



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 99

P838/26

OPINION OF LADY HALDANE

in Petition of

ABC

Petitioner

for

orders under the Child Abduction and Custody Act 1985

Petitioner: Aitken; Brodies LLP

Respondent: Cadden; SKO Family Law Specialists

9 October 2026

Introduction

[1] The petitioner seeks an order for return of the parties' children, A, who will be 11 in December, and B, who is 3½, to the Republic of Ireland, in terms of the Child Abduction and Custody Act 1985. That Act incorporated into domestic law the Hague Convention on the Civil Aspects of International Child Abduction, to which both the United Kingdom and the Republic of Ireland (hereinafter "Ireland") are signatories.

[2] Article 1 of the Hague Convention provides that "the objects of the convention are (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and (b) to ensure that rights of custody and of access under the law of one

Contracting State are effectively respected in the other Contracting States. Article 3

provides:

“The removal or the retention of a child is to be considered wrongful where -

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.”

[3] However, Article 13 provides that the requested state need not order a return of the child if it is established (among other things) 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.”

[4] Although initially the respondent, the mother of A and B, averred that the children had not been wrongfully retained in the United Kingdom, she ultimately conceded that the circumstances of the children’s removal and failure to return to Ireland did amount to wrongful retention. The principal issue in this case, as it has developed, then, is whether the defence in Article 13(b) of the convention has been established.

Background

[5] The petitioner, ABC, is an Irish citizen. The respondent, DEF, is a British citizen. The parties married in Edinburgh on 25 August 2018. A and B were born on 6 December 2015 and 6 April 2023 respectively. Both children hold Irish passports. It is accepted, for the purpose of these proceedings, that the children were at the time of their removal from Ireland, habitually resident there; and that the petitioner has rights of custody under the laws of Ireland. The parties originally lived in the United Kingdom after their marriage, and A was born in the United Kingdom before moving to Ireland in 2022, where B was born.

[6] The relationship broke down in or around September 2025. However, the parties continued to live under the same roof albeit as a separated couple. The parties' positions as to the nature of the relationship after separation are diametrically opposed. The petitioner suggests that relations were amicable, albeit in the context of the parties being separated. The respondent refutes that suggestion and makes numerous allegations of behaviour on the part of the petitioner which I do not seek in any way to minimise when I summarise them as consisting of a broad spectrum of domestic and sexual abuse.

[7] On 29 June 2026, with the agreement of the petitioner, the respondent travelled with the children from Ireland to Scotland for a holiday. Return plane tickets were purchased, with the respondent and the children expected to return, so far as the petitioner was aware, on a flight from Edinburgh to Dublin on 16 July 2026. The petitioner attended at Dublin airport to meet the respondent and the children from that flight, but they did not arrive. The respondent and the children in fact remained in Scotland, initially residing with a friend, SE, who advised the petitioner on behalf of the respondent that the respondent and the children would not be returning to Ireland. The respondent's position is that she travelled to Scotland in the first place, and thereafter refused to return to Ireland, due to the abuse suffered by her at the hands of the petitioner, and on the basis of advice received from domestic abuse services and her General Practitioner that she should travel to a place of safety. The petitioner travelled to Scotland on 16 July 2026 with the purpose of locating the children and returning them to Ireland. He attended at the home of SE where he understood the children to be residing and had two short periods of direct contact with them, followed by four video calls over the ensuing days. No further arrangements have been made for direct or indirect contact.

The relevant legal framework

[8] On the basis of the foregoing narrative, it is accepted that the children have been wrongfully retained in Scotland, as that phrase is defined in the Hague Convention. The respondent asserts that the “grave risk” defence set out in Article 13(b) is engaged. By asserting that defence, the respondent accepts the burden of proof. If she fails to establish that defence, then it follows that a return order must be made. The proper approach of the court in the context of a “grave risk” defence being asserted has been examined in a number of leading authorities. It is accepted that the authoritative reasoning in relation to the proper approach to a ‘grave risk’ defence is to be found in *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 AC 144, recently quoted with approval by the Supreme Court in *The Petition of DM* [2026] UKSC 32. From *In re E*, the following propositions may be drawn:

- (a) 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”. (paragraph 31).
- (b) 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 (paragraph 32).

- (c) 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 (paragraph 33).
- (d) 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, paragraph 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’”.

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, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of his or her own parent. If there is such a risk, the source of it is irrelevant: eg where a mother’s subjective perception of events leads to a mental illness which could have intolerable consequences for the child (paragraph 34).

- (e) 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 (paragraph 35).

- (f) There is 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. The solution is, 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. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues (paragraph 36).

[9] In *The Petition of DM*, having narrated the foregoing propositions with approval, the Supreme Court offered its own additional observations as follows:

“75. ... 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. ... 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.'"

[10] Having commended the "staged process" as described above, the Supreme Court in *DM* also made clear that the start point of this approach, that is to say taking allegations made in support of there being a grave risk as if true, did not apply across the board. The court stated at paragraph 82:

"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...

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."

[11] The foregoing authorities therefore delineate and explain the proper approach to a contention that Article 13(b) is engaged. The staged process is the start point, taking allegations made as if true, but insofar as it is asserted that return of the child or children will expose them to a grave risk of psychological harm or otherwise place them in an intolerable situation by virtue of the effect of the return on the mental health of the mother,

then an evidence base is required before the court can conclude that such a risk has been established, and, if so, whether the relevant threshold of grave risk has been met.

[12] As to the relevance of the views of the child or children, if expressed, this was a key issue before the Supreme Court in *DM*. Having carefully considered the relevant authorities, including European jurisprudence, the Supreme Court concluded at paragraphs 108 and 109:

“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.”

Submissions for the petitioner

[13] Mr Aitken, on behalf of the petitioner, adopted his written submissions and amplified those in oral argument. His overarching position was that the grave risk defence had not been made out and that in consequence the court should order the return of the children A and B forthwith. He developed that position by reiterating the policy considerations underlying, and the purpose of the Hague Convention, relying upon the description of that purpose offered by Lady Hale in *In re E* at para [8], where she explained:

“... The first object of the [Hague] Convention is to deter either parent (or indeed anyone else) from taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any dispute can be determined there. The left-behind parent should not be put to the trouble and expense of coming to the

Requested State in order for factual disputes to be resolved there. The abducting parent should not gain an unfair advantage by having that dispute determined in the place to which [he or] she has come.”

[14] Mr Aitken emphasised that removal and retention is of itself harmful to the child, and could not be viewed as a “neutral act”. In so submitting he referred to the Guide to Good Practice under the Hague Convention, and in particular Part VI, relating to the grave risk defence under Article 13(b). This document, as explained in its foreword:

“intends to provide 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(b) of the 1980 Child Abduction Convention.”

Mr Aitken pointed to the terms of paragraph 14 in support of his opening submission, which states:

“the wrongful removal or retention of a child is prejudicial to the child’s welfare and that, save for the limited exceptions provided for in the Convention, it will be in the best interests of the child to return to the State of habitual residence.”

[15] It was Mr Aitken’s contention that the respondent had taken the law into her own hands in removing the children from Ireland and thereafter retaining them in Scotland. The respondent’s actions were a clear example of the kind of abductions the convention was designed to prevent.

[16] Turning to the question of the grave risk defence asserted by the respondent, and under reference to the decision in *DM*, Mr Aitken properly accepted that it is now well recognised that one of the things it may not be reasonable to expect a child to tolerate is the exposure to the harmful effects of seeing and hearing the physical or psychological abuse of his or her own parent, and that violence and abuse between parents may constitute a grave risk to the children. The exercise of assessing whether a grave risk exists is necessarily predictive, or prospective in nature, that is to say it involves taking the allegations as if true and predicting what the children would be exposed to if returned to Ireland.

[17] Even if a grave risk is established, then there is a second aspect to the task of the court and that is to ask whether there are measures available in Ireland which will adequately protect the children against any perceived grave risks arising from the respondent's evidence. As for what might be considered to be intolerable, Mr Aitken submitted that the test is an exacting one, and he relied upon the opinion of Lady Wise in *L v H* [2021] CSOH 50, at paragraph 15, where she said:

“While the case of *In Re E* might have impacted on what things might create a grave risk for a child, the strength of the test that must be satisfied to succeed under art.13(b) remains as exacting as ever. Clear and compelling evidence of a grave risk of substantial harm is required, something much more than the risk inherent in any unwelcome return to the country of habitual residence. It has also long been established that 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—*C v C [(Abduction)]* [1989] 1 W.L.R. 654.”

[18] The prospective nature of the test is set out directly in the Guide to Good Practice at paragraph 35-37. The court must not fall into the trap of looking solely, or even primarily, at the past allegations. It must consider what the child's circumstances shall be on return and to assess whether grave risk of harm or intolerability arises from the foreseeable circumstances of the child's situation upon return (see *In Re C (A child)*, [2021] EWCA Civ 1354, [2021] 4 WLR 118 at paragraph 56-57).

[19] So far as any grave risk defence is supported by allegations of potential economic disadvantage on return, as was the respondent's position in the present case, Mr Aitken founded once again on the Guide to Good Practice at paragraph 60 where the following is to be found:

“the analysis should focus on whether the basic needs of the child can be met in the State of habitual residence. The court is not to embark on a comparison between the living conditions that each parent (or each State) may offer. This may be relevant in a subsequent custody case but has no relevance to an Article 13(b) analysis. More modest living conditions and/or more limited developmental support in the State of

habitual residence are therefore not sufficient to establish the grave risk exception. ... Only very exceptional circumstances might lead to a grave risk to the child."

[20] Drawing those statements of principle together and applying them to the respondent's case, Mr Aitken submitted that the allegations fell under five categories: serious sexual and domestic abuse of the respondent, at times in the presence of the children; psychological harm; emotional abuse of A; economic disadvantages; and sundry other issues. None of the allegations, individually or cumulatively, met the grave risk test. It was important to remember that the question of grave risk related to the children, not the respondent. Whilst it was open to her to return with the children she did not require to do so. If she did choose to return, any order for return would not be an order to return to the same circumstances as before. The parties would not live together now. The petitioner had given instructions that he would move from the family home until matters are resolved in the Irish courts.

[21] So far as the allegations of sexual and domestic abuse were concerned, it was noteworthy that these had not been reported to the police at the time in Ireland. The respondent did not contact agencies or lawyers for assistance despite the behaviour allegedly persisting for years. She had continued to live in family with the petitioner after the separation from September 2025 until July 2026 despite having numerous opportunities to leave. When the child welfare reporter appointed by the court had spoken to A, he did not report any circumstances which supported the allegations, in particular of witnessing any form of abuse of his mother. He did report witnessing arguments between his parents when both were shouting. It was noted by the reporter that:

"A was absolutely clear that he has never felt unsafe. He has felt safe all his life with his mum, and has felt safe all his life with his dad...From A's perspective, he felt that his dad was '100% kind' to him. He has never felt unsafe with his dad."

[22] Thus in the forward looking assessment, the parties would not be co-habiting. Even taking the respondent's allegations as if true, there was no real risk that she would be subjected to future sexual or domestic abuse if she returned. The parties would be living apart and the respondent would have access to support services and, potentially report matters to the police. It was notable that in her affidavit the respondent did not indicate her biggest concern in respect of return was a risk of sexual or domestic abuse or other harm, rather it was her housing situation.

[23] Whilst accepting, correctly, that psychological harm to a parent can cause harm to a child living with her and thus potentially engage the Article 13(b) defence, on the basis of the authorities such potential harm and its possible effects on the child require to be clearly evidenced in order for the court to assess whether there is any risk (and if so whether the risk is grave) of an impact on the child. If so the question then became whether there were protective measures available that would be sufficient to address the risk. The risk of harm could not be evaluated on the basis of a mere assertion by the parent.

[24] Although the respondent had alluded to psychological harm if she was to return to Ireland, there was no medical evidence to allow the court properly to analyse this. The present case could be contrasted with, for example *DM* and *AD v SD* where detailed psychological evidence of the impact of return on the mother's health was available. On the available evidence, the court could not conclude that the defence was made out insofar as based on the respondent's psychological health.

[25] Turning to the allegations made concerning emotional abuse of A, this was denied by the petitioner. In any event the allegations were not supported and indeed undermined by A's own position as reported to the reporter, information from A's school in respect of his demeanour and progress and the respondent's willingness in the past to leave A in the care

of the petitioner. Thus there was no material to permit the conclusion that A was at grave risk of any of the Article 13(b) eventualities due to emotional or psychological abuse by his father. In short, looked at in the round, no grave risk of the kind envisaged in Article 13(b) had been established.

[26] In any event, even if the court were to conclude that a grave risk had been established, it was necessary to consider whether there were protective measures available to address any identified grave risk. The starting presumption is that courts in the home country will protect a child from harm of intolerability. The onus lay with the respondent to show why protective measures would not be available or if available, effective. There was no evidence in the present case of the petitioner flouting any court orders or measures intended to restrict abuse. Mr Aitken pointed to and relied upon the report prepared by Irish senior counsel and lodged in process which set out the various measures available in Ireland, which, read short, were akin to those available in Scotland in similar circumstances.

[27] Finally, Mr Aitken addressed the question of discretion. This only arose if the court was satisfied the Article 13(b) defence was made out, but Mr Aitken accepted that whilst it would be virtually inconceivable that a court would exercise its discretion to order return a child to an intolerable situation, that did not remove the courts discretion, only suggested it be exercised in a particular way. In any event, Mr Aitken submitted that on the basis of the material before the court, the question of the exercise of discretion did not arise. The material did not support the grave risk defence and there was no room for the application of a “borderline” test. Whilst accepting that grave risk did not come in degrees, it did not in any event arise here.

The respondent's submissions

[28] For the respondent, Mr Cadden too, adopted his written Note of Argument. He accepted that there had been wrongful retention, but submitted that the grave risk defence was made out, and for that reason he invited the court to refuse the petitioner's motion and refuse to issue an order for the return of A and B to Ireland. In summary the respondent's position was that the return of the children would expose them to psychological harm and place them in an intolerable situation. He accepted that the burden was on the respondent to establish that.

[29] Mr Cadden submitted that there were three strands to the grave risk defence found upon by the respondent, and these were, firstly, the domestic abuse suffered by the respondent at the hands of the petitioner; secondly the financial implications of a return to Ireland and thirdly the availability of suitable accommodation in Ireland for the respondent and the children. Taken individually and cumulatively, these three strands demonstrated a grave risk of the children being placed in an intolerable situation if returned to Ireland.

[30] Looking firstly at the allegations of domestic abuse, Mr Cadden characterised these as forming a domestically abusive course of conduct involving allegations of the most serious kind of sexual abuse and rooted in financial control of the respondent by the petitioner. That financial control impacted the children who were not adequately provided for by the petitioner. There was a high risk of the respondent being domestically and financially abused by the petitioner on return. It was likely, contended Mr Cadden, that the petitioner would take steps to recommence an abusive course of conduct against the respondent which would have a direct effect on the children. It was not reasonable to expect the children to tolerate being exposed to domestic violence or abuse and the effects of such behaviour upon the respondent.

[31] The respondent would, in the event of return, be likely to experience anxiety and concern if the petitioner knew where she was living. Such anxiety would pose such a grave risk to her mental health that this would in and of itself create an intolerable situation for the children. Even taking account of the undertaking by the petitioner that he would remove himself from the property if the respondent returned with the children, Mr Cadden submitted that the identified risk was not completely removed. The property was occupied in terms of an unsecured tenancy with no lease. Rental payments were made in cash by the petitioner. Thus the accommodation could in effect be removed from the respondent at any given opportunity. Mr Cadden pointed to threats made by the petitioner to make the respondent homeless in support of that proposition. Thus the nature of her accommodation in Ireland was precarious. On top of that issue the respondent was financially insecure in Ireland. She had already had to rely on the support of others, particularly SE in order to “get by.” This was another element of risk to be factored in.

[32] Finally, on this aspect of matters, the respondent apprehended that upon return she would be placed back into the orbit of the petitioner who had previously domestically abused her. This of itself would lead to her anxiety intensifying and result in an intolerable situation for the children.

[33] On the assumption that the court were satisfied as to the respondent’s position so far as grave risk was concerned, then Mr Cadden acknowledged the question of protective measures became relevant. Entirely properly, Mr Cadden did not seek to demur from the general proposition, articulated by Mr Aitken, that the starting presumption, derived from principles of comity, was that there were protective measures in place in the requesting country. The issue that arose, he submitted, was that given the history of abuse perpetrated by the petitioner upon the respondent, she had a reasonable apprehension that he would not

adhere to any civil measures put in place. The respondent was concerned that, given his failure to respect boundaries in a domestic context in the past, that he would not respect any boundaries, informal or imposed by the courts, in the future. She was concerned that, for example during the handover of the children, or on shared visits to school there would inevitably be contact between the parties and that there might be domestic abuse in those scenarios that would impact upon the children. The child A spoke of witnessing arguments so this was not a situation where he saw nothing, although Mr Cadden very properly accepted that A also said that he had never felt unsafe.

[34] Responding to the criticism that there was no medical evidence to support the contention that the effect of return upon the mental health of the respondent would be such as, in and of itself, would create an intolerable situation for the children, Mr Cadden submitted that such an absence of evidence was not a bar to establishing the grave risk defence, although he accepted that in the authorities referred to there had been medical evidence in each case.

[35] In conclusion, Mr Cadden submitted that the defence was made out and invited the court not to exercise its discretion to return the children having regard to that fact that they were now well settled in Scotland, the respondent was not suffering from abuse and was less anxious as a result, and that she enjoyed the support of her friend, SE. For all those reasons, Mr Cadden renewed his motion to refuse the prayer of the petition.

Analysis and decision

[36] The start point is to bear in mind the policy aims of the Hague Convention on the civil aspects of international child abduction. It is a jurisdictional convention. Decisions made in each of the Contracting States in individual cases do not and cannot determine the

substantive issues about with whom a child should live and how often and in what circumstances they should see any person holding parental responsibilities and rights. Its principal aim is encapsulated in Article 7 which states:

“Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.”

That overriding aim is of course subject to narrow exceptions, one of which is at the heart of the present case, namely that the presumption in favour of return where a child or children have been wrongfully removed or retained will not apply where “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.”

[37] Exactly what a grave risk in this context might look like is of course to an extent fact and case specific. However the authorities set out above have explained and laid down certain cardinal features of the proper approach of the courts to this question. These include that the risk must be grave, not just real (*In re E*, paragraph 33). The child or children, if old enough, should be offered the chance to express a view on issues relevant to the Article 13(b) exercise (*DM*, paragraph 108, 109). The weight to be attached to their views remains a matter for the court (*DM*, paragraph 109). Allegations of domestic abuse are to be taken as if true (*In re E*), and the test is applied prospectively - what are the likely conditions on return? (*In re C*, paragraph 56, 57). Allegations that an order for return could precipitate a mental health crisis in the mother, if established, can of themselves support the conclusion that such could create an intolerable situation which it is not reasonable to expose a child or children to (*In re E*, paragraph 33). On the other hand, assertions of grave risk based on economic or developmental disadvantages upon the return of the child will usually not be sufficient to issue a non-return order (Guide to good Practice, paragraph 60).

[38] What then is the result of the application of those principles to this case? The respondent asserts three main factors engaging the Article 13(b) defence: the domestic and sexual abuse suffered in the past by the respondent and anticipated to recur on return; the financial implication of return, and concerns around the precarious nature of her proposed accommodation. The evidence in support of the allegations comes principally from the respondent. Affidavits lodged by her friend SE and her husband SD support the proposition that these allegations have been recounted to SE, and also set out occasions where SE states she has seen the petitioner either shout or in other ways demean or behave in an abusive way towards the respondent. SD supports these contentions to a more limited extent. So far as behaviour directed towards the children is concerned, the respondent, SE and SD state that the petitioner has expressed frustration with, and/or shouted at A, due to behaviours associated with his Autistic Spectrum Diagnosis. These witnesses state they have observed A becoming upset before, during or after indirect contact with the petitioner after their arrival in Scotland. The allegations concerning the petitioner's behaviour towards A in particular are part of the foundation of the assertion that A would be directly exposed to psychological harm or otherwise exposed to an intolerable situation on return.

[39] It is worth bearing in mind that the parties' do of course have two children, but little if anything was advanced to suggest that B would suffer any direct physical or psychological harm if returned, although he would of course be in the same living conditions as his mother and brother, which in themselves would constitute an intolerable situation and contribute to the grave risk defence being established, according to the respondent's submissions. It was clear, however, that the focus of the competing

contentions so far as the likelihood of any direct or indirect risk upon return was very much on the older child, A.

[40] The evidence of the respondent, SE and SD has to be weighed in the balance with other evidence available: the petitioner has lodged affidavits himself, as well as from his cousin and brother, which, collectively, offer a different perspective on the petitioner's relationship with A in particular. The petitioner refutes the allegations made against him by the respondent, and whilst it is not the role of this court, in this process, to adjudicate on whose account is correct, so far as the allegations of abuse are concerned, he gives examples of times since the parties separated when the respondent has been content to leave him in sole charge of one or both children while she travelled abroad, something he suggests undermines the suggestion that he was at the same time subjecting A in particular to psychological or emotional abuse.

[41] The petitioner's brother and cousin, describe the petitioner and his parenting style in positive terms, and suggest there has never been an occasion when they have had concerns about his behaviour towards either child.

[42] As is usual in such cases, a child welfare reporter was instructed to meet with and seek the views of A in relation to matters relevant to the asserted Article 13(b) defence. Perhaps self-evidently, at just 3 years old, it was not thought appropriate to carry out the same exercise so far as B was concerned. The reporter was a highly experienced senior counsel. Her report was comprehensive and thorough. Her remit invited her to have regard to A's ASD diagnosis in considering his maturity and capacity to offer views, as well as to offer him the opportunity to express views on the Article 13(b) defence from his perspective, and his views on a return to Ireland. A was described by the reporter as a "polite, charming and engaging child" who was motivated to engage with her. He spoke in positive terms

about both his parents, however when asked if his parents had arguments, he confirmed they had had a few arguments in front of him and thought perhaps his father behaved worse in those arguments though both parents had been shouting. Of significance in the present context, A was clear that he had never felt unsafe with either his mother or his father. He went so far as to say that his father was “100% kind to me” and said the same about his mother. Although positive about many features of life in Scotland, A described having more friends and family in Ireland, and when asked directly whether he would rather live in Ireland or Scotland, he said he would rather live in Ireland. Although if he was to stay in Scotland he would be “a bit happy”, if he returned to Ireland he would be “even happier.” Whilst it was the view of the reporter that A clearly had an awareness of how his parents were feeling, one example being that he was clearly aware being in Scotland made his mother happier, there was no impression gained that A had been inappropriately subjected to the views of others and that his views, particularly that he wished to return to Ireland, were genuinely his own.

Has a grave risk in terms of Article 13(b) been established?

[43] Looking firstly at the allegations of sexual and domestic abuse founded upon by the respondent, there are certain aspects that are of significance in the present context; firstly, the allegations of sexual abuse, whilst self-evidently serious, are not at any time said to have occurred in the presence of the children or to be something of which they were to any extent aware. Secondly so far as the allegations of domestic abuse are concerned, once again to a great extent these revolve around controlling behaviours so far as financial and housing matters are concerned. However, they also include verbal abuse, some of which has clearly occurred in the presence of A at least, as he spoke of this to the child welfare reporter.

Whilst it might reasonably be inferred that any child might find the experience of witnessing his parents arguing an upsetting, perhaps very upsetting experience, there is no evidence that this in and of itself has had or would have a significant psychological effect upon A. Rather, he is of the view that he feels “100% safe” with each of his parents.

[44] In any event, as the authorities explain, the test is a prospective one - what is the situation likely to be upon return? The respondent has indicated that if their return to Ireland were ordered she would return with the children and that such return would give risk to the kind of risk envisaged in both *DM* and *AD*; that is to say that the effect of having to return, to live in the former matrimonial home, and to have to be in close proximity to the petitioner would affect her mental health to such an extent that this would in and of itself expose the children to a grave risk of psychological harm or otherwise place them in an intolerable situation.

[45] Whilst it is only fair to note that the petitioner’s proposal that he would not live in the former matrimonial home if the respondent were to return there only became concrete during the course of the hearing, Mr Cadden very properly accepted that this would remove one plank of the respondent’s concerns. The authorities (most notably and recently *DM*) confirm that where a risk of serious mental health issues or perhaps even suicide (although that was not asserted in the present case) arising on return is claimed, the test moves from being one where such assertions are taken as if true, to one where evidence is required to establish that risk which, depending on the nature and degree of the illness, and its effects, may well meet the threshold of “grave”. In the present case, no such evidence was offered.

[46] In similar vein, it was contended that even if the petitioner were to move out of the house, there was a risk of domestic abuse occurring at inevitable times of contact such as handovers, or at school. Once again, looking at the matter prospectively, whilst such a risk

cannot be ruled out, and there was evidence of past behaviour such as arguing or shouting that might support the existence of such a risk in the future, there was no “clear and compelling evidence” (to borrow the words of Lady Wise in *L v H*), upon which the court could conclude that such a risk would engage the test in Article 13(b) from the perspective of the children, most notably A.

[47] In summary, so far as grave risk arising from direct psychological harm to A in particular, or otherwise placing him in an intolerable situation as a result of the petitioner’s behaviour towards him, or arising from the petitioner’s behaviour towards the respondent, is concerned, the evidence was mixed. The parties’ own affidavits and those of their friends and family were contradictory in this regard. I do not intend any criticism when I observe that, having regard to the close relationships between the parties and those providing the respective supporting affidavits, there is inevitably likely to be a degree of subjectivity on each side. Thus the views of A, whilst not only relevant in a general and legal sense, are in this context significant, and, given the findings of the child welfare reporter as to A’s relative maturity, motivation to engage and lack of any apparent undue influence, entitled to be given weight. He feels “100% safe” with each parent. He has seen his parents argue, has seen both shouting, and feels that sometimes the blame for such arguments lies with his father. That insightful view does not change how he feels about each parent so far as he is concerned, nor does it change his ultimate view that he wishes to return to Ireland. Whilst in isolation his wish to return to Ireland would not be decisive in and of itself in this context, it is nevertheless consistent with his overall views about his family and friends there, and most significantly his expressed view of feeling “safe”. I observe also that he did not express any relevant concerns so far as his brother B was concerned, although I recognise in so saying that the focus of the discussion was on his own views and opinions. Looked at as a

whole, however, his views are clear, cogent, and carry considerable weight in the exercise of balancing the competing evidence.

[48] Drawing all of the relevant evidence together, I cannot therefore conclude that the respondent has established that there is a grave risk of psychological harm to either child or both of them or that either child would be placed in an intolerable situation were they to return. Approaching the matter prospectively as I must, the parties would not be living together under the same roof on return. Whilst that would not militate against a finding of grave risk in and of itself, the respondent has not gone beyond asserting concerns and apprehension to providing clear and compelling evidence that, taken as if true, she would be likely to face domestic and/or sexual abuse that would impact the children in the manner required to engage the defence. Nor is there any evidence of the sort envisaged in *DM*, for example, that would permit me to conclude that a return order would have a detrimental effect upon the respondent's mental health of such severity that the children or either of them would be likely to be exposed to an intolerable situation as a result.

[49] So far as the other factors relied upon, such as financial concerns or worries around the condition and precarious nature of accommodation, the Guide to Good Practice under reference to a number of authorities makes clear that such disadvantages will not usually be sufficient to issue a non-return order. Rather the question is whether the basic needs of the child or children can be met in the state of habitual residence. There was evidence in this regard that both parties had been employed in Ireland, and that the respondent had in addition at times at least, received benefits in Ireland. Equally there was evidence that the respondent had over time requested, and received, financial support from her friend SE and was to some extent reliant upon her. In addition, the respondent expressed a number of concerns around accommodation, in particular, but was not able to show that the requesting

state, Ireland, would be unable to meet her basic needs nor those of the children if they returned. Thus for all the reasons set out in the Guide to Good Practice, none of the concerns asserted, taken as if true, came close to meeting the high standard required to engage Article 13(b) on this basis.

[50] Thus, for all the foregoing reasons, the respondent's defence so far as predicated on Article 13(b) fails. That being the case, there is, strictly speaking, no requirement to go further. However, for completeness, had I concluded that the relevant threshold had been reached, I would in any event have concluded that there are sufficient protective measures in Ireland to address any perceived risk. Adopting the staged approach explained at paragraph 79 of *DM*, the start point, as parties agreed, is that principles of comity assume that the requesting country is able to offer sufficient effective protective measures. In any event in the present case the petitioner lodged a report from Irish senior counsel explaining the protective measures available in the Irish courts in cases such as the present. I will not rehearse those in detail, suffice to say that many of the civil protective measures, and indeed legislative provisions relating to aliment, child support and the like, mirror or closely resemble those available in this jurisdiction.

[51] Mr Cadden, whilst recognising the general principle, and equally recognising that Ireland is able to offer a range of measures that would offer protection in principle to the respondent, submitted that there was a risk that any civil measures obtained against the petitioner would be ineffective - in short that he would not adhere to any prospective orders of the court. However, unlike the situation in *AD v SD*, where similar allegations were made that the petitioner father would breach court orders if the respondent and children returned, based on evidence of numerous previous breaches of such orders, no such evidence was offered in this case. The respondent had not sought assistance from any kind

of public service such as the police, social services, lawyers or the like, nor sought any court orders against the petitioner prior to leaving Ireland. There was no evidence of him being made subject to any relevant court orders at any time, far less of him having demonstrated a history of showing them scant regard. There is therefore no evidence before me that would permit me to draw the inference or conclusion invited on behalf of the respondent.

Therefore, on this scenario also, I would have concluded that the defence had not been made out.

Conclusion and disposal

[52] For all of the foregoing reasons I intend to grant a return order so far as A and B are concerned, all in terms of the prayer of the petition. Before pronouncing a final order however I will put the case out By Order to be addressed on the practical aspects of the arrangements for return. I will reserve meantime all questions of expenses.