Case No: B4/2015/2675

Neutral Citation Number: [2015] EWCA Civ 1298
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL FAMILY COURT
MR RECORDER TIDBURY
ZC15P00063

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2015

Before:

LORD JUSTICE TOMLINSON
LORD JUSTICE LINDBLOM
and
MR JUSTICE PETER JACKSON

- -

Between:

H (Mother)	**Appellant**
- and -	
C (Father)	**First Respondent**
- and -	
E (A Child, through his solicitor Anne-Marie Hutchinson)	**Second Respondent**

- -
- -

Barbara Mills (instructed by **Hughes Fowler Carruthers**) for the **Appellant**
Judith Murray (instructed by **Levison Meltzer Pigott**) for the **First Respondent**
Mehvish Chaudhry (instructed by **Dawson Cornwell**) for the **Second Respondent**

Hearing dates: 10 December 2015

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Judgment

Mr Justice Peter Jackson:

Introduction

1. This family appeal strongly demonstrates the damage that is caused when separated parents fail to take the opportunity to resolve their differences. Instead of finding its own solutions, this family, which has every other advantage, has engaged in two years of litigation that has caused great unhappiness, not least to two teenage children. The dispute has been about money and about child arrangements. Aside from the emotional cost and general waste of life, the financial cost has been staggering. The parents have so far expended £850,000 on legal costs and even now their overall litigation is not at an end. The scale of the costs is particularly incongruous when the parents each claim that there was not enough money to go around before the costs were spent. The proceedings are yet another example of why the Family Court repeatedly attempts to divert parties into mediated solutions that allow them to keep control of their own affairs. The court is there to resolve disagreements that cannot be resolved in any other way but, as has been said before, it is not a third parent.

2. A further and central element of the situation is that the children of this family are in fact young persons, being boys now aged 17 and 15. The case illustrates the particular caution that should be felt by any court seeking to make arrangements for children of this age. In the first place, it is likely to be inappropriate and even futile to make orders that conflict with the wishes of an older child. As was memorably said in *Hewer v Bryant* [1970] 1 QB 357 in a passage approved in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112: *"… the legal right of a parent to the custody of a child ends at the eighteenth birthday and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advice."* Nowadays, the 'no order' principle goes even further and requires the court to justify making any order at all, regardless of whether it is in support of the child's wishes or in opposition to them. With an older child, the court's grasp cannot exceed its reach, any more than a parent's can, and attempts to regulate something that is beyond effective regulation can only create a forum for disagreement and distract the family from solving its own problems.

3. The appeal itself arises from an order made by Mr Recorder Tidbury in the Central Family Court on 23 July 2015, by which he refused permission to the mother of E, then aged 16, and J, then 14, to take them from London to live in New York. Permission to appeal was granted to the mother on 2 September by King LJ. Subsequently E, who had become a party during the trial, issued his own application for permission to appeal.

4. At the hearing of the appeal on 10 December, we granted permission to appeal to E and admitted certain fresh evidence, which in the event did not affect the outcome. In E's case, we allowed the appeal brought by E and by his mother and set aside all orders relating to him. In J's case, we dismissed the mother's appeal. This judgment sets out my reasons for concurring in that decision.

5. Our conclusion is that the general approach taken by this very experienced recorder was one that he was fully entitled to take. To the extent that the appeal is allowed in E's case and, to a limited extent, in J's, it is on a basis that was not argued below, namely in consequence of the 'no order' principle the court should not have been making or continuing orders about young persons over 16 other than in exceptional circumstances.

6. As stated at the end of the hearing, the outcome allows the parents and E to discuss the arrangements for his future between them. It is a clear indication that this court does not consider it appropriate for it to contribute to that discussion in any way at all.

7. In J's case, the outcome of the appeal is that the mother may not take him to New York. That does not prevent the parents from discussing and reaching agreement about the future arrangements for his residence and schooling, but if they cannot do so the arrangements under the existing order will continue and the terms of s.13 Children Act 1989 will remain in effect.

8. However, we shall direct that the existing order will cease to have effect in J's case when he reaches the age of 16. This is a variation of the arrangements that was not the subject of appeal but it is in conformity with our decision in E's case.

The facts

9. The parents are both French. The mother is aged 46 and the father 49. They met in New York in 1991. The mother had been studying in the United States since 1986, while the father was working there in financial services. In 1995 they began to live together and in 1997 they married. At the end of that year, they left New York for Paris as the father had obtained work there. E was born in Paris in November 1998, and J in November 2000.

10. In October 2001, the father took a job in London and in August 2002 the mother and children moved to join him. The family has lived in London ever since. The children have lived here since they were respectively three and one years old. They have gone to nursery and primary school here and are now at a good London secondary school, where they are doing exceptionally well. E took his GCSEs in July and J is now in his first GCSE year.

11. The parents separated in May 2005 and in December of that year the mother moved with the children to her present rented flat in central London. The rent is currently £72,000 p.a.

12. In December 2006, when the children were aged eight and six, a shared residence order was made by consent. The holidays are divided equally and during term time the boys have spent four or five nights a fortnight with the father and the rest with the mother. The recorder found that the children have moved comfortably between both households while regarding the mother's home as their primary home. He also found that the father has been very involved in children's lives and in their schooling and sport. The parents both have jobs that take them away and the children have moved between them as necessary.

13. The 2006 order contained a provision acknowledging that if either parent wished to live in another jurisdiction, the arrangements in the order would need to be reviewed. This provision arose at the mother's behest because of her significant connections with the United States.

14. In March 2007, a financial order was made under which the mother received a lump sum and the father was placed under a maintenance obligation of £112,000 a year to the mother and £22,000 a year for each child, plus their school fees.

15. In 2009, the mother began to work, and became successful.

16. In September 2013, the mother bought an apartment in New York off plan, putting down a deposit of $500,000. She needed to provide a balance approaching $3 million by October 2015 if she was not to lose the deposit.

17. While, as the recorder found, the mother has always had the possibility of a move to America at the back of her mind, the issue did not come to a head until November 2013. At that point, the father reduced to £48,000 p.a. the amount of maintenance he was playing to the mother, but continued to pay the children's maintenance and school fees. He then made an application in January 2014 to reduce his obligation under the 2007 order.

18. In March 2014, the mother's employment came to an end. She had been earning c.£200,000 gross a year. She is now self-employed, earning a fraction of that amount. The father says that the mother effectively made herself unemployed. The mother says that she had been unable to negotiate a higher package to compensate for the drop in her maintenance. She also said that she had told the father that she could not afford to remain in London if she did not continue to receive the maintenance as ordered. The recorder was unable to make findings on these issues within the proceedings concerning the children.

19. In September 2014, the court made an interim order reducing the mother's maintenance from £112,000 to £48,000 a year, which is what he had been paying.

20. The final hearing of the father's application to reduce maintenance was heard by HHJ O'Dwyer at Central Family Court in October and November 2015. The mother, who is represented by different leading and junior counsel by direct access, is cross-applying for increased maintenance and capitalisation. This may explain the apparently inordinate length of that hearing, which has already run for eight days. On 26 November, the judge adjourned the proceedings until 20 January 2016 so that he could receive further submissions in the light of the outcome of this appeal.

The mother's application

21. In December 2014, the mother took the boys to New York for what was ostensibly a holiday. In fact, she had set up arrangements for them to visit schools. Regrettably, she did not tell the father the true purpose of the trip, and only told the boys of her plan when they were in midair.

22. On her return in January 2015, the mother issued her application through her previous solicitors. It is in Form C1, which is appropriate when seeking a specific issue order.

The application sought permission to remove both children from the United Kingdom and relocate to New York.

23. On 24 March, at the First Hearing Dispute Resolution Appointment before a Deputy District Judge, it was recorded that the mother had applied for a specific issue order. Directions were given for a CAFCASS report and a two day final hearing in July was fixed.

24. In general terms, the mother's case was that she could not afford to continue in London, that the prospects of making her way in business are much better in New York, and that she could not afford to lose her deposit on the apartment. She contended that there was no need for the father to have reduced her maintenance, with reference to some substantial financial transactions on his part before and since he did so.

25. The father responded that the children were settled at school and should continue until the end of secondary education, when they can decide where they want to go to university. The mother's plans for the children were not well thought out. She would not have the father's present level of support when she is working. The children would not have sufficient time with him. Whatever they say, they do not really want to move to America. Their views reflect a wish to support their mother. The father also pointed to the absence of a visa for the mother or the children, or a business plan.

26. The boys' views are found in the report of Ms Demery, an experienced CAFCASS officer, and in their letters to the court. Ms Demery met them twice and was clearly very impressed by them and by their response to their predicament. She describes them as being close brothers and very much a pair. When she saw them in March, the boys were unenthusiastic or undecided about moving. However, by June E was all in favour of going, while J, who wanted to live with both parents, did not want to be left behind if the mother and E moved. The overall picture was that the children would be happy staying in London if the mother was not insisting on going to New York, but that if push came to shove, they would want to be with her. The issue had plainly caused friction between E and his father.

27. In their letters to the court, the boys both emphasised that if their mother went to New York they would want to go too. The recorder included these in full in his judgment.

28. During the hearing, the recorder heard evidence from Ms Demery and from the mother and father in turn. The mother said she would be going to New York herself, whether or not permission was granted for the children to accompany her.

29. Ms Demery advised that it would be ideal if a way could be found for the mother to remain in this country at least until each boy completed his secondary education. Her final view was that this was an enormously difficult case and that the risks of the children staying may be less than the risks of them going.

30. On the third day of the hearing, an application was made on behalf of E to become a party. This was opposed by the father and supported by the mother. It was granted. E did not wish to see the judge or come into court but wanted his position to be represented by counsel.

The judgment

31. In a long and careful judgment, the recorder methodically reviewed:

The background
The general law on relocation
The law concerning orders about children over 16
The joinder of E as a party
The mother's motivation and plans
The father's finances
The mother's trip to New York with the children
Complaints made by the mother about the father's care of the boys
The boys' involvement in parental issues
Concerns about parental attitudes and costs
The report and evidence of Ms Demery
The boys' letters
The mother's visa and housing position
The effect of each outcome on the boys' time with the parents
The family's support systems
The welfare checklist

32. The recorder found the matter to be very finely balanced and described it as one of the most difficult decisions he had had to make. In stating his conclusion, he said this:

> "I am absolutely satisfied that these children want to be with their mother. I am satisfied that they want primarily to be in London. I am satisfied that they did not appreciate that their mother was going to go at the start of the proceedings, come what may. It seems to me that they hoped and thought that they possibly can stop her from going; they could persuade her not to. It appears that this is not going to happen.
>
> I have concluded at the end of the day that it cannot be right that these children – even expressing views that they do, that they want to live with their mother – that they should go through the uncertainties of the mother's move to America… She is in my view exposing children to something which is not obviously for their benefit without real thought for the possible consequences…
>
> With enormous sadness and with enormous respect for E, who I do not think has been listened to to the extent that he wants and deserves by his father, I have come to the conclusion that, in his best interests, I have to go against his expressed wishes and that is a difficult order for me to make. With regard to J, likewise, it is a difficult order, because his expressed wishes and his number one preference would be to be with his mother. I am going to refuse the application.
>
> The basis of the refusal is that I do not think that the application is realistic in terms of housing and I do not think that it is

> realistic in terms of the visa application, as it has been presented to me; it is all too last-minute. I have overborne those wishes ... because the children will not have had knowledge of the real practical difficulties that the mother in her application has failed to overcome, and because I do not in those circumstances find that it is in the best interests of the children to take those risks with their mother."

The appeal

33. The refusal of the mother's application prevented the proposed move during the summer holiday, as a result of which the boys went back to school in September to start on their new courses. The mother's application for permission to appeal was promptly launched and duly granted.

34. E's application for permission to appeal was subsequently lodged. Permission was sought to file a statement from his solicitor, Ms Hutchinson, setting out E's up-to-date position and referring to that of J. Permission was granted, but the overall picture remains broadly the same.

35. The father also applied for fresh evidence to be admitted in the form of a statement from his solicitor concerning a particular aspect of the financial hearing. On 26 November, the judge had queried why the mother's budget was based upon her expenses in London as opposed to New York. Leading counsel for the mother stated on instructions that the mother would not go to New York without the children. This of course conflicted with the mother's case in July and as presented in this appeal, namely that she would be going regardless of the outcome of these proceedings. Although this fresh evidence might have played a pivotal role in the determination of the appeal, I should make clear that for my own part it does not. The mother's decision is a choice and not a compulsion. It is not irrevocable and it cannot be determinative.

36. The mother's grounds of appeal are these:

    1) The recorder was wrong to find that he had the power to make an order in the case of a child over 16 years of age.

    2) Insufficient weight was given to the children's wishes and feelings.

    3) Insufficient consideration was given to the consequences of refusal.

    4) In contrast, excessive scrutiny was given to her practical plans.

37. An additional ground of appeal advanced on behalf of E, amalgamating the third and fourth grounds above, is that the recorder did not carry out a global analysis of the competing options.

38. The arguments were concisely put by Ms Mills for the mother and Ms Murray for the father.

39. Ms Mills, who first came to represent the mother three days before the July hearing, submits that the recorder misdirected himself on the law relating to children over 16

and that this affected his overall balancing exercise. She argues that conditional permission should have been given, in the manner of *Re M (Leave to Remove from the Jurisdiction)* [1999] 2 FLR 334. The father himself had not made much of an issue of the state of the mother's practical plans: if the recorder considered these to be a barrier, he should have acceded to her request to be allowed a few weeks to resolve issues such as her visa.

40. Ms Mills accepts that the court had jurisdiction to deal with E's case, but points to s.9(6) and 9(7) of the Children Act to show that the courts should be slow to regulate the affairs of a child of his age. She contends that the application made by the mother was one for a specific issue order, whether it is treated as being launched under s.8 or s.13.

41. In relation to the overall situation, Ms Mills argues that the recorder would have reached a different conclusion if he had given proper weight to the boys' wishes and feelings, the mother's obvious resourcefulness, her connections with New York and her need to be there, and the likelihood that it will be a formality for her to obtain a work visa. Any uncertainties about her situation in New York have to be weighed against the difficulties that she faces in London. Scrutinising the mother's plans without subjecting the father's position to the same treatment is a linear approach, particularly when the recorder was critical of the father in a number of respects.

42. In response, Ms Murray observes that it is unusual for a parent in a relocation case to take the position that she was going to go anyway. She says that the recorder gave great weight to the children's views, but rightly noted at several points that their real wish is to have both parents. He also rightly found that the mother's plans were not well thought out, even though she had seven months in which to prepare. The recorder directed himself correctly in law, addressed matters thoroughly with reference to the welfare checklist, and made sound findings. At a number of points he compared the relative consequences of granting and refusing the application before reaching his conclusion.

43. Having heard argument, we indicated that we were minded to discharge all orders in relation to E, and enquired whether this might enable the parents to reach agreement regarding J if given time, with the appeal being adjourned. The parents considered this and indicated that they did not oppose the proposed course in relation to E. They could not, however, reach a sufficient degree of agreement about J to justify the adjournment of the appeal with all the attendant disadvantages.

44. The grounds of appeal essentially fall into two parts: the court's powers in relation to older children, and the challenge to the welfare assessment. I deal with these in turn.

The court's powers in relation to older children

45. A relocation application in relation to children of this age must be unusual and in my view the provisions of the Children Act, having undergone amendment, do not sit easily with such an application. I therefore start with some basic propositions from the legislation.

46. A child is a person under 18: s.105(1).

47. When a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all: s.1(5).

48. In April 2014, the Children and Families Act 2014 replaced residence and contact orders with child arrangements orders, so that s.8 now relevantly reads:

> "8 Child arrangements orders and other orders with respect to children
>
> (1) In this Act –
>
> "child arrangements order" means an order regulating arrangements relating to any of the following –
>
> (a) with whom a child is to live, spend time or otherwise have contact, and
>
> (b) when a child is to live, spend time or otherwise have contact with any person;
>
> …
>
> "a prohibited steps order" means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court;
>
> … and
>
> "a specific issue order" means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.
>
> (2) In this Act "a section 8 order" means any of the orders mentioned in subsection (1) and any order varying or discharging such an order."

49. S.8 orders will in appropriate cases be in expressed in mandatory terms vis-à-vis parents, but from the standpoint of the child, they are not mandatory. They are based on the premise that younger children will fall in with adult rules. However, the law acknowledges the common experience that older children can in the end vote with their feet.

50. S.91, which was amended in September 2009 by the Children and Young Persons Act 2008, concerns the duration of existing orders:

> "91 Effect and duration of orders etc
>
> …

> (10) A section 8 order shall, if it would otherwise still be in force, cease to have effect when the child reaches the age of sixteen, unless it is to have effect beyond that age by virtue of section 9(6).
>
> (10A) Subsection (10) does not apply to provision in a child arrangements order which regulates arrangements relating to –
>
> (a) with whom a child is to live, or
>
> (b) when a child is to live with any person.
>
> (11) Where a section 8 order has effect with respect to a child who has reached the age of sixteen, it shall, if it would otherwise still be in force, cease to have effect when he reaches the age of eighteen."

51. Referring to s.91(10), the Explanatory Note to the 2008 Act reads:

> "At present, a residence order ceases to have effect when the child reaches the age of 16, unless the court is satisfied that the circumstances are exceptional e.g. the child has a learning disability ..."

52. S.9, which was also amended in 2009, concerns the duration of existing orders:

> "9 Restrictions on making section 8 orders
>
> …
>
> (6) No court shall make a section 8 order which is to have effect for a period which will end after the child has reached the age of sixteen unless it is satisfied that the circumstances of the case are exceptional.
>
> (6A) Subsection (6) does not apply to a child arrangements order to which subsection (6B) applies.
>
> (6B) This subsection applies to a child arrangements order if the arrangements regulated by the order relate only to either or both of the following –
>
> (a) with whom the child concerned is to live, and
>
> (b) when the child is to live with any person.
>
> (7) No court shall make any section 8 order, other than one varying or discharging such an order, with respect to a child who has reached the age of sixteen unless it is satisfied that the circumstances of the case are exceptional."

53. Referring to these amendments, the Explanatory Note reads:

> "The intention is to provide enhanced security for the child where the holder of a residence order was not the child's parent is caring for the child on a long-term basis."

The Act itself, however, is not drafted in this limited way.

54. Finally, s.13 imposes particular restrictions in respect of change of surname and removal from the United Kingdom when a child arrangements order is in force:

> "13 Change of child's name or removal from jurisdiction
>
> (1) Where a child arrangements order to which subsection (4) applies is in force with respect to a child, no person may –
>
> (a) cause the child to be known by a new surname; or
>
> (b) remove him from the United Kingdom;
>
> without either the written consent of every person who has parental responsibility for the child or the leave of the court.
>
> (2) Subsection (1)(b) does not prevent the removal of a child, for a period of less than one month, by a person named in the child arrangements order as a person with whom the child is to live.
>
> (3) In making a child arrangements order to which subsection (4) applies, the court may grant the leave required by subsection (1)(b), either generally or for specified purposes.
>
> (4) This subsection applies to a child arrangements order if the arrangements regulated by the order consist of, or include, arrangements which relate to either or both of the following –
>
> (a) with whom the child concerned is to live, and
>
> (b) when the child is to live with any person."

55. From the above, it can clearly be seen that the legislation aims to prevent the making of specific issue orders in relation to children over 16, and also that Parliament considered that change of surname and removal from the United Kingdom were issues requiring separate attention.

56. Turning to the present case, there was a s.8 order in December 2006. It was then described as a shared residence order, now as a child arrangements order. At the time it was made, it would as a matter of law have ceased to have effect as each child reaches the age of 16: s.91(10). However, in September 2009 its duration was extended to 18 by virtue of s.91(10)(A).

57. Accordingly, when the matter came before the court below, the 2006 order remained in effect in relation to both boys.

58. The mother's application sought orders in respect of both children. However, at the trial and on appeal she contended that no order could be made in relation to E.

59. There is, regrettably, some lack of clarity about how relocation applications are to be classified. The debate, which is of long standing, is whether such an application is to be made under s.13 itself or by way of an application for a specific issue order under s.8. There are in my view good arguments for the latter: see the observations of Hale J in *re M* (above) at 340-341 and the article by Dr Robert George in Family Law Journal [2008] Vol 38 p.1121. However, this court has on at least three occasions proceeded on the basis that an application to relax the s.13 prohibition where there is an existing order is not an application under s.8 for a specific issue order: *Re B (Change of Surname)* [1996] 1 FLR 791; *Payne v Payne* [2001] 1 FLR 1052; *Re F (A Child)(International Relocation Cases)* [2015] EWCA Civ 882.

60. It may seem anomalous that the statutory framework for a relocation application will differ depending upon whether there is a s.8 order in effect. In the above appeal cases, judges been enjoined to apply the welfare checklist even when it is not strictly engaged. In the present case, the difference is potentially sharper because the bar on making s.8 orders for children over 16 will only apply if the application is for a specific issue order: it does not apply if the application is considered to be made under s.13.

61. How did the recorder deal with this issue? He accepted Ms Murray's submission that he could make an order in relation to E because he could *"regard any new living arrangements as being a variation of the existing shared residence order"*. In doing so, he rejected M's submission that he would be making a new order which, he accepted, would be barred by s.9(7). He found that the circumstances were not exceptional and it is common ground that he was right to do so. Without being prescriptive, I would interpret the main intention behind the proviso as being to allow an order to be made where a child has qualities that require additional protection, not to override the views of a mature child of 16 or 17.

62. I have set out the arguments on this issue because they formed part of the recorder's decision and the argument in this court. However, drawing matters together, it seems to me that whether a relocation application is regarded as being made under s.13 or s.8, the general intention of the Act (prominently seen in s.9) is to prevent the imposition of inappropriate requirements on older children.

63. But I would go beyond that and find that the issue in this case is not to be determined by reference to s.9, but instead by reference to the wider principle expressed in s.1(5). In my view it is not better for the court to make an order in relation to E than to make no order. In fact, it would be positively better for the court to make no order about him. The simple fact is that E is too old to be directed by the court in a matter of this kind. Although the existing child arrangements order, buttressed by the effect of s.13 is not addressed to him, it directly affects him as the subject of the proceedings. This is not to ignore the common interests of this strong pair of brothers, but to recognise the proper limits on the court's exercise of its powers in the case of a mature and intelligent older child who is now 17 years of age.

64. I would therefore conclude that the learned recorder should not have made or left in force any order that affected E, who was then aged 16 years and 8 months, and I

would allow the appeal to that extent only. In that none of the parties raised the effect of the 'no order' principle in the court below or in this court, the recorder cannot be criticised for dealing with the arguments that were presented to him. I would nonetheless discharge the 2006 order insofar as it relates to E, with the consequence that the prohibition under s.13 falls away.

65. Noting that J is now less than a year short of his 16th birthday, I would also amend the 2006 order to provide that it will come to an end when he attains that age. There is no reason to think that a longer order would be any more appropriate in his case than in E's. However, the order will remain in effect until then so that there is clarity for J about where he will be spending the remainder of this school year at least.

The challenge to the welfare assessment

66. In the first place, the recorder is charged with taking a linear approach, rather than looking holistically at the issues before him. As to this, the observations of McFarlane LJ in *Re F* (above) are in point: *"... a 'global, holistic evaluation' is no more than shorthand for the overall, comprehensive analysis of a child's welfare seen as a whole, having regard in particular to the circumstances set out in the relevant welfare checklist ..."* He contrasted that with a 'linear' approach that only considers individual components in isolation.

67. In my view the recorder cannot be charged with failing to take account of all the components of this somewhat unusual situation. In favour of relocation, he considered the mother's stated need to move for financial and career reasons, the likely availability of adequate housing and schooling, and the boys' decision to throw in their lot with her. Against relocation, he weighed the boys' settled existence, the presence of both parents here, and the consequences of granting or refusing the application. He did look critically at the loose ends in the mother's plans, as he was required to do. She was proposing a fundamental change in the family arrangements and it was incumbent upon her to deal with these issues satisfactorily.

68. During this appeal, it has been said on E's behalf that he did not feel listened to by the court below. Of course, E and his mother will have been disappointed by the refusal of the mother's application, but it will be apparent to anyone reading the recorder's judgment that he listened to the views of both boys with the utmost care and weighed them alongside the other factors as he was obliged to do. I hope that E will feel able to acknowledge this.

69. It is to my mind of particular importance that the underlying wishes and feelings of both boys would have been to remain in London had their mother not developed such a determined position. Both Ms Demery and the recorder were clearly concerned about the effect on J of being drawn into a move that he would not have wished upon himself. The recorder's finding that there were real practical difficulties of which the boys were not aware is also significant.

70. I therefore conclude that there is nothing in the criticisms that are levelled at the recorder's approach to the balancing exercise or the manner in which he conducted it, and I would dismiss this ground of appeal.

71. The consequence is that the 2006 order will continue in J's case until his 16th birthday unless the parents agree on other arrangements, having no doubt consulted him.

72. The proceedings have taken a heavy toll on the children, who emerge with great credit. It must be hard for them to live amidst such conflict. The parents must now bring an end to a situation where their children are being asked to make up for their own inability to communicate effectively. The hearing of this appeal took place on the second last day of the school Christmas term, meaning that the boys did not until that moment know whether or not they would be saying goodbye to their school and their friends. They deserve better, and it is to be hoped that the end of these proceedings and the imminent resolution of the financial case will bring some respite, or even something more enduring.

Lord Justice Lindblom:

73. I agree.

Lord Justice Tomlinson:

74. I also agree.