she wishes to receive communications at her lawyer's office. In the absence of appointing her own lawyer or declaring an address in Italy at which she wishes to receive further communications, Avv Cortazzo advised that the mother will be represented and defended by a lawyer assigned to her by the Public Prosecutor's Office. On the basis of the notification order (and having no other documents or information), Avv Cortazzo reported that "*it can only be stated that there is a criminal proceeding pending against [the mother] for the offence of abduction and detention of children abroad ... and that on the date of 26.5.2023 the proceedings against [the mother] were in the preliminary investigation stage*". Her report, in summary, stated that the Prosecutor may decide to dismiss the proceedings because she believes from the evidence gathered during the investigation it is not possible to make a reasonable prediction of conviction, but she may consider the complaint well-founded and bring it to trial. The crime is being prosecuted *ex officio* and the father cannot do anything to stop that prosecution. The decision to continue the investigation is a matter for the Prosecutor's discretion.

45. In her report, Avv Cortazzo analysed the risks for the mother of arrest and detention should she return to Italy. In her opinion the precautionary measure of placing her in custody could not be applied because the crime the mother is accused of is punishable by one to four years in prison. House arrest could be applied but only if there was a danger of absconding and a judge considered the mother will commit another crime against the person and family care. Thus, in the opinion of Avv Cortazzo, the likelihood of the mother being placed under house arrest is low, but it cannot be ruled out. Avv Cortazzo would need more information to say how long any proceedings will last. In terms of the ultimate sentence the mother could receive if convicted, the offence is subject to one to four years imprisonment. However, the judge has a discretion, and the mother's character and the likelihood of reoffending would be considered. Failing to return the children to Italy without valid explanation and failing to co-operate with the Italian authorities would be aggravating features. Those features would preclude qualification for non-punishability for tenuity to act (the non-application of a sanction even though the defendant is guilty). Failing to return the children may cause a judge not to grant a suspended sentence and thus she would not have the possibility of the crime being extinguished after five years. By not engaging with the Italian authorities, in Avv Cortazzo's opinion, the mother is depriving herself of the right to plea bargain which remains open until the trial is opened in court and the ability to accept probation, which once completed, extinguishes the offence. The birth of the mother's third child would have no ultimate influence on sentence, but it would mean that whilst her third child was under one year of age, the sentence would not be carried out and the execution of sentence, including imprisonment, could be postponed by the judge until her third child reaches the age of three years.
46. I had the benefit of having Avv Cortazzo cross-examined on behalf of both the mother and the father. I listened carefully to what she had to say. As she was cross-examined on behalf of the mother, she stated again that the offence for which the mother is being investigated is *ex officio*. The investigation will thus continue regardless of the views

of the victim of the offence. The notification the mother had received usually meant that it was likely that the preliminary stage of the proceedings was coming to an end. If the prosecutor has an address for the person under investigation, then they can inform that person whether the investigation is continuing or coming to an end. That is the purpose of the notification.

47. In oral evidence, Avv Cortazzo gave a clear opinion that the mother should engage with the Italian criminal proceedings. She reiterated her advice in relation to Precautionary measures (pre-trial measures). Prison was not an option and house arrest unlikely. If the mother were to return to Italy with the children, co-operate with the authorities, then there would be no risk of absconding and no need for precautionary measures such as house arrest. If she cooperated with the Italian authorities and took the children back, it was at least possible the investigation would conclude or the offence would be expunged but if that did not happen, then her sentence would be likely to be suspended or community-based such as probation.
48. The very clear message from Avv Cortazzo was that returning the children to Italy and co-operating with the Italian authorities was the best way for the mother to avoid imprisonment (before or after trial). Avv Cortazzo's evidence to me can be summarised succinctly. If the mother were to cooperate with the Italian Prosecuting authorities and engage with the Italian process, then the risk of imprisonment would be theoretical rather than a real possibility.
49. Having heard Avv Cortazzo's evidence, I then proceeded to hear oral submissions on behalf of both the mother and father.

Submissions

50. I have had the advantage of a skeleton arguments on behalf of the mother and on behalf of the father. The written arguments were supplemented by oral submissions.

The Submissions on Behalf of the Mother

51. In the skeleton argument on behalf of the mother, at paragraph 25 and 26, the mother's case is stated to be:

"[...] Specifically, that she is no longer willing to return due to the risk of her being prosecuted and imprisoned in Italy, and the enormous consequences that will have for L, S and her third child."

52. The key submission on behalf of the mother was that it has been fundamental to the court's decision on 14 February 2023 that:
- (a) the children would remain living with their mother, whether in Italy or in England;
 - (b) That the mother's circumstances – both financial and in respect of a potential criminal prosecution- would not prevent her living in Italy; and
 - (c) That neither the mother nor the father was going to have unsupervised contact with the children, pending the matter being heard by the Italian family court.

53. The relevant changes of circumstances now asserted on behalf of the mother were outlined as follows: -

- (a) The mother is now the subject of criminal proceedings which cannot be vacated.
- (b) Consequently, the mother's future in Italy is full of uncertainty and present significant risk- to herself, S and L and her third child.
- (c) In further consequence the mother can no longer countenance a return to Italy and will *not be returning*.

54. The third question I am asked to consider on behalf of the mother is - how do these changes strike at the fundamental basis of the court's decision?

55. In oral submissions on behalf of the mother, it was submitted that the mother's refusal to return of itself undermines the order. The order would only work if the mother was there in Italy too.

The Submissions on Behalf of the Father

56. The father submits that there is no fundamental change of circumstance in this case.

57. It is submitted that it is difficult to understand how the mother's case on 30 June 2023 led the court to accede to a reconsideration. Given that:

- (a) The only possible relevance of the mother's refusal to return to Italy is the extent to which the original court considered she was a protective factor where there were disputed allegations of physical chastisement, Mr Verdan KC records on the face of his order that if the Art13(b) defence had been established *he would in any event have exercised his discretion and ordered the children's return*. The court on 30 June 2023 could have reconsidered the need for protection and implemented different strategies to ensure return.
- (b) The exception in Art 13 (b) is concerned with situations which went beyond what a child might reasonably be expected to bear. It is interpreted strictly, and harm cannot arise solely from separation from the responsible parents - *X v Latvia (27853/09)*. In *NM v SM [2023] EWHC 2209*, separation of a child from an abducting parent who was refusing to return and who had cared for that child for 15 months did not establish the Art13(b) defence. Equally if the fact the abducting parent will not return means that the children concerned are placed in foster care, that does not establish an Art13(b) defence; the central issue is whether the child will be adequately protected on return- *Re S (Abduction: Return to Care) [1999] 1 FLR 843*.

58. In relation to the stage c test in *Re W*, I am reminded that the burden of proving the fundamental change of circumstances rests on the shoulders of the applicant mother. It is submitted that the evidence from Avv Cortazzo does not establish the attested fear of arrest and imprisonment, if the mother returns to Italy. Put simply it is asserted that there is no evidential basis to substantiate the mother's application for set aside.

Legal Framework

59. Absent appeal, the only route open to challenging a final order is by way of setting it aside.
60. Pursuant to FPR 2010 rule 12.52A the Court has power to set aside a return order under the 1980 Hague Convention:

“(1) In this rule –

“return order” means an order for the return or non-return of a child made under the 1980 Hague Convention and includes a consent order; “set aside” means to set aside a return order pursuant to section 17(2) of the Senior Courts Act 1981 and this rule.

(2) A party may apply under this rule to set aside a return order where no error of the court is alleged.

(3) An application under this rule must be made within the proceedings in which the return order was made.

(4) An application under this rule must be made in accordance with the Part 18 procedure, subject to the modifications contained in this rule.

(5) Where the court decides to set aside a return order, it shall give directions for a rehearing or make such other orders as may be appropriate to dispose of the application.

(6) This rule is without prejudice to any power the High Court has to vary, revoke, discharge or set aside other orders, declarations or judgments which are not specified in this rule and where no error of the court is alleged.”

61. The rule is expanded upon by paragraph 4.1A of PD12F FPR 2010 which states:

“In rare circumstances, the court might also ‘set aside’ its own order where it has not made an error but where new information comes to light which fundamentally changes the basis on which the order was made. The threshold for the court to set aside its decision is high, and evidence will be required – not just assertions of allegations.

If the return order or non-return order was made under the 1980 Hague Convention, the court might set aside its decision where there has been fraud, material non-disclosure or mistake (which all essentially mean that there was information that the court needed to know in order to make its decision, but was not told), or where there has been a fundamental change in circumstances which undermines the basis on which the order was made. If you have evidence of such circumstances and wish to apply to the court to set aside its decision, you should use the procedure in Part 18 of the Rules.”.

62. In *Re W*, the Court of Appeal set out a four-stage approach to an application for set aside, which should ordinarily be followed by the court. It is a matter for the court in each individual case whether some or all of these four stages can be consolidated:

- (a) the court will first decide whether to permit any reconsideration;
- (b) if it does, it will decide the extent of any further evidence;
- (c) the court will next decide whether to set aside the existing order;
- (d) if the order is set aside, the court will redetermine the substantive application.

By the time the application came before me it had reached stage (c).

63. I have reminded myself that the bar for set aside is set high. In *Re W*, Moylan LJ stated at paragraph 66:

“This power can be exercised when there has been a fundamental change of circumstances which undermines the basis on which the original order was made. I set the bar this high because, otherwise...there would clearly be a risk of a party seeking to take advantage of any change of circumstances such as a simple change of mind.”

64. Further in *Re B (A Child) (Abduction: Article 13(b))* [2020] EWCA Civ 1057, Moylan LJ at paragraph 91 stated:

“I would further emphasise that, because of the high threshold, the number of cases which merit any application to set aside are likely to be few in number. The court will clearly be astute to prevent what, in essence, are attempts to re-argue a case which has already been determined or attempts to frustrate the court’s previous determination by taking steps designed to support or create an alleged change of circumstances”.

65. In *Re A (A Child) (1980 Hague Convention: Set aside)* [2021] EWCA Civ 194, Mr Justice Hayden sitting in the Court of Appeal said this at paragraph 48 of his judgment:

“The 1980 Hague Child Abduction Convention is predicated on the principles of international comity and confidence. As such, it has created a summary jurisdiction intended to ensure that applications made pursuant to it are determined expeditiously. Intrinsic to the Convention is a recognition that delay in the legal process is likely to be inimical to the child’s welfare. Underpinning the philosophy of the Convention, is an understanding that a speedy return of the child to his home country will, in principle, enable the child’s future to be determined more effectively. The exception which arises in cases where a child objects to return is generated by two conditions: first, that the child himself objects to being returned and second, that he has attained an age and degree of maturity at which it is appropriate to have regard to his views. As is well established, this does not mean that the child’s views are determinative, or even presumptively so. The court has a discretion which it will exercise, bearing in mind the nature and strength of the child’s objections, particularly, the extent to which they are authentically his own and not merely reflective of the influence, intentional or otherwise, of the abducting parent. Thus, the Convention does not yield identical results in all cases. The central principles that I have mentioned have to be weighed alongside the facts which produce the exception and such pointers as there are which illuminate the welfare of the particular child. As

Baroness Hale stated in *Re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2007] 3 WLR 975, at paragraph 48:

" The Convention itself contains a simple, sensible, and carefully thought out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying international child abduction. Further elaboration with additional tests and checklists is not required ."

It is for all these reasons that the test as to whether there has been a 'fundamental change of circumstances' requires to be set high. Were it to be otherwise it would undermine the central philosophy of the Convention."

66. In addition, I have been referred on behalf of the mother to the decision of Dexter Dias KC, sitting as a Deputy High Court Judge, namely *ST v QR* [2022] EWHC 2133 (Fam) and paragraphs 22-25 thereof in particular.

67. In *H v K, B, M (By their Children's Guardian)* [2017] EWHC 1141 (Fam), Mr Justice Macdonald, in the context of a case in which the mother accepted she had wrongfully retained the children in England and the father had offered undertakings including that he would not support criminal proceedings against the mother in the US or seek care of the children pending the first hearing between the parties in the US, said at paragraph 44:

"Generally, the risk of the abducting parent being arrested and prosecuted for child abduction is not sufficient by itself to satisfy Art 13(b). In Re L (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433 it was held that neither the possibility of criminal proceedings being brought nor even the possibility of the mother being arrested at the airport on her return was enough to establish a grave risk of harm to the children. In Re C (Abduction: Grave Risk of Psychological Harm) [1999] 1 FLR 1145 it was held that the possibility that the father would change his mind and bring criminal proceedings against the mother if she returned to the United States was not sufficient to establish the exception under Art 13(b)"

68. Later in his judgment at paragraphs 55-56 he stated this:

"55. With respect to the mother's submission that children will be placed in an intolerable situation if she is arrested and prosecuted for child abduction, in that this will deprive them of their primary carer, I accept that this risk cannot be entirely ruled out in this case given the understandable reticence of the FBI to reveal details of the existence or progress of any federal investigation. Indeed, in almost all cases it will not be possible to exclude entirely the risk that the abducting parent will face arrest and prosecution on return. The authorities make clear that this risk will generally not be sufficient to satisfy the terms of Art 13(b).

56. Two further points fall to be made in this regard. First, a parent who chooses to abduct a child from one jurisdiction to another must expect to be the subject of arrest and prosecution. That is simply one of the proper consequences of a parent unwisely taking the law into his or her own hands rather than seeking relief through the courts. It sits ill in the mouth of a parent who has abducted a child to

complain about the consequent risk of arrest and prosecution. Within this context, there is a principled argument that the court seeking to enforce the return of the child, and thereby maintain fidelity to an international instrument designed to discourage and prevent child abduction, has no business trying to protect the abducting parent from arrest and prosecution upon their return under domestic laws designed to achieve precisely the same end.

57. Second, and within this context, I am unable to accept Mr Devereux's submission that the caveats that the father seeks to add to his undertaking not to support criminal proceedings against the mother with respect to her abduction of the children from the jurisdiction of the United States, namely that he will so undertake " to the extent that this does not violate or breach any public policy, statute, regulation, court order or other legal duty on the father " are inappropriate or devalue the undertaking. In my judgment, it is perfectly proper for the father to ensure that his undertaking does not bring him into conflict with the domestic laws of the United States. Once again, there is a principled argument that it would be entirely wrong to expect the innocent left behind parent to place themselves in conflict with the laws of their home country in order to prevent the lawful arrest and prosecution of the culpable abducting parent. In short, it is wrong in principle to expect the left behind parent to assume some of the legal risk created by the abducting parent by giving undertakings that have the potential to or do come into conflict with the laws of the home state. In the circumstances, I am satisfied that the caveats the father places on his undertaking are both reasonable and necessary.

58. Within this context, I am entirely satisfied that the undertaking offered by the father with respect to the risk of arrest and prosecution faced by the mother is appropriate in its terms and ambit and offers the maximum protection reasonably available against the risk contended for by the mother."

69. I have also reminded myself of what Mr Justice Cobb stated in Re L (Article 13: Protective Measures) (no 1) [2022] EWHC 3247 (Fam):

"78. Let me be clear. All of the supposed grave risk of intolerable peril is a result of the mother's unlawful and wrongful conduct. It would be a remarkable example of the triumph of injustice over justice, of wrong over right, if a mother could clandestinely relinquish her housing, pluck the children out of school, remove them to England in breach of a court order and then state that she will not accompany if they are returned, thereby enabling her to present them to this court as prospectively abandoned, homeless, unschooled and destitute with the result that a return order is refused on that basis."

70. Finally, I have reminded myself of what Mr Justice Mostyn said in B v B [2014] EWHC 1804 (Fam). The objective of the Convention is to ensure that a child who has been removed unilaterally from the country of his or her habitual residence in breach of rights of custody is returned forthwith in order that the courts in that country can decide his or her long-term future. It is likewise important to recall that a decision by the court to return a child under the terms of the Convention is, no more and no less, a decision to return the child for a specific purpose and for a limited period of time pending the court of his or her habitual residence deciding the long-term position.

My Decision and Reasons

71. My task in this judgment is to determine whether to set aside the existing order for return. The power to set aside can be exercised where there has been a fundamental change of circumstances which undermines the basis upon which the original order was made. The burden of proving that fundamental change of circumstance sits on the shoulders of the mother who seeks to set aside the original return order.
72. I have already set out the case that the mother has advanced to justify her application to set aside at different points in the history of these proceedings and at the hearing before me. Reading the narrative chronology, I observe that over time the way the mother puts her case has evolved. However, at the heart of the mother's case are three intertwined threads. They are: -
- (a) She will face arrest and possible detention if she returns to Italy;
 - (b) She refuses to return to Italy; and
 - (c) The children, S and L, will face intolerable harm if they are deprived of her care whether because she has been detained or refused to travel with them to Italy.
73. On 7 September 2022, the mother wrongfully removed the children from Italy. She took matters into her own hands and acted without the sanction of the Italian family court or consent of the children's father. The risk of criminal investigation, prosecution and potentially punishment in the Italian criminal courts which the mother says she fears springs from the mother's abduction of the children. The mother's case on the papers and before me singularly fails to acknowledge or appreciate that the criminal consequences she may face in Italy are the result of her own actions.
74. I accept the evidence of Avv Cortezza, which was given with care and authority. I find that the actual risk of the mother's arrest and detention should she return to Italy with the children is low. Whilst I accept that that risk cannot be entirely excluded, I find that it is within the mother's own power to take steps to mitigate and manage that risk by returning the children to Italy and cooperating with the prosecuting authorities there.
75. In this case the father has acted on his undertaking to withdraw the criminal complaint in Italy. However, the Italian proceedings are *ex officio*. That means that despite the father acting on his undertaking and withdrawing the original complaint, the criminal investigation and proceedings in Italy are continuing and their continuance remains a matter in the discretion of the Prosecutor. It has been argued on behalf of the mother that that is a risk which was not factored into the original order. However, I have reminded myself of *H v K* (above). I agree. In almost all cases under the Convention it will not be possible to exclude entirely the risk of arrest and prosecution on return. The case before me is no different. The existence of a risk which comes with the territory of abduction cannot of itself amount to a fundamental change of circumstances.
76. Stripped back, the mother's argument is unattractive. She will not return to Italy with the children for fear of arrest and detention. However, she has not taken and has no

apparent intent to take any steps to mitigate and manage those risks. Because of those risks she refuses to return with the children and asserts the order for return is fundamentally undermined and the children will be at an intolerable risk of harm. I consider that there is an unpalatable circularity to the mother's argument before me which is self-serving. Her refusal to return is based on a self-generated set of circumstances. In effect she has changed her mind. That change of mind is not on the evidence objectively reasonable. Indeed, it is objectively unreasonable. I do not consider that an objectively unreasonable change of mind can amount to a fundamental change of circumstances. Nor, given the policy and principles behind, the Hague Convention, should it.

77. Nevertheless, I have asked myself does the mother's change of mind of itself fundamentally undermine the order made by Mr Verdian KC. I have considered the wording of the order of Mr Verdian KC with care. The basis of the return order itself is captured in paragraphs 3- 5 of the recital to the order wherein his primary findings are set out (see above). He found that the defence of the child's objections was not made out but, in any event, he specifically stated he would have ordered return. He used the same formulation when considering the Art13(b) defence which had been advanced at that hearing. In the light of the father's undertakings which included an undertaking to only have supervised contact pending the first hearing in relation to the children's welfare in the Italian family court, he found the Art13(b) defence was not made "*and in any event the court would have exercised its discretion to order a return*". The plain reading of that recital is that the pertinent and thus the cited protective measure was the father not having unsupervised contact with the children, not the mother's presence in Italy. The provision of supervised contact is and was not dependent on the mother's presence in Italy or the children living with her. If the mother continues to refuse to return with the children, they could live elsewhere with the friends put forward by the father or in State care until the family court in Italy was seized of the matter. Where they live until the Italian court is seized of the matter in this case, I consider is ultimately an issue of implementation. It does not fundamentally undermine the return order.
78. In the circumstances of this case and on the facts as I find them to be, the mother has not established a fundamental change of circumstance which undermines the basis on which the return order was made. The application to set aside is dismissed.
79. That is my judgment. The judgment will be handed down on Friday 10 November 2023 at 10:30am and I will hear Counsel for the parties next week in relation to their proposals for the implementation of the return order.