OUTER HOUSE, COURT OF SESSION

[2013] CSOH 40

P484/12

OPINION OF LORD JONES
in the Petition
TLMP
Petitioner;
for orders under the Child Abduction and Custody Act 1985
and Answers for
AWP
Respondent;

Petitioner: Burr; Anderson Strathern LLP (for Wright & Crawford)
Respondent: Inglis; Drummond Miller LLP

7 March 2013

Introduction

[1] The circumstances of this case are fully set out in paragraphs [1] to [14] of the opinion of Lord Stewart, which is to be found at [2012] CSOH 121. Certain matters are not in dispute. The petitioner and the respondent (respectively, "the mother" and "the father") are the parents of a child, A, who was born in the United States of America on 3 September 2007 and is now aged five years and six months. The mother and father married in Las Vegas, Nevada, on 15 March 2010. The mother is a citizen of the United States. The father, a United Kingdom citizen, was brought up in a small town in Scotland and moved to the United States in 1998, where he was resident until 1 March 2011, when he returned to Scotland with A. In order to preserve anonymity, I refer throughout in this opinion to "Scotland" rather than to the town. The child was habitually resident in the United States immediately prior to the journey to Scotland. The mother had rights of custody under the law of California. The trip to Scotland was undertaken with the agreement of

both parents. The circumstances in which the father and child came to Scotland and in which the child remains in Scotland are disputed and were the subject of a proof before me on 18 and 19 December 2012. I shall explain the implications of the resolution of that dispute more fully later in this opinion but, at the risk of over-simplifying matters, I can put the matter shortly in this way: subject to one qualification, if the mother's version of events is held to be correct, the child must be returned to the United States forthwith. If the father's account is held to be correct, the child may remain in Scotland, at least for the time being.

History of the case

[2] On 10 May 2012, the mother presented a petition seeking return of the child to the United States. On 18 May, at the first hearing, the Lord Ordinary appointed a second hearing to be held on 19 June and the two ensuing days. Following the second hearing, by interlocutor dated 9 July 2012, the Lord Ordinary ordered return of the child within seven days. The father reclaimed against that interlocutor, and it was recalled by the Inner House on 5 September, for procedural reasons that are not relevant to the issues which I have to determine. The case came before me for a second hearing on 18 and 19 December 2012. The mother and the father gave oral evidence to supplement affidavit evidence that had been lodged. SC, a friend of the mother, JLM, the mother's mother and JS, the maternal grandmother's partner, gave oral evidence by live link from California, to supplement affidavits that they had each sworn. Parties provided written submissions on 3 January of this year.

The statutory framework

[3] The mother brings these proceeding under the provisions of the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on 25 October 1980 ("the convention") which, insofar as is material, has been incorporated into United Kingdom law by section 1(2) and Schedule 1 of the Child Abduction and Custody Act 1985. The relevant provisions of the convention are as follows:

> "**Article 3**
> 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.
> The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an

agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of sixteen years.

Article 5

For the purposes of this Convention-

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

...

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested state has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

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

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

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

The judicial or administrative authority may also 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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

...

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."

The United Kingdom and the United States of America are contracting states.

[4] In order to adjudicate on the central question in this case, I first have to determine whether the child has ceased to be habitually resident in the United States, within the meaning of the convention. It is necessary, therefore, to understand the meaning of that and related phrases. In closing submissions, counsel for both parties relied on the following passage from the opinion of the court, delivered by the Lord President (Hope) in *Dickson* v *Dickson* 1990 SCLR 692, at 703 B-D:

> "It is enough to say that in our opinion a habitual residence is one which is being enjoyed voluntarily for the time being with the settled intention that it should continue for some time. The concept is the same for all practical purposes as that of ordinary residence as described by Lord Scarman in *R v Barnet London Borough Council* ex parte *Shah* at pp 342 and 343. A person can, the parties think, have only one habitual residence at any one time and in the case of a child, who can form no intention of his own it is the residence which is chosen for him by his parents. If they are living together with him, then they will all have their habitual residence in the same place. Where the parents separate, as they did in this case, the child's habitual residence cannot be changed by one parent only unless the other consents. That seems to us to be implied by the Convention. As for the next point, the Lord Ordinary held that it was not necessary for the respondent to show that the child had acquired a habitual residence in this country, and the parties agree. The only question so far as the application of the Convention in concerned is whether the child is still habitually resident in the contracting state. If the child has left the contracting state with the consent of both parents whose intention when they left was that he should settle elsewhere, then it seems to us that he must be taken to have abandoned his habitual residence in the contracting state as soon as he leaves. And once it is abandoned in this way, that is by his departure with consent with that intention, it cannot revive again just because one parent changes his or her mind."

The substance of the dispute on habitual residence

The mother's account

[5] On the mother's account of events, the parents and child were living in Las Vegas between November 2010 and February 2011, after she arranged a transfer from the grocery store in which she had been working in California. She describes the parties' relationship as having become "rocky" at that time, because, as she saw it, the father left the burden of their joint responsibilities to her. They had moved to Las Vegas in a last ditch attempt to see if they could make their relationship work. The father had no job. Consequently, she was working and it fell to the father to look after the child, but he failed to do so properly. It seemed to her that the child was regarded by the father as a nuisance. They decided to return to California and move in with the mother's father, because they could not afford to pay their rent and bills on her salary alone.

[6] According to the mother, for some time prior to February 2011 the parties had talked about the possibility of moving to Scotland to live. The father had been keen on the idea, but she never was. By February 2011, they had come to realise that their relationship was possibly not going to last and, at that point, the father said that he wanted them all to live in Scotland, even if that meant the mother and father living separately. The mother made it clear that she did not want to live in Scotland. The parties then agreed that the father would take A to Scotland for two months, to see his paternal grandmother. The mother had thought that to be a reasonable idea, because the child did not know the paternal grandmother, having only ever seen her twice. The first occasion had been in March 2008 for one month, in Scotland, and the next in 2009 for two and a half weeks, when the family went to Scotland to attend a friend's wedding. The mother's view, therefore, was that it would be good for the child to get to know his grandmother, and it would also give the father and her some "breathing space" to work out what to do in their relationship. The father and A left for Scotland on 28 February 2011.

[7] The mother travelled to Scotland on 16 May 2011. She told the father that she did not intend to live with him in Scotland. The father told her that he would never return to the United States and that he would not allow A to return. The mother left Scotland on 24 May 2011 to go back to work. In the months that followed, the parties continued to communicate. The mother wished to persuade the father to agree to a solution that would allow them and A to live together as a family. She returned to Scotland on 2 November 2011. Her purpose, according to her evidence, was "to try and sort this out face to face", but "things became very volatile" and she returned to the United States on 12 December. She filed for divorce and custody of A later that month, in California.

The father's account

[8] The parties started living together in San Diego, California at the beginning of 2006. They visited Scotland in May 2006 for an unspecified time, and returned there in or around November 2006, moving in with the father's mother. They stayed for approximately six months. The mother loved Scotland and the lifestyle there. She told the father that she wanted to live there permanently. The parties made enquiries about the mother's obtaining a visa whilst they were in Scotland, but they discovered that she could not get a visa while in Scotland and would have to make the application in the United States. The mother could not work, but the father obtained employment in the local supermarket. The mother then fell pregnant with the child. She wanted to give birth in the United States and the parties agreed to return there. They also agreed that they

would come back to Scotland on a permanent basis when A was around three or four years old. The mother returned to the United States in March 2007. The father remained in Scotland until after his brother's wedding in April 2007. Following his return to San Diego, the parties' home life was, as he describes it, unstable, nomadic and stressful. They lived at various locations with various members of the mother's family for short periods until they moved in with the mother's father, and stayed with him for two years.

[9] Following a visit to Scotland in February 2009, the parties agreed that Scotland was the most appropriate place to raise A. They spoke about the move on numerous occasions. The father's mother was very supportive and offered them accommodation whilst they saved for their own property. They agreed that they would wait until A was a few years old, but wanted to move prior to his commencing his primary school education. The parties lived in Las Vegas for a short while before returning to live with the mother's mother in San Diego at the beginning of February 2011. They agreed that they would wait for a tax refund to be paid in March 2011, and then use the money to fund their move to Scotland. It was not practical to continue sleeping on a sofa bed in her mother's living room. They talked about A's future and his education. They wanted to move prior to A's starting primary school. The mother was "adamantly in favour of the move". They wanted to stay as a family and offer A the best start possible in life. In February 2011, they decided that the father would move to Scotland and take A to allow him to settle in. They purchased one way tickets for the father and the child.

[10] In response to a reference in the mother's affidavit to some difficulty in the parties' relationship at this time, the father deponed that the mother had been about to begin an affair with a friend of her mother. He confronted them and they admitted they had been growing closer but had never slept together. The parties had a very long talk and managed to resolve their issues. The mother was even more enthusiastic to relocate to Scotland. She was fully supportive of the move, as was her family. Her family appeared supportive of the move because her mother funded the mother's plane ticket to Scotland in May 2011. The father was very surprised, however, that she was going to visit for only eight days. She assured him that she was still working on her visa and trying to save as much money as possible. The parties were happy. They went for family walks along the beach and played with A. The mother reassured the father that she would obtain her visa as soon as she returned to the United States. She told him that she thought that A was thriving. The mother did ask the father if she could take A back to the United States with her for a few weeks.

She told him that she would arrange her visa and return to Scotland. The parties talked about that and agreed that it would be too much disruption for A. There was no argument and the mother told the father that she thought it was best for A to stay. She said that she would be back with them very soon. When she left to return to the United States, the parties were in a happy relationship and she was happy for A to remain in Scotland.

[11] The mother returned to the United States on 25 May 2011 and was in regular contact with the father for approximately one week. She then became very difficult to get a hold of on the telephone. The parties' relationship ran into some difficulty when the mother's level of contact decreased in July 2011. The father suspected that she had formed a relationship with another man. She became more erratic and unreliable and, when the parties were in touch, the mother told the father that she had lost her job. He suspected that she had failed random drug testing at her workplace.

[12] The mother visited Scotland again on 2 November 2011, unannounced. The father had concerns about her. She had lost a lot of weight and was constantly complaining of being in pain. Her behaviour whilst she was in Scotland was extremely erratic. She went out regularly and drank heavily, and became very aggressive and argumentative when she was drunk. On 4 November 2011 she told mutual friends that she was addicted to the drug crystal meth and that she had withdrawal symptoms. On or about 26 November 2011, the parties discussed having one final attempt at reconciliation. If it failed, A would continue to reside with the father in Scotland and spend his summer vacations in San Diego. The mother assured the father that she would make sure that she had appropriate accommodation if that were the case. She accepted that A was well cared for and settled into his life in Scotland. When the mother returned to the United States on 12 December 2012, the parties were on good terms, having resolved their issues. The mother told the father that she was going to sort out her visa. On 13 December 2012, the parties spoke on the telephone. During that conversation, the mother told the father that she had changed her mind about their marriage and that she was going to raise a court action to have A returned to the United States.

[13] The parties' affidavits and their oral evidence contain much more detail about events, their relationship and their feelings than I have narrated here. I have considered carefully all of that material. In summarising their respective accounts, I have concentrated on what each has said

about the measure of agreement that there was between them as to their plans at the time when the father left for Scotland. Conscious that there are other proceedings in which there are contested residence and contact issues concerning A which will be determined by others, and notwithstanding the terms of article 19 of the convention, I propose to make no finding on matters which are not directly relevant to the resolution of the convention dispute which is before me.

The evidence of SC

[14] SC has known the mother since they were children. She regards the mother as being like a little sister to her. She described herself as a "stay at home mum". In her affidavit, which is number 6/15 of process, she narrates marital difficulties that the parties were experiencing in the months leading up to February 2011, and depones that, when the mother spoke about allowing A to go to Scotland to see his family on his father's side, there were many concerns from the mother's family as to whether or not that was a good idea. They were all very concerned, she says, that, if the mother allowed the child to go, the father would not allow him to come back home. She wanted her son to have the opportunity to have a relationship with the other side of his family, understandably, and to see Scotland, so she agreed that he could go even if meant letting him visit Scotland without her while she and the father worked on their marriage. As SC gave evidence, I regarded her as a straightforward, truthful witness. Her account of the parties' relationship difficulties and the mother's family's concerns about the father bringing A to Scotland were not challenged in cross examination.

JLM

[15] JLM is A's maternal grandmother. Her affidavits are produced as number 6/12 of process (sworn on 11 June 2012) and number 6/23 of process (sworn on 25 June 2012). In her affidavit of 11 June, she depones that, in February 2011, her father died and she needed help and support from A's mother. At this time, she says, the parties' relationship was rocky. The mother was getting really tired of always worrying about how the bills were going to be paid and the father was not helping because he was not getting a job. He was wanting to go to Scotland so the baby (A) could spend time with his family there. The parties made a written agreement that they both signed, that the father would take A to Scotland until May to visit family while she worked. The father was going to see about getting a job and setting up a home in Scotland. Then, in May, the mother would go to Scotland to bring A home if the relationship was not working.

[16] JLM, too, gave her evidence in a straightforward manner, and neither her evidence about the state of the parties' marriage prior to February 2011 nor about the conditional basis on which the father took A to Scotland were the subject of challenge in cross examination.

JS

[17] JS is the partner of JLM. Her affidavit is number 6/13 of process and was sworn on 11 June 2012. There, she speaks of a time when the parties' relationship "got really strained" and they moved to Las Vegas. Of the events of February 2011, she depones that, when the mother's grandfather died, the stress and loss of her grandfather were overwhelming. She remembers that the parties sat in the living room and discussed letting the father take A to Scotland to visit his grandmother. They wrote an agreement stating that the father could take A with him to Scotland to spend some time visiting his mother. During the time the parties were separated, the father was supposed to make the effort in Scotland to get a job to show he could provide for his family if they stayed together. The mother would come to Scotland in May to see if she and the father could make their relationship work. If at that time she did not feel that the relationship would work in Scotland, then she would come back home to the United States with A and then once she and her son were back home they would figure out visitation for the father to see A. They both signed this agreement in front of JS and JLM. There was nothing in the way she gave her evidence that cast doubt on her credibility of reliability. Her evidence on the agreement was not challenged in cross examination.

SWP

[18] SWP is the child's paternal grandmother. She swore an affidavit on 13 April 2012, number 7/4 of process, and another on 12 June 2012, number 7/6 of process. In the latter, she depones that the parties came to stay with her in or around November 2006 for approximately six months. The mother would often comment to her about how wonderful Scotland was and how she wished she could live here. The mother was very clear that she wanted to make plans to live in Scotland. During their visit, she fell pregnant and said that she wanted to give birth in America, but she was determined to return when the baby was approximately three or four years old. They were to return to Scotland on a permanent basis prior to A starting his education. Over the time that followed, the parties both kept speaking to SWP about their return to Scotland. The parties told her that they agreed Scotland would be the best place to raise A. They told SWP over the telephone that they were going to move out to Scotland in March 2010. They then decided they would get

married first and then move the following year. SWP remembers the mother's grandfather passed away in or around February 2011. They were still very enthusiastic about the move when they would talk to her on the telephone. The parties were committed to their plan to move. The mother was also very anxious to re-locate prior to A commencing primary school. She had many criticisms of the education system in San Diego. It appeared to SWP that the mother was the real driving force behind the move to Scotland. SWP spoke to the parties on the telephone in February 2011 and they gave her more details about their plans. They had decided that the father would bring A out to live in Scotland, arriving to stay with SWP on 1 March 2011. The mother told SWP that she would join the boys once she had obtained her visa and her inheritance money (from the grandfather's estate) was released to her.

The father's position

[19] As I have noted, the father accepts that the child was habitually resident in the United States immediately prior to the move to Scotland in February 2011. His counsel submits, however, as follows:

> "(a) The child is habitually resident in Scotland, having been brought here to settle pursuant to an agreement between his parents which contained no reservation. The Hague Convention as implemented in the Child Abduction and Custody Act 1985, therefore, does not apply;
> (b) *Esto* the child was not brought here to settle pursuant to an agreement between his parents, the mother acquiesced in the child's retention in Scotland within the meaning of Article 13(a) of the Convention;
> (c) *Separatim*: a summary return of the child would place him in an intolerable situation within the meaning of Article 13(b) of the Convention as interpreted by the House of Lords in *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 and restated by the Supreme Court in *In re E (Children: Custody Appeal)* [2012] 1 AC 144."

The mother's position

[20] The mother's position can be put shortly: when the father travelled to Scotland with A in February 2011, there was no agreement between the parties that the family would settle in Scotland; there was no subsequent acquiescence by her in the retention of A in Scotland by the father; and there is no grave risk that a return to the United States would expose A to physical or psychological harm or otherwise place the child in an intolerable situation. Consequently, the child remains habitually resident in the United States and should be returned there.

Discussion on habitual residence

[21] In determining which of the competing accounts of the circumstances of A's removal to

Scotland in February 2011 is to be preferred, I have found it helpful to consider the state of the parties' relationship at that time. The father swore an affidavit on 13 April 2012 in the context of the action at his instance in which he seeks a residence order in respect of A (number 7/3 of process). The summons in that action passed the signet on 9 January 2012. On my reading of the affidavit, it is the father's position that the decision to relocate to Scotland appears to have been taken against a background of unsatisfactory living conditions in California. The parties decided that they "would have a much better quality of life and standard of living if (they) moved to Scotland". Nothing is said about how the parties' were getting on at that time. In her petition, the mother avers:

> "... the Petitioner only agreed that the child would reside in Scotland for a period of two months, until May 2011, when either the Respondent would return to the USA with the child or the Petitioner would come to Scotland, collect A, and return with him to the USA."

In her first affidavit, sworn on 30 April 2012, the mother depones that, in February 2011, she and the father decided to separate. She agreed to the respondent taking the child on holiday to Scotland to see the grandmother "on condition that (the child) was returned to me in May 2011, if I decided not to reside in Scotland." It can be seen that these accounts differ.

[22] The account given by the mother in her second affidavit, sworn on 11 June 2012, includes the assertion which I have recorded in paragraph [6] that, by February 2011, the parties had come to the realisation that the relationship might not last. (Number 6/11 of process, paragraph 9) By contrast, in his second affidavit, sworn on 12 June 2012, the father says this:

> "It was not practical to continue living on a sofa bed in her parents' living room. We talked about A's future and his education. We wanted to move prior to A starting primary school. We both felt he would receive a more comprehensive education in Scotland. (The mother) was adamantly in favour of the move. She told me that the education system in San Diego was overcrowded and unproductive. We discussed the benefits that A would receive from the small class sizes in (Scotland). (The mother) had visited (Scotland) on a number of occasions and she told me she enjoyed the space and cleanliness. (The mother) had a good relationship with my mother and felt she was a positive influence in A's life. We wanted to stay as a family and offer A the best start possible in life. In February 2011 we decided that I would move to (Scotland) and take A to allow him to settle in. We purchased one way tickets for me and A to leave from Los Angeles International Airport at 6.25pm on Monday, 28th February 2011. (The mother) and I packed up A's clothes and a lot of his toys to take to (Scotland). We had planned that she would bring the rest of our belongings with her. It was far too expensive to ship everything over when A and I left. (The mother) came with us to the airport and was clear in wishing us well and saying she loved us both and would join us as soon as she could. I have no doubt she was in agreement that A and I were leaving the States to settle in (Scotland). We were going to live in (Scotland) and she was going to join us. We were setting up a new life. (The mother) was in complete agreement with this plan."

No mention is made of the state of the parties' relationship.

[23] The next affidavit to be sworn by the father is dated 18 June 2012. (Number 7/21 of process) By that time the mother's petition had been adjusted, and Statement II then read as follows:

> "...the Petitioner only agreed that the child would reside in Scotland for a period of two months, until May 2011, when either the Respondent would return to the USA with the child or the Petitioner would come to Scotland, collect A, and return with him to the USA. The parties agreed to this before the Respondent's departure to Scotland. On 27th February, 2011, the Petitioner and Respondent entered into a written agreement to this effect. The written agreement was signed by both parties, in the presence of the Petitioner's mother and father. The parties each took a copy. The Petitioner placed her copy in her dresser drawer on 27th February, 2011. After the Respondent left with the child on 28th February 2011, the Petitioner noticed that her copy of the agreement was missing from her dresser drawer. She confronted the Respondent about this when she was in Scotland during May 2001, and the Respondent admitted that he had taken the Petitioner's copy of the agreement. He also admitted that it had always been his intention not to return the child to the Petitioner."

In his affidavit, the father responded in these terms:

> "I wish to add the following comments since reading my wife's amended petition. The petition states that (the mother) and I had agreed that A would only reside with me in Scotland for a period of two months. This is completely untrue. We had made plans to move to Scotland on a permanent basis over a long period of time. We had been discussing our move since we lived with my mother in Scotland during November 2006. We had open and lengthy discussions about what paperwork we would require and our financial situation. We spent a long time planning the move to make sure it was financially viable. We were not discussing written contracts to return A to America after two months on the day before we left for Scotland. (The mother) is telling complete lies. There was no written agreement. There was no need for one. We were both of the understanding that A and I would move to Scotland and (the mother) would join us once she had received her visa and money from her grandfather's estate. We had never even spoken about only going to Scotland for two months. Her version of events is utter nonsense. Her parents did not witness any agreement being signed."

I shall return to the disputed matter of the written agreement in due course.

[24] The mother swore a further affidavit on 25 June 2012. In it, she addresses a number of accusations that had been made about her in affidavits that had been lodged on behalf of the father. She adds nothing to what she had earlier said about the circumstances preceding 28 February 2011.

[25] The last affidavit to be lodged in process was sworn by the father on 5 December 2012. It contains the following passages, which may be thought to have a bearing on the parties' intentions at the time when the father left the United States with A:

> "A and I went to the airport with (the mother) and her mother's partner on 28th February 2011. (The mother) was with us when we checked in. I remember that the check-in

assistant asked (the mother) if she would be travelling with us and she replied, "just these two". She gave us a hug and kiss goodbye. She told me that she would be with A and me very soon. I had brought our marriage certificate and A's birth certificate with me, together with some other essential paperwork. (The mother) and I knew that I would need those documents to enrol A in nursery and with our local G.P. and dentist in (Scotland). (The mother) and I frequently discussed sending A to (K) Primary because we felt the education provided by the teaching staff, atmosphere and ethos of the school would give A the best start in life. (The mother) frequently told me during our conversations that she thought (K) Primary was the right school for our son. She is aware of the school and its history. I had showed her the school during our previous visits to Scotland. She was aware that I had attended (K) Primary as a child."

[26] The father's evidence about the state of the parties' relationship prior to his leaving the United States with A on 28 February 2011 is consistent with the terms of answer 3 of his defences, in which he avers, "The relationship was not in trouble at that time".

[27] The parties' accounts are irreconcilable. The father speaks of a settled, unambiguous, agreed plan that he and the child would relocate to Scotland and that the mother would join them there permanently as soon as she had obtained a visa. There is no hint in his affidavits that the parties might have experienced relationship difficulties before he left for Scotland with A. Indeed, in his affidavit of 18 June, he asserts that, as late as May 2011, the mother was not in Scotland to repair their relationship. He says that, at that time, the parties were "happily married and ... were still having sex."

[28] In support of his position, the father's representatives lodged a number of emails and Facebook entries, some of which were put to the mother in cross examination, to demonstrate that the parties addressed each other in loving and, on occasion, intimate terms after the February move. They form number 7/9 and 7/34 of process. In cross examination of the father, however, the following messages, which were exchanged by the parties on 25 and 26 February 2011, were put to him:

25/2/11 at 8:55pm
[Mother to father] "i dont know why i looked for comfort in someone else either i dont understand what my problem is i really cant explain it all i can do is try to make things right and i will. im sorry you dont trust me i never meant to hurt you i honestly didnt know what i was thinking...but we will work it out thats why the time will be good. i know you miss your wife i miss myself to and i just want to work on myself so that i cane be the wife you deserve iam so sorry for everything i love you my hubby and i will work it out:)"
25/2/11 at 11:56pm
[Father to mother] "i mean i talk to girls about personal things but never throw myself at them, i'm content in my marrage and u should b 2.i'm not always happy with u but i would

never betray ur trust. u made me feel like a dick and worthless when i knew u were hiding shit and u looked me in the eye and lied to my face, if i didnt find out for myself u probably never would of told me. i mean what would u do if i had done that had been me, after everything else u have done, i've given u several second chances and i'm willing to do it again, but u will have to make a big effort if u want me 2 trust u again, like i said u have no reason to keep doing what u do, I love u, we were working towards a future and u still did that. I will always love u, i'm still very much in love with u but u have to make the effort when u come out to scotland, please baby never let me feel like this again, I can not do this again, take this time away to get the feelings back that u felt on our wedding day and to spend some quality time with ur family, i'm excited about our new start in Scotland but i want u 2 feel the same. love u my wife."

26/2/11 at 12:21am

[Mother to father] "your right i should not do what i have done, and when i get to sotland i will do everything in my power to make you see that i do love you very much. i dont want to ever do this again i dont want to lose you at all so this is me making a promise im gonna take my time that i neede to get back to me and then when I get there you will have me all to yourself i love you so much. i know you wouldn never do that to me I feel like i dont deserve you.....you are a great man and you deserve to be trested right and i know i havent done that and im going to change that i promise: i love you my hubby"

26/2/11 at 2:02 am

[Mother to father] "i feel like the worst person in the world but i want you to take this time to think about what you want as well ok.i love you and if you decide that you cant trust me and dont want to be with me then i hope you will please tell me i hope thats not the case cause i do love you and i hope we can work through this but I just want to to think as well ok i love you hubby"

The quotations are accurate.

[29] When asked about these exchanges, the father continued to maintain that the relationship between the parties was not in difficulty before his departure for Scotland. He said for, example, that, when the mother wrote "we will work in out" in the 8:55pm message, she meant that she was to work out her problems. She was "at her wits' end". Her grandfather had died and her infidelity had come out. With reference to the 11:56pm message, he denied that he had to learn to trust the mother again, and asserted that, on 25 February, he believed "it would be happy ever after" with the mother. Watching and listening to the father as he gave evidence on these matters, and having regard to the terms of the messages, I did not believe him.

[30] Further, the father's denial of relationship difficulties prior to his departure for Scotland is contradicted not only by the mother but by SC, JLM and JS, all of whom spoke about marital problems. I accept their evidence on these matters. SWP's evidence supports the father's account, but what the child's mother may have said to SWP earlier in the relationship about wanting to settle in Scotland is not necessarily reflective of the mother's wishes at a time when the marriage

was "rocky" and when the move to Las Vegas had failed to resolve the parties' difficulties. Further, in February 2011 when, as I have held, the mother wanted to retrieve the marriage and, no doubt, hoped that she would - "we will work it out", "I will work it out" - it is unsurprising, in my view, that she would speak positively to her mother-in-law about the parties' plans for the family's future. SC, JLM and JS had had the advantage, which the maternal grandmother did not enjoy, of observing the parties' relationship at close quarters.

[31] Affidavits were sworn by two friends of the father, and were lodged in process. They are not mentioned in closing submissions for the father, but I have, nevertheless, considered their terms. They provide support for the contention that the mother had expressed enthusiasm for living in Scotland at various times, but the comments that I have made about the maternal grandmother's evidence apply to their evidence also.

[32] A number of observations fall to be made about the electronic exchanges which occurred on 25 and 26 February. Firstly, and most importantly, it is clear to me that, when the father and A left for Scotland two days after the last of these messages, the parties' relationship was insecure. The father's message, timed at 11:56 pm on 26 February, made it plain to the mother that, in his view, she had lied to him and he felt humiliated. He had given her several second chances, and was willing to give her another, but she would have to make a big effort if he were to trust her again. They both saw the time apart as an opportunity to enable them, as the mother put it, to "work it out". At least in the mother's mind, the father might decide that he could not trust her and did not wish to be with her. If that were to happen, there would be no question of the family living in Scotland together.

[33] The father relies on a number of messages which passed between the parties in March 2011, and argues that they demonstrate that the mother was consenting to a permanent, settled move to Scotland. In my view, they show that the mother wanted to be reunited with the father and the child, and that she wanted the marriage to work. In his closing submissions, however, counsel for the father makes no mention of two messages from the father to the mother, which demonstrate that the relationship remained insecure and the future uncertain after the father and A moved to Scotland. These were as follows:

> 13/3/11 at 8:51pm
> [Father to mother] "I love u 2 baby, i just want u 2 make a bigger effort for us, I need 2 know that you love me and that I can still trust u. It will take a while for me 2 be able to trust u again but I still love just as much as I did b4, I still am quite disappointed with u that

> u would put our relationship in this state again but I can tell when something is not right." 27/3/11 at 1:00am
> [Father to mother] "It's alright, nae bother, just would of been a nice gesture for u 2 take him off ur friends list without me having to ask thats all. (The father had discovered that the mother had kept the man that she had been seeing as a friend on her social networking site.) I'm glad that u still love me and i would hope u wouldn't do anything like that again and end up fucking up what we have. I just want to b able 2 trust u 100%,it will take time but we will get there, as long as we both love each other and want the same things for us we will make it and have a great life together i still feel shity everyday that u would even have to do what u did but like u said nobodys perfect but please if u ever feel like that again or have doubts about me and u please talk to me before doing something u might regret forever. Just know that i still love u even after everything u have done to me and how much u have hurt me, hope u stick 2 ur promise and do all u can 2 make me trust u again."

The quotes are accurate.

[34] On the whole evidence, I reject the assertion made in the mother's affidavit of 11 June, number 6/11 of process, that, when the father left for Scotland with A, he had agreed with the mother that he would take A to Scotland:

> "and that they would stay at his mother's house for a period of two months and either he would bring him back to the US to me or I would go and get him."

That is inconsistent with what the mother says in her affidavit of 30 April: "I allowed him to go only on the condition that he was returned to me in the United States in May 2011 if I decided not to reside in Scotland." (Number 6/1 of process) I do not regard what is said in the affidavit of 11 June, however, as a deliberate lie, intended to deceive the court. In her supplementary affidavit sworn on 25 June 2012 (number 6/22 of process), the mother says this:

> "I would never give my permission for my son to stay in a foreign country without me living there with him. I only ever gave (the father) permission to take him over there on a temporary basis the consent for my son going over to Scotland was conditional, had (the father) and I chose to work out our differences and I chose to go over to Scotland then we would all be there together." (*sic*)

That is consistent with what JLM says in her affidavit, number 6/12 of process (see paragraph [15J of this opinion) and with what JS says in her affidavit number 6/13 of process as I have recorded it in paragraph [17]. It is also consistent with the terms of the messages that passed between the parties in February and March 2011.

[35] Counsel for the father mentions a further message from the mother to the father which was sent on 13 April 2011. Counsel describes it as the mother expressing delight when the child starts playschool in Scotland: "im glad that he was able to get into playschool...:) that's good news". He observes that, on the mother's account, that was only one month before the child was due to return to the United States. The mother was asked about that message in cross examination and she

explained that she thought that this was a day care centre. The father was supposed to get a job, she said, and she thought that he would be going there while the father was going to work. Once again that evidence was consistent with the proposition that the parties were attempting to repair their marriage and that, if they were able to do so, the family would be together in Scotland.

[36] At page 12 of number 7/34 of process is an email from the father to "bluesea@worldwideshipping.com" in which the father is asking for a price to ship belongings from Las Vegas to Scotland "at the end of February/beginning of March". I have no note or recollection of that email being put to the mother or the father during the hearing. The father refers to the parties' belongings in his affidavit of 12 June, saying that they packed A's clothes and a lot of the child's toys to take to Scotland and planned that the mother would bring the rest of their belongings with her, because it was far too expensive to ship everything over when the father and child left. Having found that the father has not been candid about the state of the parties' marriage at the end of February 2011, I am not persuaded that there was a decision not to ship belongings at that time because of cost considerations, rather than because the family's future was uncertain.

[37] In cross examination, the mother was shown certain further messages which she sent to the father after her return the United States in May 2011. They were in loving terms and, it was suggested, supported the father's case, demonstrating that the mother consented to A's removal to Scotland as part of an agreed plan that the family would relocate permanently to Scotland. In response, the mother said that she was: "playing along with his game. I was trying to do everything to get my son back to me". She said that she wanted to take the blame for what had gone wrong when she had cheated on the father and to make herself look bad, to make the father feel secure enough to get him to trust her so that she could get out to Scotland and uplift the child. She accepted that she was lying to the father in these emails. As I listened to her account, it seemed credible. I was conscious that, in his earlier emails, the father had emphasised that it was for the mother to persuade him that she could be trusted. The mother also gave evidence that there were numerous telephone calls between the parties at the time of the post-May 2011 emails, during which she had repeatedly asked for the child to be returned to her care. The father admitted in evidence there had been heated telephone calls between them at that time and that, after one such call in June 2011 when the mother threatened to take the child away, he contacted solicitors. He said that discussions about the mother taking the child away occurred during arguments on the telephone, although he also said that they were later retracted. In light of the evidence as to the

context in which the emails were sent, the assertion that the post-May emails demonstrate that there was an agreed plan that the family would move to Scotland and live there permanently is, in my opinion, without substance.

[38] Having regard to all of the evidential material available to me, I accept that the mother did not give her permission for A to stay in Scotland without her living here with the child. I also accept that the permission that she gave the father was conditional: only if the parties worked out their differences and decided to live together in Scotland, would they all be here together.

Decision on habitual residence

[39] The relevant test to be applied is that enunciated in *Dickson*, and recorded in paragraph [4] above:

> "Where the parents separate, as they did in this case, the child's habitual residence cannot be changed by one parent only unless the other consents ... If the child has left the contracting state with the consent of both parents whose intention when they left was that he should settle elsewhere, then it seems to us that he must be taken to have abandoned his habitual residence in the contracting state as soon as he leaves."

I find on the evidence that, when the father left the United States with A on 28 February 2011, the mother neither consented to the child's changing his habitual residence nor had she formed the intention that the child would settle in Scotland. Although both parties hoped for a reconciliation, neither party knew whether or not that would happen. Relocation as a family was to depend on a full reconciliation, which had not yet happened, and never did. The mother did not consent to the child's settling in Scotland with the father, in the event that she did not join them. Consequently, I hold that the child continued to be habitually resident in the United States and that, therefore, the retention of the child by the father in May 2011, without the mother's consent, was wrongful, within the meaning of article 3 of the convention.

[40] It will be noticed that the father's case on habitual residence proceeds on the contention that "the child is habitually resident in Scotland". As was said in *Dickson:* "(t)he only question so far as the application of the Convention in concerned is whether the child is still habitually resident in the contracting state." Having held that the child continued to be habitually resident in the United States when he was taken to Scotland, I need not address the assertion that he is habitually resident in Scotland, other than to say that that cannot be the case in the absence of the mother's consent which, as I have held, was never given.

[41] It will be appreciated that, in coming to the foregoing view, it has been unnecessary for me to make any finding on the question whether there was a written agreement. If I had rejected the mother's evidence and that of the supporting witnesses on that issue, I would still have accepted, as I do, her evidence and the evidence of SC, JLM and JS on the state of the parties' marriage in February 2011, and the mother's evidence that she did not intend that the child would settle in Scotland without her. If I had reached the view that there was no written agreement, that conclusion would have had no impact on the reasons which I give for finding that the child remained habitually resident in the United States when he left Scotland.

Acquiescence

The father's position

[42] In his pleadings, the father makes the following averments:

> "The Petitioner consented to the Respondent keeping the child following her visit in May 2011. In any event the Petitioner consented to his retention of the child between June and November 2011. The Petitioner consented to the Respondent keeping the child at the end of her visit in December 2011. The Petitioner acquiesced in the retention of the child by the Respondent. After returning to the USA in May 2011 the Petitioner contacted the Respondent and again confirmed her intention to come to (Scotland) to reside permanently and her acceptance that the child was better living in (Scotland). This occurred in telephone conversations between the parties between June and October 2011. She took no active steps to have the child returned to her until these proceedings were raised in May 2012. She did not enter the proceedings raised by the Respondent in relation to residence and interdict."

[43] Counsel for the father submits that, if A remained habitually resident in the United States in February 2011, the mother acquiesced in his retention by the father. In terms of article 13(a) of the convention, if such acquiescence is established, the court is not bound to order the return of the child.

[44] For an understanding of the legal framework in which acquiescence may be demonstrated, I have been referred to a number of authorities. Counsel for the father relies on the following passage from the judgment of Butler-Sloss LJ in *In re AZ (A Minor) (Abduction: Acquiescence)* [1993] 1 FLR 682, at page 687G:

> "Acquiescence has to be conduct inconsistent with the summary return of the child to the place of habitual residence. It does not have to be a long term acceptance of the existing state of affairs."

He cites, also, the following *dictum* from the Inner House decision in *Soucie* v *Soucie* 1995 SC 134 at 137D:

> "Acquiescence may be active or passive. It was not contended by the respondent in this case

> that there was active acquiescence but it was argued that by reason of inactivity during substantial periods within the total period from August 1992 to April 1994 acquiescence should be inferred. For a definition of what could constitute passive acquiescence counsel for the respondent referred to *Re A (Minors).* Stuart-Smith LJ at p 119 said: 'If it is passive it will result from silence and inactivity in circumstances in which the aggrieved party may reasonably be expected to act. It will depend on the circumstances in each case how long a period will elapse before the court will infer from such activity whether the aggrieved party had accepted or acquiesced in the removal or retention.
> A party cannot be said to acquiesce unless he is aware, at least in general terms, of his rights against the other parent. It is not necessary that he should know the full or precise nature of his legal rights under the Convention: but he must be aware that the other parent's act in removing or retaining the child is unlawful. And if he is aware of the factual situation giving rise to those rights the Court will no doubt readily infer that he was aware of his legal right, either if he could reasonably be expected to have known them or taken steps to obtain legal advice.'"

Finally, counsel for the father refers me to *In re A (Minors)(Abduction: Custody Rights)* [1992] Fam 106, in which Lord Donaldson MR said this:

> "In each case it may be expressed or it may be inferred from conduct, including inaction, in circumstances in which different conduct is to be expected if there were no consent or, as the case may be, acquiescence." (Page 123)

[45] It is submitted on behalf of the father that, in this case, there is a complete lack of any reference to the mother seeking or requiring the return of the child in any email, text or Facebook message. In evidence, contends counsel, she sought to explain that her approach to the father in written communications was a strategy designed to encourage him to return to the United States with the child and that she had repeatedly sought his return in telephone calls. The father acknowledged in evidence that there were such demands but, however, that they were always made in temper and then retracted later.

[46] Counsel for the father argues that the mother presented as an articulate, intelligent and assertive witness of whom it was reasonable to expect that she would take steps to obtain legal advice. Information about the rights which she claims is readily accessible on the internet. The mother accepted in oral evidence that she was served with the father's action for interdict and residence in January 2012. She took no steps to defend that action. Her application to the US Central Authority (number 6/2 of process) was only made on 6 February 2012, some nine months after the alleged wrongful retention. Counsel submits that, on the foundation of these facts, the mother's conduct was "inconsistent with the summary return of the child to the place of habitual residence" and amounted to acquiescence.

The mother's position

[47] Under reference to *In re H (Abduction: Acquiescence)* [1998] AC 72, counsel for the mother submitted that article 13 of the convention "is looking to the subjective state of mind of the wronged parent". (See Lord Browne-Wilkinson, at page 87G) In answer to the question whether acquiescence is a question of fact or law, Lord Browne-Wilkinson said this:

> "Once it is established that the question of acquiescence depends upon the subjective intentions of the wronged parent, it is clear that the question is a pure question of fact to be determined by the trial judge on the, perhaps limited, material before him." (Page 88E)

The mother's position, contended counsel, is that, between 24 May 2011 and 2 November 2011, she attempted to resolve the parties' relationship difficulties in the hope that the child would be voluntarily returned to her in the United States, as averred in her petition. This ought not to be seen as inferring acquiescence. In support of that proposition, counsel for the mother relied on the following passage from Lord Browne-Wilkinson's speech in the same case:

> "Although each case will depend on its own circumstances, I would suggest judges should be slow to infer an intention to acquiesce from attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child." (Page 88G)

[48] On behalf of the mother it was argued that there can be no acquiescence where reasons are given for any perceived delay in raising Hague convention proceedings. Counsel referred me to the following passage from the opinion of the court in *Soucie*:

> "We would entirely accept that acquiescence may be inferred from unexplained inactivity. Where, however, apparent inactivity is explained and that explanation is accepted, no such inference can necessarily be drawn." (Page 137F-G)

Discussion on acquiescence

[49] There is no allegation of active acquiescence in this case. The question which I have to address, therefore, is whether passive acquiescence is to be inferred from the mother's conduct between 24 May 2011, the date which counsel for the father acknowledges was when, on his *esto case*, the father retained the child, and, at the latest, 6 February 2012, when the mother presented her petition in these proceedings.

[50] In my opinion, in order properly to understand the mother's conduct, it is necessary first to understand her state of mind as it was when the father and A left for the United States. I have already held that, when the father left the United States with A on 28 February 2011, the mother neither consented to the child's changing his habitual residence nor intended that the child would

settle in Scotland. Nor, as I have held, did she intend "that (the father) would take (A) to Scotland and that they would stay at his mother's house for a period of two months and either he would bring (A) back to the US to me or I would go and get (the child)", as expressed in her affidavit sworn on 11 June 2012.

[51] Certain of the messages which form part of number 7/34 of process can better be understood in the context of the possibility of the mother's relocating to Scotland, than in the context of her having resolved never to move to Scotland. In his message of 25 February 2011, timed at 11:56 pm, the father talks of the need for the mother to "make the effort when u come out to Scotland", and says that he is "excited about our new start in Scotland". In her message timed at less than half an hour later, the mother says "when I get to Scotland I will do everything in my power to make you see that I do love you very much". Messages exchanged on 28 February and in March and April make further reference to the parties both looking forward to getting together and wanting to "be a family again". In a message timed at 16:23 on 8 April, the mother expresses sadness that the father does not think that she wants to be with him and the child.

[52] As I have said, these messages demonstrate that there was uncertainty about the couple's future in the mind of both parties. Further, although the messages are in loving and intimate terms, the father accepted in evidence that there were heated telephone exchanges between himself and the mother. Moreover, there is nothing said in any of these messages from which it could be inferred that the mother acquiesced in the father's retention of the child. In a message sent as late as 11 October 2011, for example, the mother expresses her love for the father and the child, and says that she just wants to be with them. That is the antithesis of acquiescing in the retention of the child against the mother's wishes.

[53] In his affidavit of 13 April 2012, the father depones that, at or about the time of the mother's visit to Scotland in May 2011, "our relationship was certainly in some difficulty". His counsel points to nothing in the mother's behaviour at that time or thereafter from which it might be inferred that she acquiesced in the retention of A by the father against her wishes. On the contrary, as I have noted, the father said in evidence that, during a telephone call in June 2011, the mother told him that she wanted to take the child away, and he contacted his solicitors for advice. According to her evidence, which I have no reason to doubt and which I accept, the mother was keen to keep lawyers out of the dispute if possible. At paragraph 5 of her affidavit of 25 June 2012 she says:

"After I returned in May I still pleaded with (the father) about (the child) to come home. I

> was trying to do every and anything I could think of so that I could get my baby home without having to involve the court system."

That attitude is consistent with her wish for a reconciliation expressed in the message of 11 October 2011.

[54] After her arrival in Scotland in November 2011, the mother again sought return of the child. In his evidence, the father agreed that she had done so, and said that he again approached his lawyers, asking them where he would stand if the mother wanted to take the child back against his wishes. Further, during the visit of November to December 2012, I am satisfied that the father hid the child's passport from the mother, an allegation that the mother makes in her affidavit of 30 April 2012. In his affidavit of 12 June 2011, the father specifically denies that he "had ever hidden" the child's passport. That claim is, however, contradicted by the father's mother who says, in her affidavit of 13 April 2012: "He has hidden (the child's) passport in case she does try and remove him". In any event, I agree with the mother's counsel's submission that her actions in coming to Scotland to seek return of the child is not indicative of acquiescence.

[55] On her return from Scotland on 12 December 2011, the mother immediately raised proceedings in the Superior Court of California (County of San Diego) seeking, among other things, custody of the child. The case was filed on 16 December 2011. (See number 6/7 of process) This is clearly inconsistent with acquiescence.

[56] The mother initiated convention proceedings on 6 February 2012. There can be no question of acquiescence after that date. Nor, in my judgment, can it be said that the length of time which elapsed from retention, in May 2011, until the initiation of proceedings, of itself demonstrates acquiescence. As narrated in this opinion, the mother was not passive during that period. Further, in her affidavit of 25 June 2012, number 6/22 of process, she depones:

> "It wasn't until April 2012 that I found out that I have sole legal and sole physical custody of (the child). If I had known that, (A) would have been returned to me a long time ago. Like I said many times before I didn't know because I didn't involve any court until I had returned in December of 2011. I really wanted (the father) and I to work this out between us without court but obviously that cannot be done and I realized that when I came back to the states in December. This is when I filed for divorce and custody of (the child) and this entire process began."

The mother's discovery of having "sole legal and sole physical custody" of the child came from the findings of the Californian court, dated 10 April 2012. (Number 6/10 of process)

[57] Ultimately the acquiescence issue concerns the mother's subjective intentions. Her evidence amounted to a clear declaration that at no time did she abandon her wish to have the child returned to her care, whether with the father, on a resumption of family life, or without him. She spoke with conviction, her evidence was supported by the objective evidence in the way that I have described, and I believed her.

Decision on acquiescence

[58] In my judgment, convention proceedings were not raised in this case between May 2011 and February 2012 because: the mother hoped that she could effect a reconciliation with the father, so that the family could be together; when reconciliation looked unlikely, she told the father that she wanted the child returned to her, but was unwilling to involve the courts; when it appeared that there would be no reconciliation and the father would not return the child voluntarily, she raised divorce proceedings in California, seeking custody of the child; a few weeks later she presented her petition in these proceedings; and at no time during that period did she realise that she had sole legal and sole physical custody of the child. In these circumstances, I hold that the article 13(a) exception of acquiescence has not been established by the father.

The father's article 13(b) defence

Proper construction

[59] The effect of the terms of article 13(b) of the convention is to give the court a discretion to decline to order the return of the child if the person opposing its return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

[60] Although certain of the father's averments are directed towards the contention that A's return would expose the child to physical or psychological harm, in closing submissions his counsel restricts his argument to the article 3(b) intolerable situation defence.

[61] Much is said by both counsel in closing submissions on the proper construction of article 13(b). Counsel for the father submits that "grave risk" and "intolerability" are distinct defences to a petition for return, and relies for that proposition, first, on the words of Baroness Hale of Richmond (with whom the other members of the Judicial Committee agreed) in *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 at 639H:

"Intolerability 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." Counsel points out that Baroness Hale's definition was adopted by the Supreme Court in *In re E (Children: Custody Appeal)* [2012] 1 AC 144 at 161H. He cites *C* v *C* 2003 SLT 793, in which Lord Macfadyen considered "intolerability" as a distinct component within article 13(b), and argues that a similar approach was taken by Macur J in *RS* v *KS, LS (By his Guardian Marion Werner-Jones)* [2009] EWCH 1494 (Fam).

[62] In response, counsel for the mother argues that the wording of article 13(b) is not to be read disjunctively. In support of that argument, he refers to the following passages from the judgement of the court in *In re E*:

> "33 Second, the risk to the child must be 'grave'. It is not enough, as it is in other contexts such as asylum, that the risk be 'real'. It must have reached such a level of seriousness as to be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm.
> 34 Third, the words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative '*or otherwise*' placed 'in an intolerable situation' (emphasis supplied). As was said in *In re D* [2007] 1 AC 619 , para 52, '"Intolerable" is a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate"'. Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent."

[63] Counsel for the mother also relies on the following words of Lord Glennie in *A Petitioner* 2012 SLT 370:

> "[33] It is wrong to take the expression 'intolerable situation' in art.13(b) as though it stood on its own. The context is important. Article 13(b) applies 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".
> The context in which the words 'intolerable situation' appear make it clear, in my opinion, that they involve something of the same degree of seriousness as 'physical or psychological harm' with which they are placed.
>
> [34] That was the view which, as I understand it, was taken in the United States Court of Appeals for the Sixth Circuit in Friedrich v Friedrich where the court said this at the end of s.III:
>
> > This provision was not intended to be used by defendants as a vehicle to litigate (or

> re-litigate) the child's best interests. Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an *intolerable* [their emphasis] situation is material to the court's determination. The person opposing the child's return must show that the risk to the child is grave, not merely serious.
> A review of deliberations on the Convention reveals that 'intolerable situation' was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an 'intolerable situation' is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimisation, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an 'intolerable situation' and subjected to a grave risk of psychological harm.
> The case of Q, Petr was a paradigm case, concerning allegations of sexual abuse. But that is not to say that the categories of 'intolerable situation' are limited to sexual abuse or the like. A very different example of 'intolerable situation' arose in C v C , where the court refused to order the return to the United States of a breast feeding child who would, in all likelihood, on her return have been unable to be with her mother.

> [35] In *In re E* (Children) (Abduction: Custody Appeal) the Supreme Court considered the proper interpretation of art.13(b). The decision of the court was given by Baroness Hale and Lord Wilson. At p.1339, paras.33 and 34 they said this:
> [Here his Lordship quotes from paragraphs 33 and 34, quoted above]
> The use of the phrase 'rough and tumble' is perhaps unfortunate, conveying as it does an image of boisterous play. Nonetheless, it is clear what the Supreme Court is saying. The line to be drawn may vary from case to case, depending on the particular child, but it has to be recognised that the court cannot refuse to make a return order simply because return to the country in question would involve discomfort and distress. The word 'intolerable' shows that something stronger than that is required."

[64] Having regard only to the structure and language of article 3(b), it is clear, in my judgment, that an abductor can successfully resist the return of a child if he establishes that there is a grave risk that his or her return would either (i) expose the child to physical or psychological harm or (ii) otherwise place the child in an intolerable situation. Neither counsel drew my attention to any authority which was expressly to a contrary effect. The passage from *Friedrich* cited by Lord Glennie in *A Petitioner* might be thought to conflate the two provisions of article 3(b) because sexual abuse by a custodial parent is given as an example of an "intolerable situation" when it might equally well be regarded as exposure to physical and/or psychological harm. As is made clear in the *Friedrich* judgment, the passage is drawn from a report by the United States Department of State which was prepared for the Senate Committee on Foreign Relations. One commentator in the United States has observed that courts there have given virtually no attention

to the term "intolerable situation", either ignoring it or assuming it to be coextensive with the "grave risk of harm" language, and has offered the view that what he calls the aggregation of the discrete concepts of "harm" and "intolerable situation" is probably attributable to the "intolerable situation" passage in the State Department report. (See *Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases* by Merle H. Weiner, Philip H. Knight Professor of Law, University of Oregon School of Law: American University Law Review [Vol. 58:335])

[65] Again having regard only to the wording of the provision, it seems to me that by linking the words "placed in an intolerable situation" with the concept of exposing the child to physical or psychological harm, by the use of the words "or otherwise" suggests two things. The first is that such exposure is regarded by the framers of the provision as intolerable. The second is that a grave risk that the child's return would place him or her in an intolerable situation other than by exposing the child to physical or psychological harm may also provide a good defence.

[66] It follows from my analysis that I agree with counsel for the father that article 3(b) provides two defences to an application for return. In my opinion, however, the distinction is not between "grave risk" and "intolerability" as he submits. It follows from what I have said in paragraph [64], that the dichotomy is between exposing to the harm specified and placing in an intolerable situation.

[67] I do not understand counsel for the mother, in submitting that article 3(b) should not be read disjunctively, to be contending that it provides only one defence. Rather, I take him to be arguing that, as was said in *In re E*, the words "physical or psychological harm" gain colour from the alternative "or otherwise" placed "in an intolerable situation." It seems to me that parties are divided on the question whether the intolerable situation defence is made out on the facts of this case, rather than on the construction of article 3(b).

The evidence on article 3(b)

[68] By interlocutor, dated 26 September 2012, on the joint motion of parties the Lord Ordinary appointed Dr Brenda Robson "to produce a report on the effect upon (the child) of any peremptory return to the United States of America". By the same interlocutor, the Lord Ordinary limited oral evidence to the issues of habitual residence, consent and acquiescence. Dr Robson duly produced a

report, dated 14 December 2012, which is number 39 of process.

[69] Among the qualifications recorded in her report, in 1979 Dr Robson gained an MSc in educational/child psychology at the University of Strathclyde and a teaching certificate at Jordanhill College of Education. She was awarded a Ph.D. in child psychology at the University of Birmingham in 1985. She is an associate fellow of the British Psychological Society. She practises as an independent child psychologist and, for the past twenty-six years, she has worked in the legal field. She acts as a reporter to around ten Sheriff Courts in Scotland, as well as the Court of Session and family courts in Northern Ireland. She regularly gives evidence as an expert witness in matters relating to children and families. For several years, she was a curator *ad litem* and reporting officer in adoption cases in Strathclyde Region. She has regularly prepared reports in permanence cases and on attachment issues over the past twenty years and has been instructed by solicitors representing parents, local authorities and trusts. She has prepared over 2,000 reports within the legal context.

[70] For the purposes of her report, Dr Robson was given a copy of the adjusted petition and answers in this case. On 19 and 20 November 2012, she visited A's primary school, discussed the child with the class teacher and observed A in class. She visited the child's home, had discussions with the father and the paternal grandmother and had a session with A. On 6 December, Dr Robson had a telephone consultation with the mother.

[71] Further to her remit, which is recorded in the interlocutor of 26 September 2012, she was given guidance in the following terms:

> "Parties are agreed that it is appropriate to provide you with the appropriate test to be applied in cases under The Hague Convention 1980 when there is an argument before the court as to whether '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 intolerable situation' (Article 13(b) of The Hague Convention 1980). The definition of intolerability has been considered by Lady Hale and parties are agreed that it is appropriate to provide you with the definition of intolerability, which is 'a situation which this particular child in these particular circumstances should not be expected to tolerate' (Baroness Hale of Richmond in *In re D* (2007) 1AC 619- re-stated in *In re E* (2012) 1 AC. 144). Parties are agreed that it would be helpful for you to have this test in your mind when considering the effect upon A of a return to the United States of America."

[72] It is clear from her report that Dr Robson was given a full account by both parents of events since February 2011. Unsurprisingly, these accounts conflict on a number of matters. Contained

within the opinion section of her report are the following observations:

> "The Hague Convention is not a mechanism to examine which parent or which environment would be best for the child in the long term. Rather, it considers the much narrower perspective regarding whether it is possible for a child to return to the country of origin so that residence and contact matters can be established there. It is my opinion that A could return to the care of his mother in California without there being a grave risk that his return would expose him to physical or psychological harm, or otherwise place him in an intolerable situation. (Original emphasis) I feel that A has suffered a degree of psychological harm by the severance of his ongoing relationship with his mother, and he has gone through a grieving process in relation to that loss. He is a reasonably resilient child and he has been resigned to the present circumstances. He has been coping with life at home and at school during the past year, but he still wants his mother to come and see him and he wants to go to see her in the United States. It is certainly not the case, as (the father) would suggest, that his mother has become a complete stranger to him. I believe if it was put to A that he was going to spend some time with his mother in the United States, then he would be able to do to this without significant harm. He might be anxious about going to the United States and he might miss his father, particularly initially if his father does not go with him, but I feel that there could be benefits for A in being able to renew his relationship with his mother. He is not yet of school age in California, and so would not need to go to school in the next few months. If it is decided that he should then reside permanently with his father in (Scotland), he would be able to return to school and make up for lost time. He is a bright boy and would be able to make up for any lost time, particularly as he is still in primary one, I do not think that it is ideal for a child of A's age to leave school, his friends and of course, his father, for any significant length of time, but within the confines of The Hague Convention, I could not argue that such a move for A would create a grave risk of physical or psychological harm. It would, of course, be better for A if his father also returned to the United States so that their relationship could be maintained, (the father) does not work and so there are no employment issues in this country, but that does mean that there might be financial constraints."

[73] In her affidavit of 11 June 2012, at paragraphs 17 to 21, the mother gives a detailed account of her employment, her domestic arrangements and her plans for A's care, should he be returned.

The father's position

[74] In his note of argument, dated 18 December, written after he had considered the terms of Dr Robson's report, counsel for the father submits that the court is not bound to accept the opinion of a skilled witness. (See *Davie* v *The Lord Provost, Magistrates and Councillors of the City of Edinburgh* 1953 SC 34 at page 40 *per* Lord President (Cooper); *Dingley* v *The Chief Constable, Strathclyde Police* 2000 SC (HL) 77 at 89A-E) He argues that I should not accept Dr Robson's conclusions, because she has "conflated two distinct principles in Art 13 (b)" and "has placed inadequate emphasis on the stability which the child has enjoyed for the last two years in his father's care." He takes the conflation point because, towards the end of the passage that I have quoted in paragraph

[72], Dr Robson refers expressly to "grave risk of physical or psychological harm" but not "intolerable situation".

[75] In his closing submissions, counsel for the father contends that Dr Robson's description of A as "a reasonably resilient child" is at odds with the description given by his school teacher in a report, dated 6 December 2012, which is number 7/30 of process. In particular, his teacher expressed the following view:

> "(A) was very demanding of adult attention and found it difficult to share this attention and take turns and was easily disappointed if others were praised and not (the child). A was eager to do well and always tried to please. A was slow to make friends as he found it difficult to share and play co-operatively. A could be rough and 'huffy' and often told tales on others as he was unable to resolve issues without adult intervention ... Since our return to school after the October break (the child) seems much calmer and only occasionally gets upset. (A's) behaviour is much less attention seeking than before and (the child) is keen to please and do his best."

This, argues counsel, tends to describe a child who is unsettled by change rather than one who is reasonably resilient.

[76] The following further criticisms of Dr Robson's report are made on the father's behalf:

> "She makes no mention of the child's relationship with his father. The school, however, records that '(A) speaks animatedly about the things (the child) does with (the child's) Dad and appears secure in (that) relationship ... When talking in class about where we were all born (A) told everyone that (the child) was born in America but never mentioned (the child's) Mum.'
>
> She did not recognise that a peremptory return would deprive A of a relationship with the child's father. He does not have the means either to visit or to engage in the legal resolution of the child's future in California.
>
> Dr Robson has not considered how long it would take a Californian Court to determine the issue of with whom the child should live.
>
> Most significantly, she appears to have made no enquiry into the mother's current circumstances. The 'swift return' envisaged by the convention aims to return him/her to familiar circumstances, and established carers. In this case, he would be taken to a property he has never seen, in a neighbourhood he does not know, to a mother living with a man he has never met and who works long and unsocial hours. He will be severed from established friendships and deprived of the school in which he has recently settled. "

Counsel for the father submits that, had Dr Robson considered these matters, she would have concluded that the "intolerability" test was made out, and that, therefore, the court should differ from her. In my opinion, that submission suggests a misunderstanding of the respective roles in this case of Dr Robson and the court. It is for the court alone to determine the question of intolerability. The expert's role is to inform the court's decision.

The mother's position

[77] In response, the mother's counsel points to Dr Robson's eminence as an expert witness in this field, and he referred me to Scottish cases in which the judge has spoken approvingly of her experience, independence and the evidence which she had given. Counsel disputes the contention that Dr Robson has conflated the concept of the creation of "grave risk of physical or psychological harm" with placing "in an intolerable situation", and he points, in particular to page 9 of her report where she expresses the view that A could return to the US "without there being a grave risk that his return would expose him to physical or psychological harm, or otherwise place him in an intolerable situation".

Discussion on article 13(b)

[78] I acknowledge that I am not bound to accept Dr Robson's opinion. It is appropriate, therefore, to have regard to the criticisms that counsel for the father makes of it.

[79] On a comparison of Dr Robson's report with that of the class teacher, the submission is, in effect, that Dr Robson has erred in concluding that A is "a reasonably resilient child". I reject that contention. The class teacher's description of A, set out at paragraph [74] above, appears in a section entitled "History" and focusses on the child as he presented after starting school in primary 1 on 15 August 2012. There is nothing in the teacher's report that causes me to doubt Dr Robson's view, informed as it is by the investigations that she carried out, as recorded in paragraph [70] of this opinion. I note that the author of the report dated 6 December, number 7/30 of process, is the teacher whom Dr Robson interviewed in late November. I reject, also, the criticism that Dr Robson makes no mention of the child's relationship with the father and that she did not recognise that a peremptory return would deprive the child of a relationship with the father. In the passage that I have quoted in paragraph [72] she recognises the implications of A leaving school, his friends and, "of course, his father" and says, in terms, that it would be better for A if the father also returned to the United States "so that their relationship could be maintained".

[80] In his closing submissions, counsel for the father raises the issue of the time that it may take for proceedings in California to be concluded. It is correct to say that Dr Robson does not consider that matter in her report. As I have noted in paragraph [70], however, Dr Robson was provided with a copy of the reclaiming print, in which the issues in the case are set out. The father's case on article 3(b) is to be found at in answer 3, and concludes in the following terms:

> "The child will be exposed to psychological harm if removed from (the child's) settled environment to live with the Petitioner and the strangers with whom she resides in a property (the child) has never visited. The Respondent does not have the means to visit the child if he is sent to California. There is a grave risk that (A's) return would expose the child to physical or psychological harm or otherwise place him in an intolerable situation."

There is no other reference to the child's being placed in an intolerable situation in the father's averments. It is an inherent feature of Hague convention cases that some delay between summary return and the resolution of residence and contact disputes is to be expected. In this case, the father has not offered to prove that such delay will be extraordinary or, for some other reason is relevant to his article 3(b) defence. In these circumstances, I would not have expected Dr Robson to have taken it upon herself to investigate the stage at which the California proceedings have reached, or the date by which they are likely to conclude.

[81] The final criticism levelled at Dr Robson's is that "she appears to have made no enquiry into the mother's current circumstances." In the reclaiming print which Dr Robson had, the mother's circumstances are described as follows:

> "The Petitioner began a new relationship with (PR) in June 2011. They have known each other from childhood. The Petitioner works as a cashier at a grocery store, ... and earns approximately $1200 gross per month. Her partner (PR) works in a restaurant and earns about $1000 gross per month. Between them they have secured a Lease of an apartment in the same building as the Petitioner's father's apartment. The address is ... A copy of the lease is produced. The Petitioner moved in to the apartment on 26th June 2012, and continues to reside there. The apartment has two bedrooms, livingroom, kitchen, bathroom and garage. The child will have his own room on return to the care of the Petitioner. The apartment complex has a swimming pool, play park, and laundry facilities. Photographs of the complex are produced. The child knows and is familiar with the apartment complex from visiting his grandfather. On the child's return to the care of the Petitioner, he will attend a local school and will be part of a network of family and friends, including the Petitioner's father, and her brother (who) works at the local school, ... where it is intended the child will attend for schooling. The child will be well accommodated, cared for, and educated in California."

These averments are met with a general denial, but the father makes no contrary averment. Further, as I have noted, Dr Robson had a consultation with the mother by telephone. It cannot properly be said, therefore, that Dr Robson's report is defective because she was unaware of the mother's circumstances.

[82] That said, Dr Robson's report is not determinative of the article 3(b) issues in this case. As was observed by the Lord President in *Davie:*

> "Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury, ..."

I must decide for myself, therefore, on the whole evidence, whether that defence has been established by the father.

[83] It is submitted on behalf of the father that the consequences of the passage of time may result

in an intolerable situation for an abducted child, and that the passage of time in this case has had that effect. In that regard, he referred to *In In re D*, and *RS* v *KS.* In *In re D*, at pages 639B, Baroness Hale said this:

> "The whole object of the Convention is to secure a swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their home, but also so that any dispute about where they should live can be decided in the courts of their home country, according to the laws of their home country, and in accordance with evidence which will mostly be there rather than in the country to which they have been removed. That object is negated in a case such as this where the application is not determined by the requested state until the child has been here for more than three years"

At page 640D, Baroness Hale continued:

> "In this context, a delay of this magnitude in securing the return of the child must be one of the factors in deciding whether his summary return, without investigation of the facts, will place him in a situation which he should not be expected to tolerate."

At 624H, Lord Hope of Craighead observed:

> "As the preamble to the Convention indicates, its purpose is to protect children from the harmful effects of their wrongful removal. The assumption on which the remedy of prompt return is that the state to which the child will be returned is the state of his habitual residence. Through no fault of his own, the child whose return is being sought has been settled for so long that this assumption is scarcely tenable."

[84] In *RS* v *KS,* Macur J considered an application concerning a child who was born in 2005 and who was wrongfully retained by her mother in the United Kingdom in 2007. Counsel for the father incorrectly narrates that the child "was therefore six" and had lived in the United Kingdom for two years. Macur J held, at paragraph 46:

> "In this case I consider that to disrupt LS's present living arrangements would have far reaching and adverse impact than in the case of an older and less sensitive child able to comprehend a sudden departure from one routine and community and would transgress the 'inevitable disruption, uncertainly and anxiety which follows the return to the jurisdiction of habitual residence.'"

In fact, the child was born on 5 April 2005 and was brought to the United Kingdom in January 2007 when he was twenty-one months old. Between May 2005 and January 2007, the father was living in Sweden and the mother and child were living in Lithuania. The mother visited and stayed with the father in Sweden in July/August 2005, for about two months. The father visited the mother and the child in Lithuania at Christmas time 2005 and thereafter travelled between Sweden and Lithuania approximately every two months, staying for periods of one to two weeks. The hearing was held on 11 and 12 June 2009 and Macur J's judgment was handed down on 29 June of that year, when the child was four years and two months old. In my opinion, the facts of that case are so different from this that I can derive no assistance from Macur J's disposal.

[85] In *In re D*, the child was aged eight at the time of disposal by the Judicial Committee, on 16 November 2006. He was taken to England in December 2002, at the age of four years and five months (not as counsel for the father submits, at the age of two). The Hague convention application took three years and ten months to reach the House of Lords, (and a further month before judgment) not, as the father's counsel contends, three years. After the passage at page 540D relied on by the father's counsel, Baroness Hale continued:

> "(The child) is not responsible for the passage of time. But the passage of time has contributed to a situation in which he is adamantly opposed to returning to Romania. As reported by the very experienced CAFCASS officer, these views are "authentically his own". They are confirmed by the very experienced solicitor who now acts for him. It is not simply that he is settled here within the meaning of article 12. He has spent nearly half his life here and has no life that he can recall in Romania. While the father has offered certain undertakings about his life there, it is quite clear that the father intends to oppose his return to the country which he now regards as his home and that if returned to Romania he will face months if not years of further litigation between his parents."

On a reading of the whole of her speech, it is clear that Baroness Hale gave particular weight to the child's being "adamantly opposed" to his return. I regard the facts in *In re D* as far removed from those in this case, to which I now return.

[86] Whilst not in any sense bound by the terms of Dr Robson's report, I am, of course entitled to accept her views. I am conscious of the opinion of the Lord President expressed in *Davie*, that the value of expert evidence "depends upon the authority, experience and qualifications of the expert and above all upon the extent to which his evidence carries conviction". Dr Robson is eminently well qualified in her field and was an appropriate person to appoint to investigate A's circumstances and report. That is no doubt why her appointment was made on the joint motion of both parties. She spoke to those best placed to help her to a view as to the effect upon the child of any peremptory return to the United States, and she had the pleadings in which the father's case on article 3(b) is set out. She was given Baroness Hale's definition of "intolerable" for the purposes of article 3(b). It is not suggested on behalf of the father that she has misunderstood the background to the case.

[87] I note that Dr Robson records that A was delighted to see his mother when she came to Scotland in April 2011, and upset when she returned to the United States. Her view that this was a further indication that A had an emotional attachment to the mother and that A's relationship with her was significant to the child is unsurprising and I accept it. Dr Robson records that the parties

dispute some of the events of the visit in November and December but her conclusion in light of her investigations is that A was again pleased to see his mother and that A spent significant time with her during that visit.

[88] A had not seen his mother for a year by the time of the hearing before me, but was due to see her after the December hearing. Dr Robson records that the child had maintained contact with his mother throughout the year by telephone, albeit the parties again dispute the frequency of these calls. A chats to his mother and tells her about life in Scotland, about school and the child's interests. The father said that they joke and laugh together. Significantly, in my view, A says that he would like his mother to come to see him again and that he would like to visit the mother in California, although not to stay there permanently.

[89] In my opinion, it is also of significance that Dr Robson's view is that A could return to California without there being a grave risk that his return would expose him to physical or psychological harm. That view is not challenged. Dr Robson has given her reasons for it, and I accept her conclusion on that matter in light of these reasons. In order to establish the article 3(b) defence, it is necessary for the father to persuade the court that there would be something other than physical or psychological harm that should be regarded as placing A in an intolerable situation should he be returned to the United States.

[90] In his closing submissions, counsel for the mother refers me to what he describes as "the well-established statement of principle found in *In re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145," which is, according to "an established line of authority":

> "that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence."

[91] In my view, in this case there is no evidence, let alone compelling evidence, that there is such a risk. I acknowledge that A has not lived in California for two years and that the child will be in an unfamiliar situation. In my judgment, however, the consequences of his return will be no more "than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence." Further, there is positive evidence from Dr Robson, which I accept for the reasons which she gives, to the effect that there is no grave risk that A's return would place him in an intolerable situation.

Decision on article 3(b)

[92] It follows from the foregoing discussion that, in my opinion, the father's article 3(b) case is not established.

Disposal and further procedure

[93] I shall repel the father's pleas in law (including an article 12 settlement plea which was not argued), grant the prayer of the petition and suspend the order in the prayer for the use of messengers at arms for a period of 10 days to allow the child to be returned to the United States of America, by means of the mother coming to Scotland to uplift him, and I shall ordain the father to hand over the child's passport with him. I shall also appoint the cause to call by order, 14 days after the date of this opinion before another Lord Ordinary, to ascertain whether the court's orders have been complied with. At the second hearing, which was held in July 2012, counsel for the father undertook that, in the event that the court were to order return of the child, the interdict *ad interim* in the action for residence and interdict would be recalled on the father's motion, to allow the child to be removed from Scotland by the mother. That undertaking was given of behalf of the father and, notwithstanding that there has been a successful reclaiming motion and a change of counsel, I regard the father as still bound by it. Accordingly, I shall ordain the father to move for recall of the interim interdict in the residence action at his instance. As both parties are legally aided, I shall make no order in respect of expenses.
