OUTER HOUSE, COURT OF SESSION

[2025] CSOH 67

P292/25

OPINION OF LADY TAIT

In the Petition of

DBH

Petitioner

for

orders under the Child Abduction and Custody Act 1985

Petitioner: Laing; BTO Solicitors LLP
Respondent: McAlpine KC; Weightmans (Scotland) LLP

25 July 2025

Introduction

[1] The petitioner seeks an order for the return of the parties' two children, OFH (born in 2016 and aged 9) and LCH (born in 2018 and aged 7) to the United States of America ("the US").

[2] The parties married in 2016 and divorced in 2023 in the US. The children were born in the US and lived there until 25 December 2023. They were habitually resident in the US immediately prior to being removed and brought to Scotland by the respondent. They have resided in Scotland since their removal. The petitioner was exercising his rights of custody in relation to the children at the time of their removal. The children have not had contact with the petitioner since 16 September 2023.

[3] The parties entered into a Separation and Property Settlement Agreement on 19 July 2023. Between July and 16 September 2023, the petitioner exercised contact with the children.

The issues

[4] Article 3 of the 1980 Hague Convention on Child Abduction ("the Convention") addresses the circumstances in which the removal or retention of a child is to be considered wrongful. The respondent accepts that the requirements of Article 3 have been met. The respondent wrongfully removed the children from the US. The court will order the children's return to the US unless one of the defences advanced by the respondent is established and the court exercises its discretion in favour of not ordering return.

[5] The respondent advances defences under Article 13 ("the objection defence"), Article 12 ("the settlement defence") and Article 13(b) ("the grave risk defence") of the Convention.

[6] The issues for determination are:

i. whether the children object to being returned to the US and whether it is appropriate for the court to have regard to those views: Article 13;

ii. given the present proceedings were commenced more than 1 year after the children were removed from the US, whether the children are settled in Scotland: Article 12;

iii. whether there is a grave risk that return of the children to the US would expose them to physical or psychological harm or otherwise place them in an intolerable situation: Article 13(b); and

iv. whether, in the event of the defences, or any of them, being made out, the court should exercise its discretion to refuse to order the return of the children to the US.

The law

[7] I address the law in respect of each of the three defences advanced. The burden of establishing each defence falls on the respondent.

The objection defence

[8] The court may refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views: Article 13.

[9] The objection defence involves a gateway test. That involves a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the children object to being returned to the US and have attained an age and stage of maturity at which it is appropriate to take account of their views: *In Re M (Children) (Abduction: Children's Objection)* (2016) Fam 1, para [69]. Once the gateway of age and maturity is passed, a "child-centric" approach is required which has the welfare of the children as the forefront consideration: *W* v *A and X* (2020) CSIH 55 para [9].

[10] Courts increasingly consider it appropriate to take account of children's views: *In Re M & another (Children) (Abduction: Rights of Custody)* (2008) 1 AC 1288 para [46]. Once its discretion comes into play, the court may have to consider the nature and strength of the children's objections; the extent to which the children's views are authentically their own or the product of the influence of the respondent parent; the extent to which the children's

views coincide or are at odds with other considerations relevant to their welfare and general Convention considerations: *ibid* at para [46]. The discretion under the Convention is a discretion at large: *ibid* at para [43]. There is no test of exceptionality for the refusal of a return order. Establishment of an exception under the Convention is itself sufficient exceptionality: *ibid* at para [40]. Whilst comity, a swift return and deterrence are relevant, the weight to be given to such considerations will vary from case to case: *ibid* at paras [42] - [46]. The older the child the greater weight that their objections are likely to carry but that is far from saying that the child's objections should only prevail in the most exceptional cases: *ibid* at para [46]. The factors set out at para [46] of *In Re M* (2008) are not to be taken as an exhaustive list because it will be difficult to predict what will weigh in the balance in a particular case: *In Re M* (2016) at para [71]. The court should have regard to other welfare considerations, so far as it is possible to take a view on them on the limited evidence available: *ibid* at para [71]. The court must give weight to the Convention considerations: *ibid* at para [71]. But while such considerations will always be relevant, the further one is from the main aim of a speedy return the less weighty they will be: *W* v *A and X* at para [9]. If the children are integrated in the new community, it is relevant to consider the effect of a further, and unwarranted, international relocation pending long-term decisions being taken: *ibid* at para [9]. The focus is not on the moral blameworthiness of the abducting parent or on notions of deterrence: *ibid* at para [9]. When assessing the weight to attach to the child's views what matters is whether they are clear and unambiguous and coincide with other relevant welfare considerations and not whether the child appreciates a return would be so the courts of the state of habitual residence could determine issues of residence: *TS* v *S* (2025) SC 76 para [12].

The settlement defence

[11] Where a child has been wrongfully removed and, at the date of commencement of proceedings a period of less than 1 year has elapsed from the date of the wrongful removal, the court shall order the return of the child forthwith. Even where proceedings have been commenced after the expiry of the period of 1 year, the court shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment: Article 12.

[12] The leading Scottish authority on the settlement defence is *C* v *N* 2018 SLT 673:

> "[62] Perhaps the most important element in the decision is the emphasis on a child centred approach. This is consistent with the overall policy of the Convention, namely to promote the welfare of children … After a wrongful removal or retention, a swift return to the country of origin will minimise disruption in the life of the child; but where that is no longer possible because of the passage of time, and the child is settled in the new environment, in many, perhaps most cases, to insist on return is likely to cause harm to the child with little or no countervailing benefit— hence the proviso to art.12(2). The child centred approach also suggests that the question of settlement should be considered from the perspective of the child, and using his or her sense of time …
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> [65] The need for exceptionality and factors overriding a duty to return the child has been rejected by the House of Lords. It is now clear that after the 12 months has passed, a two stage approach is required, not an assessment of settlement in the context of whether a return order should or should not be made. The first stage under the proviso to art.12(2) is to ask— is the child settled in the new environment? This is to be approached using the natural and ordinary meaning of the word 'settlement'. It should not be conflated with notions such as the importance of the aims of the Convention. It is a pure question of fact. If the answer to the question is no, barring some other determinative factor, the child will be returned. If the answer is yes, the court then enjoys a discretion 'at large'. In this regard the interests of the child should be at the forefront, as opposed to, for example, a desire to deprive the removing parent of what might be described as a reward for a wrongful act. The discretion is to be carried out in recognition that the primary objective of the Convention, namely to order prompt return, can no longer be achieved, given the long delay in the raising of proceedings.
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> [79] At the time of writing this opinion, the children have been in Scotland for over 20 months. They are very well settled at home, at school, and in their local community. … The court has a wide discretion to do what is in the [children's] interests, giving the appropriate weight to the terms of the Convention and its

> objectives. The primary aim of a swift return to Italy can no longer be achieved, as is implicitly recognised in the terms of art.12. I would echo the comments of Lady Hale to the effect that, against all the factors pointing to no return, the Convention policies relied on by the father and the Lord Ordinary carry little weight. I agree with her Ladyship that the return of a settled child is likely to be an unusual event."

[13] If the settlement defence is established, it will likely be an "unusual event" for a return order nonetheless to be made: *ibid* at para [74] citing dicta from *In Re M* (2008).

[14] While recognising that concealment can be a significant factor when deciding whether settlement has or has not occurred, each case will turn upon its own facts: *C* v *N* para [72].

The grave risk defence

[15] Notwithstanding the provisions of Article 12, the court is not bound to order the return of the child if it is established 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: Article 13(b).

[16] In *AD* v *SD* 2023 SLT 439 at paras [26] to [28], the Inner House considered the proper approach to the grave risk defence in light of the Supreme Court decisions of *In Re E (Children)(Abduction: Custody Appeal)* [2012] 1 AC 144 and *In Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257). The following propositions can be taken from *In Re E* at paras [30] to [35]. The onus is on the respondent to establish the defence: para [32]. The risk to the child must be a grave one. A real risk, or the return not being in the child's best interests, will not suffice. It must have reached such a level of seriousness to be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two: paragraph 33. The Article 13(b) defence contains two defences. The first relates to the exposure to a grave risk of physical or

psychological harm. The second relates to placing the child in an intolerable situation. "Intolerable situation" means a situation that a child in the particular circumstances of the case should not be expected to tolerate. Article 13(b) looks to the future and is concerned with the situation as it would be if the children were returned forthwith. This is not necessarily the same as being returned to the person who has requested the return, although it may be so if that person has the right so to demand. 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 on return: paragraph 35. If the risk exists its source is irrelevant.

[17] The separation of a child from their primary carer can give rise to a defence under Article 13(b) as illustrated in *Re R (Child Abduction: Parent's Refusal to Accompany)* [2024] EWCA Civ 1296 at para [34].

[18] Whilst recognising that each case is fact specific, in *AD* v *SD supra* it was said at para [41] that while the court had a discretion to decide whether or not to order return once the grave risk defence had been made out it would be inconceivable that a return order would be made on the material before the court. It was not the policy of the Convention that children should be put at serious risk of harm or placed in intolerable situations: *In Re M* (2008) para [45].

[19] In terms of protective measures, in the absence of compelling evidence to establish that the courts in the requesting country do not have the power to protect the child, the courts of the requested country should assume that they will be able to do so: *ML* v *JH* 2021 Fam LR 60 under reference to *C* v *C* [1989] 1 WLR 654.

Evidence

The respondent

The respondent's affidavit

[20] The respondent provided an affidavit. She is the children's mother. She was born in the US but has UK citizenship through her parents. Throughout her childhood, she frequently returned to Scotland to visit extended family.

[21] The respondent's evidence is that she has been the children's primary carer since their birth and their sole carer from 2020. She and the children moved from the US to Scotland on 25 December 2023. She is opposed to the children being returned to the US and to the children being cared for by the petitioner. She describes the children as happily settled in Scotland. They do not want to return to live in the US. Certain orders have been granted in the US granting the petitioner custody of the children and sentencing the respondent to imprisonment for contempt of court. The respondent considers that the children would be at grave risk if they were returned and placed in the petitioner's care. In the event of her return to the US, she would be arrested, the children would be removed from her care and put in an intolerable situation.

[22] On arrival in Scotland in December 2023, the respondent and children initially stayed for a few nights in a hotel; in an Airbnb rental from 30 December 2023 to 30 January 2024; and in an apartment from 31 January 2024 until 1 March 2024 when they moved to their current home which is a private residential tenancy. All of the rental properties have been in relatively close proximity. The respondent has stable accommodation for herself and the children. Since arriving in Scotland the children have quickly settled. Initially the children attended a Steiner school. The respondent had concerns about the children's attainment and enrolled them at the local school in the village where they live. They have attended the local

school since August 2024. They are developing educationally and socially. They enjoy extra-curricular activities. They have developed friendships. The children and respondent have become integrated into the local community around them. The respondent has developed a support network. She and the children have travelled within Scotland.

[23] The children's views, as expressed to the respondent, are that they love living in Scotland and do not want to return to the US. They were fully expecting to come to Scotland as a plan had been made for that to happen after the parties separated. The petitioner agreed with the plan. In the past, if the children asked about the petitioner, the respondent brought it back to the church and to him being a member of something that is not safe for them. The children are fine not seeing the petitioner and have not actually talked or asked about him in a long time. He was not in their lives from June 2020 until August 2023. The children are aware that there is something happening after being spoken to by the Reporter but they have still not asked about the petitioner nor to see him.

[24] The parties met in 2015 through a religious movement Santo Daime which the respondent terms a religious drug cult. The movement requires members to consume a medicine known as Ayahuasca which contains the hallucinogenic drug Dimethyltryptamine (DMT). Members of the movement are subject to control from more senior members. The petitioner's mother has a senior role in the movement and recruited the respondent into it. The Santo Daime leaders told the respondent that her baby should taste the "medicine" before her breast milk. The respondent complied. She had almost entirely given over her will to the movement. She gave a lot of money to Santo Daime and would do whatever she was told.

[25] The respondent describes the petitioner suffering from poor mental health during the parties' marriage. His poor mental health was exacerbated by illicit drug use, including of

DMT. The petitioner disclosed that he had been diagnosed with Schizophrenia prior to the marriage. He displayed paranoia about the respondent's friendships. He believed that he was being lead poisoned in the parties' home and that helicopters were monitoring him. He was psychologically abusive to the respondent. He threatened violence towards her. He often put her into a state of fear, alarm and distress. He belittled her. He undermined her. He controlled her. The respondent was not permitted to turn the heating on in the winter although the parties had young children. The petitioner controlled the parties' finances notwithstanding that the respondent was the sole financial provider for the family. He often had psychotic episodes. He believed he was Jesus Christ. For a time he became irrationally fixated on the parties' elder child not being his child. The petitioner became increasingly focussed on the children being raised as part of the Santo Daime movement. In June 2020, the petitioner trekked barefoot for hours to collect a rock from the roadside which he brought home. He became delusional about the rock. The parties separated shortly thereafter as the respondent could no longer tolerate the petitioner's behaviour.

[26] The respondent had extricated herself from Santo Daime by August 2020 and underwent therapy to recover. The petitioner and his immediate family, including his mother and two brothers, remain active members. The petitioner insisted that the children should reside in a Santo Daime compound and be raised as part of the movement by his mother. The respondent refused. She feels threatened by the petitioner and by members of Santo Daime. Mediation following separation was attempted but broke down as the petitioner refused to agree that the children should not be members of Santo Daime.

[27] The respondent raised divorce proceedings in March 2021. The petitioner exercised limited supervised, non-residential contact with the children. He was required to undergo a psychiatric evaluation as part of proceedings. The parties entered into a separation

agreement in July 2023. The respondent felt under duress to sign the agreement. The petitioner initially agreed to the children relocating to Scotland but later reneged on his agreement. Limited contact, as provided for in the agreement, took place. The respondent exercised his first unsupervised contact with the children in August 2023. The contact did not operate well and there was no further contact. The respondent became increasingly fearful that she could not protect the children from the petitioner and the Santo Daime movement if she and the children remained resident in the US.

[28] On 16 October 2024 the petitioner applied to the Supreme Court for the State of New York, Ulster County for an order granting him custody of the children. On 9 January 2025 the court granted the order in the absence of the respondent and without proper service upon her. The order records that an attorney appeared for the children. That attorney had no contact with the respondent nor the children in relation to the petitioner's application. Further, on the petitioner's application, the court held the respondent to be in civil and criminal contempt of court. The respondent was sentenced, in her absence, to 21 days imprisonment. A warrant for her arrest was issued on 7 May 2024.

[29] Standing these orders, upon return to the US the children would be placed in the sole custody of the petitioner. The respondent is liable to be arrested and imprisoned. Even if the petitioner sought to have the orders recalled, it would remain a matter for the discretion of the court. In any event, the children would be removed from the respondent's care in terms of the custody order. The petitioner is incapable of caring for the children. He has exercised sporadically limited, predominately supervised non-residential contact with the children between 2020 and 2023. The children would also be at risk of being exposed to the Santo Daime movement, including members of the petitioner's family.

Other affidavit evidence for the respondent

[30] The respondent produced affidavits from her mother, uncle, a number of friends from the local area where she and the children reside, the children's class teachers, their *au pair* and two of her gallerists based in Berlin.

[31] The respondent and her mother (JB) were estranged for a period but her mother visited the respondent's home in Scotland in May 2025 and spent time with the children over 3 days. She speaks of the respondent and children being happy and settled in their current home and welcomed into the community. She speaks to the respondent being much calmer and less anxious than when she was in the US. She fears for the impact upon the respondent's stability were she to return to the US because of the respondent's fear of Santo Daime. JB was to supervise three contact sessions in 2023 but the children, on arrival, refused to go with the petitioner despite her encouragement and the encouragement of the petitioner.

[32] ABB (the respondent's uncle) met the respondent and children at a family funeral in May 2025. He spoke to the apparent wellbeing and happy presentation of the children. The respondent has extended family support throughout the UK.

[33] EW and NW are the class teachers for each of the children at the local primary school.

[34] EW was the older child's class teacher for the academic year 2024/2025 when he commenced Primary 4. He was behind academically, particularly in reading. He is now making good progress with his reading. He displays a very good breadth of knowledge and is creative. He is becoming more confident and understands friendships and social situations better. He is becoming better able to express feelings and concerns. He presents well at school. His attendance was at 86% resulting in a letter being sent to the respondent.

The lower attendance may reflect that he has attended late for school. Since the respondent was contacted, the child either has not been late or the respondent has alerted school that she and the children are running behind. Initially the child made no reference to the US but has made some cultural references more recently.

[35] NW has taught the younger child for the academic year 2024/2025. She noted that she was behind when she commenced Primary 2 but attributed that to the less formal style of teaching at a Steiner school. The child has come on leaps and bounds since joining the school; she has a good circle of friends; her attainment has improved; she is more focussed; she presents well and her confidence has grown considerably. The respondent engages well with the school. The child's attendance was at 85% but has improved over the last term. NW describes a child who is articulate and with a deep general knowledge. In relation to the Reporter's visit to see the child at school, the child commented that the respondent had told her about the visit. Afterwards, the child was not unsettled and offered that she had told the Reporter that she wanted to live in Scotland. NW concludes that the child has "absolutely settled in this term".

[36] FVH and PS-G are the Berlin gallerists of the respondent who is an artist who exhibits internationally. They speak to the importance of the respondent being settled for her creativity and productivity. They speak to the fact that the respondent prioritises her children. Otherwise their knowledge of the children's circumstances is limited to the respondent's report and, in the case of FVH, what she observes during video calls.

[37] WJH, KM, DK and KL have become family friends with the respondent and children since they moved to the area. They and their families socialise with the respondent and children. They are available to help with the children. The children are happy and settled. They enjoy a range of activities and are integrated into the community.

[38] KGS is the children's *au pair* 2 days per week. She looked after them for 4 nights in February 2025 to allow respondent to attend her art show in Berlin.

Protective measures

[39] Amy Egitton is an attorney who has practised family law for over 30 years. She has extensive experience in custody matters and child abduction. She provided an expert opinion on available measures in the US court system, particularly New York State, for the protection of the respondent and her children based upon allegations of grave risk were the respondent and children to return to New York State. Her opinion is number 7/32 of process. Her evidence is that any undertakings given are agreements between the parties and not enforceable without further proceedings in the requesting country. The preferred approach would be to enter into a consent interim custody order before the children are returned. The only fully protected outcome for the children is a denial of the return.

[40] In relation to the contempt order and arrest warrant, if the respondent were in the jurisdiction of New York State the arrest warrant could be executed. The petitioner could file to withdraw the motion for contempt. Vacating the arrest warrant is more difficult. The petitioner could make a request to the court which would be in the sole discretion of the court. The court can consider the severity of the contempt, ongoing non-compliance and the best interests of the children. Were the petitioner to withdraw the contempt action and the warrant were to be vacated, this would allow the return of the respondent and children after executing a Consent Order which employs protective measures. There are many protection measures a New York court can invoke to protect children from grave danger or risk of mental or physical abuse.

[41] Ms Egitton addressed the risk of harm through exposure to a cult-like religious order. Ms Egitton outlines a number of measures to ensure the child's safety including the appointment of an attorney for the child, a psychological evaluation and a series of restrictions to ensure the child does not come into contact with any organisation (where there is evidence that the child's health, development or safety will be jeopardised).

The petitioner

The petitioner's affidavit

[42] The petitioner provided three affidavits. He is the children's father. He describes himself as the children's primary carer before the separation. The petitioner speaks to the respondent placing restrictions on his contact with the children in the US. She required him to distance himself from his family and the religion which the parties practised prior to separation. The petitioner has not practised the religion since the separation and accepts that the children should not participate in the religion. The contact which took place operated well and was progressing when the respondent stopped contact, stopped communication and left the US without the petitioner's consent. The respondent has thwarted contact with the children and alienated the children from the petitioner. The children have no connection to Scotland.

[43] The petitioner and his family made efforts to trace the respondent and children. He sought to enforce the parties' separation agreement in the US courts. In August 2024, he became aware of the children's presence in Scotland and employed private investigators to trace the respondent. He sought further orders, including a custody order through the US courts and contacted the US Central Authority on 30 January 2025.

[44] The petitioner works as a delicatessen supervisor, volunteers as an emergency responder and is studying to be a landscape architect. He has suitable accommodation for the children.

[45] The children's views have been influenced by the respondent. The respondent isolated the children from friends and family when in the US. She has spoken negatively about the petitioner and his family and made the children aware of the present proceedings. She has made the children aware of her preference to remain in Scotland.

[46] The respondent was not recruited into Santo Daime but reached out to join and was a founding member. The petitioner is no longer a member of Santo Daime; he has not been a member nor has he attended ceremonies since 2020. His mother and brothers are still members.

[47] The petitioner accepts that he struggled during the marriage and had concerns about his older child's paternity but he did not have psychotic episodes. In relation to the rock allegation, he walked 22 miles to clear his head during a distressing time. It was an isolated incident. The petitioner denies believing he was Jesus Christ and denies being diagnosed with any mental disorder. He denies any psychological abuse and denies any threatening or controlling behaviour.

[48] The respondent's wish to move to Scotland was not discussed in great detail. The petitioner was aware that she wanted to go to Scotland as she believed it would be better for her work. She did not appear to consider what was best for the children. The petitioner was clear that he would not consider a move to Scotland until the respondent was prepared to allow him to have a relationship with the children. A move to Scotland was not part of the negotiations of their separation agreement.

[49] The petitioner did not seek court orders to punish the respondent but to ensure compliance with the separation agreement and to enable contact with the children. He is willing to take such steps as are required to purge the contempt order and to ensure that the children are not removed from the respondent in the event of her return. He hoped to take the necessary steps within 2 weeks of 18 June 2025. He will ensure that the respondent remains the children's sole residential guardian. If for any reason the respondent were imprisoned on her return to the US, he would be able to collect and care for the children in that interim period. The respondent acknowledges that he misunderstood the urgency around Hague Convention proceedings and prioritised obtaining an order for custody in the US.

Other affidavit evidence for the petitioner

[50] The following members of the petitioner's family produced affidavits: DLH (mother), FEH (father), JH (brother) and JRH (brother). Each spoke to a close relationship with the parties' before their separation. They did not witness any abusive behaviour. The respondent was more involved in Santo Daime church. The petitioner was no longer a member. He had significant involvement in the children's care. The respondent sought to isolate the children when they lived in the US.

[51] Affidavits were produced by MFB and GSD who are married and are friends of the petitioner and former friends of the respondent. They describe Santo Daime as a supportive community. The petitioner is a good father. The respondent was isolationist.

[52] NS-A is the petitioner's girlfriend. She describes Santo Daime people and the petitioner's family as kind and loving. The petitioner is a respectful partner.

[53] In terms of her affidavit, Catherine Charuk was appointed to serve as attorney for the children in the US court proceedings. She has undertaken such appointments for nearly 30 years. She interviewed the children twice, once in May 2022 and the second interview was on 18 July 2023. It became clear to her that the children were being strongly influenced by the respondent, in effect, to misrepresent their preference to see the petitioner. In addition to her observation, she referred to available documentation in the form of supervised visitation reports and a custody evaluation performed by a psychologist which indicated a loving relationship between the petitioner and children. The relationship was thwarted by the respondent's unilateral actions, including relocation of the children.

Protective measures

[54] Jeremy Morley is an attorney who provided an expert opinion, number 6/38, on protective measures in New York State on behalf of the petitioner. Mr Morley was admitted to practise law in the State of New York in 1975 and has practised law there consistently thereafter. His practice focuses on international family law disputes, especially child custody and child abduction issues. His evidence is that there are extremely extensive and effective processes in New York State to protect victims of domestic violence and child abuse. Immediate as well as long-term assistance is available to protect victims, irrespective of their immigration status, income level, gender, race, sexual orientation, or nationality. The available orders include temporary restraining orders, stay-away orders or orders of protection. Such orders could prevent threatening behaviour. The petitioner could be prevented from allowing the children to be exposed to Santo Daime by way of measures within a custody arrangement. Orders can contain strong provisions for mandatory arrest. There is an extensive system of supervised visitation to provide a safe environment for a

parent to visit their children under the supervision of responsible overseers to protect children. Were the children to be returned to New York, the authorities and courts could be relied upon to provide effective protection to them and to the respondent in the event that the petitioner were to engage in domestic violence or abuse or were to threaten to do so. These methods were said to be at least as effective as those in the UK.

[55] Mr Morley reviewed the contempt order. His opinion is that were the respondent to return to the US with the children without any modification of the contempt order, she would be likely to face a real possibility of being sentenced to some very limited period of imprisonment. However, the sentence would most likely be suspended or the contempt finding would be deemed to have been purged, by reason of her return of the children. This is especially likely as she is the primary care provider to the children and, before their removal, the petitioner had only supervised access to them. The best interests of the children would take precedence.

[56] The parties could ensure the contempt orders are purged by way of motion by the respondent which would be approved in advance by the petitioner. The court has a broad discretion to purge a finding of contempt. Mr Morley accepts that there is difficultly in predicting exactly what the court in the US would do in relation to whether the arrest warrant would be purged. Mr Morley indicated he was not aware of any cases where the parties have agreed for an arrest warrant to be purged and, of its own violation, the court has not agreed to purge it.

[57] Any return could be conditional on the respondent obtaining an order from the New York court with several stipulations including removal of contempt and sole residential custody of the children being with the respondent.

Children's views

[58] Ceit-Anna MacLeod was appointed as Child Welfare Reporter by interlocutor dated 2 April 2025 to undertake enquiries and to report to the court on the matters set out in the following paragraphs.

[59] The child OFH was aged almost 9 at the date of interview with a level of maturity around what might be reasonably expected of a child of his age. He had age-appropriate capacity to form views and express them clearly. The child LCH was aged 7 again with a level of maturity around what might be reasonably expected of a child of her age. She had age-appropriate capacity to form views and express them clearly. Her use of language was more advanced than might be reasonably expected of a 7-year-old.

[60] In terms of the purpose of a return, neither child fully understood that the purpose is not necessarily to return to the care of the other parent but to allow the court of habitual residence to determine general welfare issues including residence and contact. Both children understand that the case is about a return to the US as a place but not necessarily that it is so that the court there can make decisions about what should happen next. The Reporter does not consider that either child is envisaging that a return to the US would necessarily mean a return to the care of the petitioner. Neither child said anything about returning to his care in the context of speaking of their views about a return. The reason for that was more about the children not having contemplated the possibility of a return to his care as opposed to them having a particularly clear understanding of the purpose of the petition.

[61] Leaving aside the children's precise understanding of the purpose of a return, the Reporter concluded that both children had capacity to form a view about a return to the US more generally and to express those views in an age-appropriate way. Both children hold a

clear view that they do not wish to return. Both children expressed that view freely and repeatedly. While their manner was quite different to one another, with the younger child appearing more at ease with the Reporter and the older child more guarded, their views were very much aligned. They were each able to provide reasons for their views. For both children, the reasons they provided were focused on their clear wish to remain in Scotland and the things they enjoy in Scotland including school, friends and social activities. The sorts of things the children shared about their likes and dislikes about the US gave the understanding that they may not have a particularly clear memory of living there in terms of day-to-day life, whether positive or negative. The Reporter was left with the understanding that they did not think about or speak about life in the US very much. Similarly, while both children very much expressed negative emotions about the petitioner, she was left with the impression that they did not have clear memories of specific things about him or of specific times spent with him.

[62] As the Reporter's remit focused on the children's views, she did not carry out general enquiries into the children's welfare. She did not speak with the parties about matters generally concerning the children's welfare. In order to assist with questions of maturity and capacity, she asked the children's teachers some general questions, such as about their presentation at school and their levels of ability and understanding.

[63] The views expressed by the children coincide to a degree with matters others reported about what the children had said and about the children's views. For example, the views expressed by the children coincide with what the respondent said about her understanding of the children's views and their reasons in terms of the children not wishing to return to the US and their reasons being focused on why they wish to remain in Scotland. The views expressed by the children coincide with what the respondent said about the

children not speaking about the petitioner. The views expressed by the children coincide in general terms with what the petitioner said the children expressed to him in 2023 about an expectation they appeared to have about moving to Scotland and that it appeared they had been told they could not go because of him. The views expressed by the children coincide with what the petitioner said the children expressed to him in September 2023 indicating that they were not interested at that time in having a relationship with him, although he said their response to reading a story together and the manner in which they then engaged with him indicated they were comfortable in his presence.

[64] The views expressed by each of the children appeared to be authentically their own, in that the Reporter did not form the view that it had been suggested to either of them what sorts of things they should say or how they should, or should not, express themselves. It does, however, seem likely that each of the children's views have been influenced by their understanding over time that the respondent's wish is not to return to the US and that her clear wish is for her and them to remain in Scotland. If the children are able to see that the respondent is much happier in Scotland, that is also likely to have a gradual bearing on their views. The Reporter considers that these sorts of factors, combined with the limitations on the memories the children appear to have of life in the US, and the children's direct and current enjoyment of life in Scotland are likely to have impacted upon the views they hold about a return.

Decision

[65] Having regard to the available material, I am satisfied that the respondent has established an objection defence under Article 13 and a settlement defence under Article 12 of the Convention. Further, I am satisfied that a grave risk defence under Article 13(b) has

been established in respect that for the children to be removed from the respondent's care on return to the US would place the children in an intolerable situation. I now set out my reasons in relation to each of the defences and then address the exercise of my discretion.

Objection defence

[66] The court has the benefit of the Child Welfare Report setting out the views of the children who were almost aged 9 and aged 7 at the date of the report. The Reporter's clear conclusions are that each of the children objects to being returned to the US and that each has attained an age and stage of maturity at which it is appropriate to take account of their views.

[67] The terms of the report allow me to be satisfied that the gateway test has been met. Nonetheless, the petitioner invites me to exercise my discretion by making a return order. He prays in aid that the children's ages may be thought to be in the lower age range of having the ability fully to understand the implications of the case or to give fully informed views; that they did not provide reasons for certain responses when asked by the Reporter; and the children are likely to have been subject to negative influence by the respondent and, in particular, her attitude to the petitioner.

[68] In a detailed exploration of the children's views, the Reporter concludes that each child was able to provide reasons for their views that they did not want to return to the US. Those reasons focused on why they wanted to remain in Scotland, their enjoyment of Scotland, their school, friends and activities. The Reporter gained the impression that the children did not have clear memories of their lives in the US, whether positive or negative. The lack of articulation by the children of their experience in the US does not detract from

their articulation of why they want to remain in Scotland and chimes with the material available to the court in terms of their lives in Scotland as detailed below under settlement.

[69] The Reporter acknowledges in the final paragraph of her report at page 15 that it is likely that the views will have been influenced by an understanding over time that the respondent does not want to return to the US and that she wants to remain in Scotland and is happier here. The Respondent does not conclude that the children were coached. Importantly, in the assessment of the Reporter, the children's views are authentically their own.

[70] Further, the petitioner submits that there is material before the court from which it may be inferred that the respondent sought to thwart the children's relationship with the petitioner and may have negatively influenced the children. Broadly, reliance is placed on the affidavit of the children's court appointed attorney (Catherine Charuk) and records of positive contact between the children and the petitioner. In contradiction to those records, the respondent describes difficulties in contact and the children do not speak positively about the petitioner. The respondent's mother speaks to the children's refusal to go with the petitioner despite encouragement. Catherine Charuk asserts that the children were being strongly influenced by the respondent, in effect, to misrepresent their preference to see the petitioner. Ms Charuk last met with the children in July 2023. The available material is conflicting and now historical. Ultimately, the court appointed Reporter reports that each child objects to being returned; each has attained an age and stage of maturity at which it is appropriate to take account of their views and those views appear to be authentically their own. That report is recent and is an assessment in light of the children's current circumstances.

[71] This is not a case where the manner in which the objections are expressed or their nature are such as to render them of little weight in the overall balancing exercise. The children's ages do not preclude the court placing considerable weight on their views.

Settlement defence

[72] There is a significant volume of material before the court in support of the respondent's contention that the children are settled in Scotland. They have lived in Scotland now for in excess of 18 months and that in the same local area. They have lived in their current rented home for more than 16 months. That is stable accommodation and the only potential move would arise if the respondent were to buy a home in the area. The children have been in the Scottish education system since January 2024 albeit the first 6 months were spent at a Steiner school before moving to the local primary school. The children have completed an academic year at the local school, having finished Primary 4 and Primary 2 respectively. There are a number of affidavits from the respondent's mother and friends which speak to the children and respondent embracing and being embraced into the local community and having become integrated. That no doubt stemmed from school friendships but it has grown to engaging with families and activities in the wider community. The children are known, welcomed and supported in the community.

[73] There is also independent material available in the form of the affidavits from the children's class teachers. Those speak positively to the progress made by the children during the last school year, both academically and socially. While some concern was noted about the children's attendance, the indication is that the respondent has addressed the concern which in part may have arisen from late attendance as opposed to non-attendance.

In terms of the present determination, I do not consider this factor militates against the children being settled in Scotland.

[74] The petitioner submits that the nature of the children's removal (planned, in the face of court orders, without notice, without whereabouts being subsequently shared and whereabouts only being established through the petitioner's investigations) gives rise to consideration of concealment. Through social media, the petitioner became aware on 2 August 2024 that the children were in Scotland. Although given advice about the Hague Convention, he prioritised obtaining orders in the US courts and failed to appreciate the urgency of initiating Hague proceedings. As stated in *C* v *N supra* para [72] while recognising that [concealment] can be a significant factor when deciding whether settlement has or has not occurred, each case will turn upon its own facts. As in *C* v *N*, any concealment here was of limited duration, did not prevent timeous raising of proceedings and does not significantly impact upon settlement having occurred.

Grave risk defence

[75] I am not satisfied on the available material that there is a grave risk that return of the children to the US would expose them to physical or psychological harm. The respondent relies upon the petitioner's continuing membership of Santo Daime or at least his close family's association with Santo Daime; the petitioner's poor mental health; and the petitioner's psychologically abusive, threatening and controlling behaviour. Although described by the respondent as "extreme", there is relatively limited specification of the petitioner's behaviour and not of persistent behaviour. The parties separated in August 2020. Until then, the respondent was also a member of Santo Daime. It is not suggested that the children have been exposed to Santo Daime since separation nor that the

petitioner has behaved abusively to the respondent since separation. While there is a *prima facie* case arising from the respondent's allegations of threatening and controlling behaviour, assuming them to be true, an evaluation of the available material does not allow me to conclude that the nature and severity of the risk to the children can properly be characterised as grave. In any event, these were matters known of and before the US court in the divorce proceedings and might reasonably be expected to have informed the orders which were made. Those orders apparently included protective measures such as supervision of contact. Were I to be in error as to the severity of any risk, the opinions of each of Jeremy Morley and Amy Egitton would satisfy me that sufficient protective measures would be available.

[76] However, I am satisfied that there is a grave risk that return of the children to the US would otherwise place them in an intolerable situation. It is not disputed that after the respondent's removal of the children to Scotland, the following orders were made by the US court: i) a finding of contempt against the respondent; ii) a warrant for her arrest in the US; iii) an order for her to be imprisoned for 21 days; and iv) for the children to reside with the petitioner. The last order was made absent the children's views and where there has been no contact since mid-2023. The opinion of Amy Egitton is that vacating the extant arrest warrant is not within the gift of the petitioner. That is also the opinion of Jeremy Morley albeit in his experience he is not aware of any cases where a court has refused to vacate an arrest warrant where the parties make a joint request.

[77] In terms of potential imprisonment of the respondent, the petitioner's evidence is that he will take "all necessary steps" to ensure the respondent does not face punishment for abducting the children. Having regard to the respondent's role as primary carer for the children and the US court's requirement to consider the best interests of the children, it is

submitted to be unlikely that the respondent would be imprisoned on any return to the US and the children removed from her care. The court can assume that in the event of a return order, the respondent would take steps to protect her position. I am invited to put the case out By Order to discuss the practical arrangements for the return of the children. There would be scope for protective measures to be put in place prior to the making of any return order. The onus of establishing this part of the defence rests on the respondent. On the basis of the evidence before the court, including expert evidence, it is submitted that she has failed to discharge that onus.

[78] I am not satisfied that this court can put in place protective orders prior to making a return order which would be sufficient to guard against the respondent's arrest. There remains an extant arrest warrant and order for imprisonment which the parties themselves cannot vacate. On the evidence before the court, I am satisfied that if the respondent returned with the children to the US, there is a grave risk that she would be arrested and imprisoned and the children would be removed from her care and placed into the care of the petitioner. That would be against a background of minimal contact between the children and the petitioner since 2020 and none since September 2023. To be removed from the respondent's care, even for a short period, and in the context of having been removed from their settled lives in Scotland, would put the children into a situation which they should not be expected to tolerate.

Exercise of discretion

[79] The defences having been established as set out above, the court has a discretion to return the children. I am mindful of the objectives of the Convention. As was stated in *W* v *A and X supra* at para [9], while Convention considerations will always be relevant, the

further one is from the main aim of a speedy return the less weighty they will be. Further, courts are increasingly giving weight to the views of the child and a child centric approach is required, with the children's interests and general welfare at the forefront. The focus is not on the moral blameworthiness of the abducting parent, nor on notions of deterrence. Particularly relevant to the present case, if a child is integrated in the new community it is relevant to consider the effect of a further, and unwanted, international relocation pending the long-term decision.

[80] The available evidence is that the children have established good and settled lives in Scotland. They have lived in Scotland for longer than 18 months. They are as fully integrated into life here as can be expected for children of their ages. A swift return is now impossible. The children clearly object to being returned to the US and being uprooted from their lives here. Further, in the event of their return the children would be removed, at least in the short-term, from the respondent's care. A return to the US pending a long-term decision on their future would disrupt their settled lives for no obvious benefit. The question of the children's future care arrangements and their relationship with the petitioner and wider paternal family will be considered in due course and in light of the children's best interests. Accordingly, I exercise my discretion to refuse to order that the children be returned to the US.