

Law Reports and citations:

Court of Session Outer House: [2025] CSOH 109

Court of Session Inner House: [2026] CSIH 9, 2026 SLT 213

Hague Convention - Child abduction – Exception to return – Intolerable situation – Child’s views – United Nations Convention on the Rights of the Child.

Time occupied in the courts below:

Court of Session Outer House: 1 day

Court of Session Inner House: 1 day

IN THE SUPREME COURT OF THE UNITED KINGDOM

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

IN THE PETITION OF

DM

Appellant

against

SM

Respondent

and

HM

Second Appellant

STATEMENT OF FACTS AND ISSUES

Introduction

[1] This is an appeal by the father of a child “H” (born 25 May 2011), and by H himself, against the decision of an Extra Division of Inner House of the Court of Session, which recalled the Lord Ordinary’s order that H should be returned to the USA under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (“1980

Convention”). The 1980 Convention has the force of law in the United Kingdom by virtue of the Child Abduction and Custody Act 1985.

Narrative of the material facts

[2] On 14 July 2025 the appellant father, respondent mother and children H (then age 14) and B (born 1 September 2017, then age 8) travelled from their habitual residence in Florida, USA, to the UK for a three week holiday. On 26 July 2025 the respondent mother told the father she intended to remain in Scotland with the parties’ children. On 1 August she raised proceedings in Peterhead Sheriff Court and obtained *ex parte* an interim interdict preventing the father from removing H and B from her care and control. B has since then lived with the mother. Since 15 August 2025 H has lived with his father. He refuses to return to the care of his mother. H has maintained throughout that he objects to being retained in the UK and wishes to return to the USA.

[3] The father raised proceedings in the Court of Session seeking the return of the children to the USA under the 1980 Convention. His petition for return was registered on 8 August 2025. The petition was served on H, who has throughout been a party to the action. The first hearing of the petition took place on 19 August 2025. Proceedings were continued to a second hearing on 4 September 2025. On 22 August 2025, the second hearing assigned for 4 September 2025 was discharged due to judicial availability and a second hearing was assigned for 11 September 2025. On 2 September 2025 the mother attempted suicide by overdose. She was found unconscious and unresponsive by B and taken to hospital. The 11 September 2025 second hearing was discharged and refixed for 21 October 2025, which was also discharged. The petition was heard by Lord Braid on 27 October 2025.

[4] A child psychologist, Dr Katherine Edward, was instructed by the mother to ***provide a report***. Dr Edward saw neither child. She provided a written report the contents of which are summarised by the ***Lord Ordinary at paras 61 to 67*** of his opinion.

HB171

HB177

[5] A Consultant Forensic Clinical Psychologist, Professor Gary Macpherson, was instructed by the mother to provide a *report*. The **Lord Ordinary's** conclusions based on that report are set out at *paras 80 and 81* of his opinion.

HB187

HB127

[6] On 21 November 2025 Lord Braid issued his opinion (*[2025] CSOH 109*). He decided in principle that H should be returned to the USA but that the petition in respect of B would be refused. He appointed the cause to call by order on a date to be afterwards fixed to discuss the practical arrangements for H's return.

HB88

[7] The Lord Ordinary found that the father had lied about educational provision for the boys in private schools and that if they returned to the USA they would require to attend public schools or be privately educated. The father's evidence about his income and wealth was not reliable, the family had been living a peripatetic lifestyle and that pattern was likely to continue on return to the USA. The father had entered into a lease, so accommodation was likely to be immediately available on return. It could not be stated with confidence that health insurance would be in place, although Florida may provide free health care and emergency treatment would be available for a child without consideration of ability to pay. The mother made allegations of domestic abuse. She had long-standing mental health issues including a previous suicide attempt in 2006. She intended to remain in Scotland, even were the children returned to the USA. The Lord Ordinary found that the mother's intention not to return to the USA was genuine and objectively reasonable. He found that given the difficulties for the mother in initiating proceedings in the USA that if the children were to be returned to the USA that would likely be determinative of the long-term residence for the children with the father. **The Lord Ordinary (para 45)** observed that whilst certain factors cited by the mother appeared to lend some support for the mother's position that the father had exerted influence upon H and sought to manipulate him, the Lord Ordinary made no finding in this regard and left this factor out of account in the final analysis.

[8] The Lord Ordinary discounted the relevance of allegations of domestic abuse. He held that despite the uncertainty of the appellant's financial circumstances the children were likely to have a roof over their heads immediately upon return, to attend a state school and to have access to emergency health care, but took account of the risk of

psychological harm arising from separation from the mother and the risk to her mental health and a possible further attempt on her own life. The Lord Ordinary held that a very grave harm would result to B in the event the mother were to commit suicide. He held there was a grave risk of his being placed in an intolerable situation and that he should not be returned.

[9] The Lord Ordinary found that H had capacity to express his views and sufficient age and maturity to do so. He took account of H's strong wish to return to the state of his habitual residence, deciding he was of sufficient maturity that regard should be had to his views. H was aware of the fragility of his mother's health and that his father had been lying to him about which school he would attend, but he still wished to finish his schooling in the US. The gap in age between the two boys meant that prospects of their separation were not determinative. The Lord Ordinary accordingly held that the article 13(b) defence was not established in respect of H. He would not be placed in an intolerable situation were he returned, nor would there be a grave risk of his suffering physical or psychological harm.

[10] The Lord Ordinary further held that had he decided there was a grave risk to H, it was so borderline that having regard to his views, he should in any event be returned on a discretionary basis.

[11] The father reclaimed the decision of the Lord Ordinary in respect of B. The mother reclaimed the decision of the Lord Ordinary in respect of H. The initial date fixed for the hearing was 23 December 2025, but no senior counsel with expertise in this area was available to act for the mother on that date. *The reclaiming motion* was heard on 23 January 2026. On 10 February 2026 the Inner House issued their opinion refusing the reclaiming motion of the father and allowing the reclaiming motion of the mother (*[2026] CSIH 9, 2026 SLT 213*).

HB150

HB68

[12] The Inner House held that what a child might be willing, subjectively, to tolerate cannot be more relevant to the "intolerable situation" aspect of article 13(b) than it

would be to a risk to him of serious physical harm (*paragraph 53*). The Lord Ordinary had erred in law in taking H’s views into account in assessing whether the situation to which he would return would be intolerable for him. Further, following the approach *In re M (Abduction: Rights of Custody) [2007] UKHL 55, [2008] 1 AC 1288* it was “inconceivable” that the court would exercise a discretion to order his return if article 13(b) was established (*paragraph 55*). The Inner House adhered to the Lord Ordinary’s decision in respect of B and that decision has not been appealed.

HB85

HB519

HB541

- [13] On 9 March 2026 the father and H sought permission to appeal to the UKSC in respect of the decision relating to H. They were prepared to have the permission application determined on the papers, but the mother sought a hearing. The hearing was listed for 13 May 2026. On that date the Inner House refused permission.

Issues before the Court appealed from

- [14] It was a matter of agreement that the mother wrongfully retained H in Scotland, in breach of the father’s rights of custody in terms of *article 3 of the 1980 Convention* and that *article 12* applied to require H’s return, forthwith to the USA, unless one or more of the exceptions in article 13 applied. The mother relied on article 13(b) which states:

HB219

HB220

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

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”

- [15] It was also agreed that the court was bound to have regard to article 12 of the United Nations Convention on the Rights of the Child which states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the

child, the views of the child being given due weight in accordance with the age and maturity of the child.

[16] The issues before the Inner House were:

- (1) Whether the Lord Ordinary had erred in taking account of H's views when deciding whether his return to the United States would give rise to a grave risk that he would be placed in an intolerable situation.
- (2) Whether the Lord Ordinary had erred in indicating that H should in any event, in the circumstances, be returned, having regard to his views.
- (3) The impact of article 12 of the United Nations Convention on the Rights of the Child on the decisions of the court.

[17] The Inner House referred to the decision of the House of **Lords *In re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619 at paragraph 52**, as cited ***In re E (Children)* [2011] UKSC 27, [2012] 1 AC 144**, to the effect that “intolerable” when applied to a child means “a situation which this particular child in these particular circumstances should not be expected to tolerate” (**paragraph 24**) as the basis for holding that the question of what is intolerable is an objective one (**paragraph 25**). They 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 (**paragraph 55**).

HB465

HB469

HB76

HB77

[18] The Inner House also relied on ***In re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619 at paragraph 55, as cited *In re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288, at paragraph 45**, to the effect that it would be inconceivable that a court which had reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless exercise a discretion to order the child's return to face that fate (**paragraphs 26 and 55**).

HB82

HB77

[19] It was a matter of agreement that there must be compliance with article 12 of the United Nations Convention on the Rights of the Child (**paragraph 29**). The Inner House by implication was satisfied that compliance with article 12 was achieved by the child participating in the proceedings and instructing counsel throughout the proceedings,

HB229

absent the child's views being taken into account, in assessing whether the situation to which he would be returned in the USA would be intolerable for him.

THE LEGAL ISSUES ARISING IN THIS APPEAL ARE:

- (a) WHETHER the test of intolerability for the purposes of article 13(b) of the 1980 Convention on the Civil Aspects of International Child Abduction is, as a matter of law, wholly objective, or whether the child's subjective response to their circumstances is relevant.
- (b) WHETHER the court has a discretion to order the return of a child where an article 13(b) defence to return is established.
- (c) 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.

Janys M Scott KC

Marie Clark KC

Alex Critchley, advocate

Julian Aitken, advocate

Counsel for the Appellant, DM

Counsel for the Respondent,

SM

Rachel Shewan KC

Morag McEwan, advocate

Counsel for the Second Appellant,

HM