

**IN THE SUPREME COURT OF THE UNITED KINGDOM**

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

**IN THE PETITION OF**

**DM**

**Appellant**

**against**

**SM**

**Respondent**

**and**

**HM**

**Second Appellant**

**CASE FOR THE APPELLANT**

[1] This appeal raises a short point about the treatment under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (“1980 Convention”) of a mature child who wishes to return to his state of habitual residence, despite good reasons why he should not do so. It raises three related issues:

1. Whether the child’s views are relevant to the determination of whether there is a grave risk of an intolerable situation for the purposes of article 13(b)<sup>1</sup>.

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<sup>1</sup> HCCH documentation refers to “article 13(1)(b)”. This Case follows the usual UK reference to “article 13(b)”.

2. Whether the child's views may be taken into account when exercising a discretion whether the child should be returned notwithstanding a finding that the exception in article 13(b) has been established.
3. The impact on these considerations of **article 12** of the United Nations Convention on the Rights of the Child ("UNCRC").

HB220

[2] The basic facts of the case are set out in the Statement of Facts and Issues, to which reference is made.

[3] A search of domestic and international authorities has produced only one case raising directly analogous issues (*S v S* [1999] 3 NZLR 513, see below). The Lord Ordinary and the Extra Division relied heavily on the *obiter* remarks of Baroness Hale in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619 ("*Re D*"). They were *obiter* because the court held that the left behind father in that case did not have rights of custody and accordingly there was no obligation under the 1980 Convention to return the child. The argument for the appellant father here is that the Extra Division has misconstrued the *dicta* in *Re D*, or has misapplied it to the present case. Further, the *dicta* requires to be reconsidered by this court on the basis of current developments relating to the views of children in terms of article 12 of UNCRC.

HB856

HB465

[4] It is not disputed that the respondent mother retained the child H in Scotland in breach of the appellant father's rights of custody in term of **article 3 of the 1980 Convention**. The appellant father commenced immediate proceedings under the 1980 Convention in the Court of Session. This gave rise to a *prima facie* duty under article 12 to order H's return forthwith. The respondent mother relied on the exception in article 13(b) to resist return.

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[5] The case does not turn on grave risk of physical or psychological harm. It concerns whether there was a grave risk of an "intolerable situation" and the consequences of making a finding of such a situation.

#### **Ground I (a). Exception to return – Article 13(b)**

[6] Article 13(b) states:

“Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—...

(b) 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.”

[7] The following general propositions apply:

- (a) The 1980 Convention is designed to protect the rights and interests of children.
- (b) The exception to return is to be restrictively applied. The presumption is for return.
- (c) The burden of proving the facts relevant to the exception is imposed on the person opposing return.
- (d) Establishment of the exception will not invariably result in the child’s retention (more of this below).
- (e) Respect for children’s views is inherent in the Convention. Children require to be heard.

[8] These points are made in the *Explanatory Report for the 1980 Convention by Elisa Perez-Vera*. There is express comment on article 13 at *paras 113 and 114*. In addition, the Explanatory Report refers (*at para 24*) to the underpinning principle expressed by the Parliamentary Assembly of the Council of Europe that children are to be recognised as individuals with their own rights and needs. The child himself is the true victim of the situations covered by the Convention. Further (*at para 30*) the child’s views about return may be conclusive. The Convention gives children the possibility of interpreting their own interests. This is “absolutely necessary” given that the Convention applies to all children under the age of sixteen and “the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will.”

HB1006

HB1040

HB1011

HB1013

[9] Baroness Hale (with whom the other members of the House agreed) comments at *paras 51 and 52 of Re D*:

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“51 It is obvious, as Professor Perez-Vera points out, that these limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated: para 34. The authorities of the requested state are not to conduct their own investigation and evaluation of what will be best for the child. There is a particular risk that an expansive application of article 13(b), which focuses on the situation of the child, could lead to this result. Nevertheless, there must be circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Convention to require it. A restrictive application of article 13 does not mean that it should never be applied at all.

52 In this case, it is argued that the delay has been such that the return of this child to Romania would place him in an intolerable situation. “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”.”

[10] Significantly, Baroness Hale went on at *para 57* to discuss the views of the child. She referred to the:

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“...growing understanding of the importance of listening to the children involved in children’s cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents’ views.”

[11] Baroness Hale continued, at *para 58*, to refer to the need to ensure that the child is given the opportunity to be heard, not just in cases within the European Union, but universally and consistent with the UK's international obligations under article 12 of UNCRC, in every case where the court was being asked to apply article 12 of the 1980 Convention and direct summary return. There is a presumption that the child will be heard in every Hague Convention case, unless this appeared inappropriate.

[12] Whether read independently, or taken together with the Perez-Vera Report, Baroness Hale's observations are consistent with a test of intolerability that takes into account the child's views. The child's subjective view of what he, in his particular circumstances, can bear cannot be dismissed as irrelevant. Intolerability is by its nature subjective.

[13] Baroness Hale refers to "the particular circumstances". That may involve comparison, but will do so from the child's perspective. For example, in a choice between a situation of uncertainty about home, education and healthcare, and an alternative of the requirement to adapt to an unfamiliar setting, remote learning and separation from his peers, it is principally the child who will be able to express which is more tolerable. It is not for adults to tell the child which he can best tolerate.

[14] There is further support for the appellants' position in the decision of the *European Court of Human Rights (Third Section), dated 9 September 2025, in MP and Others v Greece (Application No 2068/24)*. This was a 1980 Convention case relating to children aged four and six, returned by Greece to the United States, despite a claim by their mother that the exception in article 13(b) applied. The court of first instance had held the exception applied but that finding was overturned by the Court of Appeal, whose decision was upheld by the Court of Cassation. The children had not been heard. The European Court of Human Rights held that there had been a violation of article 8. In the light of the relevant international instruments there was a consensus among member states that there is an obligation to provide children with a real and effective opportunity to express their views. The Court affirmed that national authorities are required to consider whether it is appropriate to hear the

child. The Court concluded that the domestic courts not having heard the children, were not in a position to determine, on an informed basis, whether there was a risk within the meaning of article 13(b) and the decision-making process had failed to satisfy the requirements inherent in article 8 of ECHR (*paras100 -104*).

HB705

#### **Ground I (b). Article 13(b) application in this case**

[15] Lord Braid held (*at §83*) that were the child B to be returned this would be to accommodation which was unlikely to be permanent, to uncertain schooling, with uncertain health insurance, in the care of a father who is of uncertain means, with the added worry about his mother and her mental health, coupled with the very grave harm which would result were the respondent to commit suicide. He concluded there was a grave risk of B being placed in an intolerable situation were he to be returned. B's wishes carried little weight as he appeared (erroneously) to think he would be returning to his friends and toys and B was not of an age where his view carried a great deal of weight.

HB128

[16] In the case of H, (*at §85*) Lord Braid took account of his views, drawing a distinction between physical and psychological harm on the one hand and placing the child in an intolerable situation on the other. He recognised that what was "intolerable" must, to an extent, depend on what the particular child was able, and willing, to tolerate, or at any rate that there was 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.

HB130

[17] Having regard to H's age (then fourteen), and the evidence before him Lord Ordinary proceeded (*at §§86 – 88*) on the basis that regard should be had to his views. He factored into his decision H's state of knowledge about his mother's mental health, living away from her and his knowledge that his father had been lying to him about his school. He gave considerable weight to the difficulty for H in adjusting to a different school curriculum when closer than B to the end of his school

HB130

career. The six year age gap between H and B was such that he did not treat their separation as determinative.

[18] Factoring in H's views along with the matters taken into account in relation to B, the Lord Ordinary held that H, unlike B, would not be placed in an intolerable situation were he to be returned, nor would there be a grave risk of physical or psychological harm.

[19] The Inner House held (*para 55*) that the Lord Ordinary had erred in law in taking H's views into account. Taking his views out of the assessment, they held that combination of circumstances to which H would be exposed on return was one he should not reasonably be expected to tolerate and there was therefore a grave risk that his return would place him in an intolerable situation.

HB85

[20] The key difference between the Outer House and the Inner House decisions was whether it was competent for the Lord Ordinary to take H's views into account. If, as the Inner House considered, taking H's views into account was an error of law, then the Inner House were entitled, and obliged, to reconsider the issue of intolerability. If the Lord Ordinary was entitled to take H's views into account, then it is submitted that the Lord Ordinary's reasoning in paras *86 to 88* is sound.

HB130

[21] It is submitted that the Lord Ordinary did not err. His decision was consistent with *Re D* because:

- (a) Intolerability, as explained by Baroness Hale is a subjective issue. It relates to the particular child in the particular circumstances. Unless an articulate child is consulted and his views heard, then the decision-maker will be missing information that is relevant, and potentially central to the question of intolerability.
- (b) Reading *Re D* as a whole, the judgment of the House of Lords endorses listening to children, and doing so in every Hague case, not just a case turning on a child's objections to return. This is consistent with international obligations under article 12 of UNCRC.
- (c) This view is consistent with the Perez-Vera Report, which refers to giving children the possibility of interpreting their own interests.

The decision was in any event compliant with the requirements of article 8 of ECHR.

- [22] Excluding H's views altogether, as the Inner House has done, is inconsistent with the 1980 Convention, as interpreted with the assistance of the Perez-Vera Report and House of Lords authority and at odds with ECHR, article 8.

## **Ground II (a). Exercise of discretion**

- [23] If an exception to return is made out on the facts, then the court has a discretion not to order summary return of the child (as explained, for example, in *Re D at para 55*). This is also explained in the Perez-Vera Report *at para 113*:

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“In general, it is appropriate to emphasize that the exceptions in these two articles (*ie articles 13 and 20*) do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of the exceptions gives judges a discretion – and does not impose on them a duty – to refuse to return the child in certain circumstances.”

- [24] This should be uncontroversial. *The HCCH Guide to Good Practice, applying to Article 13(1)(b) simply states (at para 42):*

HB1102

“- 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 the return of the child, which means that it is within the court's discretion to order the return nonetheless.”

- [25] *In re M (Abduction: Rights of Custody) [2007] UKHL 55, [2008] 1 AC 1288* was a case that primarily turned on whether children were settled in their new environment, in terms of article 12, although they also objected to return for the purposes of article 13. *Lord Hope, in para 5*, refers to the argument for there being discretion, as the policy of the Convention as a whole is to ensure that full weight can be given in a variety of circumstances to the interests of the child. Lord Rodger takes a slightly different view, seeing the exercise of discretion in these

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circumstances as exercised outside the Convention, but he is in the minority. Baroness Hale (with whom the other members of the Court agreed) held that there was a discretion to return a settled child (*para 31*). This, she said, ultimately came down to a case-by-case analysis (*para 39*). The discretion is at large. “The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider consideration of the child’s rights and welfare.” (*para 43*).

HB535

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HB538

[26] It is in this context that Baroness Hale said (*at para 45*):

HB539

“45 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.”

She does not however stop there. She goes on at *para 46* to refer to article 12 of UNCRC and that courts increasingly consider it appropriate to take account of the child’s views, concluding with a comment that the older the child, the greater weight her objections are likely to carry, although that is far from saying that the child’s objections should only prevail in the most exceptional circumstances. She endorses the plea for a “child-centric” approach (*paras 52 and 53*).

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HB540

[27] The comment in *Re M* derives from *Re D*. In neither case was it part of the ratio. *Re D* turned on rights of custody under article 3 and *Re M* concerned settlement under article 12. *Re M* contains a careful analysis of the exercise of discretion, which can be characterised as wide ranging, taking account of Convention policy and the rights and welfare of children (emphasis added). Both cases endorsed the importance of hearing children, which implies allowing their views to influence the decision. Again this is consistent with article 12 of UNCRC.

[28] Lord Braid is not the first, or only, first instance judge to recognise that a finding of an exception under article 13(b) does not exclude the exercise of discretion to order return of a child. See, for example:

- ***WM v JD (FD17P00306, HH Judge Hiller, 20 October 2017, para 65***, where what Baroness Hale said is referred to as “wise counsel.” HB600
- ***C v B [2019] EWHC 2593 (Fam) at para 74*** where the Deputy High Court judge indicated that even were he persuaded of the article 13(b) defence he would have exercised his discretion to order return. HB251
- ***H v O [2025] EWHC 114 (Fam) at para 46*** in which Macdonald J acknowledges that the court retains a discretion, although it will not ordinarily be appropriate to exercise this where the harm exception is made out. HB388

In none of these cases was the discretion exercised, but its existence appears to be uncontroversial.

[29] The Supreme Court of the United States also confirm in ***Golan v Saada (596 US 666 (2022))*** that in a case where return would put a child at grave risk of physical or psychological harm the court has a discretion to grant or deny return (***p9***). HB837  
HB848

[30] ***In S v S [1999] 3 NZLR 513*** a mother retained children aged 11, 13 and 15 in New Zealand, alleging domestic abuse. The children wished to return home to Australia. The decision of the District Family Court refusing return was overturned by Fisher J in the High Court. The Court of Appeal refused leave to appeal. The original Family Court judge had found a grave risk in terms of article 13(b) stemming from the father’s propensity for abuse and the mental fragility of the mother who could not take an effective part in custody proceedings in Australia. Fisher J reasoned that the court should be influenced by a mature child’s wish to return for much the same reasons as are advanced in this case (***see pp 521.10 to 522.20***). He held that “a critical error of principle” had occurred in the devaluation of the children’s wishes. Substantial weight should be afforded to their wishes when carrying out the discretionary exercise (***pp 525.10 to 526.15***). The grave risk case was marginal but HB856  
HB865  
HB869

the “principal anti-abduction objectives ... in combination with the clear wishes of the children, required an order for return” (*pp 527.20 to 25*). Keith J, giving the decision of the Court of Appeal, reviewed the decision of Fisher J and dismissed arguments that Fisher J had erred (*paras 26 – 33 on pp 534 – 536*). The Court of Appeal read his judgment as leaving standing the finding that the exception had been established, the appeal succeeding on the “decisive factor” of the children’s wishes. There had been no error of law in the exercise by Fisher J of that discretion.

HB870

HB877

[31] It is submitted that the *obiter* comment taken from *Re D* and repeated by way of illustration in *Re M* does not represent a rule of law that overrides the existence of a discretion to return a child in the particular circumstances of a case. The discretion remains. It is neither incompetent, or inevitably an error of law, to exercise discretion. A discretion, by definition, allows a decision either way. Provided there is a reasoned decision, which gives weight to the wishes of a mature child, it should not be displaced on appeal (even if the appeal court would have reached a different decision).

[32] The present case was on any view marginal. In *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 Baroness Hale and Lord Wilson JSC, delivering the opinion of the court at *para 33*, pointed out that the risk to the child must be “grave”. It was not enough that the risk was “real”. This indicated the level of seriousness to be reached. There is an inverse relationship between harm and risk. A relatively low risk of death or really serious injury would properly be qualified as “grave” while a high level of risk might be required for other less serious forms of harm. Hence economic disadvantages rarely amount to “grave risk” (*see HCCH Good Practice Guide para. 40*).

HB512

HB1101

## **Ground II (b). Exercise of discretion in this case**

[33] This is a case where return would be conceivable. As the Lord Ordinary says (in *para 89*):

HB131

“For completeness, 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. Putting that another way, the circumstances to which he is returning, although far from ideal, are not so drastic, or intolerable that it is inconceivable that he be returned.”

[34] The Lord Ordinary did not overlook *Re D*. He refers to what was said by Baroness Hale in *Re M*, citing *Re D at para 13*, together with the Scottish case *AD v SD [2023] CSIH 17, 2023 SLT 439*, citing the House of Lords decisions. He acknowledges that it is difficult to envisage circumstances in which a court would return a child to a grave risk of harm or to an intolerable situation.

HB529

HB221

[35] That said, in this case he says, had the exception in article 13(b) been established, he would still have ordered return on a discretionary basis. He gives reasons. The first is that the grave risk in respect of H was “so borderline” and the second that this was “having regard to his views”.

[36] The Lord Ordinary’s decision on exercise of discretion was not incompetent. He gave reasons. If there was an article 13(b) exception it was marginal (see para 28 above). And he had regard to H’s views, as he was bound to do (see para 26 above).

[37] The Inner House, *at para 55*, simply say:

HB85

“Following the approach in *In re M*, it is inconceivable that we would exercise our discretion nonetheless to order his return.”

This seems to have been treated as if it were a rule, which it was an error of law to overlook. They treat the matter as amenable to only one answer, as opposed to a genuine question for the exercise of discretion. They do not engage with the Lord Ordinary’s reasoning. They allow for neither a consideration of the nature and extent of the risk, nor the views of the child. They were not in the circumstances entitled to interfere.

### Ground III (a). UNCRC article 12

[38] Article 12 of the UNCRC states:

“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.”

[39] The UNCRC was adopted by the United Nations on 20 November 1989 and entered into force on 2 September 1990. United Kingdom signed the Convention on 19 April 1990, ratified it on 16 December 1991 and it came into force in the UK on 15 January 1992.

[40] The *UN Committee on the Rights of the Child issued General Comment No 12 (2009) (“GC 12”)* on the right of the child to be heard. This identifies (*at para 2*) “The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. It constitutes not only a right in itself, but falls to be considered in the interpretation and implementation of all other rights.”

HB1147

HB1151

[41] The right is not just to be heard, but to have views “given due weight” or “duly taken into account” as *para 4 of GC 12 puts it. Para 15 states:*

HB1151

“This right imposes a clear legal obligation on States parties to recognize this right and ensure its implementation by listening to the views of the child and according them due weight.”

This is explained further at paras 28 – 31.

“Article 12 stipulates that simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming views”

A decision-maker should explain to a child how her or his views were considered, as a guarantee they have been taken seriously and if necessary to allow the child to

appeal (*para 45*). States are urged to avoid “tokenistic approaches” which allow children to be heard, but fail to give their views due weight (*para 132*).

HB1159

HB1175

- [42] As indicated above (*at para 11, taken from Re D*) there is recognition that children should be given the opportunity to be heard in 1980 Convention cases, as is consistent with the UK’s international obligations under article 12 of UNCRC. This was reinforced by Lord Stephens JSC giving the judgment of the court in *G v G* [2021] UKSC 9, [2022] AC 544 at §73. There is, of course, a substantial case law on article 12 based on *ZH (Tanzania) v Home Secretary* [2011] UKSC 4, [2011] 2 AC 166 (*at para 34*). And as Baroness Hale said in that case (*at para 37*) “Children can sometimes surprise one.”

HB1153

HB254

HB602

HB619

- [43] The European Court of Human Rights in *MP and Others v Greece (Application No 2068/24)* refers to both article 12 and GC 12 (paras 49 and 50) when explaining the international consensus giving rise to the imperative to hear the child as part of the decision-making process in a case where there is an allegation of grave risk in terms of article 13(b) of the 1980 Convention.

HB684

- [44] The European Court of Human Rights in *M v Croatia (2017) 65 EHRR 9* supports the UN Committee’s pleas in CG 12 (2009) for due weight to be given to children’s views (*paragraph 97*) and endorsing the Council of Europe’s 2010 *Guidelines on child friendly justice*, including the giving of due weight to the child’s views and opinions (*paragraph 102, see also paragraphs 171, 172, 185 and 186*).

HB622

HB655

HB679

- [45] *The Council of Europe 2010 Guidelines on Child Friendly Justice* endorses treating children with respect, care and fairness. A child-friendly justice system “listens to children, takes their views seriously and makes sure that the interests of those who cannot express themselves (such as babies) are protected.” This is not however to give children’s views disproportionate weight to the detriment of children’s best interests (p8). The guidelines focus on “Participation” as a fundamental principle. This is said to include giving due weight to the children’s views (*p17*). The

HB800

HB895

requirement to take into account and give “due weight” to children’s view’s is repeatedly stated (*see paras 25, 44 – 49*).

HB931

[46] The 2010 Guidelines are in course of revision, with a movement from “Participation” to “Effective Participation” such that children’s views are taken seriously and given due respect (*Draft Report to Steering Committee paragraphs 61 and 62*). The proposed revisions refer to *the Laura Lundy model of conceptualising the child’s right to participation (see paper ‘Voice is not enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child’)* which includes “influence” as a key element of article 12.

HB937

HB1199

[47] The UN Committee is following a similar route, in the preparation of GC 27 on Children’s Rights to Access to Justice and Effective Remedies.

[48] The UK’s position on article 12 is consistent with international standards on hearing and taking into account the views of children. Professor Marilyn Freeman’s analysis commissioned by the European Parliament’s JURI committee points out that “if we are to protect children from the harmful effects of child abduction, it is critical to afford the opportunity to be heard to children who wish to participate when the decisions taken about them in abduction proceedings have the potential to impact so significantly on their lives.”

[49] Scotland addresses the issue of maturity in relation to the participation of children in proceedings by direct representation in the Age of Legal Capacity (Scotland) Act 1991, as amended by the Children (Scotland) Act 1995. That Act inserted in the 1991 Act, sections 2(4A) and (4B)

“(4A) A person under the age of sixteen years shall have legal capacity to instruct a solicitor, in connection with any civil matter, where that person has a general understanding of what it means to do so; and without prejudice to the generality of this subsection a person twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding.

(4B) A person who by virtue of subsection (4A) above has legal capacity to instruct a solicitor shall also have legal capacity to sue, or to defend, in any civil proceedings.”

### **Ground III (b). Treatment of children’s views in this case**

[50] H was served with the petition in this case (see Schedule for Service). He exercised his right as a child with actual (and presumed) capacity to instruct a solicitor. He was represented from the first calling of this Petition. He instructed Answers setting out his position. Through his representatives he made his position clear throughout. In article 12 terms he was provided the opportunity to be heard in judicial proceedings that affected him, through a representative in a manner consistent with the procedural rules of national law. He was also heard directly in so far as he swore two affidavits, which were received by the court.

[51] The Lord Ordinary’s treatment of H’s views accords with article 12 and the current developments on effective participation. He not only heard H, he gave due weight to his views. The Lord Ordinary did not simply accept and follow H’s views, he set out his reasons for why and how he took account of the views at *paras 85 to 88*.

HB130

[52] Turning to the Inner House, they held it was an error of law for the Lord Ordinary to take H’s views into account. They reached a decision by “taking H’s views out of the assessment of whether the situation to which he would return would be intolerable for him” (*para 55*). They discounted his views and gave them no weight in relation to the question of intolerability or exercise of discretion.

HB85

[53] The Inner House acknowledged the requirement for compliance with article 12 of UNCRC (at *para 29*), but allowed no scope for its operation. Article 12 requires a children’s views to be weighed. It does not permit a court to hear and dismiss children’s views as irrelevant.

HB78

[54] While the court made some “observations” at *para 57*, these were not part of their reasons for overturning the Lord Ordinary’s decision. They were in any event

HB86

misplaced. H did not require a curator *ad litem*. He was entitled to, and did, represent his own interests. He was by no means the youngest child to be represented in proceedings in the Court of Session. A decision on his maturity, and any influence that should result in the discounting of his views, was a matter for the Lord Ordinary. H's views were by no means irrational.

[55] As argued in the permission application, the UK has been a leading exponent of the Hague Convention, as can be seen from the cases before the House of Lords and the Supreme Court. The Inner House decision is adrift from the case law. It veers in the opposite direction to current developments on child-friendly justice, and the need to hear and give due weight to the views of children. It is a matter for this Court whether this is a decision they are prepared to allow to stand.

Jany M Scott KC

Alex Critchley, advocate

22 June 2026