

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

Case ID: UKSC / 2026 / 0080

IN THE PETITION OF DM No1 AND No2

**ON APPEAL FROM THE EXTRA DIVISION, INNER HOUSE, COURT OF
SESSION**

Neutral Citation Number: [2026] SSIH J (10th February 2026)

ON APPEAL FROM THE OUTER HOUSE, COURT OF SESSION

Neutral Citation Number: [2025] CSOH 109 (21st November 2025)

**WRITTEN SUBMISSIONS PREPARED ON BEHALF OF THE INTERNATIONAL
CENTRE FOR FAMILY LAW, POLICY AND PRACTICE**

Filed on 1st July 2026

Introduction and overview

1. The International Centre for Family Law, Policy and Practice (“the ICFLPP”) is grateful for the opportunity to intervene in this appeal which raises important issues about the extent to which children and young people are able to meaningfully participate and contribute to decisions made about them. Permission was granted on 25th June 2026 (by email, and by order dated 29th June 2026) for an intervention by way of written submissions and papers were received from the parties on 26th June 2026.

2. The ICFLPP is aware that there are a number of other organisations intervening in this case and has therefore confined its submissions to those issues which relate to the particular expertise of the ICFLPP and Professor Freeman, as described in the application for permission to intervene. Professor Freeman's research and scholarship have consistently explored the negative impact on children of decisions made unilaterally by their parents, together with the rights of children to participate in processes that concern them, and to be viewed as holders of rights rather than merely objects of protection. It is that research which underpins the submissions set out below and the approach the ICFLPP invites the Court to take in the present case. The most recent published research in that regard is found in a book co-edited by Professors Freeman and Taylor entitled, *Children's Right to Identity, Selfhood and International Family Law* (hereafter "*Children's Rights*")¹.
3. The ICFLPP instructs Hunters Solicitors (Amy Rowe) and counsel (Charles Hale KC, Charlotte Baker and Olivia Gaunt of 4PB) *pro bono* on this appeal.
4. The ICFLPP takes no position on the issues of fact between the parties in this case, and any observations on factual issues are advanced only on the basis of principle and practice.

Keeping pace with society: interpreting the 1980 Hague Convention in 2026

5. Over ten years-ago now, Mr Justice Mostyn remarked as follows in **B v B [2014] Fam. Law 1225:**

“The Hague Convention of 1980 is arguably the most successful ever international treaty and it has over 90 subscribers to it, over half the countries in the world. The underlying and central foundation of the Convention is that, where a child has been unilaterally removed from the land of her habitual residence in breach of someone's rights of custody, then she should be swiftly returned to that country for the courts of that country to decide on her long-term future.”

¹ [*Children's Rights to Identity, Selfhood and International Family law*](#)

6. Whilst the underlying purpose and objective of the 1980 Hague Convention remains as it was at its inception, over forty-five years ago, it now has 103 Contracting States, continues to operate in a modern-world and must keep pace with society. In the present case, the ICFLPP will commend an approach to the interpretation of article 13(b) that recognises and emphasises that children and young people:
- a. Are holders of rights; rather than just objects of protection;²
 - b. Have a right to be heard in all matters affecting them, and for those views to be given due weight in accordance with their age and maturity³; and
 - c. Have their own distinct identity – which article 8 of the UNCRC imposes a positive obligation on state parties to respect and preserve – and which is impacted and sometimes disrupted by systems that society has constructed.⁴
7. Few decisions are as monumental in the life of a young person as where and with whom they live, particularly so when they engage a choice between two completely different jurisdictions and the consequential impact on their way of life, education and day-to-day experiences.
8. Whether those are long-term decisions arrived by a court seized with substantive welfare proceedings,⁵ or summary decisions made in the context of an application for return following an abduction in the context of the 1980 Hague Convention, they are decisions that are bound to have a profound and enduring impact on the young person who is subject to them and as a consequence, a profound impact on their identity both during their minority and beyond it, into their adult lives.
9. “Identity” is defined by Professors Freeman and Taylor in *Children’s Rights* as follows:⁶

“We suggest that identity can incorporate selfhood, but that selfhood (which addresses the ‘who am I?’ question) is also capable of being a separate, discrete topic addressing feelings, emotions, and thoughts about oneself

² *Handbook on European Law relating to the Rights of the Child*, European Union Agency for Fundamental Rights and Council of Europe, 2015, page 17.

³ Article 12 of the UNCRC

⁴ *Children’s Rights* at page 3

⁵ In England & Wales, that would usually follow a decision made on relocation and determined in accordance with the Welfare Checklist per section 1(3) of the Children Act 1989.

⁶ pp.3-5

which may change at different times over the life course and in response to the experience of various life events and transformations. It relates to how you see yourself, rather than how others see you, although the two can, of course, be interlinked. Perhaps that is why the terms are, to some extent, used so interchangeably in the literature: ‘What I am as a self, my identity, is essentially defined by the way things have significance for me’.

This evolving nature and the potential possibilities of such continual ‘re-birth’ make it difficult to formulate a neat, one-size-fits-all conceptualisation of identity. Yet identity is such a critically important personal hallmark that a better understanding of it is needed. It tells us, and others, who we are, and provides our horizon:

‘To know who I am is a species of knowing where I stand. My identity is defined by the commitments and identifications which provide the frame or horizon within which I can try to determine from case to case what is good, or valuable, or what ought to be done, or what I endorse or oppose. In other words, it is the horizon within which I am capable of taking a stand’⁷.

It is important to also consider how identity formation is impacted, and sometimes disrupted, by the institutions and systems that society has constructed. Our particular focus in this book is on the legal system, family law, and the associated family justice professionals, courts, and legal instruments in use domestically, regionally, and internationally. Taking identity into better account in these contexts will improve outcomes and provide greater support for the children and young people who use, or are affected by, them.

Our identity is made up of what we are, how we feel (our selfhood), our individual experiences, and the impacts they have had on us. These may affect the way we view ourselves and, importantly, the way that society views us because of them. Identity is comprised of issues we personally know about and recognise, as well as those of which we are unaware. Ursula Kilkelly puts it this way:

⁷ Quoting Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press, 1989) 34 at 27.

The child's right to identity is associated with the child's personal attributes and belonging, as well as their "sense of self-knowledge, self-awareness and self-esteem".⁸

These are not inconsequential or theoretical matters. Our identity and sense of selfhood will not only affect us but also have the potential to affect others to whom we are close (the small society), as well as those to whom we are not close but with whom we form part of everyday life (the large society). Critically, they have the capability to affect future generations when we parent children who inherit our experiences and the characterisations derived from them, which we have carried through life."

10. This case therefore provides a rare opportunity to reflect on the extent to which children are able to meaningfully participate in decisions made about them, and the extent to which their views and their identity are actually taken into account by those decision makers entrusted to make fundamental decisions about their lives.
11. The Court will no doubt have in mind the need to ensure that its interpretation and application of the 1980 Hague Convention is consistent with the growing movement towards children being involved in decisions impacting their lives and keeping children at the centre of disputes concerning them. Moreover, as well as this Court's decision being binding on both Scotland and England & Wales as distinct legal systems, decisions of the UK Supreme Court are often influential in the application and interpretation of the 1980 Hague Convention throughout the world. In that regard, ICFLPP considers it of vital importance that questions of children's rights should not be so haphazard in their application that they must rely on the serendipity of geography⁹, and so welcomes this as an opportunity to contribute towards a UKSC decision that is likely to have wide-ranging implications, around the (Hague Convention) world.

⁸ Quoting Ursula Kilkelly, Chapter 13, also citing Usang Maria Assim, 'Civil Rights and Freedoms of the Child', in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer, 2019, 389–417) 400

⁹ Professor Freeman, *The Child Perspective in the Context of the 1980 Hague Convention*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, at pp.5 and 18

12. The importance and need for a more systemic treaty interpretation in Hague

Convention decision making has recently be recommended and called for by Ms Tine Van Hoff (Guest Professor and Senior Researcher at the University of Antwerp) following significant analysis of over 800 Hague cases worldwide (see “**Private International Law and Children's Rights Law: Conflicts in International Child Abduction Cases (Studies in Private International Law)**”)¹⁰

Children, young people and the 1980 Hague Convention

13. The 1980 Hague Convention ceases to apply once a child attains the age of sixteen (see article 4). That decision was explained as follows in the *Explanatory Report on the 1980 Hague Convention*, as prepared by Ms Perez-Vera, at paragraphs 77-78 (with our added emphasis):

“The age limit for application of the Convention raises two important questions. Firstly, the matter of age in the strict sense gave rise to virtually no dispute. The Convention kept the age at sixteen and therefore held to a concept of 'the child' which is more restrictive than that accepted by other Hague Conventions. **The reason for this derives from the objects of the Convention themselves; indeed, a person of more than sixteen years of age generally has a mind of his own which cannot easily be ignored either by one or both of his parents, or by a judicial or administrative authority.** As for deciding upon the point at which this age should exclude the Convention's application, the most restrictive of the various options available was retained by the Convention. Consequently, no action or decision based upon the Convention's provisions can be taken with regard to a child after its sixteenth birthday.

[...]

On the other hand, the decision taken in this regard cannot be isolated from the provision in article 13, second paragraph, which allows the competent authorities to have regard to the opinion of the child as to its return, once it has reached an appropriate age and degree of maturity. **Indeed, this rule leaves it open to judicial or administrative authorities, whenever they are faced with the possibility of returning a minor legally entitled to decide**

¹⁰ [Private International Law and Children's Rights](#)

on his place of residence, to take the view that the opinion of the child should always be the decisive factor. The point could therefore be reached where an optional provision of the Convention becomes automatically applicable, but such a result seems preferable to an overall reduction in the Convention's scope.”

14. Earlier in the report, at paragraph 30, Ms Perez-Vera explains as follows (with our added emphasis):

“In addition, the Convention also provides that **the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities, attained an age and degree of maturity sufficient for its views to be taken into account. In this way, the Convention gives children the possibility of interpreting their own interests.** Of course, this provision could prove dangerous if it were applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but who may also suffer serious psychological harm if they think they are being forced to choose between two parents. **However, such a provision is absolutely necessary given the fact that the Convention applies, *ratione personae*, to all children under the age of sixteen; 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.** Moreover, as regards this particular point, all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities.”

15. This text from the report suggests that a child’s views are relevant not only to the question of the particular defence of an objection to return, but it is phrased more widely as to allow for the possibility of children interpreting their own interests more generally. Such an interpretation is consistent with the overarching objects of the 1980 Hague Convention which include securing the prompt return of children who have been wrongfully removed or retained (see article 1 of the Convention). As the whole Convention is constructed on the basis that a return is mandatory unless one or more of the exceptions is established, it is perhaps unsurprising that the question of the child’s views is included only as a specific defence rather than anything else, because absent a defence, the obligation to return is mandatory.

The voice of the child in 1980 Hague Convention proceedings

16. Self-evidently the views of young people are relevant to objections defences, but perspective, views and state of mind have also, in different ways, been held to be relevant to the question of whether they have achieved a habitual residence in England & Wales and whether they are “settled” for the purposes of article 12 of the 1980 Hague Convention.
17. In both situations, the question is not necessarily what the subject child’s views are, nor what they necessarily want, but rather their state of mind and experiences more widely construed. By way of example, Lord Wilson explained the child’s perspective thus in *Re LC (Children)* [2014] AC 1038 as relevant to the question of habitual residence at paragraph 37 (with our added emphasis):

“Where a child of any age goes lawfully to reside with a parent in a state in which that parent is habitually resident, it will no doubt be highly unusual for that child not to acquire habitual residence there too. The same may be said of a situation in which, perhaps after living with a member of the wider family, a child goes to reside there with both parents. But in highly unusual cases there must be room for a different conclusion; and the requirement of some integration creates room for it perfectly. No different conclusion will be reached in the case of a young child. But, where the child is older, in particular one who is an adolescent or who should be treated as an adolescent because she (or he) has the maturity of an adolescent, and perhaps also where (to take the facts of this case) the older child's residence with the parent proves to be of short duration, the inquiry into her integration in the new environment must encompass more than the surface features of her life there. I see no justification for a refusal even to consider evidence of her own state of mind during the period of her residence there. Her mind may – possibly – have been in a state of rebellious turmoil about the home chosen for her which would be inconsistent with any significant degree of integration on her part. In the debate in this court about the occasional relevance of this dimension, references have been made to the "wishes" "views" "intentions" and "decisions" of the child. But, in my opinion, none of those words is apt. What can occasionally be relevant to whether an older child shares her parent's habitual residence is her state of mind during the period of her residence with that parent.

In the *Nilish Shah* case, cited above, in which he propounded the test recently abandoned, Lord Scarman observed, at p 344, that proof of ordinary (or habitual) residence was “ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind”. Nowadays some might not accept that evidence of state of mind was not susceptible of objective proof; but, insofar as Lord Scarman's observation might be taken to exclude the relevance of a person's state of

mind to her habitual residence, I suggest that this court should consign it to legal history, along with the test which he propounded.”

18. The question of whether or not a child is settled for the purposes of article 12 of the 1980 Hague Convention is similarly one which requires a focus on the child, and consideration **from the perspective of the child**, not the adults (see *AH v CD* [2018] EWHC 1643 (Fam) as endorsed by the Court of Appeal in *Re B (Child Abduction: Settlement)* [2025] 4 WLR 125, at paragraph 66).
19. It may be of interest for the Court to know that the practice in England & Wales when faced with objections, settlement and issues relating to the habitual residence of older children, is to direct a report from an experienced officer of the Cafcass High Court team who will meet with the subject child and analyse and share their views. The officer will often be alive to the risks that views may be subject to influence and be able to report to the court accordingly, balancing for the court the circumstances leading to the expression of a child’s wishes and feelings.

Children as autonomous decision-makers – Gillick in 2026

20. Having surveyed, briefly, the ways in which children’s perspectives are woven into the Convention beyond objections defences, it is now necessary to consider the core principles in domestic and international law which underpin the UK’s approach to the role children play in decisions made about them. The Court already has the benefit of the relevant aspects of the UNCRC addressed in documents prepared on behalf of the parties in their written submissions. Those provisions are not, therefore, repeated here, save to observe/remind that whilst the UNCRC has been formally incorporated into Scottish¹¹ and Welsh law¹², it is not directly incorporated into English law. Nonetheless it is relevant and therefore referable to English law as well through the prism of article 8 of the ECHR. Per Lady Hale in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166 at paragraph 21:

“21. It is not difficult to understand why the Strasbourg Court has become more sensitive to the welfare of the children who are innocent victims of their

¹¹ The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024

¹² Rights of Children and Young Persons (Wales) Measure 2011

parents' choices. For example, in *Neulinger v Switzerland* (2010) 28 BHRC 706, para 131, the Court observed that "the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken . . . of 'any relevant rules of international law applicable in the relations between the parties' and in particular the rules concerning the international protection of human rights". The Court went on to note, at para 135, that "there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount."

21. It is an anomaly (we would argue) that England remains the outlier in failing to incorporate the UNCRC. The tension that exists between children and decision-maker has been explored in detail in previous decisions of this Court, primarily through the prism of the tension between the exercise of parental responsibility as set against a child's own autonomy, which increases with age and maturity.
22. In 1985, the seminal decision of *Gillick v West Norfolk and Wisbech Area Health Authority (supra)* was handed down by the House of Lords. It was important at that time not just because of its novel approach to (at that point in history) relatively novel issues about contraception and women's independence, but also because of the emphasis it placed on laws moving pace with society. Per Lord Tullybelton at paragraph 841:

"It is, in my view, contrary to the ordinary experience of mankind, at least in Western Europe in the present century, to say that a child or a young person remains in fact under the complete control of his parents until he attains the definite age of majority, now 18 in the United Kingdom, and that on attaining that age he suddenly acquires independence. In practice most wise parents relax their control gradually as the child develops and encourage him or her to become increasingly independent. Moreover, the degree of parental control actually exercised over a particular child does in practice vary considerably according to his understanding and intelligence and it would, in my opinion, be unrealistic for the courts not to recognise these facts. Social customs change, and the law ought to, and does in fact, have regard to such changes when, they are of major importance."

23. In practical terms, that meant dispensing with much of what was developed in a time gone by where parents (and fathers, in particular) had absolute power over their children. See, for instance, Lord Tullybelton's classic view expressed at paragraph 843E (with our added emphasis): "*In my opinion, the view of absolute paternal authority continuing until a child attains majority which was applied in Agar-Ellis is so out of*

line with present day views that it should no longer be treated as having any authority. I regard it as a historical curiosity.”

24. Notwithstanding its progressive views on the underlying issue, the *ratio decidendi* of *Gillick* was limited to establishing that it was for doctors and not judges to decide on the capacity of a person under sixteen to consent to medical treatment (see *R (Bell) v Tavistock and Portman NHS Foundation Trust* [2022] 1 All ER 416 at paragraph 76).¹³ However, the phrase “*Gillick competent*” thereafter was oft-used far more widely in England & Wales to describe the age and maturity of young people who are capable of making informed decisions as to their futures in a whole range of situations which are wholly unconnected with medical treatment. Per the then-President of the Family Division in *Re S (Wardship: Removal to Ghana)* [2026] 1 FLR 73, at paragraphs 45 – 47 of the judgment:

“45. Having considered the issue during the hearing and since, I am clear that Ms Foulkes is correct that, in terms of its legal impact, the decision in *Gillick* is limited to the ability of a young person to give autonomous valid consent to medical treatment. The purpose of the decision is to offer clarity for the benefit of medical practitioners who require valid consent for a proposed procedure. Lord Scarman was plain in limiting the context of the principle:

‘I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law.’

46. It is also right that, over time, the phrase ‘*Gillick competent*’ has been used more loosely to describe the age and maturity of young people who are seen as being capable of making informed decisions as to their future in a range of situations wholly unconnected with medical treatment. An example of this is the use of the phrase by Cobb J in *Re S*, but, it must be stressed, that *Re S*, whilst not concerning consent to medical treatment, was specifically focused upon the capacity of the ‘child’ in that case to give valid consent to adoption. Cobb J was not referring to, or deploying, the concept of *Gillick competence* in the course of making a CA 1989, s 1 determination as to the child’s welfare – which is the situation in the present case.

¹³ And see the question as expressed by Lord Scarman at 851F: “*The question, therefore, for the House is – can a doctor in any circumstances lawfully prescribe contraception for a girl under 16 without the knowledge and consent of a parent?*”

47. By the close of submissions, Ms Fottrell did not seek to go beyond the position described in the previous paragraph. In the circumstances, it is right to proceed in the present case on the basis that the characterisation of S as being Gillick competent has no direct legal impact in a case which does not concern the evaluation of his ability to give or to withhold valid consent to medical treatment. In the context of this case, ‘Gillick competent’ is no more, nor no less, than a convenient label to indicate that S has sufficient maturity and understanding to form his own view as to where he may live. His ‘wishes and feelings’ are matters that the court is specifically required to take into account by CA 1989, s 1(3)(a). They are to be considered ‘in the light of his age and understanding’. The fact that all parties before the judge accepted that S was Gillick competent was a factor that should have been given appropriate weight by the court in its overall welfare evaluation. The wishes and feelings of a young person who is so regarded are likely to attract more weight, and, depending on the issue in question and the circumstances of the case, in some cases significantly more weight, than that attaching to the wishes and feelings of a younger or less mature child. But, as a matter of law, it is wrong to assert, as the appellant’s ‘fifth proposition’ asserted, that the wishes and feelings of a Gillick competent young person can only be overridden if the court finds clear and compelling reasons for doing so. As with each of the other elements in any holistic welfare balance, all will turn on the weight that is attributed to each of the relevant factors.”

25. In *In the Matter of D (A Child)* [2019] 1 WLR 5403, the Supreme Court considered the issue of *Gillick-competence* in the context of a very different situation: deprivation of liberty and the prospect of the expansion of parental responsibility, rather than the tempering of it. In her judgment and in the particular circumstances of that case, Lady Justice Black declined to interpret *Gillick* beyond the bounds of the question that was specifically before the House of Lords with regards to the medical treatment of children under the age of sixteen but observed with apparent approval its potential to be applied to other areas of family law. Per paragraph 88 of her judgment (with our added emphasis):

“[...] The respondent recognises that the focus of *Gillick* was specific to the issue of consent to medical treatment of children under 16 but invites this court to conclude that the test laid down there applies beyond that scope and up to the age of majority. I accept that certain things that were said in *Gillick* were capable of being interpreted as applying to a situation such as the present, but it would not, in my view, be appropriate to interpret them in that way, so as to draw into the *Gillick* net a situation which is diametrically opposed to that with which the House was concerned (not the *tempering* of parental responsibility in relation to the under 16 age group, but its *expansion* in relation to those aged 16 and 17 so as to give it a role which would not otherwise be afforded by the common law). My unwillingness to adopt this interpretation is reinforced by what I perceive to be the distinct, and rather special, features of the field of deprivation of liberty with which we are here concerned. It follows that the rights of a parent in relation

to restricting the liberty of a child remain, at common law, as described in *Hewer v Bryant*. The inescapable result of that is, I think, that it is not within the scope of parental responsibility for parents to give authority for their 16 year old child to be confined in a way which would, absent consent, amount to a deprivation of liberty. **In so saying, I do not intend in any way to water down the important changes brought about by *Gillick* or to alter the way in which it has been applied in many spheres of family law. I have only been concerned to consider its application in the very specific context of confinement of children of the ages of 16 to 18.**”

26. It follows that whilst the *ratio decidendi* of ***Gillick*** is limited to a specific species of decision making, it has already been acknowledged (by this Court) as well capable of having wider application and, as is clear from the judgment itself, the relevant principles identified by Lord Scarman as regards the question in issue in ***Gillick*** are entirely relevant to the questions now raised on this appeal. In that regard, the Court is respectfully invited to consider the following passages of Lord Scarman’s judgment. Per paragraph 852H:

“The law ignores these developments at its peril. The House's task, therefore, as the supreme court in a legal system largely based on rules of law evolved over the years by the judicial process is to search the overfull and cluttered shelves of the law reports for a principle, or set of principles recognised by the judges over the years but stripped of the detail which, however appropriate in their day, would, if applied today, lay the judges open to a justified criticism for failing to keep the law abreast of the society in which they live and work.”

27. Thereafter, having searched the shelves for that which was relevant in 1985, Lord Scarman explained thus at paragraph 854G-H, with our added emphasis:

“Parental rights clearly do exist, and they do not wholly disappear until the age of majority. Parental rights relate to both the person and the property of the child—custody, care, and control of the person and guardianship of the property of the child. But the common law has never treated such rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. **The principle of the law, as I shall endeavour to show, is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.** The principle has been subjected to certain age limits set by statute for certain purposes: and in some cases the courts have declared an age of discretion at which a child acquires before the age of majority the right to make his (or her) own decision.

But these limitations in no way undermine the principle of the law and should not be allowed to obscure it.”

28. Continuing at paragraph 855H:

“The underlying principle of the law was exposed by Blackstone and can be seen to have been acknowledged in the case law. It is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.”

29. Having identified that parental rights yield to children who are of sufficient understanding and intelligence to make up their own mind on matters, Lord Scarman concluded at paragraph 858D with regards to the specific issue before the House (with our added emphasis):

“I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. **It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law.**”

30. Continuing, at paragraph 858G, to set out that which a doctor is required to satisfy themselves with before determining that a child had capacity to consent:

“It follows that a doctor will have to satisfy himself that she is able to be appraised of these factors before he can safely proceed upon the basis that she has at law capacity to consent to contraceptive treatment. And it further follows that ordinarily the proper course will be for him, as the guidance lays down, first to seek to persuade the girl to bring her parents into consultation, and if she refuses, not to prescribe contraceptive treatment unless he is satisfied that her circumstances are such that he ought to proceed without parental knowledge and consent.”

31. It follows then that whilst the principle established in **Gillick** is that a child is only competent to consent to treatment where a doctor considers they have achieved a sufficient level of understanding and intelligence, but recalling the words of Lady Justice

Black in *In the Matter of D (supra)*, its application is and has the potential to be of far greater effect including in the family jurisdiction.

32. **The ICFLPP would therefore invite the Court to consider the principle in *Gillick* such that the views of children assessed to be of a sufficient level of understanding and intelligence are viewed as likely to be of wider application including in decisions made about them in different spheres of family law and not just limited to questions of medical treatment.** Of course, observing that in the present case, the issue arises in relation to the desire of this particular child to return home and the relevance of his views to article 13(b) of the 1980 Hague Convention, and further, specific submissions about the same are advanced below.

Application of these principles to article 13(b)

33. Article 13(b) of the 1980 Hague Convention provides as follows:

“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 -
[...]

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.”

34. The leading authorities on the application of article 13(b) in UK remain ***Re E* [2012] 1 AC 144** and ***Re S* [2012] 2 AC 257**, from which the following principles can be extracted:

- a. Article 13(b) is, by its very terms, of restricted application [***Re E*** at §31];
- b. The burden of proof in establishing “grave risk” lies with the person opposing the return, and the standard is the ordinary balance of probabilities, subject to the summary nature of the process [***Re E*** at §32];

- c. The risk must be “grave”. A relatively low risk of death might properly be qualified as grave; whilst a higher level or risk might be required for other (less serious) forms of harm [*Re E* at §33];
 - d. “Physical or psychological harm” and “intolerable situation” are not defined but when applied are child and situation specific. That does not mean some rough and tumble; but that which is not reasonable to expect a child to tolerate [*Re E* at §34];
 - e. Article 13(b) looks to the future and the situation on return. It depends “crucially” on the protective measures that can be put in place [*Re E* at §35];
 - f. The critical question for the court is what will happen if the child is returned. If the court concludes that the effect on the returning parent’s mental health will create a situation that is intolerable for the child, then the child should not be returned [*Re S* at §34];
 - g. The extent to which there is good cause for the returning parent to be anxious on return will be relevant to the court’s assessment of their mental state if the child is returned [*Re S* at §34].
35. It is important, in the context of this appeal, to emphasise that the threshold is child and situation specific. Per *Re D (A Child) (Abduction: Rights of Custody) [2007] 1 AC 619*, endorsed in *Re E (supra)* at [§34]:

"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'".

36. In that regard, the ICFLPP would respectfully depart from the characterisation of article 13(b) as either subjective or objective (see Key Documents bundle, **pages 14 - 16, 29 – 34, 53 – 56, 77**) but submits instead that it is, in reality, a question of fact. A situation which might be intolerable for one child; could be entirely tolerable for another, what is crucial is the fact specific, child specific, inquiry.

37. Whilst the questions regarding the application of article 13(b) have not meaningfully appeared before this Court since *Re S (supra)*, the proper approach to article 13(b) is the subject of frequent decisions of the Court of Appeal, particularly in light of the increased number of, “psychiatric harm” cases as a factual basis of the defence.
38. In *Re B (A Child) (Abduction: Article 13(b): Mental Health) [2024] EWCA Civ 1595*, having considered both *Re E* and *Re S*, Lord Justice Moylan distilled the court’s approach into the following exercise at paragraph 51 (with our added emphasis):

“The effect of this approach, as noted by Lewis LJ during the hearing, **is that the court must assess the nature of the risk, the likelihood of the risk materialising and the consequences of the risk materialising for the child.** In a case such as the present, for the purposes of determining whether the circumstances set out in Article 13(b) have been established, **this will involve consideration of the nature or extent of any potential deterioration or relapse in the mother’s mental health and the nature or extent of any potential impact on A.**”

39. The ICFLPP respectfully commend that approach to this Court.

Assessing risk as it relates to a (“Gillick”) competent young person

40. Drawing all of those threads together then, and having regard to the implications of the decision in *Gillick* as well as developments in international and domestic law on the importance of young people meaningfully and actively participating in decisions made about themselves, the ICFLPP advances the following core submissions as relevant to the issues in the present case:

- a. **First**, ICFLPP commends to this Court the very recent decision of the ECtHR in *MP and Others v Greece (Application No 2068/24)*. The subject children in those proceedings were as young as 5 and 3 at the time of the father’s application under the 1980 Hague Convention (rising to 6 and 4 by the time the matter came before the Court of Appeal in Greece). The sole exception to return relied upon in that case was article 13(b). The breach of article 8 of the UNCRC was founded on the basis that the Greek courts did not use all of the means at their disposal to ensure the children would not face an article 13(b) situation on return

(see paragraph 103). As a consequence, the ECtHR concluded that the Greek court was unable to make an informed determination of whether there was a risk on return. **It is therefore respectfully submitted that courts in the UK seized with 1980 Hague Convention cases should routinely consider whether a child needs to be heard beyond merely objections defences, because their views, perspectives and opinions are relevant to a whole host of issues as relevant to the application of the 1980 Hague Convention, including article 13(b).**

- b. **Second**, in relation to questions of article 13(b) in particular, it is respectfully submitted that in order to assess the consequences of any identified risk materialising for a young person on return, the court must have regard to the views of that young person and what that young person is willing and / or able to tolerate. To “tolerate” something is an active and engaged process; it is not merely something that is happening *to* a child, but something that they participate in. The court must therefore have a clear understanding of what a child is willing to tolerate, in order to understand what the consequences are for them on return. **Where a child is *Gillick* competent (should that concept be extended beyond questions of medical treatment per the submissions advanced above) then a child’s perspective in that regard is likely to play a significant role in the court’s determination of whether the article 13(b) threshold is met, but the ICFLPP does not go as far as to submit that those views would necessarily be determinative.** They might, depending on the other circumstances. Much in the way that the doctor in *Gillick* is the safeguard and ultimate arbiter of whether a child is ultimately able to consent to treatment (see [§858G] of *Gillick*), the judge is the ultimate arbiter of risk in 1980 Hague Convention cases (see *Re N (A Child) (Ukraine: Art.13(b))* [2024] EWHC 871 (Fam). The ICFLPP further commend the approach of Mostyn J in *AS v CPW* [2020] 4 WLR 127 in that regard, albeit in the context of an objections defence, rather than article 13(b):

“I would go further. In my judgment it is not merely a question of giving “due regard” to the wishes of a *Gillick*-competent child on a particular issue. In my judgment, if the decision of the House of Lords in *Gillick* is not to be hollowed out, the wishes of a *Gillick*-competent

child on a particular issue, where they are not objectively foolish or unreasonable, should normally be given effect.”

The Court may also find some assistance, in a different context, from the observations of the then President of the Family Division in *O v P & Anor* [2025] 4 WLR 9 in an entirely different context and framework, about the ability of the court to override the consent to medical treatment of a competent young person over the age of sixteen. He said this at paragraph 46 about the limitations of the court’s jurisdiction in such circumstances:

“It is important to stress that the court's best interests jurisdiction with respect to consent to medical treatment given by a competent person who is over 16, but under 18, is not a general welfare jurisdiction. As was made plain in *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64, the court will only override the consent of a competent young person, who is over 16, where it is necessary for the court to intervene to protect them from '*grave and irreversible mental or physical harm*' (Nolan LJ p 94).”

- c. **Third**, in respect of the issues as to whether a child’s particular views should be construed narrowly as against just one of the defences only, the ICFLPP would respectfully suggest that a more appropriate judicial approach would be first to assess the child’s view, say, in respect of the article 13(b) defence, and then to stand back and to consider the views of the child more broadly against the other issues in the case. For instance, as here the views of the older child cannot, we say, be ignored in respect of the younger child and vice versa. Each has a view about the situation of the other which should be respected as relevant to the issues in the case, just as the views of the parents are relevant. In that sense, the children’s views cannot and should not be siloed and separated out into discrete boxes. After all, sibling relationships often endure and may take on greater significance to one’s identity than parental ties.
- d. **Fourth**, on the issue of discretion, whilst the ICFLPP does not seek to suggest that a court will routinely exercise a discretion in favour of return once the article 13(b) threshold has been met and proposed protective measures deemed insufficient, **it considers it important that the discretion remains, primarily**

because it is the only area where the court is able to balance the risks on return as against risks of a return being refused. A court *may* conclude that the risks are relatively equally matched, and in those circumstances, may well decide to make an order for that child's return particularly if a return is consistent with a competent, mature child's views. The ICFLPP would argue that it is in this context that issues with regards to identity are likely to be most relevant. **It is respectfully submitted that without retaining a discretion for that purpose, the court would be fettering the ability to make decisions consistent with the framework imposed by international human rights law.** There may well be cases where the article 13(b) threshold has been met but the clearly held views of the child tip the balance properly in favour of exercising the discretion to return the child. That would in the right case, respect the child's rights including to their own identity and selfhood.

41. Those representing the ICFLPP remain able to attend the hearing on 2nd July 2026 if short, oral expansion of these submissions would be of assistance.

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**For the ICFLPP
1st July 2026**