Neutral Citation: [2017] NICA 71 | *Ref:* **GIL10417**

Judgment: approved by the Court for handing down | *Delivered:* **7/11/2017**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

BETWEEN:

FERGUS

Appellant;

and

MARCAIL

Respondent

Before: MORGAN LCJ, GILLEN LJ and DEENY LJ

GILLEN LJ (giving the judgment of the court)

ANONYMISATION

[1] It is appropriate that we follow the nomenclature adopted in the High Court which ensured that the parties to this case were not identified by name. Thus the appellant is identified as Fergus, and the respondent as Marcail and the child, the subject of these proceedings, as Elliot. This will ensure that nothing would or should be reported which would identify any of the parties to this appeal or in particular the child who is the subject of these proceedings.

The Appeal

[2] This is an appeal from an order made by McBride J on 23 February 2017 to the following effect:

- That a Residence Order dated 1 June 2010 made by Stephens J shall be extended until such time as the child Elliot, who is the subject of this appeal, reaches his eighteenth birthday.

- The appellant shall have contact with the child in terms of the contact agreement scheduled thereto.

[3] The appeal is solely in relation to the Residence Order. We observed in the course of the hearing that the appellant sought to make his consent to the contact order conditional upon the Residence Order not being extended. However the Notice of Appeal contained no appeal against the contact order and hence we have not taken that fresh matter into account. However we have included the contact order in an appendix to this judgment.

[4] Both the appellant and the respondent appeared in person. Ms Murphy of counsel appeared on behalf of the child instructed by the Official Solicitor.

Grounds of Appeal

[5] The appellant, who is a personal litigant, has set out five grounds of appeal. Essentially however there are two aspects of his appeal namely:

(i) **Procedural unfairness.**

The appellant contends as follows:

- He was provided neither with an opportunity to cross-examine the respondent regarding her application to extend the residence order nor the social worker and Official Solicitor who had prepared reports on the issue notwithstanding the court order was made allegedly on the ground of these reports.

- The principle of adversarial justice was therefore impugned.

- His inability to cross-examine the professionals who had spoken to Elliot deprived him of the opportunity of illustrating that the prolongation of the Residence Order had not been fully explained to Elliot in terms of his loss of autonomy for the next two years - for example the appellant asserted the boy would be unable to live with a female partner if he wished - and that legislation required exceptionality to justify this.

- His rights under Article 6 of the European Convention of Human Rights and Fundamental Freedoms ("the Convention") had been violated.

(ii) Exceptionality

The appellant contends as follows.

[6] The relevant legislation dictated that a Residence Order should only be extended until the eighteenth birthday of the subject child in exceptional circumstances. There were no such exceptional circumstances. In particular:

- The learned trial judge relied on the Contact Order to illustrate that the appellant had recognised the exceptional nature of the case in circumstances where he was unaware that this was part of the agreement.

- Unusual circumstances must be distinguished from exceptional circumstances as any case may have some unique individual circumstances.

- The circumstances of the Contact Order and the Residence Order were different and should not be equated in terms of exceptionality.

Background

[7] There are three children of the respondent and appellant namely the subject child Elliot who is now 16 years of age, X who is now in or about 20 years of age and Y who is now in or about 21 years of age.

[8] Stephens J, who dealt with this matter in 2010 (see paragraphs [15] & [21] below) further found that Fergus had negatively influenced all three children against their mother and at paragraph 122 he found that he had "disrupted contacts" and used contacts between and the children to undermine their placements.

[9] These findings echo the reports before this court from the designated social worker involved with this family from the relevant Trust.

[10] In this context it is worth citing an extract from the designated social worker's report of 27 April 2016 which recorded as follows:

> "This is a particularly complex family situation that has been reflected in the previous level of court involvement and the personnel associated with this case. A number of judgments have delivered in respect of Elliot and his siblings in previous public law proceedings. …
>
> Elliot previously lived with his mother and two siblings X and Y in Belfast from 2005 until 2009. The respondent moved out of the family home in February 2009 citing ongoing emotional, financial and psychological pressurisation by the appellant as her main reason for

moving. Elliot to have (sic) a good relationship with his mother at this stage.

In February 2009, Elliot, X and Y's relationship with their mother significantly broke down with all children refusing to see their mother.

The decisions in respect of the children's residence and contact with their mother were a matter before the Family Proceedings Court from February 2009 until September 2009.

In January 2010 the court delivered its judgment in relation to a fact-finding hearing and found that the threshold criteria had been met in the following areas:

- The appellant is a highly intelligent, domineering and manipulative individual who has set out to and has destroyed the children's relationship with their mother engendering, particularly in X and Y, hatred of her or similar emotions.

- All three children are so heavily influenced and controlled by the appellant that they are almost mesmerised by him. Through that control he has manipulated all three children so that they did not attend school.

- As a result of the strong emotions that X and Y feel towards the appellant, they are beyond her control."

[11] At that time the court directed a transfer of Elliot's residence to his mother's care in 2009 and after initial resistance he settled quickly. Court proceedings concluded in 2010 with X and Y refusing to be placed in their mother's care and subsequently placed in residential and foster care. It was at this time that a Supervision Order was granted in respect of Elliot. Furthermore a No Contact Order and Non-Molestation Order was put in place in order to safeguard Elliot from his father's influence.

[12] The Trust had contended that this was primarily a case of implacable hostility from the appellant towards the respondent and that this implacable hostility impacted on all of the children's emotional and educational well-being as they had been drawn into the wider parental discord that exists between the parents.

[13] The social worker's report goes on to declare that since Elliot moved into his mother's care in 2009 he continues to thrive.

[14] The chronological sequence of events in this case have been as follows. On 5 October 2009 the child was made the subject of an Interim Care Order when he was removed from the appellant's care (his father) and placed with the respondent (his mother). He has remained in her care until the present date.

[15] On 1 June 2010, upon the application of the relevant Trust, a series of orders under Article 8 of the Children (Northern Ireland) Order 1995 ("the 1995 Order") were made by Stephens J including the following

- a Supervision Order in respect of Elliot for a period of 12 months which expired on 1 June 2011.

- A Residence Order that the child should reside with the respondent his mother.

- A Contact Order to the effect that there should be no contact between the child and his father.

- A Prohibited Steps Order preventing the removal of the child from Northern Ireland without leave of the court was made.

[16] In November 2010 the appellant's appeals against these orders were dismissed by the Northern Ireland Court of Appeal ("NICA").

[17] On 6 June 2011 an order pursuant to Article 179(14) of the 1995 Order was made against the appellant preventing him making any application for contact, residence orders or variation of the Care, Supervision or Residence orders.

[18] On 24 November 2011 an appeal against this order was dismissed by the NICA.

[19] Commencing on 21 January 2010 there has been a series of non molestation orders made against the appellant in respect of the child accompanied by unsuccessful appeals culminating on 15 April 2013 when a Non-Molestation Order pursuant to Article 20 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 was made prohibiting the appellant from "molesting, harassing or intimidating" the respondent or the child. That order also prohibited the appellant from entering specified areas at specified times. It too was unsuccessfully appealed to the NICA.

[20] The trigger for the present proceedings was the appellant's application in January 2016 for a Contact Order pursuant to Article 8 of the 1995 Order. The Official Solicitor represented the child in the proceedings. In the course of the

proceedings the respondent sought an order extending the existing Residence Order until the child was aged 18.

[21] It is worthy of note that, as McBride J recorded at paragraph [14] of her judgment, when making the Residence Order in favour of the respondent and the No Contact Order in 2010, Stephens J had said:

> "My assessment of Fergus is that he is a domineering individual both physically and mentally. Physically through his size and presence … mentally through his intelligence, his manipulation, his use of the presence of uninterrupted speech ... I consider that Fergus' overriding objectives are to exclude Marcail from the lives of all three children and to have them in his sole care".

Relevant Legislation

[22] Article 9(6) of the 1995 Order.

> "No court shall make any Article 8 Order which is to have effect for a period which will end after the child had reached the age of 16 unless it is satisfied that the circumstances of the case are exceptional."

[23] Article 3 of the 1995 Order.

> (1) Where a court determines any question with respect to:
>
> (a) the upbringing of a child …. the child's welfare shall be the court's paramount consideration.
>
> ….
>
> (3) In the circumstances mentioned in paragraph (4) a court shall have regard in particular to –
>
> (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
>
> (b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant;

(g) the range of powers available to the court under this Order in the proceedings in question.

(4) The circumstances are that –

(a) the court is considering whether to make, vary or discharge an Article 8 Order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or

(aa) the court is considering whether to make an order under Article 7; or

(b) the court is considering whether to make, vary or discharge an order under part V.

(5) Where a court is considering whether or not to make one or more orders under this order 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."

The Role of an Appellate Court

[24] Ms Murphy correctly drew our attention to the now well-trodden comments of Lord Wilson in *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647 in the context of a family law appeal where he said at page 651:

"The jurisdiction in such cases is one of great difficulty, as every judge who has had to exercise it must be aware. The main reason is that in most of these cases there is no

> right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory. It is comparatively seldom that the Court of Appeal, even if it would itself have preferred a different answer, can say that the judge's decision was wrong, and unless it can say so, it will leave its decision undisturbed." (cited with approval in *Re B* [2013] 1 WLR 1911).

Discussion

Procedural Unfairness

[25] The appellant chose not to present a skeleton argument in this case but rather relied on the terms of his Notice of Appeal. He dilated somewhat upon this in the course of his oral submissions.

[26] The English Court of Appeal in *Re B (Minors) (Contact)* 1994 2 FLR 1 has described a "spectrum of procedure" for Family cases ranging from a hearing on "minimal evidence" to a "detailed investigation on oral evidence which may be prolonged".

[27] How a case is to be determined on this "spectrum of procedure" is a matter for the court, a view echoed in such leading textbooks as Hershman McFarlane at C [1167].

[28] It has to be recognised that in some instances the dynamics and emotions of family cases make the full gamut of adversarial litigation inappropriate. Such a process can increase tensions between the parties, tensions that do not go away after the court process is completed. A court in such circumstances must exercise its discretion and recognise that it is unwise to "impose a rigid formula upon the conduct of proceedings" in such cases (see *W v Ealing London Borough Council* [1993] 2 FLR 788 at 794.

[29] The width of the discretion to be exercised by a judge *vis-a-vis* the procedure to be adopted has been echoed in case after case in a Family Division. (See *Re B (Minors) (Contact)* 1994 2 FLR 1, In *Re C (Contact: Conduct of Hearings)* [2006] 2 FLR 289, *Munby LJ* in *Re C (Family Proceedings: Case Management)* [2013] 1 FLR 1089 at paragraph 14 and *Re H (A Child (Contact Order: Relaxation of Restrictions prior to full hearing*) [2013] EWCA Civ 72 at paragraph [53].

[30] In *Re C (Contact: Conduct of Hearings)* [2006] 2 FLR 289 at paragraphs 30-33 Wilson LJ cited with approval the dicta of Butler-Sloss LJ in *Re B* as follows:

> "In my view a judge in family cases has a much broader discretion … to conduct the case as is most appropriate for the issues involved and the evidence available … There is a spectrum of procedure for family cases from the ex parte application on minimal evidence to the full and detailed investigations on oral evidence which may be prolonged. Where on that spectrum a judge decides a particular application should be placed as a matter for his discretion. Applications for Residence Orders or for committal to the care of a local authority or revocation of a Care Order are likely to be decided on full oral evidence but not invariably."

[31] In *Re B* at paragraph 6(a)-(d) Butler-Sloss LJ indicated that, in deciding whether to conduct a full investigation with oral evidence, a judge should consider whether:

> "(a) there was already sufficient evidence to make the decision;
>
> (b) the proposed further evidence was likely to affect the outcome of the proceedings;
>
> (c) the opportunity to cross-examine witnesses was likely to affect the outcome;
>
> (d) a full investigation, including any consequential delay, would be injurious to the welfare of the child;
>
> (e) the applicant for a full trial had real prospects of success; and
>
> (f) the justice of the case required a full investigation."

[32] In short these are not ordinary civil proceedings. Family proceedings present a situation where it is fundamental that judges have an inquisitorial role, their duty being to further the welfare of the children which, by statute, is paramount. Hence judges exercising the family jurisdiction have a much broader discretion than they would have in the civil jurisdiction to determine the way in which an application is being pursued.

[33] Thus there are cases in which the judge, bearing the interests of the child at the forefront of the judicial mind and where litigation has perhaps been on-going for

a very long time, will feel compelled to act on rather less evidence and argument or rather more urgently than otherwise would be the situation.

[34] The approach of the European Court of Human Rights reflects a similar latitude in such cases dealing with Article 6 of the European Convention on Human Rights and Fundamental Freedoms. Everyone is entitled to a fair and public hearing in the determination of his civil rights and obligations or of any criminal charge against him, but the requirements inherent in the concept of "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases (see *Dombo, Veheer VV v Netherlands* [1993] ECHR 14448/88 at [32]).

[35] Equally however, courts must be wary of taking an over robust attitude in the particular circumstances of any given case. The presumption still should be that if evidence is filed which is controversial, the party who challenges that evidence should have the right to cross-examine the witness. If no evidence is called, the court is unlikely to be able to decide issues of fact "on paper".

[36] Thus for example in *Re W (Cross-examination)* [2010] EWCA Civ. 1449 where the evidence of the children's guardian went to the core issue of the clear debate between the competing views of the guardian and the father , the court determined that written submissions would rarely be a substitute for oral evidence and challenge in cross-examination. At paragraph [25] Black LJ said:

> "It is very common for the parties' respective cases to be set out in writing before the hearing and even argued between them in more formal areas of the law. This is of course the purpose of pleadings. This process is rarely, however, a substitute for the giving of oral evidence, which is tested in cross-examination ..."

[37] It is trite law that, in the absence of agreement between the parties, until the maker of a statement attests to or affirms the truth of his statement, it is not oral evidence at all.

[38] Hence the status of a document (statement or report) which has not been affirmed or attested is in a hybrid class of evidence capable of course of being admitted by the court and standing as a form of documentary evidence if the parties agree or there is some other legal basis for admitting it. [See *S v Merton London Borough* [1994] 1 FCR 186].

Applying that principle to the instant case

[39] It was the appellant's contention that the consequences of the prolongation of the Residence Order was not fully explained to Elliott in terms of his loss of freedom and autonomy for the next two years and that the legislation required exceptionality in such circumstances. To demonstrate that, the appellant contended that he was anxious to have cross-examined the professionals who had spoken to the child and was deprived of the opportunity to do so despite what he alleges was his clear demonstration of a wish to do so.

[40] This case had been divided into two parts. On day one and part of day two, under the spur of the judge's direction, the parties had engaged in an attempt to achieve an agreement on the issue of contact. We are satisfied that that was agreed albeit the appellant did assert that the contact arrangements were only agreed by him on the basis that the Residence Order would not be prolonged. However he has not appealed that Contact Order since his Notice of Appeal is confined to an appeal against the prolongation of the Residence Order until Elliott was 18. It is to be noted that the Contact Order was extended until Elliott was 18 and, as the judge pointed out in the course of her judgment, was extended on the basis that there had been exceptional circumstances.

[41] The learned trial judge then turned to the question of the extension of the Residence Order. It was agreed between the parties that the respondent should initially set out her case followed by a response from the appellant. The appellant had already given evidence on the question of contact but he had not been cross-examined.

[42] The hearing in respect of the Residence Order proceeded on the basis of submissions by each of the parties without any evidence being called.

[43] A close perusal of the various extracts from the transcript of the hearing relied upon by the appellant on the one hand and by Ms Murphy on the behalf of the Official Solicitor on the other lent no certainty to this court as to whether or not the appellant had requested that the mother and the Official Solicitor Ms Coll who had reported on the issue of the child's understanding needed to be called to give evidence. He certainly did not ask that the social worker Ms Pearson who had reported other meetings with the child should be called and indeed consented to her being released.

[44] However we are satisfied that the appellant did make it a central plank in his case that the child did not understand the concept of prolongation of the Residence Order and a close scrutiny of the reports of the designated social worker Ms Pearson and the Official Solicitor Ms Coll once again does not lend any certainty to that issue.

[45] Clearly the learned trial judge purported to take into account the wishes and feelings of the child as set out in the reports of the social worker and the Official Solicitor.

[46] At paragraph [27] of her judgment she said:

> "Elliot is now aged 15 years. He is described as an intelligent young man who gives reflective and well-reasoned responses. He told the Official Solicitor that he saw merit in the extension of the Residence Order and was mindful of the protection that would be afforded by extending the Order until he was an adult. This is in line with the theme which runs through the Social Worker and Official Solicitor's reports that the timeframe within which Elliot wishes to speak directly to his father is when he has finished his exams, left school and is an adult. It is therefore Elliot's clearly expressed wish to have the Residence Order extended until his 18th birthday."

[47] In our view, in light of the controversy that clearly existed between the Official Solicitor and the father as to whether the proper explanation had been given to the child as to the meaning and consequences of an extension of the Residence Order – which was potentially of importance to the outcome of the case –the presence of the reports were not a substitute for the giving of oral evidence tested in cross-examination.

[48] There were two ways in which the child's understanding of the concept could have been tested. First, by cross-examination of the Official Solicitor and/or social worker to elicit what briefing or explanation had been given to the boy as to the meaning of the concept of extension of the Residence Order. That was not done.

[49] The second way of eliciting this matter would have been, as suggested by the appellant in paragraph [5] of his statement of 18 May 2016 which was before the court that there should be "conversation between [Elliott] and the judge … as [Elliott's] motivation is unclear and could be revealed during this conversation".

[50] The question of whether or not there has been procedural unfairness must be judged by looking at the process as a whole. We are satisfied that in this instance the question of the child's understanding could have been determined in one of two ways. First, by calling the Official Solicitor to give oral evidence in light of her report. Secondly, by the judge interviewing the child.

[51] So far as the latter is concerned, a past reluctance to see children in private on the assumption that it was not the right thing to do has now undergone material change. Increasingly in this jurisdiction and elsewhere there are now circumstances

where children of appropriate age are interviewed by the judge, principally in private law cases.

[52] The voice of the child in proceedings under the 1995 Order is always extremely important.

[53] The starting point is reflected in Article 12 of the United Nations Convention on the Rights of the Child which records as follows:

> "1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose the child shall in particular be afforded the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

[54] We note with approval that in the instant case the voice of this child, now being 16 years of age, had been accorded a real measure of expression and weight. Ms Coll the Official Solicitor records in her report of 27 September 2016 as follows:

> "Given [Elliot's] age I was keen to ensure that he understood fully the reasons why he was meeting with me and my role in the proceedings and I am confident that he did fully understand the reasons for his meeting with me. I acknowledge that he has already spoken to the social worker and that he has already provided views but that the judge wished to ensure that any views he holds are truly his own independently his mother. I am again confident that Elliot understood and he was a willing and co-operative participant in the meeting throughout. I assured [Elliot] that he was being given an opportunity by the judge to have his views and wishes known before decisions would be taken on his behalf. I assured him also that given his age it was an entirely appropriate step and that it was important that he should grasp the opportunity to speak freely and forthrightly. I acknowledge that sometimes young people feel some reticence about expressing their views candidly for fear of causing upset or anger amongst their parents. However should he feel this way we could discuss how this

> information could be passed to the judge confidentially. [Elliot] indicated his understanding but did not require availing of this confidentiality provision.
>
> I discussed with [Elliot] whether he felt that he required or would like to have separate representation in the proceedings or if he would like to speak directly to the judge. [Elliot] clearly declined both and expressed that he was content for me to pass on his views in my report."

[55] The views of Elliot were articulated both to the designated social worker and the Official Solicitor. He is an extremely intelligent young man engaged with GCSE/AS and A levels in the ensuing months and years. The following points emerged from his discussions with these two professionals:

- He does plan to see his father in the future but not until he has completed his exams and finished school.

- He knows that his father has a very forceful personality with strongly held views and that, for example, he is aware that his not wanting to live with him frustrated his father.

- He believes that at this point in his life he may not be well enough armed to deal with or challenge his father's behaviour or views.

- He believes if this was to arise it may affect his confidence and ability to concentrate on his own endeavours.

- He believes he would be better placed once this very important foundation stage in his life is over and he is older and better equipped to deal with his father's personality.

- Whilst he is not afraid of his father per se, he does have a fear and anxiety about dealing with "a difficult and forceful" dad. He noted that his father is not a man who likes to have his opinions and views challenged and that this may result in clashes which he would be uncomfortable in having to deal with at this important stage in his life. He wishes to apply himself to his studies to achieve the best possible outcome in his exams over the next few years.

[56] Elliot was willing to have indirect email contact with his father which in itself was a significant change from the prior arrangements. It is worthy of note that the contact arrangements with which the appellant agreed, provide only for indirect contact through the medium of email correspondence.

[57] It is noteworthy that the Northern Ireland Guardian Ad Litem Agency ("NIGALA") is currently engaged in developing resources for practitioners to engage with children and young people designed to address wishes and feelings, best interests, resilience factors as well as providing options and opportunities for engaged with the court process, whether for example, this be by writing to a judge or visiting the judge.

[58] Equally we are acutely aware of the attendant dangers of raised expectations or misunderstanding of the role of the judge by the child, the Article 6 rights of the European Convention on Human Rights of the other parties in the case, and the child feeling betrayed even if the gist of what they have said is revealed to the parents. Nonetheless the reluctance to meet with children has been increasingly questioned. Growing awareness of the UNCRC, the concepts of children's rights generally and the advent of the Human Rights Act 1998 have all acted as a spur in this direction.

[59] In England in April 2010, the Family Justice Council issued guidelines for judges meeting children who are subject to family proceedings. The purpose was "to encourage judges to enable children to feel more involved when connected with proceedings in which important decisions are made in their lives and to give them an opportunity to satisfy themselves that the judges understood their wishes and feelings and to understand the nature of the judge's task". In our view the *normalisation* of the process – but not necessarily as a matter of routine – is to be recommended in appropriate cases so long as there is clarity about what the purpose is for the meeting of the child. It would not be helpful if the child wanted it for one purpose (to tell the judge their views) and the court offered it for a different one (to tell the child about the court). Judges must retain the flexibility to decide whether it is appropriate that the normalisation of the process would serve as an impetus to the notion that it should be carefully considered throughout the hearing and certainly at case management stages in most instances.

[60] We emphasise however that the concept of normalisation does not mean it must normally happen in every instance. It simply means it will be normal to consider the possibility in every case. It is entirely within the discretion of the judge to determine if a meeting would be profitable.

[61] Accordingly in the instant case we invited the views of the appellant, respondent and Ms Murphy on behalf of the child as to the benefit of meeting the child in this instance. The appellant was anxious for us to do so and the other parties did not raise any objection.

[62] Accordingly one member of the court met with this child in order to explore with him his understanding of the concept of the extension of a Residence Order in the context where a contact order had been agreed.

[63] In setting up arrangements for that meeting, we recognise that different measures may be adopted depending upon the circumstances. However we set out the following guidelines.

- The meeting must be on a voluntary basis and the child's agreement should be obtained. Forcing the child to meet the judge would be potentially counter-productive.

- The meeting should be in the judge's chambers.

- It is beneficial if the child is made familiar with the court building before the day that he attends the meeting with the judge.

- The meeting should be as informal as possible and it may be useful to have in attendance an independent person. In the present case, we consider that the social worker, was the appropriate person to attend with the child.

- The purpose of the meeting was fully explained to the child so he was under no illusion as to why he was there.

- It was explained to the child at the outset that the gist of the meeting would be explained in court to the parents and that whilst his views were very important they might not be translated into a finding of which he approved.

[64] We have appended to this judgment a note of that meeting. As a result the following conclusions were reached.

- This was a highly intelligent young man.

- He fully understood the meaning of a residence order.

- He readily grasped that the meaning of exceptionality involved in the extension of a Residence Order.

- He understood that the contact order could potentially give him protection from meeting directly with his father unless he wished to do so.

- This gifted, articulate and reflective young man had no difficulty grasping the concepts in this case. We were satisfied that his fears were genuine on his part and not as a result of any coaching or suggestion by any other party

[65] In the wake of this meeting we were certain that the learned trial judge had correctly interpreted the wishes and feelings of the child and had properly taken those into account.

[66] In these circumstances we were satisfied that there was no substance in the appellant's submission that procedural unfairness had deprived him of eliciting facts which might have been favourable to his case.

The circumstances of the case are exceptional

[67] The concept of "Exceptional circumstances" does not find a definition in the legislation itself.

[68] However it is a concept that has made regular appearances in the legislative fabric. A helpful general observation about the construction of "exceptional" is found in the context of section 2 of the Crime (Sentences)Act 1997 (exceptional circumstances which justify not imposing a sentence of life imprisonment)

[69] Lord Bingham of Cornhill CJ said in his judgment dealing with this section in *R v Kelly (Edward)* [2000] Q.B. 198 at 208:

> "We must construe "exceptional as an ordinary, familiar English adjective and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be an exceptional circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered".

Cited with approval by Lord Woolf CJ in *R v Offen* [2001]1 WLR 253 at 269.

[70] We commence our deliberations against the background of the welfare checklist set out in Article 3 of the 1995 Order.

1. We have taken the opportunity to ascertain the wishes and feelings of the child as set out in the appendix to this judgment. We are satisfied that the position had been correctly captured by the Official solicitor, the social worker and, importantly, the learned trial judge.

2. His emotional and, of great importance to this boy, his educational needs desperately require a stress free and unpressurised period over the next two years as he moves towards his A levels and inevitable third level education.

3. It was clear to us that any change in his circumstance whereby he felt that his current residence with his mother could be less secure, much less imperilled, over the next two years than is now the position is likely have a major detrimental effect on him and his prospects for exam success.

4. He is a sixteen years old boy on the cusp of manhood who is the product of a clearly troubled background with a father who undoubtedly loves him dearly but who has a very forceful personality with strongly held views. Whilst the boy is not afraid of his father per se, he does have a fear and anxiety about dealing with "a difficult and forceful" dad. It was clear at the meeting with the boy that, as the judge found, he believes that at this point in his life he may not be a strong enough character to be well enough armed to deal with or challenge his father's behaviour or views.

5. He believes that he is at risk of harm to the extent that if he does not have the security of a residence order with his mother and is exposed to his father 's efforts to persuade him to live with him, it may affect his confidence and ability to concentrate on his own endeavours.

6. We do not believe his father is currently capable of meeting his needs and assuaging his current fears whereas his mother is.

[71] We consider that the learned trial judge correctly assessed this case to carry the necessary measure of exceptional circumstances to justify extending the current residence order until this child is eighteen years of age.

[72] It is out of the ordinary, unusual and uncommon to find such a mature intelligent boy of sixteen years of age – at a moment in his life when he should be virtually fearless and growing in confidence - still harbouring such genuine fears about the overbearing nature of his father and what it may do to him. In our experience such a situation is not normally encountered.

[73] We are satisfied that this child genuinely believes he would be better placed to deal with his father once this very important foundation stage in his life is over and he is older and better equipped to deal with his father's personality. These fears are extremely important at a stage when he wishes to apply himself to his studies to achieve the best possible outcome in his exams over the next few years. What an unforgiveable tragedy it would be if the stress of this whole affair were to adversely affect his whole future career prospects.

[74] The reference he made to the emails recently received from his father is but one illustration of what makes this circumstance exceptional. Irrespective of whether his father was genuinely attempting to circumvent the effects of the contact order (and he is adamant that he was not), the fact of the matter is that we are completely satisfied that the child genuinely *believes* this to be the case and it causes him grave concern as to what such further pressure his father may bring to bear on him to change his residence if he does not have the security of an extended residence order. It is a wholly exceptional circumstance that a young man of this calibre should carry such fears in a scenario where he is convinced that if they are realised it will adversely affect his academic and emotional future at least in the next two years.

[75] We are conscious that these are comfortless sentences for his father. However it is our fervent hope that he recognises this child's genuinely held concerns and that he will carefully adhere to the terms and, equally importantly, the spirit of the contact order. His son undoubtedly loves him and there is a real prospect of the pair of them developing a rich, meaningful and rewarding relationship in the fullness of time – provided the appellant can bring himself to take this at his son's pace and build up the boy's confidence in him by observing without reservation the terms of these orders.

[76] We therefore affirm the findings of McBride J and dismiss this appeal.
We shall invite the parties to address us on the matter of costs.

APPENDIX 1

Fergus

-v-

Marcail

Meeting with child Elliot with his social worker
on Tuesday 3 October 2017 at RCJ

---

[1] I explained the purpose of the meeting namely to ascertain the understanding of the child as to the meaning of:

- A contact order.
- A residence order.
- The consequences of an extension to the residence order and the effect on his autonomy of such an order.
- The need for exceptionality.

[2] I explained to the child the importance of the court listening to the voice of the child in every case whilst emphasising that ultimately it is a matter for the court to make a decision. His views are important but they do not necessarily dictate the outcome of the case. I also took the opportunity to explain to him that I would be giving to both his mother and father and all the parties in the case the gist of what we were discussing today. Moreover I indicated that if he felt after our meeting that there was something that he had omitted to mention to me he was at liberty to contact his social worker to ask that that matter be raised with me.

[3] I briefly outlined to him the competing views of his father and mother on the question of the extension of the residence order to the age of 18. I indicated to him that the court needed to be certain that his indication to the Official Solicitor that he was in favour of an extension of the residence order was informed by a proper understanding of the meaning and consequences of such an extension. I explained the loss of autonomy which this would involve and the necessary restraint on his freedom of action until he was 18. I gave some illustrations of potential restraints on his autonomy and independence which a residence order, and the consequent extension, would involve. I then asked him to explain to me in his own words what I had just outlined and I was satisfied he fully understood the content and meaning of my explanation.

[4] Having fully explained this to Elliot, I then asked him whether the manner in which I had explained the issue to him reflected the explanation that had been given

to him on this issue by Ms Pearson and Ms Coll, the Official Solicitor. He indicated that he did not remember what Ms Pearson had explained to him but that he was fully satisfied that Ms Coll had explained the issue to him in the same manner as I had outlined. In other words he affirmed to me that there was nothing new in the explanation that I had given to him, that his understanding was precisely as I had outlined and that this reflected what Ms Coll had told him. Consequently I was satisfied that Elliot had a full understanding not only of what a residence order meant, but of what the consequences of an extension would be.

[5] I then asked him what was his view on the suggestion of an extension of the residence order. He indicated that he was in favour of such an extension. We then discussed why he was in favour of an extension of the residence order until he was 18. His reasons were as follows:

- He considered that he was doing well at school e.g. his GCSEs had gone very well, that everything else was stable and that he felt a change in the circumstances would not be "conducive to this continuing stability".

- He considered that if the residence order was not extended his father might step up his attempts to have direct contact with him and that this concerned him.

- Notwithstanding the terms of the contact order - which I again explained to him confined contact to indirect contact with his father unless he wished to change it - he was concerned that his father had in the course of e-mails on 6 September 2017 and 11 September 2017 suggested that Elliot might come to his house and therefore have direct contact. I asked to see these two e-mails but was unable to benefit from this because they were in Russian. The boy quoted from an e-mail of 6 September 2017 in which he father had said that Elliot "could come to us at" his father's address. On 11 September 2017 his father had said in an email that Elliot would be "a welcome guest" at his address. The boy felt that there was a suggestion in these e-mails that there should be direct contact and this made him think that his father did not understand the terms of the contact order or was attempting to circumvent them. His fear was that without the residence order such suggestions/requests might increase in frequency and become more overt. It makes him feel nervous and apprehensive about approaches from his father. In short he concluded that if the residence order was not extended, there was a fear that his father might step up attempts to have direct contact. Accordingly he does not consider that the contact order alone affords him sufficient security .

[6] I have no doubt that this is an extremely intelligent, articulate and reflective young man who has no difficulty grasping the concepts in this case. I was satisfied that his fears were genuine on his part and not as a result of any coaching or suggestion by any other party.

APPENDIX 2

CONTACT ORDER

(a) by consent the following indirect contact can take place between the applicant and the subject child, Elliot:

i. E-mails from the applicant to Elliot once per week, to which Elliot is at liberty to respond if he so wishes. If Elliot responds and invites a response from the applicant, the applicant is at liberty to respond by further e-mail. To facilitate this an appropriate e-mail address for Elliot shall be provided to the applicant by the Solicitor on behalf of the respondent on or before 8 March 2017;

ii. the applicant is at liberty to provide appropriate gifts and cards to Elliot on his birthday and at Christmas, to which Elliot is at liberty to respond. Delivery of such gifts and cards shall be by way of postal services or through Elliot's sisters;

iii. the applicant shall be provided with copies of school reports by the school;

iv. Elliot is at liberty to notify the applicant of any awards or achievements in relation to academic, sporting or musical interests if he wishes;

v. the applicant is at liberty to include photographs of himself and information on his work and interests as he may choose in the e-mails referred to at paragraph I;

vi. Elliot is at liberty to provide photographs or video records of himself as and when he wishes.

b) the indirect contact shall be subject to the following conditions:

i. the applicant shall not discuss or address the following issues with Elliot: the financial settlement reached between the parties; the mother.

c) there shall be such other contact, whether indirect or direct, as Elliot may wish to initiate;

d) the applicant shall not initiate, pursue or suggest direct contact with Elliot, whether himself or through any third party. Direct contact shall only take place should Elliot invite same.

THIS ORDER SHALL EXPIRE ON THE SUBJECT CHILD'S 18th BIRTHDAY