

THE COURT ORDERED that that no one shall publish or reveal the name or address of the children who are the subject of these proceedings or reveal any information which would be likely to lead to the identification of the children or of any member their family in connection with these proceedings.



[2026] UKSC 32

On appeal from: [2026] CSIH 9

JUDGMENT

In the Petition of DM

before

Lord Reed, President

Lord Stephens

Lady Simler

Lord Doherty

Lord Snowden

JUDGMENT GIVEN ON

9 September 2026

Heard on 2 July 2026

First Appellant – DM – The Father
Janys M Scott KC
Alex Critchley
(Instructed by Turcan Connell)

Second Appellant – H – The Child
Rachel Shewan KC
Morag McEwan
(Instructed by Balfour + Manson LLP)

Respondent – SM – The Mother
Marie Clark KC
Julian Aitken
Molly Little
(Instructed by Brodies LLP)

Intervener – International Academy of Family Lawyers (by its Amicus Committee, Edwin Freedman, Chair) (written submissions only)
Jacqueline Renton KC
Harry Langford
Frankie Shama
(Instructed by Burges Salmon LLP)

Intervener – The International Centre for Family Law, Policy and Practice (written submissions only)
Charles Hale KC
Charlotte Baker
Olivia Gaunt
(Instructed by Hunters Law LLP)

Intervener – Reunite International Child Abduction Centre (written submissions only)
Anita Guha KC
Katy Chokowry
Tadhgh Barwell O'Connor
(Instructed by Dawson Cornwell LLP)

LORD STEPHENS AND LORD SNOWDEN (with whom Lord Reed, Lady Simler and Lord Doherty Agree):

1. Introduction

(a) The first issue on this appeal

1. The legal issue of general public importance on this appeal arises in the context of a petition brought by a father (“F”) under article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (“the Hague Convention”) for the return to the USA from Scotland of his son, H, who was at the commencement of proceedings, a 14-year-old adolescent. The application for the return of H is opposed by his mother (“M”) under article 13(b) of the Hague Convention. Article 13(b) in so far as relevant provides that “the judicial ... authority of the requested State is not bound to order the return of the child if the person ... 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.” The issue is whether the views of H, who is the person in relation to whom a return order is sought, can be taken into account in assessing whether there is a grave risk that his return would expose him to psychological harm or otherwise place him in an intolerable situation.

2. In his Opinion dated 21 November 2025 ([2025] CSOH 109), Lord Braid (“the Lord Ordinary”) identified one of the issues for determination as being:

“whether H’s (strong) wish to return to Florida is relevant in the assessment of the Article 13(b) defence”.

The Lord Ordinary held, at para 85, “that there is room for the child’s views to be taken into account in assessing, for that particular child, in the particular circumstances of the case, whether the situation to which he would be returning would be intolerable for him”. The Lord Ordinary concluded, at para 88, “that, factoring H’s views into the equation along with ... other factors ... H would ... not be placed in an intolerable situation were he to be returned, nor would there be a grave risk of his suffering physical or psychological harm”. Therefore, he held that the article 13(b) defence had not been established in relation to H, and a return order was made.

3. M, by a reclaiming motion, appealed to the Inner House. In an Opinion delivered by Lady Carmichael dated 10 February 2026, an Extra Division (Lord Armstrong, Lord Ericht, and Lady Carmichael) disagreed with the Lord Ordinary: [2026] CSIH 9; 2026 SLT 213. It held, at para 55, “that the Lord Ordinary erred in law in taking H’s views into account in assessing whether the situation to which he would be returning would be

intolerable for him.” It held that once H’s views were left out of account “The combination of circumstances to which H would be exposed on return ... is one which he should not reasonably be expected to tolerate.” Therefore, the Extra Division was satisfied that there was a grave risk that H’s return to the USA would place him in an intolerable situation, so that the article 13(b) defence was made out. Thereafter, the Extra Division considered whether it should exercise its discretion to order H’s return to the USA despite there being a grave risk that his return would place him in an intolerable situation. Following the approach in *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51; [2007] 1 AC 619 (“*In re D*”), at para 55, it held that “it is inconceivable that we would exercise our discretion ... to order his return” to face an intolerable situation and declined to do so. Therefore, the Inner House allowed M’s reclaiming motion, recalled the interlocutor of the Lord Ordinary of 21 November 2025, and refused to order H’s return to the USA.

(b) The second issue on this appeal

4. The second issue on this appeal, advanced by F and H, arises if the article 13(b) defence is established. If it is established, then article 13(b) confers upon the court only a discretion not to order the child’s return. The Lord Ordinary considered whether he would have exercised his discretion to make a return order in respect of H even if the defence had been established. He assessed that if the article 13(b) defence had been established it would have been a “borderline” defence so that, having regard to H’s strong wish to return to Florida, he would have exercised his discretion to return H to Florida “in any event.” The Inner House held that the article 13(b) defence was established and declined to exercise its discretion nevertheless to order H’s return as it was inconceivable that it would do so. F and H submit that the Lord Ordinary was entitled to exercise his discretion to order H’s return to the USA even if the article 13(b) defence was established and the Inner House ought not to have interfered with the exercise of the Lord Ordinary’s discretion. Furthermore, F and H submit that in exercising its discretion the Inner House erred by failing to take into account H’s views. F further submits that the Inner House erred in treating Lady Hale’s approach to the exercise of discretion in *In re D* (for which see para 85 below) as a rule of law that overrides the existence of discretion.

(c) The third issue on this appeal

5. The third issue on this appeal, advanced by M, arises if H’s views ought to be taken into account in assessing whether the situation to which he would be returning would be intolerable for him. M submits that if H’s views were relevant then the Lord Ordinary, in attributing weight to those views, ought to have, but failed to, resolve the question as to whether those views reflected F’s manipulation of H.

(d) The fourth issue on this appeal

6. If the Inner House incorrectly excluded H's views, then M seeks to uphold its order that H should not be ordered to return to the USA. She submits that the Lord Ordinary's analysis in respect of the nature of the risk of harm to H was flawed and that, accordingly, his conclusion in respect of the article 13(b) defence was wrong: see *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911, at paras 44, 91, and 203, *In re H-W (Children)* [2022] UKSC 17; [2022] 1 WLR 3243 at para 49, and *In re JR123* [2025] UKSC 8; [2025] AC 1256 at para 36. M submits that, but for errors in the Lord Ordinary's analysis, he should have concluded that the article 13(b) defence was established and that this court should, accordingly, uphold the decision of the Inner House to dismiss F's application for a return order.

(e) B: M's and F's younger son

7. F's petition was not only for the return of H to the USA but also for the return of M's and F's younger son, B, an eight-year-old. M established an article 13(b) defence in relation to B. The Lord Ordinary refused to order B's return to the USA. F's reclaiming motion to the Inner House seeking a return order in relation to B was refused. There was no application for permission to appeal to this court in relation to the Lord Ordinary's decision not to order B's return to the USA.

(f) Applications for permission to appeal to this court

8. F and H applied to the Inner House for permission to appeal to this court pursuant to section 40 of the Court of Session Act 1988. On 13 May 2026, this application was refused by an Extra Division (Lord Clark, Lord Ericht, and Lady Carmichael).

9. On 1 June 2026, H, and on 5 June 2026, F applied to this court for permission to appeal.

10. On 10 June 2026 permission to appeal was granted to both F and H in relation to, amongst other issues, the issue as to whether H's views can be taken into account in assessing whether there is a grave risk that his return would expose him to psychological harm or otherwise place him in an intolerable situation.

(g) Pro bono representation and expedition of the appeal to this court

11. The court is grateful to the solicitors who acted pro bono on M's appeal to the Inner House and to this court. We are also grateful to counsel (Scott McAlpine KC and John Laing) who acted pro bono on behalf of M before the Inner House. Counsel presently instructed on her behalf have represented her, free of charge, before this court. All those acting pro bono have undertaken a considerable amount of high quality work on an appeal which is of general public importance.

12. The court is also grateful to solicitors and counsel for prioritising the preparation of this appeal to facilitate an expedited hearing.

(h) Intervenors on the appeal to this court

13. This court permitted written interventions on the appeal from three organisations, namely the International Academy of Family Lawyers, Reunite International Child Abduction Centre, and the International Centre for Family Law, Policy and Practice. The court has been assisted by their written cases.

(i) The decision of this court with reasons to follow

14. The appeal was heard on 2 July 2026. On 8 July 2026 this court gave its unanimous decision (with reasons to follow) that the Inner House fell into error in holding that the Lord Ordinary erred in law in taking H's views into account in assessing whether there was a grave risk within the meaning of article 13(b). H's views were relevant. Nevertheless, this court also decided that the Lord Ordinary should not have ordered H's return to the USA. The only reasonable conclusion to draw from the Lord Ordinary's findings on the evidence was that there was a grave risk that H's return to the USA would expose him to psychological harm which he could not reasonably be expected to tolerate. This court therefore dismissed the appeal against the order made by the Inner House.

2. Factual background and procedural history

15. F, M, and H are British citizens holding Green Cards entitling them to permanent residence in the USA. B is a USA citizen. The family has lived in Florida, USA for some years.

(a) F's petition under article 12 of the Hague Convention

16. On 14 July 2025 H (then aged 14), and his brother B (then aged eight), travelled with F and M from their habitual residence in Florida to the UK for a three-week holiday and to visit their respective families. On 26 July 2025, whilst they were in Scotland, M told F that she intended to remain in Scotland with the children. F did not consent to the retention of the children in Scotland and, on 1 August 2025, he brought a petition seeking an order for the return forthwith of the children to the USA under article 12 of the Hague Convention as incorporated into the domestic law of the UK by the Child Abduction and Custody Act 1985.

(b) Interim interdict and with whom H and B are presently residing

17. On 1 August 2025 M raised proceedings in Peterhead Sheriff Court and obtained an ex parte interim interdict which, among other things, prohibited F from removing H and B from her care and control, or from that of anyone to whom she had entrusted their care and control.

18. On 15 August 2025 M agreed that H could accompany F to Yorkshire to visit paternal family members. On 19 August 2025 H returned to Scotland and on 20 August 2025 he was due to return to M but has not done so. F's position is that H refuses to go back. Since 15 August 2025, H has resided with F in Scotland, whilst B continues to reside with M.

(c) M's reliance on article 13(b)

19. In these proceedings M did not dispute that the children have been wrongfully retained in Scotland within the meaning of article 3 of the Hague Convention. M opposed the return of the children relying on an article 13(b) defence.

20. In seeking to establish the article 13(b) defence M did not allege that the children's return would expose them to a grave risk of physical harm. Rather, she relied on several matters, all of which require to be considered holistically, seeking to establish that the children's return would expose them to a grave risk of psychological harm or otherwise place them in an intolerable situation. The matters alleged by M as giving rise to the grave risk (within the meaning of article 13(b)) if H and B were returned to the USA included: (a) the lack of a proper education for the children; (b) the prospect of house moves, homelessness, and an unstable lifestyle as a result of F's precarious financial position; (c) the lack of future accommodation for the children; and (d) the lack of health insurance and therefore the potential lack of health care for the children.

21. A further matter upon which M relied were allegations of domestic abuse. In her affidavits M stated that she was the victim of domestic abuse in the form of controlling, coercive, and verbally abusive behaviour by F towards her. We would observe at this stage that even if the abuse is not directed towards the children, in the context of article 13 it is well settled that one of the things that it may not be reasonable to expect a child to tolerate is “exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent” and that “violence and abuse between parents may constitute a grave risk to the children”: see *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 AC 144 (“*In re E*”) at paras 34 and 52. However, M’s allegations of domestic abuse must be seen in the context that currently she does not intend to return to the USA even if a return order was made in relation to the children.

(d) M’s mental health

22. Another matter which M alleged gave rise to a grave risk that the children’s return to the USA would expose them to psychological harm or otherwise place them in an intolerable situation related to M’s mental health. M stated that: (a) her current intention is to remain in Scotland even if the court ordered the return of the children to the USA; (b) given her history of mental health problems, including two attempts at suicide, the stress of the children being returned to the USA without her gave rise to a real risk that she would commit suicide; (c) if that risk eventuated it would be traumatic for both children and would cause them extreme psychological harm; and (d) on the basis of that risk alone, but also in combination with all the other matters she relied on, there was a grave risk that the children’s return would expose them to psychological harm or otherwise place them in an intolerable situation.

23. M has long suffered from depression and mental health issues which arose before she and F met.

24. F acknowledges that M has suffered from depression and mental health issues.

25. In 2006, following relationship difficulties within a former relationship, M attempted suicide.

26. In 2022 M’s brother died from suicide, following which she presented with symptoms of depression and was prescribed anti-depressants.

27. In October 2024, a doctor in the USA diagnosed M as suffering from an anxiety disorder. She was prescribed medication for anxiety and insomnia.

28. In her first affidavit, sworn on 22 August 2025, M described the family's transient lifestyle in the USA. She stated that before travelling to the UK for their holiday in July 2025 she felt that she had no control over her life, resulting in feelings of depression, anxiety, and constant worry about the long-term effects on the children. She asserted that the lifestyle inflicted upon her and the children by F affected her health adversely.

29. On 2 September 2025, 11 days after swearing her affidavit, M made an attempt on her own life, overdosing on approximately 40 zolpidem tablets and 20 xanax tablets. She was discovered unconscious and unresponsive by B at breakfast time that morning and was rushed to hospital where she remained until discharged the following day.

30. On 4 September 2025 a psychiatric nurse wrote to M's General Practitioner narrating the contemporaneous account which M gave of the events which led her to overdose. M had said that she felt in a "no-win" situation, in that if she won "the custody hearing", her sons would not be happy here, but if they returned to the USA, she would barely see them.

31. On 9 September 2025 M arranged a follow-up appointment with a general practitioner when she was prescribed an anti-depressant for her low mood.

32. On 14 October 2025 M swore her second affidavit in which she explained why she attempted suicide. She recounted that B had returned from a contact visit with F, repeating things B had evidently been told by F. In particular, B told her that he would be fine without her. She found that heartbreaking and it was the tipping point: she lay awake contemplating what seemed a bleak and uncertain future and felt as though she could not face another day, and that suicide was the only option to release the immense pain she was feeling. She said that she was currently being supported by the mental health charity, Penumbra, whom she met once per week, which (along with numerous visits from a domestic abuse support worker) was helping her to cope with her feelings and manage her stress a little better. Reflecting on events of 2 September 2025 she had feelings of guilt, shame, and embarrassment. She now realised the hurt and upset her death would cause her children and family and had had no further thoughts of suicide.

(e) Professor MacPherson's report in relation to M's mental health

33. M lodged a report by Professor Gary Macpherson, Consultant Forensic Clinical Psychologist, who assessed her remotely for the purposes of offering an expert opinion on a range of matters, including: M's vulnerabilities if required to return to the USA, and whether her mental health was currently in such a state that she could realistically return to and cope with life in the USA; whether the recent events on 2 September 2025 constituted a genuine attempt on her life; any diagnosis for M and what further professional input might be required to support her mental health; and an assessment of

any risks to her mental health if the court ordered the return of the children to the USA, particularly if she felt compelled to follow them there. In preparing his report, Professor Macpherson had access to the pleadings, an affidavit of M, a report from a liaison psychiatric nurse and recent NHS Grampian clinical records.

34. Professor Macpherson noted that M's brother died from suicide three years ago in 2022 and that she remains reactive to that loss. She had presented with symptoms of depression and had been prescribed anti-depressants. As already noted, she had previously, in 2006, taken an overdose with suicidal intent in the context of relationship difficulties. She had been assessed by mental health services and received several sessions of crisis counselling and a telephone call from the mental health charity Samaritans. On her admission to hospital in September 2025, she had presented as anxious and distressed and had disclosed a background of acute stressors including what B had said, and longer-term stressors including allegations of coercive and controlling behaviour by F.

35. Professor Macpherson formed the view that M's history of symptoms of depression and anxiety in relation to life stressors in 2006 and 2022 and her more recent history of symptoms were consistent with a diagnosis of Adjustment Disorder (DSM-5) with low mood and anxiety. That was not an illness but a variant reaction to a stressor(s) which was beyond normal reactions and was by definition a temporary response to the stressor, with symptoms that would resolve once the stressor ceased. The Adjustment Disorder had emerged due to stress in the relationship and court proceedings and would persist as long as proceedings were ongoing.

36. M completed the CORE-10, a self-report questionnaire recommended by the Scottish Government to assess mental health symptoms over the past week. Her results indicated a moderate level of psychological distress, including symptoms such as anxiety, panic, sleep issues, difficulty coping, and unhappiness.

37. In relation to the question as to whether the incident on 2 September 2025 was a genuine suicide attempt, Professor Macpherson declined to discuss it in those terms. However, he noted that the overdose was impulsive, taken with suicidal intent in the context of custody proceedings, and acutely precipitated by B saying that he wished to return to the USA. The attempted suicide by overdose in 2006 was in response to stress in a relationship and feeling out of control of her life. So, repeating her actions remained a risk if she continued to feel out of control. She had indicated to mental health practitioners and to him that she no longer had thoughts of suicide. If her symptoms persisted, he recommended cognitive behavioural therapy. From a psychological view, her main concern was not to be separated from her children. A court ordered return of the children to the USA would have an immediate negative impact on her mental health.

(f) Dr Edward's report in relation to (amongst other matters) the impact on H and B if M's mental health deteriorated or if M committed suicide

38. M lodged a report dated 22 September 2025 by Dr Katherine Edward, a chartered clinical psychologist, as to the impact of various matters on H and B. The questions which Dr Edward addressed included the impact on H and B of a lifestyle in the USA characterised by financial instability, transient accommodation, and disrupted schooling. She considered that such a lifestyle would lack all the fundamental aspects of security that were essential to positive emotional development for H and B. She also addressed the impact on H and B if M's mental health relapsed further. She considered that there would be a tangible risk of a negative mental health impact on the children. She stated that:

“Worry about their mother, even if not openly expressed or acknowledged by the children, would be likely to cause distress and anxiety. Further there is a real risk that in that scenario the children would experience extremes of personal guilt if they perceive their rejection of their mother has precipitated deterioration in her mental health. If all these emotions cannot be expressed verbally, they may be expressed through withdrawn or destructive behaviour patterns.”

In relation to the worst-case scenario, that is M's suicide, the Lord Ordinary summarised his opinion, at para 66, as being that this “would be traumatic for the children and bring unavoidable and significant negative mental health consequences.”

(g) H's involvement in the proceedings

39. F's petition was served on H so that throughout he has been a party to these proceedings. He has been in receipt of legal aid, and he has provided instructions to and has been represented by solicitors and counsel.

40. H lodged two affidavits and some supporting productions. In those affidavits H set out his view that he wishes to return to the USA and in particular he wishes to be educated there, in the system with which he is familiar, rather than in Scotland. In addition, H set out his views in relation to some of the matters relied on by M as establishing an article 13(b) defence. The matters relied on by M included the lack of proper schooling for the children in the USA, the lack of accommodation, and the impact on them if she committed suicide. In relation to schooling H stated “Even if I didn't end up going to [school A], I could go to a Public School. I wouldn't mind going to a public school ... I would rather do that than stay in Scotland and go to school here.” In relation to accommodation in

Florida, he stated that “The plan is to buy a house ... If this doesn’t happen and we have to carry on renting I don’t really care.”

41. In relation to the position as regards his mother, H stated:

“I am not happy that Mum might not be coming back to the US. However, even if Mum decided not to come back to the USA, this wouldn’t change my mind about going back. I would be able to call and text Mum if I go back to the USA. I would feel comfortable coming back to Scotland to see her ... I am not sure how often I would want to come back each year to see my Mum, maybe 2-3 times per year. I know that my Dad would support this ... 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 or to do that.”

(h) B’s views in relation to the proceedings

42. B’s views in relation to the proceedings are contained in a Child Welfare Report lodged in court. The reporter—experienced senior counsel—formed the opinion that B was an articulate and able boy who showed a level of understanding and maturity consistent with his intellectual ability and age. He had the capacity to express his views, which were clear, frequently stated, and firmly held, that he wanted to return to the USA. However, the reporter also formed the view that B displayed an inappropriate knowledge of the petition, which she attributed to F (and to H, although she did not criticise him) and that there had been an attempt to influence him. Nonetheless the reporter’s ultimate conclusion was that notwithstanding that attempt, B’s views were held for more personal reasons, namely, his desire to return to his friends, his toys, and a place he considered to be home.

3. The Opinions of the lower courts

43. It is necessary to go into some further detail in relation to the Opinions of the Lord Ordinary and of the Extra Division.

(a) The Opinion of the Lord Ordinary

44. The Lord Ordinary considered, at paras 55 to 57, M’s unwillingness to return to the USA. He stated, at para 57, that he was mindful of the need to scrutinise closely M’s

position as to whether she would return to the USA. Having done so, the Lord Ordinary was satisfied that M's decision not to return to the USA (even if the court ordered the return of the children) was genuine rather than tactical. He stated:

“It is not surprising that [M] found the circumstances of family life, including the frequent changes of accommodation, financial uncertainty and the lack of health insurance, intolerable, and given her fragile mental health her decision not to return is both genuine and objectively reasonable.”

45. The Lord Ordinary found, at para 59, that until 15 August 2025 M was the main carer for both H and B and she has remained the main carer for B.

46. The Lord Ordinary set out the evidence lodged by F and M, and H's views in relation to M's article 13(b) defence under the headings: (a) Education; (b) House moves/homelessness/general lifestyle; (c) Future accommodation; (d) Health care/health insurance; (e) Manipulation of the children in order to influence their views; (f) Domestic abuse; (g) M's mental health; and (h) M's unwillingness to return to the USA. The central factor was M's mental health.

47. The Lord Ordinary adopted the staged approach commended in *In re E* (see para 79 below) when determining whether M's allegations of domestic abuse gave rise to a grave risk to the children. In relation to M's remaining allegations the Lord Ordinary resolved all of them on the affidavits and productions except for the allegation that F had manipulated the children and influenced their views.

48. In relation to “Education” the Lord Ordinary found that while in Florida the children were moved from private education to homeschooling. The Lord Ordinary did not accept F's claim that on return to Florida both boys would attend a particular private school. The Lord Ordinary found that F had either attempted deliberately to mislead the court, or had provided material unsatisfactorily lacking in detail, particularly with regard to payments made to the private school.

49. In relation to “House moves/homelessness/general lifestyle” the Lord Ordinary found that the family had frequently moved as a result of F's financial dealings, and that for the preceding year they had led a peripatetic lifestyle. The Lord Ordinary did not accept F's evidence as to his income or wealth. He found that there was no evidence that F could fund the lifestyle that he wished to lead, and, on the contrary, there was evidence that he was sued frequently and was unable to pay his debts. The Lord Ordinary considered that this pattern was likely to continue on return to the USA.

50. In relation to “Future accommodation”, the Lord Ordinary found that F had entered into a lease and that there would be likely to be accommodation available on return for the children. However, given F’s financial history, there was no certainty that the lease would run its course and there was no realistic prospect that F would, as he had claimed, purchase a property.

51. In relation to “Health care/health insurance” the Lord Ordinary had no confidence that there would be health insurance in place for the children if they were to return. However, if there were an emergency situation, the children would receive care without consideration of ability to pay.

52. In relation to “Domestic abuse” the Lord Ordinary was unable to conclude that, even if all the allegations were true, there would be a grave risk to the children if they were returned to Florida. An important factor in that evaluation was that M did not intend to return to the USA.

53. In relation to manipulation of the children by F in order to influence their views the Lord Ordinary set out, at para 45, that this was denied by both F and H. The Lord Ordinary found that there were factors lending some support to M’s position that F had exerted improper influence over the boys and manipulated them. However, the Lord Ordinary decided to leave this factor out of account in his final analysis of the case.

54. The Lord Ordinary summarised, at paras 76 and 77, the core facts which he found to be established on the evidence in relation to his headings (a)-(d). He stated:

“76. ... if returned, the children and [F], at least in the immediate future, are likely to have accommodation in the property for which [F] has entered into a lease, recognising, too, that notwithstanding [F’s] financial travails, there has never been a night when the children have not had a roof over their heads; the children are likely to attend an unspecified public (state) school, since [F] will not have the funds to send them to a private school; and they are unlikely to have health insurance for the duration of their stay in the US but would receive emergency medical care should it be required. In terms of general lifestyle, [F’s] financial circumstances are uncertain, but he does appear to receive money from time to time; the evidence does not show that the children would be living in penury.

77. On any view, none of the foregoing is ideal. [F’s] ability to maintain the lease for a year is unknown, and history would

suggest that within a year the family will have to move again. The quality of the education they would receive, and where they would receive it, is unknown. Any future changes of accommodation may necessitate a change of school. Non-emergency medical needs, such as dental care, may not be met ...”

55. Having reached those conclusions, the Lord Ordinary stated that there were four further factors to add to the mix: separation of the children from M if they are returned to the USA without her; the risk to the children of harm caused by a deterioration in M’s mental health, including, but not limited to, the risk of suicide; the relevance of both children’s wish to be returned; and the risk posed by a separation of the brothers (if an order were made for the return of H but not of B).

56. In relation to separation of the children from M if they are returned to the USA without her the Lord Ordinary concluded, at para 79, that this would be upsetting for, and potentially harmful to them.

57. In relation to the risk to the children of harm caused by a deterioration in M’s mental health, including, but not limited to, the risk of suicide, the Lord Ordinary set out his conclusions at paras 80 to 82. The Lord Ordinary accepted, at para 80, Professor Macpherson’s evidence that M was suffering from “Adjustment Disorder, the symptoms of which are likely to alleviate when the stressors giving rise to them are no longer present.” The Lord Ordinary identified one of the stressors as being the possibility of both boys being returned to the USA and he inferred that if they were returned, that stressor would not be removed. The Lord Ordinary then addressed the risk of M committing suicide. He acknowledged that M does not currently intend to commit suicide but he found that:

“having regard to her history of two overdoses with suicidal intent, and of depression, the possibility of a further attempt on her own life should the boys be returned cannot be ruled out. I am again conscious of the need to scrutinise the evidence closely, but we are not dealing with a situation where [M] has merely made a potentially empty threat to commit suicide as a tactical ploy: the events of 2 September 2025 vividly illustrate the reality of the risk, and the possibility of that being a tactical manoeuvre can safely be discounted.”

The Lord Ordinary then considered the impact on the children if the risk of suicide were to eventuate. He stated:

“we hardly need Dr Edward to tell us that their mother’s suicide would be traumatic for both children and would cause them *extreme psychological harm*, as was accepted by counsel for [F].” (Emphasis added.)

The Lord Ordinary then stated that “even a small risk of such extreme harm may constitute a grave risk.”

58. Having dealt with the impact on H and B if the risk of M’s suicide were to eventuate, the Lord Ordinary made findings, at para 81, in relation to the extent to which they would worry about the possibility of M committing suicide and also worry about M’s mental health in general were they to be in the USA without her. The Lord Ordinary concluded that this “too, gives rise to a very real risk of psychological harm to them.”

59. The Lord Ordinary did not decide that the real risk of “extreme psychological harm” combined with the “very real risk of psychological harm” and all the other factors that he had considered amounted to a grave risk withing the meaning of article 13(b). Rather, he stated, at para 82, that:

“It may be that none of these factors, on its own, gives rise to a grave (as opposed to a real) risk that the children will suffer psychological harm or be placed in an intolerable situation should they return to the US with the petitioner. However, all of the foregoing factors must be viewed collectively, and in addition their impact must be considered in relation to each child separately.”

60. The Lord Ordinary considered the impact of the various factors on B and considered B’s expressed wish to return to the USA. In relation to B’s expressed wish to return, the Lord Ordinary considered, at para 83, that it was based “at least in part on what appears to be a false premise, namely, that he would be returning to his friends and toys.” B’s views even though relevant did not carry “a great deal of weight.” In relation to the cumulative effect of the various factors the Lord Ordinary held, again at para 83, that if B “were to return to the US without [M], to accommodation which is, on past performance, unlikely to be permanent, to uncertain schooling, with uncertain health insurance, in the care of a father who is of uncertain means, with the added worry about his mother and her mental health, coupled with the very grave harm which would result were [M] to commit suicide, it can be said that there is a grave risk of his being placed in an intolerable situation were he to be returned.” The Lord Ordinary was satisfied that the article 13(b) grave risk defence was made out in relation to B.

61. The Lord Ordinary then considered the impact of the various factors on H. In doing so the Lord Ordinary applied the approach of taking H's views into account in assessing whether the situation to which he would be returning would be intolerable for him. In relation to taking a child's views into account the Lord Ordinary considered, at para 85, that "a distinction may fall to be drawn between physical and psychological harm, on the one hand, and of placing the child in an intolerable situation on the other." The Lord Ordinary considered that there was no room for taking a child's views into account in relation to physical and psychological harm. However, he considered that "It is at least arguable that what is intolerable must, to an extent, depend upon what the particular child is able, and willing, to tolerate; or, at any rate, that there is room for the child's views to be taken into account in assessing, for that particular child, in the particular circumstances of the case, whether the situation to which he would be returning would be intolerable for him."

62. The Lord Ordinary stated that:

"86. Applying that approach to H, he is 14 years of age, and does appear, from his affidavits and the other evidence about him, to be of sufficient maturity that regard should be had to his views. He 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. He is aware now that his father has been lying to him about which school he will be able to attend, but that has not altered his view. He is closer to the end of his school career and probably would find it more difficult than B to adjust to the Scottish curriculum, such that his view that he wishes to finish his schooling in the US carries considerable weight."

63. The Lord Ordinary considered, at para 87, the impact on both H and B if they were separated by ordering the return of H to the USA without B. Given, amongst other matters, the six-year age gap between the boys, the Lord Ordinary did not consider this fact of such significance that it should be determinative.

64. Thereafter, at para 88, the Lord Ordinary came to his conclusion in relation to H. He stated:

"factoring H's views into the equation along with the other factors also taken into account in relation to B, H would—unlike B—not be placed in an intolerable situation were he to

be returned, nor would there be a grave risk of his suffering physical or psychological harm; and therefore, insofar as H is concerned, the Article 13(b) defence has not been established. He will fall to be returned to the US with [F].”

65. Finally, the Lord Ordinary considered how he would have exercised his discretion if M’s article 13(b) defence had been established. He stated, at para 89, that “the decision about whether there would be a grave risk in respect of H is so borderline that I consider that he should be returned on a discretionary basis, having regard to his views, in any event.”

(b) The Opinion of the Extra Division

66. F, by a reclaiming motion, argued that the Lord Ordinary should have ordered the return of both boys to the USA. F submitted, amongst other matters, that the Lord Ordinary had failed to consider what protective measures might be put in place in Scotland to guard against a deterioration in M’s mental health. It was submitted that the Lord Ordinary had erred because he had ignored the potential for M to receive cognitive behavioural therapy if she were to continue to experience clinically significant symptoms of adjustment disorder. The Inner House rejected this argument. The Lord Ordinary had taken into account all relevant information including the availability of cognitive behavioural therapy. The Inner House considered it to be incorrect to elevate the reference to cognitive behavioural therapy, such as to mitigate the risk of suicide or mental ill health, to such an extent as to vitiate the Lord Ordinary’s conclusions on grave risk. F’s reclaiming motion was refused. There is no appeal to this court in relation to the outcome in respect of B.

67. M, by her reclaiming motion, argued that the Lord Ordinary should not have ordered the return of H to the USA. She submitted that the question of what was intolerable was an objective one, and the Lord Ordinary had erred in taking into account H’s subjective wishes. M also submitted that returning H to the USA would result in a grave risk of psychological harm which he could not reasonably be expected to tolerate, for the reasons set out by Dr Edward and apparently accepted by the Lord Ordinary. H’s stated views did not negate or mitigate that risk. Both F and H opposed M’s reclaiming motion.

68. The Inner House rejected, at para 53, the distinction drawn by the Lord Ordinary between physical or psychological harm on the one hand, and, on the other, otherwise placing the child in an intolerable situation. The Inner House held that “the question of what the child may be willing, subjectively, to tolerate cannot be any more relevant to the ‘intolerable situation’ aspect of Article 13(b) than it would be to serious physical harm.” The Inner House concluded, at para 55, that “the Lord Ordinary erred in law in taking H’s

views into account in assessing whether the situation to which he would be returning would be intolerable for him.” The Inner House held that “Once H’s views are taken out of the assessment of whether the situation to which he would return would be intolerable for him, there is no proper basis for distinguishing between his situation and that of B, and the Lord Ordinary was plainly wrong to make that distinction.” The Inner House viewed the matter on the basis of the combination of factors identified by the Lord Ordinary, but among those the Inner House attached particular weight to the risk of very serious harm to H were M to commit suicide. The Inner House concluded that the combination of circumstances to which H would be exposed on return, including that risk, was one which he should not reasonably be expected to tolerate. It was therefore satisfied that there was a grave risk that H’s return to the USA would place him in an intolerable situation. The article 13(b) defence was established in relation to H.

69. In relation to the exercise of the discretion even though the article 13(b) defence had been established, the Inner House stated that it was inconceivable that it would exercise the discretion nonetheless to order his return.

70. The Inner House therefore allowed M’s reclaiming motion, recalled the interlocutor of the Lord Ordinary of 21 November 2025, and refused to order H’s return to the USA.

4. General legal principles in relation to article 13(b)

71. Article 13(b) provides:

“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.”

72. The effect of article 13(b) is well-established. As set out in *In re E*:

“31. ... there is no need for [article 13(b)] to be ‘narrowly construed’. By its very terms, it is of restricted application. The words of article 13 are quite plain and need no further elaboration or ‘gloss’.

32. ... it is clear that the burden of proof lies with the ‘person, institution or other body’ which opposes the child’s return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination.

33. ... the risk to the child must be ‘grave’. It is not enough, as it is in other contexts such as asylum, that the risk be ‘real’. It must have reached such a level of seriousness as to be characterised as ‘grave’. Although ‘grave’ characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as ‘grave’ while a higher level of risk might be required for other less serious forms of harm.

34. ... the words ‘physical or psychological harm’ are not qualified. However, they do gain colour from the alternative ‘or otherwise’ placed ‘in an intolerable situation’ (emphasis supplied). As was said in *In re D* [2007] 1 AC 619, 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””. Those words were carefully considered and can be applied 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 or neglect 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 of it is irrelevant: e g, where a mother’s subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

35. ... article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that if the risk is serious enough to fall within article 13(b) the court is not only concerned with the child's immediate future, because the need for effective protection may persist.

36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues."

73. At this point it is appropriate to make several observations in relation to paras 31–36 of *In re E* as quoted above.

74. First, the burden of proof is plainly imposed on the person, institution, or other body which opposes the child's return.

75. Secondly, what must be established is clearly identified: that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. That requires prediction, based on the evidence, of what may happen if the child is returned. It does not require a determination that physical or psychological harm will actually occur. Nor does it require a determination that the child will actually be placed in an intolerable situation. Rather,

what is required to be established is a risk within the meaning of article 13(b) which must have reached such a level of seriousness as to be characterised as grave.

76. Thirdly, the words “physical or psychological harm” are not qualified. However, they do gain colour from the alternative “or otherwise” placed “in an intolerable situation.” Intolerable is a strong word, but when applied to a child must mean “a situation which this particular child in these particular circumstances should not be expected to tolerate.” Those words can be applied just as sensibly to physical or psychological harm as to any other situation. Whilst every child has to put up with a certain amount of rough and tumble, discomfort, and distress, “there are some things which it is not *reasonable* for a child to tolerate.” (Emphasis added). The question of what is intolerable is therefore an objective one for the court to determine; albeit that it must do so by reference to the particular child and their circumstances. The court must consider whether it is *reasonable* for the particular child in the child’s particular circumstances to tolerate the situation on return.

77. Fourthly, there is a connection between the nature of the risk and the assessment of whether it is a grave risk within the scope of article 13(b). The more serious or significant the character of the risk, the lower the level of the risk which “might properly be qualified as ‘grave’”, and vice versa. The Lord Ordinary in this case, at para 6(ii) of his Opinion, contrasted a low risk of death or serious harm with a low risk of minor harm. He stated that “a low risk of death or serious harm [is] likely to be a grave risk, but a low risk of minor harm [is not] likely to be such a risk.” In doing so he was faithfully following the observations in *In re E* at para 33 as quoted above.

78. Fifthly, there is a similar relationship between the character of the risk and effectiveness of protective measures. In *In re E*, at para 52, Lady Hale stated: “The clearer the need for protection, the more effective the measures will have to be.” A particularly high risk of the most severe harm will require to be balanced by more effective protection than a lower risk of either that or of less severe harm. In *AD v SD* [2023] CSIH 17; 2023 SLT 439, Lady Wise, at para 27, described the exercise which required to be carried out in relation to protective measures as involving “a delicate slide rule type balance to be struck between the assessed risk and the protective measures offered.”

79. Sixthly, in relation to allegations of domestic abuse, a staged approach is commended. The court first asks itself of the disputed allegations whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If it concludes that there would be such a grave risk, “the court must then ask how the child can be protected against the risk” in the context that “The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country”. If there are no effective protective measures, then the court “may have no option but to do the best it can to resolve the disputed issues.”

80. In relation to the staged approach, it is often said that the allegations are taken at their “highest” but that is not what this court stated in *In Re E*. Rather, the allegations are to be taken as “if true”.

81. In *In re E* this court did not say that the staged approach was confined to allegations of domestic abuse. In *In re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10; [2012] 2 AC 257 Lord Wilson JSC, delivering the judgment of this court, stated, at para 22, that “at a general level, the [staged] approach commended in *In re E* should form part of the court’s general process of reasoning in its appraisal of a defence under [article 13(b)]”. He continued by stating that “the guidance given in para 36 of *In re E* relates to factual ‘disputes’ and to resolution of the ‘disputed issues.’” The staged approach could have been applied by the Lord Ordinary to some of the allegations, apart from domestic abuse, made by M in this case.

82. However, the staged approach cannot apply to all allegations. For instance, it should not be transposed to an allegation that the taking parent will not return with a child to the requesting state: see *In re R (Children)* [2024] EWCA Civ 1296; [2025] Fam 67 at para 41. In that case Peter Jackson LJ stated that if the court was obliged to take the allegation that the mother would not return with the child as true there would be an obvious risk that the effective operation of the Hague Convention would be hindered. He set out how the court should make the relevant assessment. He stated, at para 36, that:

“Where [a] parent asserts that they will not accompany the child to return, the court will scrutinise the assertion closely, because it is an unusual one for a main carer of a young child to make. The court will therefore make a reasoned assessment of the degree of likelihood of the parent not returning. Relevant considerations will no doubt include the overall circumstances, the family history, any professional advice about the parent’s health, the reasons given for not returning, the possibility that the refusal is tactical, and the chance of the position changing after an order is made. The court will then factor its conclusion on this issue into its overall assessment of the refusing parent’s claim to have satisfied article 13(b). By this means, it will seek to ensure that the operation of the Convention is neither neutralised by tactical manoeuvring nor insufficiently responsive to genuine vulnerability.”

We agree.

83. Similarly, if the court were obliged to take an allegation of a risk that the mother would commit suicide as true there would be an obvious risk that the effective operation

of the Hague Convention would be hindered. The staged approach should not be transposed to such an allegation. In *Director-General, Department of Families v RSP* [2003] FamCA 623; (2003) 177 FLR 169 the Full Court of the Family Court of Australia quoted, at para 15, the approach of Warnick J, the trial judge, to the risk of the mother's suicide. Warnick J, at para 78, accepted that there was a grave risk that if the child was returned to the USA the mother would commit suicide. At para 79 he accepted the evidence of the harm for the child which might follow a suicide by the mother and found that there was a grave risk of psychological harm. At para 80 he stated:

“I do not reach these findings without disquiet. Courts will understandably have a real concern about the disingenuous adoption of stances designed to achieve the purposes of abductors in resisting orders for the return of children. But the response to this concern cannot be to disregard evidence, but rather to scrutinise it with great care.”

84. We agree that an allegation of a risk of suicide should be scrutinised with great care. However, if a real risk of suicide is established then we would have no disquiet about accepting evidence of psychological harm for the child which might follow a suicide by a parent. Rather, as the Lord Ordinary stated, at para 80 of his Opinion in this case:

“If the risk of suicide were to eventuate, we hardly need Dr Edward [the expert witness] to tell us that their mother's suicide would be traumatic for both children and would cause them extreme psychological harm, as was accepted by counsel for [F].”

Whilst we consider that the risk of suicide must be examined with great care, we consider that if a real risk of suicide is established, it is likely that a parent's suicide will cause extreme psychological harm to the child. Given the gravity of the consequences, even a small risk would amount to a grave risk that return would expose the child to psychological harm or otherwise place the child in an intolerable situation.

85. A further well-established effect of article 13(b) is that if the defence is established, the court retains a discretion to decide to return the child in any event. However, in *In Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55; [2008] AC 1288 (“*In re M*”), citing *In Re D* at para 55, Lady Hale said, at para 45, that it was “inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate”.

5. The first issue on this appeal

86. The issue is whether the views of a child (on this appeal H's views) can be taken into account in assessing whether there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Several decisions of the House of Lords and of this court establish that the child can be heard and the child's views ought to be taken into account. Doing this is consistent with, for instance, article 12 of the United Nations Convention on the Rights of the Child (1989) (Cm 1976) "the UNCRC").

(a) In re D (A Child) (Abduction: Rights of custody)

87. The issue was considered by House of Lords in *In re D* in opinions delivered (approximately two decades ago) on 16 November 2006. The mother had taken the child from Romania to England without the knowledge or consent of the father. The father issued proceedings seeking the return of the child to Romania under articles 3 and 12 of the Hague Convention. The mother resisted the return of the child on the basis that: (a) the father did not have "rights of custody" for the purposes of the Hague Convention when the child was removed to England; and (b) there was an article 13(b) defence. An aspect of the article 13(b) defence was that the magnitude of the delay in securing the return of the child was one of the factors in deciding whether his summary return, without any investigation of the facts, would place him in a situation which he should not be expected to have to tolerate.

88. The House of Lords allowed the appeal and dismissed the proceedings seeking a return order in respect of the child on the ground that the father did not have rights of custody when he was removed to England so that the removal was not wrongful. That was all that needed to be said to dispose of the appeal, but Lady Hale considered that some of the many other matters which had been canvassed required comment. Those matters included the views of "The child himself": see paras 57–62. Her speech included the following:

"57. ... Especially in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so

may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.

58. Brussels II Revised Regulation (EC) No 2201/2003 recognises this by reversing the burden in relation to hearing the child. Article 11(2) provides:

‘When applying articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.’

Although strictly this only applies to cases within the European Union (over half of the applications coming before the High Court), the principle is in my view of universal application and consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child. It applies, not only when a ‘defence’ under article 13 has been raised, but also in any case in which the court is being asked to apply article 12 and direct the summary return of the child - *in effect* in every Hague Convention case. It 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.

59. It follows that children should be heard far more frequently in Hague Convention cases than has been the practice hitherto. The only question is how this should be done ...

62. ... It goes without saying that if, having heard from the child, an issue arises under the Convention which has not been raised by either of the parties, the court will be bound to consider it irrespective of the pleadings.” (Emphasis added.)

89. Lady Hale’s comments, albeit obiter, were made at the highest appellate level after the issues had been canvassed and they were endorsed by all the other members of the appellate committee. Lord Carswell, at para 75, stated:

“Courts would ... do well to take careful account of the factors now favouring hearing the child’s views which Baroness Hale has set out in paras 57 to 62 of her opinion.”

Lord Nicholls, at para 1, Lord Hope, at para 2, and Lord Brown of Eaton-Under-Heywood, at para 84, agreed with Lady Hale’s speech.

90. We make several observations in relation to the paragraphs in *In re D* set out above.

91. First, there is no obligation on the child to express his or her views. Rather, in effect there is a presumption that the child will be given an opportunity to be heard.

92. Secondly, there would be no point hearing from a child if the court were then to hold as a matter of law (as the Inner House did) that the child’s views should be left out of account.

93. Thirdly, and in a similar vein, giving a child an opportunity to be heard is not to be confused with giving effect to the child’s views. Although the child’s views ought to be taken into account by the court, it may determine that they are of limited relevance or should be accorded little or no weight. An illustration on this appeal is that if H had expressed the view that he was strong enough to tolerate “extreme psychological harm” if M committed suicide, then, whilst that view should be taken into account, it is highly likely that no weight would be attached to it regardless of his age or maturity.

94. Fourthly, there is an important qualification to the presumption that the child is given the opportunity to be heard in effect in every Hague Convention case. The child should not be given the opportunity if it is inappropriate to do so having regard to the child’s age or degree of maturity. Thalia Kruger in “*International Child Abduction – The Inadequacies of the Law*” (2011) at page 37 states that hearing the child is a sensitive issue that must be approached with care by all involved and that it is important not to place a burden on a child in the eye of a heavy family storm. In our view it is inappropriate to hear from the child either generally or on a specific matter if doing so is not in the child’s best interests. Whether it is appropriate or inappropriate for the child to express a view on an issue is a matter for the judge to decide: though we would suggest that latitude should be exercised in favour of hearing from the child. The voice of the child should not be stifled by an overly paternalistic approach. Generally, it is in a child’s best interests to respect and promote their autonomy to the extent that the child’s maturity dictates by allowing the child to express a view.

95. Fifthly, the opportunity for the child to express a view is not limited to any particular aspect of an article 13 defence or indeed to any particular aspect of an application for the child's return under article 12. We disagree with the Lord Ordinary when he stated that "a distinction may fall to be drawn between physical and psychological harm, on the one hand, and of placing the child in an intolerable situation on the other." In *In re D* no such distinction was drawn. No such distinction is drawn in article 11(2) of Brussels II Revised Regulation (EC) No 2201/2003 or in articles 21 and 26 of Regulation (EU) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (OJ 2019 L178, p 1).

96. Furthermore, the Hague Conference on Private International Law (Conférence de La Haye de droit international privé) ("the HCCH") *1980 Child Abduction Convention, Guide to Good Practice Part VI Article 13(1)(b)* ("the HCCH Guide") dated 2020, provides guidance to judges, central authorities, attorneys, and other practitioners working in the field of international family law and who are faced with the application of Article 13(1)(b) of the Hague Convention. As recorded by Christophe Bernasconi, the Secretary General, in the introduction to the HCCH Guide, it was approved by all the (then) 83 Members of the HCCH. The HCCH Guide at paras 6, 86, and 87 draws no distinction between physical and psychological harm, on the one hand, and of placing the child in an intolerable situation on the other. It is not inconsistent with the HCCH Guide for a child to express views in relation to article 13(b) which could include views as to physical or psychological harm and what the child is prepared to tolerate.

97. Sixthly, in practice asking, in age-appropriate terms, a child about their views as to return will elicit information in relation to the taking parent's article 13(b) defence. If a child does not wish to return, the child may, for instance, give as the reason that one or other of the parents is physically violent or abusive. In practice it is artificial to draw a distinction between physical and psychological harm on the one hand and placing a child in an intolerable situation on the other.

(b) In re M and another (Children) (Abduction: Rights of Custody)

98. In giving judgment in December 2007 in *In re M* in the different context of a child's objection to being returned, Lady Hale stated, at para 46:

"These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views."

(c) *In re E*

99. By June 2011, when Lady Hale and Lord Wilson delivered the joint judgment of this court in *In re E*, the position in relation to the views of the child in Hague Convention cases was understood to be settled practice. They observed, at para 17, that following the decision of the House of Lords in *In re D* the child is now routinely given the opportunity to be heard in all Hague Convention cases, unless this appears inappropriate having regard to his or her age or maturity. Lady Hale and Lord Wilson also stated, at para 16, that “although children do not always know what is best for them, they may have an acute perception of what is going on around them and their own authentic views about the right and proper way to resolve matters.”

(d) *The United Nations Convention on the Rights of the Child and the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024*

100. The UNCRC of 20 November 1989 was ratified by the UK on 16 December 1991. Article 12 provides:

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

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

101. The provisions of article 12 are not framed so as to confer autonomous rights upon children but rather they are a directive to the state to assure for the child the right to express his or her views in matters which affect the child and in particular the opportunity to be heard in judicial and administrative proceedings affecting the child. The state’s obligation under article 12(2) is predicated and consequential upon judicial or administrative proceedings.

102. By virtue of section 6 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (“the 2024 Act”) it is unlawful for a court to act, or fail to act, in connection with a relevant function in a way which is incompatible with UNCRC requirements. In *FPS v SM* [2024] CSIH 20; 2025 SC 61, decided just before

the 2024 Act came into force, an Extra Division expressed the view that proceedings under the Hague Convention are a relevant function within section 6. If that was so, then the obligations under article 12 of the UNCRC would confer autonomous rights in domestic law in Scotland upon children in Hague Convention proceedings by virtue of the 2024 Act. However, the Inner House in this case doubted whether proceedings under the Hague Convention are a relevant function within section 6. On this appeal no party submitted that Hague Convention proceedings are a relevant function within section 6 so that the obligation under article 12 of the UNCRC was a part of Scottish domestic law in relation to Hague Convention proceedings. For present purposes, and in relation to the UNCRC, it is sufficient to state that the decisions of the House of Lords and of this court that the child can be heard and the child's views ought to be taken into account in Hague Convention cases are consistent with article 12 of the UNCRC.

(e) Strasbourg jurisprudence

103. The practice that the views of a child can be taken into account in assessing whether there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation is consistent with Strasbourg authority in relation to article 8 of the European Convention on Human Rights (“the ECHR”).

104. In *MP v Greece* (Application No 2068/24), judgment of 9 September 2025, a mother and her two children complained of a violation of article 8 ECHR in the context of the return of two children to their father in the USA by order of the Greek courts in international child abduction proceedings. The Court noted, at para 88, that it was not disputed between the parties that the return of the children ordered by the domestic courts constituted interference with the mother and the children's right to respect for their family life, as protected by article 8 ECHR. It also noted, at para 89, that the return decisions taken by the Greek authorities were based on the Hague Convention, which was incorporated into Greek law, and that they were intended to protect the rights and freedoms of the two children. The interference at issue was therefore provided for by law and pursued a legitimate aim within the meaning of article 8(2) ECHR. The court then addressed the question whether such interference can be considered “necessary in a democratic society” in pursuit of the objective in question. It is only necessary for present purposes to refer to some aspects of the court's reasoning in relation to proportionality.

105. First, at para 92, it pointed out that:

“the danger referred to in Article 13(b) of the Hague Convention cannot arise solely from separation from the parent who is responsible for the removal or the illegal retention. Thus, this separation, although difficult for the child, does not

automatically meet the ‘serious risk’ test (*KJ v Poland*, Application No 30813/14, para 67, 1 March 2016).”

106. Secondly, it stated, at para 93, that:

“the expressed will of a child of sufficient understanding is a key element to be taken into account in any judicial or administrative proceedings concerning him or her (*MK v Greece*, Application No 51312/16, para 91, 1 February 2018)”

107. Thirdly, at para 102, it carefully set out the specific circumstances of that case which led it to conclude that the Greek courts should have endeavoured, by virtue of their obligation to act in the best interests of the children, to consider whether it would be appropriate to hear the children, irrespective of any explicit request made by them. It was a cautious decision based on the specific circumstances which were: (a) the children’s return to the USA from Rhodes—where their mother and their maternal and paternal grandparents lived—was likely to entail considerable changes in their lives; and (b) conflicting decisions by the domestic courts concerning the return of the children. In those circumstances there was a positive procedural obligation for the domestic courts to examine of their own motion whether it would be appropriate to hear the children, either directly or otherwise, in order, if necessary, to rule out that possibility in a reasoned decision. Consequently, the court concluded that the domestic courts had not used all the means at their disposal to rule out any “grave risk”, within the meaning of article 13(b) of the Hague Convention. The decision-making process under domestic law had therefore not met the procedural requirements inherent in article 8 ECHR and the forcible return of the two children to the USA could not be regarded as necessary in a democratic society. There had therefore been a violation of article 8 ECHR.

(f) Conclusion in relation to the first issue on this appeal

108. In Hague Convention proceedings the views of a child can be taken into account in assessing whether there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

109. In this case H was heard. He was represented by solicitors and counsel. The Inner House having heard what he had to say chose to exclude it from their consideration. We consider that the Inner House fell into error in holding that the Lord Ordinary erred in law in taking the views of H into account when deciding whether the situation to which he would be returning, if his return to the USA were to be ordered, would be intolerable for him. Rather, H’s views ought to have been taken into account. Of course, H’s views are not determinative, and it is for the court to determine what, if any, weight to attach to them.

6. The second issue on this appeal

110. The second issue on this appeal is whether the Inner House ought not to have interfered with the exercise of the Lord Ordinary's discretion to order H's return to the USA even if the article 13(b) defence was established. In addition, F submits that the Inner House in exercising discretion erred by: (a) failing to take into account H's views; (in which H makes the same submission) and (b) treating the comment of Lady Hale in *In re D*, at para 55, as a rule of law that overrides the existence of discretion.

111. The Lord Ordinary stated that even if he had found that the article 13(b) defence had been established, he would have exercised discretion nevertheless to order H's return to the USA. The Lord Ordinary gave two reasons for so doing. We consider that both were wrong, so that the Inner House was entitled to exercise discretion itself.

112. The first reason given by the Lord Ordinary was that if he had found the article 13(b) defence had been made out, it would have been "so borderline". The terminology of the defence being "borderline" is inappropriate. The decision as to whether a grave risk identified in article 13(b) has been established is a binary decision. Either it has or it has not. If it has, then the court has found that there is a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation. Difficulties in arriving at the assessment or whether the finding is relatively evenly balanced, and in that sense "borderline", does not change the ultimate finding which is that there is a grave risk within the meaning of article 13(b).

113. The second reason given by the Lord Ordinary was that he considered it appropriate to take into account H's strong wish to return to Florida: and he commented that "the circumstances to which [H] is returning, although far from ideal, are not so drastic, or intolerable that it is inconceivable that he be returned". We agree that H's views could (and should) be taken into account in the exercise of discretion as well as on the issue of whether the article 13(b) defence was made out. But if the hypothesis was that H's return would expose him to a grave risk of extreme psychological harm which he could not reasonably be expected to tolerate, then for the reasons explained by Lady Hale in *In re D* at para 55 quoted in paragraph 85 above, at the very least the Lord Ordinary should have given the most anxious consideration as to why he should nevertheless expose H to that risk. The Lord Ordinary did not conduct such an evaluation. Instead, he applied a concept of relative intolerability, asking whether the circumstances were "not so drastic, or intolerable"; and he turned Lady Hale's views on their head when concluding that it would not be inconceivable that H should be returned. For those reasons the Inner House was entitled to set aside the Lord Ordinary's exercise of discretion and to exercise discretion itself.

114. We also reject F's submissions that the Inner House erred in the exercise of its discretion as to whether to order H's return even though the article 13(b) defence had been established. On a fair reading of Lady Carmichael's Opinion, the Inner House did not treat the comments of Lady Hale in *In re D* at para 55 as a rule of law excluding the existence of their discretion. Rather, the Inner House indicated that they were exercising their discretion and would follow Lady Hale's approach.

115. We would dismiss this ground of F's appeal.

7. The third issue on this appeal

116. The third issue on this appeal arises if, as we have concluded they should, H's views ought to be taken into account in assessing whether the situation to which he would be returning would be intolerable for him. M submits that if H's views were relevant then the Lord Ordinary, in attributing weight to those views, ought to have, but failed to, resolve the question as to whether those views reflected F's manipulation of the children.

117. If the views of a child have been manipulated so that they are not, or to some extent they are not, authentically their own views, then to that extent very little or no weight should be attached to those views. It is central to a decision as to what if any weight to place on a child's views to determine the extent to which they are authentically their own. There are procedures which can be adopted to reduce the risk of the court receiving views that are the result of manipulation of the child: see *In re D* at para 60, and the three possible ways in which the views of the child can be obtained independently. However, no matter how the child's views have been obtained, a court should do its best on the evidence presented and if the evidence permits, to determine on a summary basis whether and if so the extent to which the child's views are the product of manipulation: see for example *Re X (A Child)* [2026] EWCA Civ 518; [2026] 2 FLR 270. Furthermore, in cases where the child has been abducted some time before, the child might not have had contact with the left behind parent for several months. In those circumstances, the court should use its best endeavours to determine if possible whether the child has a false image of the left behind parent.

118. In this case the Lord Ordinary recognised that there was competing evidence as to whether H had been manipulated by F. On the one hand: (a) the Lord Ordinary made many adverse findings in relation to F; and (b) the Child Welfare Reporter in respect of B attributed an attempt by F to influence B: see para 42 above. However, on the other hand the allegations of manipulation so as to influence the views of the children were denied by F. The allegations were also denied by H who was 14 years of age, who had the capacity to express his views, and who had sufficient maturity and understanding to do so. The Lord Ordinary decided that he could not resolve this issue and therefore left it out of account: see para 53 above.

119. Although this court might have felt able to resolve the issue that is not the question. The question is whether the decision of the Lord Ordinary not to resolve it on the evidence presented to him was wrong: see the authorities in para 6 above. Although other judges might have felt able to arrive at some conclusion on the evidence, we consider that his decision on this point was one that he was entitled to reach. However, his decision not to resolve the issue had other consequences, to which we shall return below.

120. We would dismiss this ground of M's appeal.

8. The fourth issue on this appeal

121. If (as we have found that it did) the Inner House incorrectly excluded H's views, then M nonetheless seeks to uphold the order of the Inner House that H should not be ordered to return to the USA. She submits that even though the Lord Ordinary took H's views into account, his analysis in respect of the risk of harm to H was flawed and that, accordingly, his conclusion in respect of the article 13(b) defence was wrong.

122. The Lord Ordinary's findings on the evidence were that: (a) M's decision not to return to the USA (even if the court ordered the return of the children) was genuine rather than tactical; (b) there was a real risk of M committing suicide; and (c) if that risk eventuated it would be traumatic for both children and would cause them *extreme psychological harm*. Extreme psychological harm to H in such a situation was accepted by counsel for F. On those findings this was a paradigm case of a low risk of really serious psychological harm qualifying as grave. In our view it cannot be contended that such a risk to a child does not warrant the description of "grave". The only reasonable conclusion to draw from the Lord Ordinary's findings on the evidence was that there was a grave risk that H's return to the USA would expose him to psychological harm which he could not reasonably be expected to tolerate.

123. Such a conclusion alone suffices to establish the article 13(b) defence. But there were additional factors found by the Lord Ordinary pointing against return that had to be considered cumulatively, and which compounded the risk of harm. There was a risk of psychological harm to H by worrying about M's mental health, and H faced uncertain accommodation, uncertain schooling, uncertain medical care and a peripatetic lifestyle. If M committed suicide, H would have to cope with the consequent extreme psychological harm, having experienced worry about M's mental health, against the background of those other uncertainties.

124. As we have indicated, the Lord Ordinary was correct to take H's views into account in his article 13(b) determination. However, the evidence of those views did not bear the weight that the Lord Ordinary placed upon it for two reasons. First, the weight to be attached to H's views depended on the extent to which they were authentically his

own views, as to which the Lord Ordinary had come to no conclusion. Secondly, the evidence did not address the critical risk that had been identified. That is because in the central passage of his affidavit outlined in para 41 above, H did not even contemplate, still less address, his likely reaction to M actually committing suicide. The underlying assumption of all he said was that his mother would be alive, and that he would be able to visit her in Scotland regularly. H was not asked to contemplate M succeeding in committing suicide. It would have been completely inappropriate to ask him to do so. But since H did not express any view as to how he would react in that eventuality, there was nothing for the Lord Ordinary to take into account in assessing whether H would be placed in a situation which he could not reasonably be expected to tolerate, if M did commit suicide. In short, H's stated views did not negate or mitigate the real risk of extreme psychological harm that had been identified which he could not reasonably be expected to tolerate.

125. Cumulatively, therefore, the only reasonable conclusion to draw from the Lord Ordinary's findings on the evidence was that there was a grave risk that H's return to the USA would expose him to psychological harm which he could not reasonably be expected to tolerate.

126. We would allow this ground of M's appeal.

9. Evaluation of the article 13(b) defence and the exercise of discretion

127. As we have concluded that the Lord Ordinary's decision cannot stand, the next issue is whether this court can properly determine the application or whether there needs to be a rehearing.

128. We consider that this court should determine the application. First, the jurisdiction under the Hague Convention is not a continuing jurisdiction but one which requires a summary decision to be made on the evidence at the date of the hearing. It is not a "wait and see" jurisdiction: see *In re S (A Child) (Abduction: Article 13(b): Mental Health)* [2023] EWCA Civ 208; [2023] 3 FCR 317 at para 109. These proceedings have already taken far longer than they are meant to. A remit for further evidence to be obtained would exacerbate the problem and depart further from the intention that the procedure should be summary. Secondly, this court has the Lord Ordinary's full and careful findings of fact. Thirdly, the only reason advanced by F and H in favour of a rehearing (when asked by this court about disposal) was that the risk of suicide for M may have reduced given that no return order has been made in relation to B. However, no evidence was advanced to that effect. Rather, the report of Professor Macpherson said that her Adjustment Disorder would persist as long as proceedings were ongoing: see para 35 above. Accordingly, this court is not in the situation where it is obvious that there has been a material change of circumstances since the matter was dealt with by the Lord

Ordinary so that it might be appropriate to remit. Fourthly, we bear in mind that this court is not deciding any long-term question about H's welfare on this petition under the Hague Convention, which will in any event cease to apply to him in less than a year's time when he attains the age of 16.

129. On the factual findings made by the Lord Ordinary, which we have set out above, the only reasonable conclusion is that there is a grave risk that H's return to the USA would expose him to psychological harm which he could not reasonably be expected to tolerate. As we have indicated, H's views, whilst of weight in relation to matters such as schooling and accommodation, do not address whether he could tolerate harm caused to him if M commits suicide.

130. In conclusion, the article 13(b) defence is clearly established in relation to H. That being so there is nothing to suggest that the discretion should be exercised nonetheless to order H's return to the USA.

10. Overall conclusion

131. We would dismiss the appeal (for reasons different to those given by the Inner House) and affirm the order of the Inner House that refused to order the return of H to the USA.