

IN THE SUPREME COURT OF THE UNITED KINGDOM

**ON APPEAL
FROM THE EXTRA DIVISION OF THE COURT OF SESSION
IN SCOTLAND**

in the **PETITION**

of

DM (Assisted Person)

APPELLANT

against

SM

RESPONDENT

and

HM (Assisted Person)

SECOND APPELLANT

WRITTEN CASE FOR THE RESPONDENT

Introduction

1. These appeals concern the child H, (age 15) the second appellant. They do not concern the child B (age 8) in respect of whom the decision of the Lord Ordinary of 21st November 2025, affirmed by the Inner House, refusing the petition for return of the child on the basis of article 13(b) of the 1980 Convention on the Civil Aspects of International Child Abduction (the Hague Convention) to the USA, is unchallenged.

2. The legal issues arising in these appeals are as identified at *page 7 of the Statement of Facts* and Issues, namely:-

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- i) whether the test of intolerability for the purposes of article 13(b) of the Hague Convention is, as a matter of law, wholly objective, or whether the child's subjective response to their circumstances is relevant
 - ii) whether the court has a discretion to order the return of a child where the article 13(b) defence is established and
 - iii) whether article 12 of the United Nations Convention on the Rights of the Child requires the court to have regard to the views of the child in respect of his return when deciding whether article 13(b) applies and when deciding whether discretion should be exercised to order the return of the child.
3. Grounds of appeal for the appellant a), b) and c) relate to the legal issues i), ii) and iii) respectively.
4. Grounds of appeal for the second appellant 3(a)(i)(ii) and (d) relate to the legal issue iii), i) and ii) respectively. Ground of appeal 3(a)(iii) re article 8 ECHR is not associated with a legal issue.
5. It is intended to accommodate the appellants' grounds of appeal by response to the legal issues identified in the Statement of Facts and Issues.
6. Ground of appeal for the second appellant 3(a)(iii) is accommodated separately there being no legal issue pertinent thereto.

Key Propositions

7. The Inner House did not err in law. Their opinion is thus not vulnerable to review.
8. *Esto*, they did err in law, which is not accepted, return to the USA would place the child at a grave risk of psychological harm or otherwise place him in an intolerable situation. The appeals should be refused adhering to the order that the petition in respect of H be refused.

First Issue – whether the intolerability test is wholly objective, or whether the child’s subjective response is relevant

9. The Lord Ordinary found that the grave risk defence in relation to H was not made out.

He drew a distinction between grave risk of physical or psychological harm on the one hand and of placing a child in an intolerable situation on the other (**para [85]**). The Inner House determined correctly that the Lord Ordinary erred in so doing.

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10. The Lord Ordinary applied the child’s views to the determination of intolerability.

He considered, from the child’s own perspective, that which the child could tolerate upon return to the USA, rather than that which the child should not be expected objectively to tolerate upon return (**paras [84-86]**). The Lord Ordinary in doing so imported a subjective test into his analysis. The Inner House determined correctly that the Lord Ordinary was wrong so to do.

HB129

11. At **para [84]** the Lord Ordinary identified correctly that in respect of the issue of fact as to whether there would be a grave risk of harm on return, the views of the child were irrelevant.

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12. At **para [85]** the Lord Ordinary went on to develop his analysis in the matter of the grave risk defence in respect of H, favouring a subjective test, stating “*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, 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.*”.

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13. In **para [85]** the Lord Ordinary in applying a subjective test departed from established jurisprudence. He erred in so doing.

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14. The Inner House at **para [55]** held 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 him. They took into account, as the Lord Ordinary had, a

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combination of factors with particular weight to the very serious harm to H were the respondent, his mother, to complete suicide. They held that the combination of negative circumstances, including the risk of the respondent's suicide, were circumstances which the child "*should not reasonably be expected to tolerate*". They were satisfied that there was a grave risk that H's return to the USA would place him in an intolerable situation. They held, following the approach in *In re M* that it was "*inconceivable that we would exercise our discretion nonetheless to order his return*" to the USA.

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15. The Inner House at **para [53]** relied upon the decision of *In re E (Children)* [2011] UKSC 27 referring to paragraphs 33 and 34 thereof in connection with the of the nature of harm to the child. **Para [34] of In re E** states:- analysis
"...the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or otherwise" place the child "in an intolerable situation. As was said in In Re D [2007] 1AC 619 at para 52, "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". These words were carefully considered and can apply just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source is irrelevant eg where a mother's subjective perception of events leads to mental illness which could have intolerable consequences for the child."

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16. The Inner House held at **para [53]** that the risk to the child required to be grave, with regard to both the seriousness of the harm and the likelihood of it eventuating. They held that the risk of placing the child in an intolerable situation should not be considered to be of a less serious character than a grave risk of physical or psychological harm. They referenced the utility of the word "*otherwise*" in making plain that the level of harm to the child requires to be such that the child should not

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reasonably be expected to tolerate. They held that the question of that which a child may be willing, subjectively, to tolerate was irrelevant to the intolerable situation aspect of article 13(b) as it was to the serious physical harm aspect. They were correct to hold as they did.

17. In following ***In re E*** the Inner House correctly held that the subjective tolerance of a child was irrelevant to the intolerable situation element of Article 13(b), just as it would be irrelevant to the risk of serious physical harm (para [53]). They were correct to equiparate these elements. They were correct to hold that the test re intolerability was an objective one. This approach is consistent with the language of ***In re E in para [34]*** of circumstances which a child “*should not be expected to tolerate*”. This underlines an objective analysis. It does not support a subjective analysis. This does not suggest that the test is standardised for children. The test is particular to the individual child, although determined objectively.

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18. The approach of the Inner House also follows the decision delivered by Baroness

Hale in ***In re D (A Child)*** (***Abduction: Rights of Custody***) [2006] UKHL 51; ***IAC 619. Para [52] of In re D*** describes the objective nature of the test of intolerability by reference to the circumstances which a child “*should not be expected to tolerate*”. Reference is made to the recognition of the “*growing understanding*” of the importance of considering the views of the child. There is recognition that the decision of the court will impact the child, more than other parties underlying the importance of “*listening to the child*” who are described as capable of being “*moral actors*” in their own right. There is also the observation that children, just like adults, may have to comply with the court’s decision, even though it does not accord with their own views, but it is noted in terms that merely because a decision does not align with the views of the child, that is not a defensible reason to refuse to hear the views.

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19. It is important to note that Baroness Hale in ***In re D*** makes express reference to article 12 (and 13) UNCRC with the acknowledgement that the same applies in every Hague Convention case. (***para [58]***). It is recognised that article 12 “*erects a presumption that the child will be heard unless this appears inappropriate. Hearing the child is, as already stated, not to be confused with giving effect to his views.*”

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20. The Inner House were correct in their approach in equiparation of the intolerable situation element to the grave risk of physical harm. In exploring this approach, it is helpful to consider circumstances where a subjective intolerability test might be applied to a grave risk of physical harm, such harm having a more tangible quality than the concept of intolerability. If a child is found to be subject to a grave risk of physical harm, but the child, nevertheless, states a view that they are prepared to tolerate that grave risk, it can be readily envisaged that the child's view could not be operative in the determination of the matter of intolerability in terms of article 13(b). The application of the child's view would lead the child into danger. A child requires to be protected from the grave risk of physical harm, once established, regardless of his wish to risk suffering that harm. It is "*inconceivable*" that the court would make an order placing the child into such a situation no matter the strength of the child's view. The same rationale can be extended to the relevance of subjective views to the question of the child wishing to suffer an intolerable situation. Thus, once grave risk is established the perception of the child on intolerability is not relevant all as guided by the interests of the child.
21. A distinction requires to be drawn between representations/submissions for the child concerning whether, as a matter of objective fact, the article 13(b) is made out, and the child's views as to his desire for return. When assessing whether the defence is made out, any representations made by the litigant child on that issue must be considered by the court. This has been done for H throughout, with H being represented by counsel for the entirety of the process. He has fully participated in the decision-making process and due regard has been given to such representations. However, adequate participation does not require that the child's subjective views concerning return should influence the fact-finding for the purposes of article 13(b). The views of the child on return cannot influence the establishment of fact. The views on return are irrelevant to the establishment of fact. This is further discussed for issue three below.
22. Care should be taken not to conflate the centrality of a child's views in an objection case, with the relevance of views in a grave risk case. The child's views are the

essence of the objection in an objections case and are focal to the decision making by the court. The child's views are not the essence of an article 13(b) case. The essence of a grave risk case is the determination of the fact of the grave risk and the issue of intolerability considered objectively. An article 13(b) case is prosecuted in two stages as confirmed in *In re D (para [55])*. The first stage is the determination of the fact of grave risk and the issue of intolerability. The second stage is operative following the establishment of grave risk and the intolerability involving the exercise of a judicial discretion whether, in the light of the finding of grave risk and intolerability, that the child should nevertheless be returned. The views of the child with regard to return are relevant to the exercise of discretion. They are not relevant to the establishment of fact.

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23. The decision in *Maumousseau v France (2007) 51 EHRR 822* cited with approval at *para 20 in In re E*, notes that the consideration by the court of the exceptions to return of a child under the Convention, with particular reference to articles 12, 13 and 20, should proceed on “*objective considerations concerning the actual person of the child and its environment*”. This decision also confirmed that a child's best interests were a primary consideration of the Convention. This approach is consistent with the application of an objective test in connection with an article 13(b) defence, which is informed by objective considerations applied to the child's circumstances with regard to the interests of the child.

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24. Accordingly, the subjective views of the child to the establishment of grave risk are not relevant. Once the threshold of grave risk is met the views of the child with regard to intolerability are not relevant. It cannot be open to a child to have his views applied to conclude that, regardless of the finding of grave risk, the child is prepared to suffer the grave risk of harm such as would render same tolerable. To permit otherwise is to sanction a child electing to suffer a grave risk of harm. Such is an abrogation of the requirement to protect the child and operates in opposition to the best interests of the child.

25. The Inner House were correct to observe (*at para [26]*) that it was “*not the policy of the Convention that children should be put at serious risk of harm or placed in intolerable situations*”. Neither is it the policy of the Convention to sanction a child

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leading himself towards a grave risk of harm or otherwise placing himself in an intolerable situation by the application of a subjective test on the matter of intolerability.

26. The test on intolerability is wholly objective.

Secondary submission- Esto case

27. Esto the Inner House erred in holding that the child's views could not be relevant to the determination of intolerability and that the test is not wholly objective, which is not accepted, and their decision is vulnerable to review, in all the circumstances of this case the child's views ought not to be attributed such weight as to result in his return to the USA. The circumstances of the child, as referred to below, when considered alongside the gravity of the risk of harm, particularly in connection with the risk of decline in the mental health of the respondent, and the likely consequences for the child in the event of such a decline, the court should find that the child would be at grave risk of being placed in an intolerable situation were he to return to the USA and that the article 13(b) defence is made out.

The circumstances of the case

i) The findings re B

28. The Inner House, at *para [55]* held correctly that once the child's subjective views were removed from the analysis, that there was no basis for distinction in the decision making for the child B and the child H.

HB85

29. The Lord Ordinary found at *para [83]* that the child B would suffer “*very grave harm*” should his mother commit suicide. He found other negative factors were the lack of permanent accommodation, uncertain schooling, uncertain health insurance, being in the care of the appellant who was of uncertain means, in addition to the very grave harm should the respondent's suicide eventuate, led to a conclusion that there was a grave risk of the child being placed in an intolerable situation were he to be returned. The factors applied to the analysis for B are also apt for H.

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30. The Lord Ordinary had regard to the *report by Professor Gary Macpherson, Consultant Forensic Clinical Psychologist on the respondent (paras [52-54] and para [80])*. Professor Macpherson wrote that the mother had symptoms of depression and anxiety consistent with a diagnosis of Adjustment Disorder with low mood and anxiety. He wrote that a court return order of the children would have immediate negative impact on the mental health of the mother. The Lord Ordinary, at para [80] accepted the evidence of Professor Macpherson. He found that the mother was suffering from an Adjustment Disorder, a stressor associated therewith being the possibility of return of the children to the USA, and that return of the children to the USA would cause the stressors to remain. The Lord Ordinary found that a further suicide attempt by the mother should the children be returned could not be ruled out and that should suicide eventuate the children would experience trauma and extreme psychological harm. (*para [80]*)

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31. The Lord Ordinary held at *para [57]* that given the respondent's fragile mental health her decision that she would not return to the USA was genuine and objectively reasonable.

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32. Baroness Hale in *In re E discussed (at para [33])* the approach to assessing gravity of risk, considered by the Lord Ordinary at *para [6]*. "Grave" characterises the risk rather than the harm, however there is a link between the two. It was recognised in *In re E* that a relatively low risk of death or really serious injury might properly be qualified as "grave". The relatively low risk of a serious decline in the mental health of the respondent or the suicide of the respondent would, it is submitted qualify as "grave" in respect of H. This is consistent with *In re S (A Child) (Abduction; Rights of Custody) [2012] UKSC 10* where it was determined that a mother's subjective perceptions of mental illness could have intolerable consequence for the child and were capable of founding a grave risk defence.

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ii) Inadequacy of evidence of tolerance by H

33. The evidence with regard to the ability of H to tolerate trauma and extreme psychological harm should the respondent commit suicide, and the other negative factors identified at para 22 above, is scant and unconvincing.

34. The Inner House observed at *para [57]* their concern that there had been no independent input in relation to H's individual level of maturity, or the independence of his views. They expressed concern that there was no independent assistance to the Lord Ordinary in this assessment with particular note of the child's circumstances where the child required to confront and express views regarding the serious mental health crisis suffered by the respondent and the impact of same upon him, noting that the child had transferred to the care of the appellant in apparent contradiction to the "*spirit*" of the interdict *ad interim* granted by the Sheriff at Peterhead. The concerns expressed by the Inner House are well founded.

HB86

35. The only evidence of the ability of the child to tolerate the adverse circumstances identified were he to return is located in the *child's affidavit dated 14th October 2025 in paragraphs 21-26*. There is no psychological, medical or school report.

HB139

36. The circumstances of the respondent's suicide attempt, such as they are known to the child, are discussed at *para 20 and 21 of his affidavit*. He provides a narrative of gaining an understanding of the attempt, together with exchanges with B. There is no insight or self-reflection regarding the emotional or psychological response by the child, or the impact upon him of what must have been a significant event.

HB147

37. The matter of a future decline in the respondent's mental health is discussed by the child at *para 26*. He states "*If I went back to the USA and my mum's mental health declined and she tried to take an overdose again, I would feel sad but I don't think I would blame myself because I haven't asked her to stay in Scotland*". The child's evidence is equivocal ("I don't think") and lacks conviction. The child does not at any time contemplate the possibility of the respondent committing suicide.

HB148

38. The evidence of, and about the child, which the Lord Ordinary applied to tip the balance from borderline in the non-establishment of grave risk to justifying a return order, as discussed in *para [89]*, is lacking in material respects. The Lord Ordinary found that, were a future suicide attempt to eventuate, extreme psychological harm would result for both children (*para [80]*). There is no evidence from H or otherwise regarding his consideration of such an eventuality. Professor Macpherson reported

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upon the stressor of a court ordered return of the children and the immediate negative impact upon the mental health of the respondent. Dr Edward reported upon the tangible risk of a mental health impact upon the children in the event of a relapse in the mental health of the respondent and the “*extremes of personal guilt if they perceived their rejection of their mother had precipitated deterioration in her mental health*”. In the event of a successful suicide attempt by the respondent it is likely the emotional and psychological burden carried by the child would be life-long. The gravity of such a happening cannot be overestimated. Yet, there is no evidence, or insight from the child, or elsewhere, in analysis of his ability to tolerate such an event.

39. The Lord Ordinary failed to engage with analysis of the child’s ability to tolerate the likely enduring detrimental impact of the suicide of the respondent. The Lord Ordinary failed to properly engage with the analysis of whether the child could tolerate a deterioration in the respondent’s mental health. The extent of the engagement by the Lord Ordinary is found within *para [86]*. The Lord Ordinary finds that the child “*is aware of the fragility of his mother’s health and better able than B to take an informed view as to whether he would find it intolerable to be living on the other side of the Atlantic from her in circumstances about which he is reasonably well informed.*” The focus on the child’s tolerance of his ability to live geographically distant from the respondent fails to engage with the central dilemma for the child. The observation that the child “*is reasonably well informed*” about the respondent’s fragile mental health fails to recognise the centrality of the issue in the analysis of the ability of the child to tolerate impending circumstances.

HB130

40. The observations by the child with regard to his ability to tolerate a decline, whether moderate or catastrophic, in the respondent’s mental health are superficial and lacking care. There is no recognition of the profundity of the likely impact of a deterioration in the mental health of the respondent, even where that does not result in suicide. Given the circumstances where B found the respondent in the wake of the suicide attempt in September 2025 it might have been anticipated that H would have considered the consequence for B in the event of a further attempt. In respect that B is to be in the care of the respondent, it might have been anticipated that H would have reflected upon the peril for B should a decline in the respondent’s

mental health occur. That H does not consider this aspect, and the likely impact upon H in respect of any suffering by B, again suggests that the statement of tolerance fails to consider the range of circumstances which H would require to navigate and ultimately tolerate. The Lord Ordinary fell into error in his lack of scrutiny of the child's true tolerance. The Inner House were correct to allow the appeal in respect of H.

iii) Failure of proper engagement on influence and manipulation

41. It is notable that Lord Ordinary failed to properly engage with the matter of influence and manipulation by the appellant upon the child. The Lord Ordinary discusses the issue at *para [45]* where he records the respondent's evidence that the appellant exerts "*improper influence*" on the two boys and "*manipulates them*". He notes the factors cited by the respondent in support of influence and manipulation, being B's "*apparent change in attitude following a recent contact visit*", "*the speed with which H was able to instruct solicitors*", that he had "*appeared to have been turned against the respondent's family*" and the "*extent to which the boys had an inappropriate knowledge of the case*". The Lord Ordinary notes "*while the factors cited appear to lend some support to the respondent's position*" he leaves the matter of influence and manipulation out of account in his final analysis of the case. This omission is concerning particularly where the report *by Dr Edward (at para [64])* recorded that were the court to accept that the children were being influenced or manipulated by the appellant that this would be expected to fundamentally undermine their capacity to both form and express their own views.

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42. Further, the omission of the matter by the Lord Ordinary in the final analysis is of particular concern. The Lord Ordinary noted that experienced senior counsel appointed by the court as Child Welfare Reporter in respect of B attributed an attempt by the appellant to influence *B (para [71])*. In all the circumstances of the children, the matter of influence and manipulation of the children, and particularly H, ought to have been the subject of determination by the Lord Ordinary. It ought not to have been left out of account. This is particularly so where the views of H were potent in the final analysis by the Lord Ordinary, and in the exercise of his discretion.

HB121

43. *Esto* the decision of the Inner House is vulnerable to review, the court is invited to adhere to the refusal of the petition in all the circumstances of the case.

Exercise of discretion by the Lord Ordinary

44. The second appellant asserts that, 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 held that the grave risk defence was not made out re H (*para [88]*). Accordingly, he did not require to exercise his discretion. It is recognised that there is a suggestion, at *para [89]* although not expressly stated, that had he determined the grave risk defence was made out that H should be returned on a discretionary basis. The Inner House held that the Lord Ordinary erred in law rendering the matter open for review, including the exercise of a discretion. The Inner House cannot be bound by the exercise of a discretion by the Lord Ordinary where the Lord Ordinary is found to have erred in law.

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HB131

Second Issue- Whether the court has a discretion to order the return of a child where an article 13(b) defence to return is established.

45. The court has a discretion to order the return of a child where an article 13(b) defence is made out. There is a consistent seam of authority in which the discretion is recognised. There is consistent seam of authority, both national and international, which recognises that in the circumstances of a finding of grave risk it would be inconceivable that the discretion would be exercised.
46. The discretion was noted in **In re D (Abduction: Rights of Custody) [2007] 1 AC 619; [2006] UKHL 51**. It was noted (at para [55]) that in circumstances where a grave risk offence is established it was "*inconceivable*" that a court would return a

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child to face the grave risk. Such a return would be in clear conflict with the interests of the child. The interests of the child form a primary objective of the Convention. The exercise of discretion by the court must have regard to those interests. The tendency towards a refusal to exercise the discretion in the interests of the child does not mean that the discretion does not exist. It is the natural consequence of the finding of grave risk. In this respect the exercise of discretion further to a finding in terms of article 13(b) is of a different character to the exercise of discretion in e.g. a child's objection case.

47. The existence of a discretion was also noted in *AD v SD [2023] CSIH 17; 2023 SLT 439 in a decision of the Extra Division delivered by Lady Wise. In para [41]* the court having found that the grave risk defence had been made out and expressly noted that, despite so finding, the court had a discretion to decide to return the children (*para [41]*). They went on to state that given the material before the court it would be “*inconceivable*” that a return would be ordered.

HB221

HB240

48. The decision in *S v S [1999] 3 NZLR 513* founds upon the determination that the grave risk was marginal. On a proper analysis of the instant case for the reasons identified above, the Lord Ordinary erred in his finding that the grave risk assessment was borderline in respect of H. This decision can thus be distinguished. In any event it is recognised that all Hague Convention cases are highly fact dependent. The decision in *S v S* is thus of only peripheral import in the instant case.

HB865

Third Issue- Whether article 12 of the United Nations Convention of the Rights of the Child requires the court to have regard to the views of the child when deciding whether article 13(b) applies and when deciding whether discretion should be exercised to order the return of the child

Overview of Article 12 under reference to UN Committee General Comment No 12 (2009)

49. It is noted that the ground of appeal for the appellant 1(c) makes reference to paragraphs **28, 45, 46 and 132 of the UN Committee General Comment.**

HB1159

50. **Paragraph 28** states that simply listening to the child is insufficient and that where the child is capable of forming views, the views of the child have to be seriously considered. This is related to the concept of the child's participation in the process.

HB1157

Paragraph 3 states "*A widespread practice has emerged in recent years, which has been broadly conceptualised as "participation", although this term does not appear in the text of article 12. This term has evolved and is now widely used to describe ongoing processes, which include information sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.*" It is noted that the term "participation" is also referred to in the HCCH Guide to Good Practice. It describes an ongoing process of sharing information and discussion between the child and adults, together with explaining to the child how their views are taken into account and shape the outcome. Beyond this, the constituents of participation are not prescribed. There can be no doubt that H participated fully in the process. He has been represented by solicitors and counsel throughout the case. His views and submissions as instructed by him have been fully and seriously considered by the court.

HB1151

51. **Paragraph 45** relates to the requirement that the child be informed of the outcome of the proceedings. This requirement has been complied with. **Paragraph 46** relates to the right to advance a complaint where the views have been disregarded or not taken seriously. It cannot be said that the views have been disregarded or not taken seriously merely because the views of the child have not prevailed.

HB1159

HB1159

52. **Paragraph 132** relates to the risk of “*adult manipulation*” where it is noted that such manipulation is not an ethical practice and is in conflict with implementing article 12. This underlines the importance of establishing, in the present case, the fact or otherwise of the manipulation of H by the appellant, as an essential component in assessment of the weight to be afforded to the child’s views. It further supports the concerns expressed by the Inner House in respect of the deficiency of material before the Lord Ordinary in his affording the views of the child particular weight.

HB1175

53. **Paragraph 132** urges States Parties to avoid tokenistic approaches which limit a child’s expression of views, or which fails to give due weight to those views. The dicta of Baroness Hale in *In re D at para [57]* is pertinent in this respect. It is not tokenistic to fail to give effect to the views of the child. It is recognised that there is a considerable margin in the listening to the views of the child and affording them due weight, and giving effect to those views. The participation of a child in proceedings and the statement of views by the child can and often does result in a judicial decision which does not align with those views. That is in the nature of the judicial function.

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54. The child should have a sufficient understanding to be capable of appropriately forming his or her own views on the matter (**paragraphs 21 and 25**). There is concern that the understanding by H of issues was deficient with this affecting the weight to be attached to his views. Reference is made to the *affidavit of H dated 14th October 2025* which did not contemplate the possibility of the respondent committing suicide, as discussed above.

HB1156

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55. **Paragraph 21** encourages an awareness of the “*potential negative consequences of an inconsiderate practice*” of article 12, noting that this is particularly apt where the child is very young or vulnerable through mistreatment. The emphasis is on the child’s right to be heard and requires to be exercised ensuring full protection of the child. This highlights the limitations of article 12 in the interests of the child. The right to express a view cannot be utilised in a manner which compromises the protection of the child.

HB1155

56. It is noted that the right of the child is to express their views “*freely*” which means “*without pressure*” and further that the child “*must not be manipulated or subjected to undue influence or pressure*”. This recognises the deleterious effect of manipulation and influence on the expression of views by a child. The concern stated by the Inner House in connection with the matter of manipulation and influence is apt. It affects the weight to be attached to the child’s views.

57. **Paragraph 30** addresses that the impact upon the child of decisions are to be taken into consideration, noting that the greater the impact of the decision on the life of the child, the more relevant an appropriate assessment is undertaken of the child’s maturity. This is an important consideration in the instant case. The impact upon H of the potential outcomes, with particular reference to the decline in the mental health of the respondent, renders the need for assessment of maturity more acute, as identified by the Inner House. There is still no such assessment.

HB1157

58. **Article 3 of the UNCRC** emphasises that in all actions by courts, amongst other actors, concerning children, the best interests of the child shall be a primary consideration. The issue of whether a tension exists in connection with article 3 and article 12 is addressed in **paragraph 74**. This identifies that there is no tension, and that the two articles operate complementary roles. It is submitted that taking of the views of the child is a procedural mechanism to advance the overall objective of securing the child’s best interests. Taking the views of the child and affording those views due weight is a means, along with the establishment of material facts and other procedural mechanisms, of the court ensuring that the decision-making is in the best interests of the child. Article 3 can predominate when the interests of the child so demand. The application of article 3 and article 12 are fact dependent. The exercise of article 12 by the child in the instant case is consistent with article 3. It is wholly UNCRC compliant.

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Consideration of Article 12 under reference to General Comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (article 3, para 1)

59. As recognised above article 3 confers upon the child the right to have their best interests taken as a primary consideration. **Paragraph 37** states “primary consideration” means that the child’s best interests may not be considered on the same level as all other considerations. This when read along with **paragraphs 39 and**

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43, as discussed below, suggests an elevation of the article 3 right beyond other rights which may include article 12 rights.

60. **Paragraph 39** recognises that the best interests of the child, once assessed and determined, might conflict with the interests and rights of others eg other children, the public, parents etc and that the “*right of the child to have his or her best interests taken as a primary consideration means that the child’s interests have high priority and not just one of several considerations*”. It states that “*a larger weight must be attached to what serves the child best*”.

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61. **Paragraph 43** states that “*Viewing the best interests of the child as “primary” requires a consciousness about the place that children’s interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.*”

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62. **Paragraphs 37, 39 and 43** consider the interplay between articles 3 and 12 identifying that the two articles have complimentary roles, the first aims to realise the child’s best interests and the second provides the methodology for hearing the views of the child and their inclusion in all matters affecting the child, including the assessment of his best interests. It emphasises the predominance of article 3 where the interests of the child so require.

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63. **Paragraph 83** recognises that that there “*may be situations where “protection” factors affecting a child (e.g. which may imply a limitation or restriction of rights) need to be assessed in relation to measures or “empowerment” (which implies full exercise of rights without restriction). In such situations the age and maturity of the*

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child should guide the balancing of the elements.” It is thus recognised that the protection of a child may require the limitation of the article 12 rights of the child, and that the balancing of these aspects is a necessary and legitimate exercise. This is important in the context of this case.

64. **Paragraph 89** provides that a “*vital element*” of the process in the right of the child to express their views is “*communicating with children to facilitate meaningful child participation and identify their best interests*”. This vital element has been recognised in the full participation of the child in the proceedings.

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65. It is plain that the views of the child and the establishment of facts are separate legal safeguards. There is recognition that article 12 rights can be curtailed where article 3 so requires in the best interests of the child. This is consistent with the approach of not considering the views of the child in the circumstances which are directed towards the establishment, or not, of the fact of grave risk. It is consistent with the approach of leaving the views out of account in the assessment of intolerability once grave risk is established in the interests of the child.

Article 8 ECHR

66. The decision in ***MP and Others v Greece (Application no 2068/24)*** concerned a failure by the national court to hear children in Hague Convention proceedings. The children had taken no part in the proceedings. Their views had not been taken or heard. The court understandably found that there had been a failure to satisfy the procedural requirements inherent in article 8. The case is entirely distinguishable from the instant case where H has been involved in the proceedings with the benefit of solicitors and counsel from the outset, where he has had the opportunity of participation and representation throughout, and where he has had the opportunity of expressing his views. There can be no doubt that following ***MP and Others v***

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Greece that the article 8 rights of H have been respected. It is not accepted that hearing the views of a child and failing to have regard to those views is the same as not hearing the views of the child at all (as submitted in the second appellant’s

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written case at *para 26*). Reference is made to the dicta of Baroness Hale in ***In re D as discussed at paragraphs 18-19*** above.

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Professor Lundy's Model of Child Participation

67. Reference is made to the ***Laura Lundy model of participation in paragraph 46*** of the appellant's written case. The article '***Voice is not enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child***' was published in 2007. The article considers how the Lundy model of participation can be used to conceptualise Article 12 "*in terms of educational decision making*" (at page 299). One of the key elements of the model is that "*influence*" is important to the implementation of article 12. Professor Lundy suggests that "*influence*" means that a child's view must be acted upon, "*where appropriate*" (at page 301). The article does not address when it would be appropriate to temper the influence a child's view is afforded to meet the overriding objective of promoting the child's welfare. The article considers the implementation of Article 12 in educational settings and is of limited assistance in the context of Article 13(b).

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Council of Europe 2010 Guidelines on Child Friendly Justice

68. Reference is made to the ***Council of Europe's 2010 Guidelines on Child Friendly Justice*** by the first appellant. The Guidelines outline five fundamental principles which include participation and the best interests of the child (***at pages 17 to 19***). The Guidelines warn against giving children's views disproportionate weight to the detriment of the child's own best interests. In such cases, the Guidelines state: "*Europe has witnessed tragic miscarriages of justice where children's views were given disproportionate weight, to the detriment of other parties' rights or of the children's own best interests. As children and young people declare, child-friendly justice is not about being over-friendly or overprotective. Nor is it about leaving children along with the burden of making decision in lieu of adults. A child-friendly system protects the young from hardship, makes sure that they have a place and say, gives due consideration and interpretation to their words without endangering the reliability of justice or the best interests of the child*" (***pages 8-9***).

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The Guidelines confirm that it is not appropriate to afford disproportionate weight to a child's views where to do so would compromise their best interests. This is instructive with regard to the consideration that views ought not to be utilised to the detriment of welfare.

Conclusion

The Inner House not having erred in law their decision, it is not vulnerable to review. *Esto* they have so erred, having regard to all the circumstances as discussed in paragraphs 27 to 43 above, the court is invited to:-

- i) refuse the appellant's appeal
- ii) refuse the second appellant's appeal and
- iii) adhere to the decision of the Extra Division of the Inner House of the Court of Session of 10th February 2026 sustaining the respondent's pleas-in-law in respect of the second appellant, repelling the pleas-in-law for the appellant and second appellant and refusing the prayer of the petition in respect of the second appellant.

Marie H Clark KC

Julian Aitken, Advocate

Counsel for the Respondent