

IN THE SUPREME COURT OF THE UNITED KINGDOM

WRITTEN CASE FOR HM, SECOND APPELLANT

ON APPEAL

**FROM AN EXTRA DIVISION OF THE COURT
OF SESSION**

IN THE PETITION OF

DM

Appellant

against

SM

Respondent

and

HM

Second Appellant

Introduction

1. This is an appeal by the father of a child “H” (born 25 May 2011), and by H himself, against the decision of an Extra Division of Inner House of the Court of Session. That decision recalled the order of the first instance judge (the Lord Ordinary) that H should be returned to the United States of America in terms of the Child Abduction and Custody Act 1985 (which incorporated into domestic law the Hague Convention on the Civil Aspects of International Child Abduction – (“1980 Hague Convention”)).
2. On 21 November 2025, the Lord Ordinary issued his opinion in the petition of DM (*[2025] CSOH 109*). He refused the petition for return of the child B (age 8) to the United States of America, and granted, in principle, the petition for return of the second appellant, H (then age 14) to the US. He put the case out by order to discuss the practical arrangements for H’s return to the USA.
3. The father reclaimed the decision of the Lord Ordinary in respect of B. The mother reclaimed that decision in respect of H. On 10 February 2026, an Extra Division of the

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Inner House issued their opinion (*[2026] CSIH 9, 2026 SLT 213*) allowing the mother's reclaiming motion and refusing the father's reclaiming motion. The court recalled the interlocutor of the Lord Ordinary of 21 November 2025 and sustained the respondent mother's pleas-in-law in respect of H and B. The Inner House also repelled the pleas-in-law for the appellant father and H and refused the prayer of the petition for the return of H and B to Florida, United States of America.

4. On 10 June 2026, permission was granted to H for an appeal to the Supreme Court against the decision of the Inner House in terms of section 40 of the Court of Session Act 1988 on the following grounds.

Grounds of Appeal

5. The Inner House erred in law on the following grounds:
 - (a) By determining that H's views that he wished to return to the US could not be taken into account when assessing the respondent mother's Article 13(b) defence and thus adopting a restrictive approach to the requirement to have regard to the views of an obviously mature child who was a party to the proceedings. In particular, the Extra Division erred;
 - i) In failing to have any regard to the child's views in an action concerning him, which is a breach of Article 12 of the United Nations Convention on the Rights of the Child (incorporated into Scots domestic law by the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024). This is not a case in which it is suggested that the court is exercising a relevant function, as defined in section 6 of the 2024 Act. The child having been allowed the opportunity to be heard in the proceedings, the Extra Division required to have regard to those views and to consider the weight to be attached to those views, or the opportunity to be heard is rendered meaningless and the court is in breach of Article 12.

- ii) In failing to recognise that the issue of “intolerability” is a matter which is personal to the child to an extent, rather than a purely objective matter.
- iii) In circumstances where the mode of conveying the child’s views had been determined at first instance (through the child being separately represented), it is a breach of Article 8 ECHR (right to respect for private and family life) to fail to take account of the child’s representations in determining an Article 13(b) defence.

(b) In the event that the Article 13(b) defence is held to be established it was a matter for the discretion of the Lord Ordinary, not for the discretion of the Inner House, as to whether the child’s return should nevertheless be ordered. The Lord Ordinary’s exercise of discretion was not so plainly wrong that he must have exercised his discretion wrongly.

Consideration of the views of the child in Article 13(b) grave risk defence

6. The Inner House erred in law in determining that H’s views that he wished to return to the US could not be taken into account when assessing the respondent mother’s Article 13(b) defence. At *paragraph 53* of the decision of the Inner House, it is stated that:

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“the question of what the child may be willing, subjectively, to tolerate cannot be any more relevant to the “intolerable situation” aspect of Article 13(b) than it would be to physical harm.”

The appellate court thus adopted a restrictive approach to the requirement to have regard to the views of an intelligent, capable and mature child who was a party to the proceedings. While the child was represented in the process, and his voice was heard to that extent, his views were not considered. The decision of the Inner House was that his view could not be relevant to the issue of “intolerability”. Had the Inner House not erred in law, it would have realised that H’s views are central to any decision of this sort. That was the approach taken, correctly, by the Lord Ordinary (*at paragraph [85]*).

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United Nations Convention on the Rights of the Child

7. The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (“the 2024 Act”), came into force on 16 July 2024. The effect of the legislation is that the United Nations Convention on the Rights of the Child (“UNCRC”) is now fully incorporated into Scots domestic law. Proceedings under the 1980 Hague Convention have been considered relevant proceedings for the purposes of the UNCRC - *FPS v SM [2024] CSIH 20, 2025 SC 61, at paragraph 32.*

8. Article 3 UNCRC requires that the best interests of the child shall be a primary consideration in all actions concerning them. Article 12 UNCRC provides as follows: -

“1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

9. In the present case the Lord Ordinary dealt with the obligation to consider the best interests of the child as a primary consideration at *paragraphs 14 and 15* of his opinion. There he set out that the rebuttable presumptions in proceedings under the Hague Convention are (first) that the interests of the child should be of paramount importance in resolving that dispute, and (second) that the best interests of the child will be served by a prompt return to the country where they are habitually resident. Those assumptions can only be rebutted if a defence available under the Convention is satisfied, of which Article 13(b) is one. In that way the Convention is compliant with the need to consider the best interests of the child as a primary consideration, and the consideration of a separate welfare test will be for the courts of the State of habitual residence.

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10. In relation to the right to express his views, and the opportunity for the child to be heard in terms of Article 12 of the UNCRC, the Lord Ordinary fulfilled that obligation by allowing H to enter into process. H was heard in the proceedings at first instance and in the Inner House, as he was represented by solicitors and counsel on both occasions. The obligation of the court must however go further, in that the obligation to provide the child with an opportunity to be heard cannot end there. Article 12 provides that the views of the child should be given due weight in accordance with the age and maturity of the child. There must logically be a duty to have regard to the views of the child, or the obligation to hear the child would be utterly worthless. Where a child puts forward the specific defence that he objects to returning to his country of habitual residence, the court must take his views into account in considering that specific defence which is set out in Article 13. That is clear. However, the existence of that specific defence in terms of Article 13 does not then mean that the court cannot take the views of a child into account where he is taking the opposite position to that defence- ie that he wants to be returned to his country of habitual residence. The court's obligation to provide the child with an opportunity to be heard under Article 12 UNCRC, in accordance with the with the age and maturity of the child, remains. That obligation must have a purpose. As the *Lord Ordinary sets out at paragraph 85* of his opinion: -

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“the court must have regard to the views of the child when considering any petition under the Hague Convention, not simply where a stated defence is that the child objects, and nowhere does either the Hague Convention, or the UNCRC, state that regard must be had only to views which point in a particular direction.”

11. The Lord Ordinary here correctly identifies that the obligation of the court is not simply to hear the child, but to have regard to his views, when considering any Hague Convention petition. That obligation to have regard to his views does not result in the court being obliged to make a decision which accords with those views - but those views required to be considered. Depending on the particular circumstances of the child, and the particular circumstances of the case, the court may give no weight to those views or may give significant weight to those views.

Subjective aspect of “intolerability”

12. The Inner House erred in law in failing to recognise that the issue of “intolerability” is a matter which is personal to the child, rather than necessarily a purely objective matter. *The Lord Ordinary, at para 85* of his decision, sets out that: -

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“In the case of a 14-year-old child who has a strong wish to return to the State of habitual residence, as does H, it is difficult to hold that his views should not be factored into the final decision at all. On closer analysis, it seems to me that a distinction may fall to be drawn between physical and psychological harm, on the one hand, and of placing the child in an intolerable situation on the other. It is at least arguable that what is intolerable must, to an extent, depend upon what the particular child is able, and willing, to tolerate; or, at any rate, that there is room for the child's views to be taken into account in assessing, for that particular child, in the particular circumstances of the case, whether the situation to which he would be returning would be intolerable for him.”

In the UK Supreme Court case of *In Re E (Children) [2011] UKSC 27, [2012] 1 AC 144*, *Baroness Hale of Richmond and Lord Wilson JJSC set out, at paragraph 34*, that “ ‘Intolerable’ is a strong word, but when applied to a child must mean ‘a situation which this particular child in these particular circumstances should not be expected to tolerate’ ”.

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13. The Lord Ordinary considered that the views of this child must be part of the assessment as to whether for this particular child, in the particular circumstances of this case, return to the US would be intolerable. The Lord Ordinary came to the correct decision by reference to the principles set out in *In re E* and his obligations under the UNCRC.

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14. The issue of what a particular child should not be expected to tolerate cannot be considered in a vacuum or in the abstract. It must be considered with reference to the whole circumstances of this child, which necessarily includes his or her views. There must be an element of subjectivity to some extent, at least, in every case. Every child is different in various ways, including in terms of his or her personality and circumstances. The importance of a child's views, and the weight to be attached to those views, will

differ depending on the age and maturity of the individual child, and to what extent the court considers that his best interests coincide with his views. In adopting that approach, the court ensures compliance with Articles 3 and 12 of the United Nations Convention on the Rights of the Child.

15. It is an error in law to opine that this exercise must always be carried out entirely objectively. It is the particular circumstances of the particular child which are relevant to the assessment of tolerability, as per *In re E at paragraph 34*. It is of course accepted that there are some circumstances, such as physical abuse of the child, where in considering the views of the child, the court can attach little, if any, weight to those views because the court considers that those views are contrary to the child's best interests. That accords with the discussion in *In re E (paragraph 34)* where the court sets out that every child has to put up with some rough and tumble, discomfort and distress as part of growing up, but that there are some things which it is not reasonable to expect a child to tolerate, and among those are physical or psychological abuse of the child himself.

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16. The decision to take account of the child's views was through the application of well accepted principles rather than an entirely novel approach, as has been argued on behalf of the respondent mother. In having regard to the views of the child the Lord Ordinary did not fall foul of the approach to consideration of an Article 13(b) defence as set out in *In re E* but applied that approach.

17. It is well accepted that the older the child, the greater weight their views are likely to carry. That is a principle which the courts apply in relation to child related cases, and the House of Lords held in the case of *In re M & another (Children) (Abduction: Rights of Custody) [2007] UKHL 55, (2008) 1 AC 1288 at paragraph 46* that this also applies in cases under the Hague Convention.

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18. The approach for which H contends is consistent with the position adopted in at least one other Commonwealth jurisdiction. The case of *S v S [1999] 3 NZLR 513* is the only international or domestic case which has been identified as in point with the

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present case. In that case the Court of Appeal of New Zealand provided its reasons for the refusal of leave to appeal against the decision of the High Court judge, Fisher J. Fisher J had found, on appeal from the Family Judge, that the court should be influenced by the wishes of a mature child to return in circumstances when the court might otherwise be minded not to return the child. At *paragraph 17* of the Court of Appeal decision, it is stated that Fisher J.:-

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“did rule positively on the submission that the Court should be influenced by a mature child's wish to return in circumstances where it might otherwise have been inclined to allow the child to remain. He reached that conclusion notwithstanding the fact that s 13(1), following art 13, refer only to a child of age and maturity objecting to being returned. He gave four reasons for that conclusion:

- (1) s 13(1) set out the exceptions to the presumption of return; it might have been thought redundant to expressly articulate reasons supporting the presumption already stated in s 12;
- (2) the mature child's wishes are to be respected in full or not at all;
- (3) the conference report on the convention referred generally to the wishes of the child; and
- (4) the obligation under art 12 of the Convention on the Rights of the Child to give due weight to the views of the child.”

The Court of Appeal refused permission to appeal.

Although this case had not been identified at the time the present case called before the Lord Ordinary, or before the Inner House, it is striking that the Lord Ordinary adopted a very similar approach to that adopted by Fisher J. in *S v S*. That approach accords with the position argued for the child at first instance and before the Inner House. The decision in *S v S* on the issue of discretion shall be discussed below.

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Error in law

19. The Inner House erred in law in finding that the question of what the child may be willing, subjectively, to tolerate cannot be relevant to the issue of “intolerability”.

Further, it was an error in law to determine (*at paragraph 55*) that the Lord Ordinary erred in law in taking H’s views into account in assessing whether the situation to which

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he would be returning would be intolerable for him. The decision amounted to a bald assertion that a child's views can never be relevant to the issue of "intolerability". It is an error in law, and the opinion of the Inner House is not compatible with the authority of *In re E*, the terms of Article 13(b) of the 1980 Convention, or Article 12 of the UNCRC.

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European Convention on Human Rights, Article 8

20. Article 8 of the European Convention on Human Rights (ECHR) provides: -

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

21. Article 8 ECHR includes procedural as well as substantive rights: the decision-making process leading to measures of interference must be fair - *McMichael v UK* [(16424/90) (1995) 20 EHRR 205 at *paragraph 87*. There are positive procedural obligations inherent in the right to respect for family (and private) life. A parent (or other person) whose family life is at risk in proceedings must be afforded a proper opportunity to take part in the decision-making process – *Principal Reporter v K* 2011 SC (UKSC) 91 at *paragraph [48]*.

22. In accordance with the Grand Chamber decision of the Strasbourg Court in *Neulinger and Shuruk v. Switzerland* [2011] 1 FLR 122, the United Nations Convention on the Rights of the Child requires to be considered when assessing a party's Article 8 rights in the context of an Article 13(b) defence to a 1980 Hague Convention application (paragraphs 132-138). Further, Article 13 of the 1980 Hague Convention must be

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interpreted in conformity with ECHR (*paragraph 137*). Nothing that this court decided in *In re E* is inconsistent with these requirements.

HB819

23. Recently, the Strasbourg Court (Third Section) has considered in the context of 1980 Hague Convention proceedings whether the failure to hear children in such proceedings violates their rights under Article 8 ECHR – *M.P and Others v Greece (Application no 2068/24) (unreported) given 9 September 2025, European Court of Human Rights*

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(Third Section). There the Greek courts had ordered the return of two children to the United States of America without their views having been heard, either directly or indirectly. The court highlighted that a child's right to be heard and to participate in decision-making in family proceedings that primarily affect him or her is guaranteed by several international legal instruments (*paragraph 93*). The court affirmed “that national authorities are required to consider whether it is appropriate to hear the child either directly or indirectly, and, where necessary, to rule against it by means of a reasoned decision.” (*paragraph 101*). In *M.P and Others v Greece*, by failing to hear from the children, the domestic courts had not been in a position to determine, on an informed basis, whether there was a risk within the meaning of Article 13(b) of the 1980 Hague Convention. The decision-making process under domestic law had accordingly failed to satisfy the procedural requirements inherent in Article 8 (*para 104*).

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24. H’s Article 8 rights were engaged in the proceedings before the Scottish Courts. It should be uncontentious that the decision made by an Extra Division of the Inner House constituted interference with his right to respect for his private and family life. H’s consistent strong desire throughout these proceedings has been to return to his home country regardless of which parent will accompany him there.

25. The failure to take account of H’s representations in determining the Article 13(b) defence is a violation of the procedural aspects of Article 8 ECHR. The mode of conveying H’s views had been determined at first instance, namely through his being separately represented by solicitors and counsel. The Inner House, by opining (at *paragraph 55*) that the Lord Ordinary erred in law in taking H’s views into account in assessing whether the situation to which he would be returning would be intolerable for

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him, wrongly deprived him of a voice at the appellate stage of the proceedings. Despite H participating in the appellate court process, the court had no regard to his views. That contradicted the ordering and implementation of his participatory rights at first instance. Hearing a child but not having any regard to his or her views has the same effect as not hearing him or her at all. There was no reasoned decision for not considering H's views. The appellate stage violated the established procedural requirements of Article 8 ECHR, rendering the decision-making process unfair.

Exercise of the discretion of the Lord Ordinary and the Inner House

26. The Lord Ordinary made clear that if the Article 13(b) defence had been established in relation to H, he would have returned him on a discretionary basis – *paragraph 89*.

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That was a matter for the discretion of the Lord Ordinary, not for the discretion of the Inner House. The Lord Ordinary's exercise of discretion was not so plainly wrong that he must have exercised his discretion wrongly.

27. The position argued for H at first instance was that should the respondent mother's Article 13(b) defence be established then the Lord Ordinary should nevertheless exercise his discretion and order his return. The Lord Ordinary addressed the matter of discretion at para 89 of his judgment and opined that "the decision about whether there would be a grave risk in respect of H is so borderline that I consider that he should be returned on a discretionary basis, having regard to his views, in any event." That decision was open to the Lord Ordinary, who clearly accepted that while the circumstances in the United States are far from ideal, "they are not so drastic, or intolerable that it is inconceivable that H be returned" (Decision of the Lord Ordinary at *para 89*). The Lord Ordinary, when exercising his discretion, took proper account of all relevant factors and reached a decision that was reasonably open to him on the available material. He was clearly entitled to consider the views of the child at the stage of exercising his discretion. He was correct to do so. In any event, the exercise of his discretion was not so plainly wrong that he must have exercised his discretion wrongly. - *G v G [1985] 1 WLR 647 at 652*.

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28. It is clear from the terms of the 1980 Hague Convention that the court has the discretion to order return, in circumstances where a defence in terms of Article 13(b) has been

established. Article 12 of the 1980 Convention provides that where a child has been wrongfully removed or retained, the authority shall order the return of the child forthwith to the country of origin. At Article 13(b), it is provided that the requested State is not bound to order the return of the child if it is established that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The very wording, that the court is not bound to return the child if an Article 13(b) defence is established, makes it clear that there remains a discretion to return the child in those circumstances.

29. That this is the true meaning of Article 13(b) is clear from the terms of *paragraph 42 of the HCCH 2020 Guide to Good Practice* in cases involving Article 13(b). There it is set out that “where the court is satisfied that the evidence presented/information gathered, including in respect of protective measures, establishes a grave risk, it is not bound to order return of the child nonetheless.” HB1102

30. In the present case, at *paragraph 26* of the Inner House decision, under the heading “The law- Article 13(b)”, the court stated:- HB77

“It is not the policy of the Convention that children should be put at serious risk of harm or placed in intolerable situations. It is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place in him an intolerable situation would nevertheless return him to face that fate: *In re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288, *paragraph 45, citing In re D, paragraph 55*”.

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It is submitted that this statement of the law, with reference to the cases of *In re D*[2006] UKHL 51, [2007] 1 AC 619 and *In re M*, is too absolute, and amounts to a blanket statement which has the purported effect of removing the discretion of the court which clearly exists under Article 13(b), even after the establishment of a grave risk defence.

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31. It is worthwhile to set out exactly what was said by Baroness Hale at *paragraph 45* of

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In re M;

“By way of illustration only, as this House pointed out in *In re D (A Child)* (Abduction: Rights of Custody) [2007] 1 AC 619, para 55:

“it is inconceivable that a court which reached the conclusion that there was a grave risk that the child’s return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate. It was not the policy of the Convention that children should be put at serious risk of harm or placed in intolerable situations.”

These obiter comments followed upon other references confirming that discretion remains following the establishment of an Article 13(b) defence.

At paragraph 28, Baroness Hale confirms that “We have not been invited to overturn the long line of authority holding that, once one of the exceptions in article 13 has been made out, there remains a discretion to return the child under the Hague Convention rather than under the ordinary law.”

HB534

At paragraph 30, Baroness Hale states “A discretion not to return is imported into the words of article 13 itself.... Thus article 13 clearly envisages that the discretion may result in a decision to return within the Convention procedures.”

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32. In the case of *Golan v Saada* 596 U.S (2022) the Supreme Court of the United States

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made clear that while a court “is not bound” to order return upon making a grave risk finding, a court retains the discretion to grant or deny return.

33. The comments by Baroness Hale in *In re D*, and *In re M*, are obiter comments. If interpreted, as the Inner House have done in this case, to mean that the court has no ability to exercise its discretion under Article 13(b) where grave risk is established, then this is incompatible with the terms of Article 13(b). That is not the interpretation of Baroness Hale’s remarks which has been adopted by the English or Scottish courts hitherto, and it is respectfully submitted that in the present case the Inner House has fallen into error.

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34. There is a body of English authorities following upon *In re M* which demonstrate that where a grave risk defence has been established under article 13(b), the courts will be very unlikely to exercise discretion to return the child nonetheless, but that the possibility of doing so remains. In *WM v JD [2017] 10 WLUK 513* at *paragraph [65]*, Hillier J stated:

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“I have, in saying this, clearly borne in mind Baroness Hale's wise counsel in the case of *Re M (Abduction: Zimbabwe)* [2007] UKHL 55. In a similar vein, if the father had established an Art.13(b) defence my exercise of discretion would have inevitably resulted in summary return.”

In that case, Hillier J was well aware of the “wise counsel” of Baroness Hale but is clear that her discretion to return remains, after an Article 13(b) defence is established. In that case, it is the children's lives in South Africa, the existence of support and extant court proceedings there, and the behaviour of the father and stepmother in the UK which are the factors propelling a “summary return” of the children on the basis of the court's discretion, even had an Article 13(b) defence been established.

35. In a similar vein, in *C v B [2019] EWHC 2593 (Fam)* Peel QC sitting as a High Court Judge found at paragraph [74]:

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“I should add that even if I had been persuaded of the Article 13(b) defence by M, I would, in the exercise of my discretion, have decided to order a return.”

In these two cases, the decision made reflects the decision made by the Lord Ordinary in the present case in relation to the exercise of his discretion in the event that he had found the Article 13(b) defence to have been established.

36. In a number of English cases, the courts have commented on the nature and extent of discretion in circumstances where an Article 13(b) defence has been established.

37. In *NP v JP [2015] EWHC 2551 (Fam)* Baker J. at paragraph [36]: stated-

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“It is widely recognised, for example in *Re D* [2006] UKHL 51, that it will be inconceivable that a court which reached a conclusion that there was a grave risk that a child's return would expose him or her to psychological or physical

harm or would place him in an intolerable situation, would nevertheless return the child to face that fate. Thus, once the court has made the finding that a return would so expose him to a grave risk of harm or place him in an intolerable position, it is almost inevitable that it would exercise its discretion by refusing to return the child.”

38. In the case of *Re A (Article 13(b) Mental Ill-health) [2023] EWHC 2082 (Fam)* at *paragraph [101]* Cobb J. stated:

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“But on the facts of this case, I can do no better than to turn to the speech of Baroness Hale said in *Re D (A Child) (Abduction: Custody Rights) [2007] 1 AC 619*, at [55]: “it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate.

In short the discretion will almost inevitably be exercised by refusing to make a return order where the Article 13(b) exception is made out on the basis of a grave risk of harm.”

39. In *T v G [2024] EWHC 246 (Fam)* at *paragraph [59]* Peel J. stated:

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“Should the Article 13(b) exception be established, that is not the end of the matter. The court is required to go on to consider whether, notwithstanding the availability of the defence, the child should nevertheless be returned. This is an exercise of discretion, albeit it is well established (see *Re M (Abduction: Zimbabwe) [2007] UKHL 55*) that in the usual course of events it is unlikely that the court will order a return if to do so would place the returning child in the way of the very harm which has been found to constitute the Article 13(b) defence.”

40. And finally in relation to this English run of authority, in the case of *H v O* [2025] *EWHC 114 (Fam)* at *paragraph* [46], McDonald J stated:

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“Whilst the court retains a discretion to order the return of the subject child where the exception provided by Art 13(b) is established, where the court has concluded that the harm exception is made out and that no protective measures can be put in place that will sufficiently meet the level of risk assumed to exist, it will ordinarily not be appropriate to exercise that discretion in favour of making a return order notwithstanding those conclusions.”

41. The case of *AD v SD* 2023 *SLT* 439, demonstrates that the Scottish courts have taken that same approach to the interpretation of Baroness Hale’s obiter statements. In that case, an Extra Division of the Inner House was satisfied that the respondent mother had established a grave risk defence under Article 13(b) against a background of a catalogue of physical and sexual violence. The opinion of the court was given by Lady Wise who set out at *paragraph* 41 that:

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“[d]espite being so satisfied, we have a discretion to decide to return the children. However, it would be inconceivable that a return would be ordered given the material before us and we shall refuse so to order.”

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It is clear that the decision not to return the children was made on the basis of the material before the court, which was fact specific, and that the court considered that it had the discretion to return despite the establishment of the Article 13(b) defence.

42. The proper interpretation of the obiter remarks in *In re M (Abduction: Rights of Custody)* [2007] *UKHL* 55, [2008] *1 AC* 1288, *paragraph* 45, citing *In re D*, *paragraph* 55 is that where a grave risk defence is established in terms of Article 13(b), discretion to return the child remains with the court, but that it will be very unusual circumstances where that discretion is exercised to order return.

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43. The issue of discretion requires to be considered through the prism of the overarching aim of the Convention, which is that children should be returned to the country from which they have been wrongfully removed or retained.

44. In *S v S* [1999] 3 NZLR 513, the Court of Appeal of New Zealand produces the opinion of High Court Judge Fisher J, including his decision on the issue of discretion following upon the establishment of an Article 13(b) defence. Fisher J concluded (*page 525*) that even if the case came within the Article 13(b) grave risk defence, there nevertheless remained an overriding discretion. Under that heading, regard had to be had to the children's wishes. While those wishes were not determinative, these were mature, well adjusted and intelligent children and it would be in contravention of the international conventions and legislation to fail to give substantial weight to their views. Fisher J allowed the appeal and ordered return of the children. Leave to appeal that decision was refused by the Court of Appeal, as discussed above. This decision accords with the decision of the Lord Ordinary in the present case.

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45. The circumstances of the present case are highly unusual. In deciding that he would have exercised his discretion to return, had he found the Article 13(b) grave risk defence established, the Lord Ordinary adopted a similar approach to Hillier J. in *WM v JD* and Peel QC in *C v D*. The Lord Ordinary describes the case on grave risk as “borderline”–*paragraph [89]*. This is exactly the sort of case where it was reasonable and appropriate for the Lord Ordinary, in exercising his discretion, to return the child after the establishment of an Article 13(b) defence.

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46. H is a child who is now 15. His strongly held view is that he wants to return to the country where he has lived since he was two years old. That has been his consistent view since his wrongful retention in Scotland on 26 July 2025. He describes himself as American and regards the United States of America as his home. He has no recollection of life prior to moving to that country. His desire to return to the United States is not linked to living in a specific property or attending a particular school. The Inner House has held that H's views are entirely irrelevant to their decision about his life. The Lord Ordinary accepted that Hunter's views were well informed and particularly in relation to his schooling should carry considerable weight (*at paragraph 86*). H's views are clear, coherent and rational and based on his own lived experience.

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47. The decision by the Inner House is particularly focused on the risk of his mother committing suicide. There are problems for this child whether he stays in Scotland or returns to the US. H has refused to live with his mother, who resides with his maternal grandmother. He has a difficult relationship with the maternal side of his family, and in particular with his maternal grandmother. H's views are that his living conditions in Scotland will be more intolerable for him than his living conditions in America. He is absolutely clear that he will return to the US as soon as he is able, on turning 16 in May 2027. Meantime his life is on hold, in a place where he does not want to be, and where he will not be living after May 2027. He is unable to access in person education under the US system in Scotland. He has maintained a relationship with his mother through contact and is able to consider the effect of his mother's mental health on his own life.
48. Ignoring the views of a now 15 year old child in these circumstances is in itself inconceivable. It was and is necessary and appropriate to consider those views. In the circumstances of this case, weight should be attached to the views of this now 15 year old child, and it was appropriate to exercise the discretion provided for in Article 13(b) in favour of return. The approach taken by the Lord Ordinary was correct.

Error of law

49. It was an error of law for the Inner House to conclude that it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place in him an intolerable situation would nevertheless return him to face that fate. The court requires to exercise the discretion which remains after the establishment of an Article 13(b) defence by reference to the material facts of the present case.

It was an error of law for the Inner House to overturn the Lord Ordinary's exercise of his discretion.

In any event, it was an error of law for the Inner House not to consider the views of the child in relation to the exercise of its discretion.

Conclusion

50. For all of these reasons, the Court is invited to allow the appeal, to recall the order made by the *Inner House on 10 February 2026* insofar as it relates to H, and to reinstate the decision of the Lord Ordinary in that regard; BECAUSE: the

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- (i) The court has an obligation to have regard to the views of the child in terms of Article 12 UNCRC and Article 8 ECHR in considering whether a defence has been established under Article 13(b) of the 1980 Convention. The Inner House found that the views of the child could not be relevant to the issue of “intolerability” in terms of Article 13(b). That was an error of law.
- (ii) The appellate stage violated the established procedural requirements of Article 8 ECHR, rendering the decision-making process unfair.
- (iii) Where a “grave risk” defence is established in terms of Article 13(b), the court has a discretion as to whether to order return of the child or not. In considering the exercise of that discretion, the court has an obligation to have regard to his views. The Inner House concluded that where a court decided that an Article 13(b) defence had been established it was inconceivable that that court would nevertheless return the child to face that fate. The Inner House failed to have regard to the views of the child in exercising its discretion. That was an error of law.

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