Twelfth Report of the Special Rapporteur on Child Protection

A Report Submitted to the Oireachtas

Professor Geoffrey Shannon

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Table of Contents

ACKNOWLEDGEMENTS 4

EXECUTIVE SUMMARY 5

RECOMMENDATIONS 32

SECTION 1: INTERNATIONAL DEVELOPMENTS 57

1.1 RIGHTS OF THE CHILD IN A DIGITAL ENVIRONMENT 57

1.2 SUSTAINABLE DEVELOPMENT GOALS, CHILDREN IN MIGRATION AND DIRECTIVE 2016/80 71

1.3 EMERGING ISSUES IN THE UNITED KINGDOM 82

1.4 VOLUNTARY CARE IN A CHILD PROTECTION CONTEXT: RECENT DEVELOPMENTS IN THE UNITED KINGDOM 93

1.5 UN DEVELOPMENTS 99

A. Committee on the Rights of the Child: General Comment No. 21 (2017) on Children in Street Situations 99

B. General Comment No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence 108

C. Female Genital Mutilation and Non-Refoulement before the Committee on the Rights of the Child 121

D. UN CEDAW Committee: Ireland's Compliance with the Convention on the Elimination of All Forms of Discrimination Against Women 124

E. UN CAT Committee: Ireland's Compliance with the UN Convention Against Torture 132

SECTION 2: DOMESTIC DEVELOPMENTS 135

2.1 REVISED GENERAL SCHEME OF THE CHILD CARE (AMENDMENT) BILL 2018 135

2.1.1 Introduction 135

2.1.2 Existing position with regard to GALs 135

2.2 MENTAL HEALTH AND CHILDREN 144

2.3 SOCIAL WELFARE ENTITLEMENTS AND CHILD REFUGEES 151

2.4 CHILDREN AND FAMILY RELATIONSHIPS (AMENDMENT) ACT 2018 156

2.5 GUARDIANSHIP OF INFANTS ACT 1964 (CHILD'S VIEWS EXPERT) REGULATIONS 2018 158

2.6 THE DOMESTIC VIOLENCE ACT 2018 AND THE CRIMINAL LAW (EXTRATERRITORIAL JURISDICTION) BILL 2018 164

2.7 ARTICLE 42A AND THE CHILD CARE ACT 1991 177

2.8 BREXIT AND CHILD AND FAMILY LAW 185

SECTION 3: DOMESTIC CASE LAW 188

3.1 INTRODUCTION 188

3.2 COURT OF JUSTICE 189
3.2.1 Hampshire County Council v. C.E. and N.E., CFA and the Attorney General 189
3.2.2 Hampshire County Council v. C.E. and N.E., CFA and The Attorney General 193
3.2.3 Hampshire County Council v. CE and N.E., CFA and The Attorney General 195
3.3 SUPREME COURT 197
3.3.1 G v. The Child and Family Agency 197
3.4 COURT OF APPEAL 199
3.4.1 P.M. v. V.H. 199
3.4.2 A.M.Q. v. K.J. (otherwise K.A.) and Anor 204
3.4.3 E.E. v. The Child and Family Agency 208
3.4.4 M.S. v. A.R. 211
3.4.5 V.R. v. C. O'N.. 214
3.4.6 C.D.G. v. J.B. 218
3.5 HIGH COURT 224
3.5.1 M.J. v. S.O. 224
3.5.2 B.B. v. Z.B. 228
3.5.3 D.H. v. L.H. 230
3.5.4 A.M. v. S.McG. 232
3.5.5 Lincolnshire County Council v. J.MCA and Another 236
3.5.6 Swansea County Council v. M.O. 239
3.5.7 P. v. The Child and Family Agency 242
3.5.8 J.F. and A.F. v. Health Service Executive; K.K. and F.C. v. Health Service Executive 246
3.5.9 The Child and Family Agency v. L.B. and Another 249
3.5.10 S.O'N. v. C.D. 252
3.5.11 R v. The Child and Family Agency 254
3.5.12 L.S.M. (A Minor) v. The Child and Family Agency 256
3.5.13 Emergency Care Order overturned – 27 November 2018 258
3.5.14 Obligation on the CFA to initiate proceedings – 13 December 2018 260
3.5.15 The Child and Family Agency v. K.B. and Another 261
3.5.16 CFA v. A.A. (a minor) and C. 263
3.5.17 CFA v. A.A. (a minor) and C. (No. 2) 266
SECTION 4: CRIMINAL DEVELOPMENTS 269
4.1 DETENTION OF YOUNG PERSONS 269

4.2 ONLINE WORLD AND CHILDREN 276
4.3 INTERNATIONAL INSTRUMENTS AND CYBERCRIME 288
4.4 CRIMINAL JUSTICE (VICTIMS OF CRIME) ACT 2017 305
4.5 SEXUAL EXPLOITATION AND CHILDREN 307
SECTION 5: TUAM REPORT 311
5.1 INTRODUCTION 311
5.2 EUROPEAN CONVENTION ON HUMAN RIGHTS 311
5.2.1 Article 8 ECHR 312
5.2.2 Returning body to family member – delay between death and burial 316
5.2.3 Right to know the fate of a family member – information surrounding circumstances of death 318
5.2.4 Treatment of body – samples and consent 323
5.2.5 Specific requests regarding burial 329
5.2.6 Application of Article 8 principles 330
5.2.7 Articles 2 and 3 ECHR 332
5.2.8 Duty to investigate 333
5.2.9 Duty to investigate incidents which took place before the ECHR came into force 338
5.2.10 The rights of relatives under Articles 2 and 3 ECHR 347
5.2.11 Obligation to collect the bodies of the deceased 352
5.3 INTERNATIONAL HUMAN RIGHTS LAW: THE UN FRAMEWORKS 354
5.4 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: TREATMENT OF THE DEAD AND THE RIGHT TO KNOW 364
5.5 THE IRISH CONSTITUTION 371
5.6 STATUTE LAW 377
5.7 COMMON LAW 378
5.8 LIMITATION PERIODS 385

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The Report reflects the law and practice as at 31 December 2018, but it has been possible to include new developments since that date.

Professor Geoffrey Shannon

EXECUTIVE SUMMARY

GENERAL INTRODUCTION

2018 was an important year from the perspective of child protection. The adoption by the Irish people of a new Article 42A of the Constitution concerning children and children's rights was a significant development. The vulnerable nature of children and childhood makes it appropriate that children should be the subject of discrete constitutional provision, beyond that which applies to citizens generally. In this regard, the amendment marks an expansion of the Constitution's focus on the child, sitting alongside existing provisions applying to education and replacing the earlier provision in respect of State intervention in the family for the protection of children. A number of the 2018 Superior Court judgments, considered in Section 3 of this Report, elaborate on the implications of Article 42A.

During 2018, Ireland made impressive progress in implementing a recent General Comment from the Committee on the Rights of the Child on the rights of the child during adolescence.[1] Lesbian, gay, bisexual, transgender and intersex (LGBTI) adolescents, the Committee states, commonly face persecution, abuse and discrimination. This can lead to low self-esteem, depression, suicide and homelessness. All adolescents have the right to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy. States are required to repeal all laws discriminating against people based on their sexual orientation, gender identity or intersex status and protect all LGBTI adolescents from violence, discrimination or bullying. They must engage in public awareness-raising, and implement relevant support measures. Ireland has made very significant advances in this area, a process which has been led by the current Minister for Children, Katherine Zappone TD.

The year also witnessed a wide variety of other developments, many of which are discussed in this report. I welcome the commencement by the Minister for Justice and Equality of the innovative new provisions in the Domestic Violence Act 2018. A number of crucial reforms are contained within the 2018 Act, providing increased protection for victims of domestic violence – including children. As discussed in this Report, however, there remain certain

[1] General Comment No. 20 on the implementation of the rights of the child during adolescence CRC/C/GC/20.

areas in the Act within which improvements can be made to secure heightened protection for victims of domestic violence and children in particular.

During 2018, I also examined, at the request of Minister Zappone, the human rights issues that appeared to arise in the wake of the discovery of juvenile human remains at the site of the former Mother and Baby Home in Tuam, County Galway. In particular, I was asked to examine the following matters:

(i) human rights issues relating to the right of an individual to a respectful and appropriate burial;

(ii) obligations, if any, under international human rights law, including under the European Convention on Human Rights, arising from the right to respect for family life. This was to include an examination of the entitlement of living family members to know the fate of their relatives;

(iii) any obligation on the State under human rights law to fully investigate the deaths so as to vindicate the right to life of those concerned;

(iv) on a more general level, the applicable domestic law and human rights law in place between the years 1920 to 1960, and how this might impact on the right to respect for family life, and/or the right to a respectful and appropriate burial.

I have included my analysis in section 5 of this report.

It is hoped that the year ahead will also provide an opportunity for reflection and/or action upon several of the issues discussed in this Report.

SECTION 1: INTERNATIONAL DEVELOPMENTS

1. Rights of the Child in a Digital Environment

The digital environment creates opportunities for and risks to well-being and to the enjoyment of human rights. This is true for children as it is for all groups. A new Recommendation was adopted in 2018 by the Council of Europe's Committee of Ministers which aims to better respect, protect and fulfil the rights of the child in the digital environment.[2] The text provides comprehensive guidelines for action by European governments and is based on international and European legal instruments. It is recommended that governments review their legislation, policies and practices to adequately address children's digital rights across the spectrum of children's rights. There is also an emphasis on States ensuring that business enterprises and other key partners uphold human rights obligations and that these private entities are held to account where they are in breach of these standards.

The Council of Europe in 2014 published a *Guide to Human Rights for Internet Users*.[3] This Guide provides information about rights and freedoms in the context of the internet. It outlines how the rights can be relied and acted upon, as well as remedies which can be accessed. The guide emphasises the protection of the right to freedom of expression, access to information, the right to freedom of assembly, protection from cybercrime, the right to a private life, and the protection of personal data. It makes the protection of children one of its seven main pillars.

The Council of Europe also has an *Internet Literacy Handbook*[4] which is a tool for children, parents, teachers and policy makers to use the internet safely, and for educating about opportunities and risks. The first edition of the *Internet Literacy Handbook* was issued in 2003 and the most recent was issued in 2017. It takes into account the many changes in the digital environment in the past few years, for example considering new concepts of digital

[2] Council of Europe, *Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment: Recommendation CM/Rec (2018) 7 of the Committee of Ministers* (Council of Europe, 2018).
[3] Council of Europe, *Guide to Human Rights for Internet Users* (Council of Europe, 2014).
[4] The Council of Europe, *Internet Literacy Handbook* (Council of Europe, 2017), available at https://edoc.coe.int/en/internet/7515-internet-literacy-handbook.html.

citizenship and digital parenting. It includes 26 fact sheets arranged under six thematic headings.

In 2012, the European Commission set out a *European Strategy for a Better Internet for Children*[5] to assist children in achieving the digital skills they need to safely benefit from being online. It also aims to achieve interactive, creative and educational online content. The strategy sets out the aim of a series of actions based on the primary goals around educational online content for children; awareness and empowerment including teaching of digital literacy and online safety in all EU schools; a safe environment for children; and combatting child sexual abuse material online and child sexual exploitation.

The Council of Europe has also considered children's own views in the digital environment, producing in 2017 *It's Our World: Children's views on how to protect their rights in the digital environment – Report on child consultations*.[6] It was found that despite the diverse backgrounds of the children taking part in the eight states examined, children held the same views and made similar recommendations in relation to various issues concerning the digital environment. It was found that children were somewhat aware of the existence of children's rights, but that there was wide variation on knowledge about the content of the rights. Children felt that, as they got older, they were getting more capable and had a better understanding of the digital environment. They expect support from parents and other adults in accordance with their age and maturity; and believe that the use of "parental control" was sometimes justifiable for them. Children felt that internet access was important for many reasons, and were very aware of potential consequences of sharing content online.

The Irish Government produced its first Action Plan for Online Safety in July 2018. The main aim of this action plan is to establish and implement actions over an 18 month period, which will improve online safety for everyone in Ireland. It has five goals: Online Safety for All; Better Supports; Stronger Protections; Influencing Policy; Building our Understanding. It is presented as the first step in a holistic Government approach "which is particularly important for an issue that spans so many different Departments, and deals with such a wide range of concerns." The strategy constitutes a positive step to achieving a more holistic, joined-up,

[5] European Commission, *European Strategy for a Better Internet for Children* (European Commission, 2012).
[6] Council of Europe, *It's Our World: Children's views on how to protect their rights in the digital environment – Report on child consultations* (Council of Europe, 2017).

modern and effective approach to digital access and safety. Children feature prominently and many of the elements outlined in the Action Plan reflect the factors and recommendations highlighted in the Council of Europe documents and the consultation with children alluded to above. In particular the need for education through schools about safety online is well reflected. The strategy explicitly cites the European Strategy for a Better Internet for Children yet regrettably does not refer to the UN Convention on the Rights of the Child (CRC).

2. Fundamental Rights and Children in Ireland

In part 2 of section 1, I consider children's rights in Ireland in the context of a European Union fundamental rights framework. I discuss Ireland's Sustainable Development Goals National Implementation Plan 2018–2020 which provides a whole-of-government approach to implement the 17 Sustainable Development Goals and contains an ambitious strategy to guide Ireland to fully achieve these goals at home by 2030. I also outline measures in Ireland for children in migration, including the operating protocol regarding unaccompanied children going missing, and the procedures for unaccompanied minors upon their arrival in the jurisdiction. Regarding procedural safeguards for children who are suspects in criminal proceedings, I note the failure to opt into Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

3. Emerging Issues in the United Kingdom

There have been some interesting recent decisions of the UK Supreme Court on 'habitual residence' for the purpose of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the 1980 Hague Convention).

It is in breach of the 1980 Hague Convention to remove a child without permission from a country of origin ('home state') in which another person (usually the 'left behind parent') has rights of contact or residence with that child. The purpose of the 1980 Hague Convention is to "secure the prompt return of children wrongfully removed to or retained in any Contracting State".[7] That the child is 'habitually resident' in the country to which he/she is taken ('destination state') is a defence under that the 1980 Hague Convention. Where a child is habitually resident depends on the unique facts of each case and may change over time.

[7] Article 1.

The UK Supreme Court stated in *A v. A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)*[8] that it is desirable for the courts of England and Wales to approach habitual residence in a manner similar to that of the Court of Justice of the European Union. That court held in proceedings brought by *A*[9] that habitual residence is about the totality of the circumstances in a particular case. In England and Wales, domestic courts have emphasised that habitual residence is primarily a question of fact to be determined by relevant circumstances rather than a pre-determined set of rules.[10]

In *B (A Minor: Habitual Residence),*[11] Hayden J. summarised the meaning of habitual residence: It is partly about where and how well the child is integrated; it all depends on the facts; one must look at the practical connection between the child and the country in question; one parent can, deciding on his/her own to take the child abroad, cause a change of habitual residence (but not necessarily); a child usually has the same habitual residence as the parent, especially a younger child, but it depends on a number of factors; the parental intention is relevant, but isn't necessarily the whole answer; a child almost always has habitual residence somewhere; when looking at whether a move has caused a change of habitual residence, look at the degree of connection with the previous place, before the move; look at stability not permanence – that is, integration rather than length of time; the child doesn't need to be fully integrated to become habitually resident somewhere; habitual residence can, sometimes, change quite quickly after a move.

In the case of *In the Matter of KL (A Child),*[12] the Supreme Court held that parental intention plays a part in establishing the habitual residence of a child, but it will be one of many factors relevant to the question of whether there was a sufficient degree of stability to amount to a change of habitual residence for the child. The court rejected the father's argument that the child could not acquire habitual residence where he was living in a foreign country in accordance with an order that was under appeal. In *Re LC (Children*),[13] the Supreme Court held that the state of mind of the older child may affect whether residence is habitual. In *AR*

[8] [2013] UKSC 60.
[9] Case C-523/07 [2010] Fam 42.
[10] See e.g. *Re J (A Minor)(Abduction: Custody Rights)* [1990] 2 AC 562.
[11] [2016] EWHC 2174 (Fam).
[12] In the *Matter of KL (A Child)* [2013] UKSC 75.
[13] In *Re LC (Children)* [2014] UKSC 1.

v. RN (Scotland),[14] the Supreme Court stated that the important question is whether there is a quality of stability necessary to prove residence, not whether it is intended to be permanent. In *B (A Child),*[15] the Supreme Court held that the parental intention to leave the jurisdiction should not determine habitual residence; the correct question is whether the child had achieved the required degree of disengagement from her environment. In the case of *Re N (Hague Convention - Habitual Residence),*[16] the England and Wales High Court compared the formal steps of obtaining citizenship and a G.P. for a child in its determination of habitual residence, but these were trumped by the lack of links outside of the home (e.g. nursery, playgroup etc.) in one jurisdiction as compared to the other. In *Re C (children: anticipatory retention),*[17] the Supreme Court's decided that the 1980 Hague Convention cannot be invoked if, by the time of the alleged wrongful removal or retention, the child has become habitually resident in the requested state, and; there can be wrongful retention *before* the expiry of the period of absence agreed by the parents.

4. Voluntary Care in a Child Protection Context: Recent Developments in the United Kingdom

The case of *Williams and another (Appellants) v. London Borough of Hackney (Respondent)*[18] concerned an appeal to the UK Supreme Court regarding the lawfulness of the accommodation of the appellants' children by the respondent local authority under section 20 of the Children Act 1989. Section 20 refers to the duty of local authorities to provide accommodation for a "child in need" and has been a difficult provision for courts to define and for professionals and others to apply and understand. The question in *Williams* related to the limits of a local authority's powers and duties to provide accommodation for children in need under section 20 of the Children Act 1989 without the sanction of a court order. As the Court put it: "Specifically, what is the local authority to do if the parents ask for their accommodated children to be returned to them but the local authority perceive that there are obstacles to doing so?"[19] The appellants claimed that the local authority had breached their right to family life under Article 8 of the European Convention on Human Rights.

[14] *AR v. RN (Scotland)* [2015] UKSC 35.
[15] *In the matter of B (A Child)* [2016] UKSC 4.
[16] *Re N (Hague Convention - Habitual Residence)* [2017] EWHC 63 (Fam).
[17] *Re C (Children: Anticipatory Retention)* [2018] UKSC 8.
[18] *Williams and another (Appellants) v. London Borough of Hackney (Respondent)* [2018] UKSC 37.
[19] Para. 1.

The Supreme Court dismissed the appeal, and held that the appellants did not object nor did they unequivocally request the immediate return of the children. The children's continued accommodation under section 20 consequently had a lawful basis. The Supreme Court set out, however, detailed guidance on what is expected of social work professionals in England and Wales to ensure they adequately inform parents of rights and duties in relation to accommodation of children by the local authority under section 20 of the Children Act 1989. It is a very interesting decision and may prove to be of assistance in interpreting sections 4 and 5 of the Child Care Act 1991.

5. UN Developments

Committee on the Rights of the Child: General Comment No. 21 (2017) on Children in Street Situations

The UN Committee on the Rights of the Child recently produced General Comment No. 21 (2017) on children in street situations.[20] Although the CRC does not explicitly refer to children in street situations, the Committee states "all of its provisions are applicable to children in street situations who experience violations of a large majority of the Convention's articles". In this General Comment, the Committee on the Rights of the Child gives authoritative guidance to States on how to develop comprehensive, long-term national strategies to protect and promote the rights of children in street situations in line with the CRC. There are children in street situations in Ireland, for example those who must spend time on the streets as they have not been provided with adequate housing. There is much to be done in terms of acknowledging this as a distinct problem in Ireland, and viewing this group as children in street situations.

General Comment No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence

Another recent General Comment from the Committee is No. 20 (2016) on the implementation of the rights of the child during adolescence.[21] This general comment provides guidance to States on how to ensure the realisation of the rights of children during adolescence, highlighting the importance of a human rights-based approach which respects

[20] *General Comment No. 21 (2017) on children in street situations* CRC/C/GC/21 (20 June 2017).
[21] *General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence* CRC/C/GC/20 (06 December 2016).

the dignity and agency of adolescents; their participation in their own lives; their health, well-being and development; and the progression of their human rights, without discrimination. It seeks to call attention to the opportunities afforded by, as well as the challenges faced, during adolescence. It aims for greater awareness of the situation of adolescents, greater recognition for their evolving capacities, and for investment for this particular group to ensure the realisation of their rights.

Female Genital Mutilation and *Non-Refoulement* before the Committee on the Rights of the Child

The Committee on the Rights of the Child published its first views in January 2018 under the third Optional Protocol, the communications procedure whereby individuals can take complaints under the CRC. The case of *IAM (on behalf of KYM) v. Denmark* is an important development in relation to the CRC. It concerns international children's rights approaches and *non-refoulement* – the practice of not forcibly returning refugees or asylum seekers to countries in which they are likely to be subjected to persecution.

The Committee emphasised in this case that children's rights to be free from violence under Article 19 CRC is not dependent on a parent's willingness to resist social pressure. The 'principle of precaution' should be considered when evaluating the risk of harm to the child: where there is 'reasonable doubt' about the receiving/home state protecting the child against practices such as Female Genital Mutilation (FGM), the child should not be returned. The children's rights perspective, as well as the individual circumstances of the mother and child, were the primary focus of the Committee in its determination on whether it was acceptable from a CRC perspective to order the return of a mother and her child to Somalia.

UN CEDAW Committee: Ireland's Compliance with the Convention on the Elimination of All Forms of Discrimination Against Women

The UN Committee on the Convention for the Elimination of Discrimination Against Women (CEDAW) monitors compliance of states with that instrument. In 2017, it published its 'concluding observations' – a comprehensive assessment on the record of the state – on women's rights in Ireland. The Committee first noted Ireland's progress on a number of fronts. The Paternity Leave and Benefit Act, in 2016, which introduced paid statutory leave for new fathers was noted, as was the Gender Recognition Act 2015, which provides that, from 16 years, the preferred gender of an individual will be fully recognised by the State for

all purposes. The Committee welcomed Ireland's efforts to improve the policy framework which aims to promote gender equality and to progress the elimination of discrimination against women.

The Committee urged the amendment of Article 41.2 of the Constitution to remove the stereotypical language on the role of women in the home. The Committee also had concerns about the equality framework in Ireland, expressing concern that section 14 of the Equal Status Acts 2000-2015 prevents the use of the equality framework to challenge discriminatory laws. The Committee emphasised that the failure to adequately deal with historical abuses has a continuing effect on the rights of the victims of those violations. The Committee advised that prompt, independent and thorough investigations be conducted into all historical abuses, in line with international human rights standards. The Committee acknowledged the Gender Equality Division in the Department of Justice and Equality but was concerned, however, at the closure of a number of institutions that once formed part of the national machinery for the advancement of women.

The Committee noted efforts in Ireland to address gender-based violence against women but expressed concern that domestic violence is not criminalised and there is no specific definition of domestic violence in Ireland's legislation. The Committee also criticised the poor legal aid provisions in civil law for victims of domestic violence and the low prosecution and conviction rates in cases of trafficking in persons. It should be acknowledged, however, that the CEDAW concluding observations were published before the commencement of the Domestic Violence Act 2018, which is discussed in Chapter 2.6 of this Report.

The Committee welcomed measures taken to improve women's and girls' access to education, but noted sexism in education, as well as obstacles to adequate sexuality education. It called upon Ireland to increase efforts aimed at economic recovery in a manner that addresses the impact of austerity measures on social benefits for women.

UN CAT Committee: Ireland's Compliance with the UN Convention Against Torture

In 2017, the UN Committee against Torture, which monitors compliance of states with the UN Convention Against Torture (CAT), published its' 'concluding observations' – a comprehensive assessment on the record of the state – on Ireland's compliance with the CAT.

It was the second examination of Ireland's record by the Committee. There were a number of areas concerning children's rights which were examined by the Committee.

The Committee expressed concern that its recommendations on the implementation of the recommendations of the report of the Commission to Inquire into Child Abuse (the Ryan Report) and the Magdalene Laundries Report have been only partially implemented.

SECTION 2: DOMESTIC DEVELOPMENTS

Section 2 of my Report considers important developments that have occurred in Ireland during 2018 concerning child protection and welfare issues. It examines the legislative changes and proposals for further reform.

The Revised General Scheme of the Child Care (Amendment) Bill 2018 is analysed in this section of the Report. It was approved and published in February 2018. The Revised Scheme provides for the reform of the guardian *ad litem* service in child care proceedings, addressing criticisms of the original General Scheme and adopting recommendations made in respect of the General Scheme – particularly those made by the Joint Oireachtas Committee on Children and Youth Affairs in its pre-legislative scrutiny of the Bill. The establishment of a nationally organised, managed and delivered guardian *ad litem* service is proposed– with the aim of ensuring that the guardian *ad litem* service can be provided to the greatest number of children and young people, to enable their voices to be heard in child care proceedings. The revisions contained in the Revised Scheme are to be welcomed and it is urged that a Bill along the lines of the Revised General Scheme be drafted as soon as possible, alongside the establishment of the necessary infrastructure to ensure the effective operation of these new proposals.

Two important Court of Appeal decisions are discussed in Section 2 of the Report. First, the judgment in *P.L. v. Clinical Director of St Patrick's University Hospital & Others*[22] concerning the provisions of section 23 of the Mental Health Act 2001 is analysed. Section 23 of the 2001 Act concerns the power to prevent a voluntary patient from leaving an approved centre under the Act. The judgment of the Court is considered in full and the

[22] [2018] IECA 29.

implications of this decision for children in particular are discussed. Secondly, the Court of Appeal decision in *Agha (a minor) v. Minister for Social Protection*,[23] concerning two related appeals, is analysed. This is a crucial decision concerning the issuing of social welfare payments for the benefit of children seeking refugee status, where the parents of the relevant children involved were refused payment of child benefit due to their immigration status. It has served to clarify the law on social welfare payments that may be made in favour of child refugees and child citizens whose parents do not have status in this jurisdiction, finding that sections 246(6) and 246(7) of the Social Welfare Consolidation Act 2005 were unconstitutional. The implications of this finding are considered later in this report.

This Section further discusses the short, technical provisions of the Children and Family Relationships (Amendment) Act 2018 – an Act introduced recently to rectify certain minor errors contained within the Children and Family Relationships Act 2015. Its commencement is currently awaited and is expected to allow the related parts of the 2015 Act concerning donor-assisted human reproduction to be initiated. The content of the Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 is similarly examined. These regulations provide for much-needed direction in terms of the expertise and qualifications of experts appointed under section 32(1)(b) of the 1964 Act, the standards to apply to their role and the maximum fees applicable for the preparation of such reports.

This Section additionally considers the recently enacted and commenced Domestic Violence Act 2018, discussing the positive reforms made therein, as well as certain areas in the Act within which improvements can be made to secure heightened protection for victims of domestic violence and children in particular. The Criminal Law (Extraterritorial Jurisdiction) Bill 2018 is also discussed. This Bill proposes to create extraterritorial jurisdiction over certain criminal offences, extending the Irish criminal law to certain conduct engaged in abroad. The Bill is the last step in the Government's 18 step Action Plan, approved in October 2015, to enable Ireland to ratify the Istanbul Convention.

Finally, the decision of the High Court in *A Foster Mother v. CFA*[24] and its implications for the Child Care Act 1991 are reviewed. This decision, and the Court's approval of O'Donnell

[23] [2018] IECA 155.
[24] [2018] IEHC 762.

J.'s dicta in the case of *In the Matter of JB (A Minor),* makes it clear that there is an obligation on the Oireachtas to ensure its legislation gives effect to the commitments made in Article 42A of the Constitution. In this regard, it is recommended that the Child Care Act 1991 be amended to include a similar best interests provision to section 19(2) of the Adoption Act 2010 and section 31 of the Guardianship of Infants Act 1964.

SECTION 3: DOMESTIC CASE LAW

This Section considers certain important decisions of the Irish courts made or published during 2018 in which issues relating to child protection or children's rights have emerged. Whilst legislative and policy developments in child protection and welfare are important, so too are developments emanating from the courts. It is the courts that interpret and apply the law in relation to child protection and welfare, hence the commensurate need to monitor and consider developments in this field also.

The issues that have arisen in the cases that are examined in this Section include: developments in Hague Convention/child abduction cases; considerations concerning the transfer of jurisdiction pursuant to Article 15 of Brussels II *bis*; enforcement of foreign care orders under Brussels II *bis*; recognition and enforcement of foreign orders of parental responsibility to which no international conventions apply; the mandatory obligation to complete an assessment of need under the Disability Act 2005; the requirement for sufficiently clear findings of fact to allow the High Court reach conclusions in a case stated; the standards expected of lay litigants in court proceedings; fair procedures in care order hearings, including the proportionality of emergency care orders; whether special care order applications have to be heard *in camera*; and the legal test to justify breach of patient confidentiality. Cases are considered and grouped by Court.

Further, the judgment of the Court of Justice of the European Union following references by the Irish Court of Appeal in two cases, *Hampshire County Council v. C.E. and N.E., CFA and The Attorney General*[25] and *Hampshire County Council v. C.E. and N.E., CFA and The Attorney General*[26] is also discussed.

[25] [2018] IECA 154.
[26] [2018] IECA 157.

SECTION 4: CRIMINAL DEVELOPMENTS

This Section discusses developments in the criminal sphere that have occurred in the last year which impact on child protection and welfare issues. Reform of existing criminal law and a review of current practices in the area of crime prevention and detection are highlighted herein, as well as a particular focus within the State on efforts to prepare the country for ratification of various international instruments.

Concerning the detention of children and young persons, this Section addresses two key areas. First, it discusses the recent inspection of the Oberstown Children Detention Campus, carried out in March 2018 by the Health Information and Quality Authority (HIQA) with reference to the Standards and Criteria for Children Detention Schools. Secondly, it considers the pilot Bail Supervision Scheme which is currently in operation – reiterating recommendations previously made to expand the application of this Scheme.

The relationship between children and the online world is also discussed in this Section. This involves an analysis of the recent Garda Inspectorate Review, *Responding to Child Sexual Abuse – A follow up Review from the Garda Inspectorate*, which was published in February 2018, and which makes wide-ranging recommendations for the effective investigation and prevention of child sexual abuse, in particular online abuse and exploitation. On an international level, the Council of Europe's Committee of Ministers new Recommendation concerning online safety, adopted in July 2018, is addressed, as well as related national progress in the Government's launch of its first Action Plan for Online Safety 2018-2019.

This Section considers the broad reach of cybercrime as a serious threat to the fundamental rights of all individuals, especially children, and encompassing a vast range of criminal behaviour. It discusses the Budapest Convention, known as the Convention on Cybercrime, the 2nd Additional Protocol to the Budapest Convention which is currently being prepared as well as the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, known as the Lanzarote Convention, and Ireland's response to each of these international instruments. The European Court of Human Rights decision in *K.U. v.*

Finland,[27] delivered on 2 December 2008, is also analysed. Developments at an EU level in the European Commission's E-Evidence Regulation proposals and draft E-Privacy Regulation have also taken place and the implications of these international instruments are considered herein.

The rights of victims within the criminal justice system and specifically child victims are also discussed. This Section considers the additional protection for certain victims now required and identifies certain weaknesses apparent in the Criminal Justice (Victims of Crime) Act 2017. Finally, the Section deals with the sexual exploitation of children, highlighting the fact that Ireland continues to be the only EU Member State that has not ratified the Second Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. The recommendations of the UN Special Rapporteur on the sale and sexual exploitation of children following her visit to Ireland in May 2018 are also discussed.

SECTION 5: TUAM REPORT

Section 5 of my Report contains an examination of the human rights issues to arise in the wake of the discovery of juvenile human remains at the site of the former Mother and Baby Home at Tuam.

In international law there are no unified mass-grave protection guidelines in place for States to follow when they are faced with the discovery of sites, such as the burial site at the former Mother and Baby Home in Tuam, despite the existence of guidelines to deal with situations of armed conflict and investigations of missing persons.[28] Calls have been made to work toward a more comprehensive set of legal guidelines for the protection of such graves at an international level. This would assist in achieving a number of desired aims, including ensuring that family members are informed of the fate of their relatives, allowing survivor populations be aware about what happened at the site in question and enabling proper

[27] No. 2872/02 ECH.

[28] For instance, the Geneva Conventions and their Additional Protocols form the core of international humanitarian law, regulating the conduct of armed conflict and seeking to limit its effects. With regard to missing persons, the International Committee of the Red Cross (ICRC), "Guiding Principles/Model Law on the Missing" (2009) and the International Convention for the Protection of All Persons from Enforced Disappearance are of assistance.

investigations to take place - answering questions and finding those responsible where possible.[29] While the site at Tuam cannot be considered to be a mass grave in terms of what is typically associated with violence or conflict, physical investigation of the site has necessitated use of the skillset designed to forensically investigate mass graves and similar legal issues are thus raised.

European Convention on Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR) came into force in 1953. It was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and make them binding. Its contracting states are obliged to secure to everyone within their jurisdiction the rights and freedoms set out in section 1 of the ECHR. The European Court of Human Rights (ECtHR) is tasked with enforcing the provisions of the ECHR and its judgments, in some cases, have broadened the interpretation of the Convention. In Ireland, the European Convention of Human Rights Act 2003 was introduced to give further effect to the ECHR in Irish law. The Act did not incorporate the Convention into Irish law, but rather requires Irish courts to interpret legislation in line with the Convention insofar as it is possible to do so. It also requires that certain public bodies perform their functions in a manner compatible with the Convention, unless precluded by law.

Application of Article 8 principles

Article 8 of the ECHR may be of relevance in relation to the particular set of circumstances arising from the discovery of juvenile remains at Tuam. Article 8 has been broadly interpreted, providing family members of deceased persons with a substantial number of rights capable of assertion. While these rights are not absolute, and may be proportionately interfered with, their existence is of considerable importance and the State should be careful to ensure no illegitimate infringement of such rights. Family members may possess the right to have their loved one's body returned to them. Moreover, relatives may have a right to know the fate of their family members, including information surrounding the death and/or

[29] See Melanie Klinkner, "Towards mass-grave protection guidelines" *Human Remains and Violence,* Volume 3, No. 1 (2017) 52-70. This article, however, concerns primarily the protection of mass-graves in post-conflict situations.

burial of their loved ones. A failure to provide relatives with definite and/or credible information may fall foul of the positive obligation under Article 8, even where the death occurred before the Convention came into force in the relevant county, where the failure to provide information continues following the coming into force of the ECHR. It is also of note, that where samples are sought to be taken from a corpse, the consent of the family member is a relevant concern and should be borne in mind in any approach taken in relation to the subject matter of this chapter of my report. Irish authorities are required to carry out their functions in a manner compatible with the ECHR and Article 8 rights in particular must be positively vindicated. Regard should be given to the distress and anguish of family members seeking information surrounding the death and/or burial of their loved ones. Nonetheless, it should also be borne in mind that there may be limits to the information which can or must be provided for the purposes of complying with Article 8. The decisions of the ECtHR confirm that Article 8 rights include information concerning the fate and place of burial of the deceased but it may not necessarily extend to additional matters (although these may be covered by Articles 2 and 3 ECHR).

The Court's Article 8 case law has been concerned so far with negative interferences on the part of the State with the right of family members to the return or disposal of bodies, or to information about their disposal. The Court does not yet appear to have considered whether Article 8 imposes a more extensive positive obligation on the part of State authorities to assist or ensure that a burial takes place in the particular manner desired by the family.

Furthermore, any Article 8 ECHR right should be considered having regard to the extreme delicacy of any exhumation and further investigation at the Tuam site, as determined by the Expert Technical Group (ETG). The report of the ETG states that: "There are a number of factors that make this situation unique: The forensic requirement of the site; The 'significant' quantities of juvenile remains; The commingled or intermixed state of the remains; The position of the remains within subsurface chambers, with limited access." The report[30] concludes that the comingled state of the remains renders identification "particularly challenging". Moreover, the ETG states there is a "risk of destruction to human remains" that raises ethical issues.

[30] Report of the Expert Technical Group, December 2017, (i).

In terms of pursuing any claim for violation of Convention rights, it is the family members alone who are capable of asserting these rights. The deceased no longer possess human rights and they are not capable of asserting same. This approach is similarly demonstrated in the Council of Europe's Additional Protocol on Transplantation of Organs and Tissues of Human Origin.[31] Pursuant to Article 18, "Respect for the human body", it is provided that during removal of organs and/or tissues, the human body must be treated with respect and all reasonable measures must be taken to restore the appearance of the corpse. The Explanatory Comment to Article 18 states; "A dead body is not legally regarded as a person, but nonetheless should be treated with respect."

Therefore, it is the family members who assert their rights under the Convention. They are not asserting the rights of the deceased, but their own as relatives. It is even questionable whether the deceased possess any human rights, as realistically due to their death, they are not capable of asserting same. This issue was considered by Rosenblatt in relation to the investigation of mass graves in *International Forensic Investigations and the Human Rights of the Dead.*[32] He states:

> … [H]uman rights for the dead are philosophically unworkable and irreconcilable with the practical limitations of forensic work; therefore, we should not think of the dead as having human rights. However, this conclusion does not end discussion about what forensic investigators do for dead bodies. Rather, it makes room for a modest but rich sense of how exhumation can restore the identity, physical location, and care that have been denied to victims of atrocity.

Articles 2 and 3 ECHR

While much of the discussion above focuses on Article 8 ECHR rights and the right to respect private and family life, Articles 2 and 3 of the Convention also warrant consideration. Article 2 protects the right to life. The obligation of States to protect life is set out in the Convention, but is similarly recognised in other international human rights instruments, including the Universal Declaration of Human Rights (Article 3). As with Article 8, the ECtHR has interpreted Article 2 as placing a positive obligation on States. While, therefore, it requires States to refrain from the intentional and unlawful taking of life, they must

[31] Adopted 24 January 2002, entered into force 1 May 2006; See Comment to Article 18, Additional Protocol on Transplantation of Organs and Tissues of Human Origin.
[32] *Human Rights Quarterly*, Volume 32, Number 4, November 2010, pp. 921-950 (Article) published by The Johns Hopkins University Press.

positively take appropriate steps to safeguard the lives of those within their jurisdiction. Procedurally, there exists an obligation upon States to effectively investigate a killing or suspicious death within their territory. Article 3 prohibits torture, inhuman or degrading treatment or punishment. A similar obligation to investigate arises out of Article 3 ECHR. Where inhuman or degrading treatment is alleged, a State has a duty to investigate a complaint made.

The ECtHR case law concerning Article 2 in particular demonstrates that the procedural obligation upon a State to investigate effectively arises where the death occurs in suspicious circumstances or where an individual has gone missing in life-threatening circumstances. The purpose of such investigations is to ensure that domestic law in place to protect the right to life is implemented. The Last Rights Project, in its article *The Dead, the Missing and the Bereaved at Europe's International Borders – Proposal for a Statement of the International Legal Obligations of States*,[33] sets out the criteria which the ECtHR has required to be met for an investigation to satisfy international human rights standards as follows:

- State initiative – the State authorities must take the initiative to investigate once the matter has come to their attention and may not leave it to the next of kin to bring proceedings;
- Independence – those carrying out the investigation must be independent from those implicated in their death;
- Effectiveness – the investigation must be capable of leading to a determination of whether the action taken by State officials was justified in the circumstances and to a determination of the culpability of those responsible for the death. Steps must be taken to secure all relevant evidence in relation to the death;
- Promptness – the investigation must take place promptly and must proceed with reasonable expedition;
- Transparency - the investigation must be open to public scrutiny to a degree sufficient to provide accountability in the circumstances of the case.[34]

Duty to investigate incidents which took place before the ECHR came into force

The Convention duty to investigate incidents may include incidents that happened some time ago. It is, however, a more limited duty in relation to historical incidents which occurred before the State in question signed the Convention. Nevertheless, relatives of the deceased

[33] May 2017.
[34] The Last Rights Project - *The Dead, the Missing and the Bereaved at Europe's International Borders – Proposal for a Statement of the International Legal Obligations of States* (May 2017) at p.11.

should be involved in the investigation to a sufficient degree to safeguard their legitimate interests.[35]

The ECtHR has stated that its temporal jurisdiction to review a State's compliance with its procedural obligation under Article 2 to carry out an effective investigation into alleged unlawful killing by State agents was not open-ended where the deaths had occurred before the date the Convention entered into force in respect of that State. In such cases, the Court has jurisdiction only in respect of procedural acts or omissions in the period subsequent to the Convention's entry into force, provided there was a "genuine connection" between the death as the triggering event and the entry into force. For a "genuine connection" to be established, the period between the death and the entry into force had to have been reasonably short, no more than 10 years, and a major part of the investigation had or ought to have been carried out after the date of entry into force. The emergence of new, credible information about such past events, however, may trigger the duty to investigate.

The unsettled position in the UK should be noted. In *Re McKerr*,[36] the UK Supreme Court held that an obligation to initiate an investigation under Article 2 only applies to deaths occurring after the Human Rights Act 1988 came into force in 2000. A similar approach was followed by the UK Supreme Court in *Keyu v. Secretary of State for Foreign and Commonwealth Affairs*, discussed in this report. This approach, however, was called into question in other decisions and the current position is unclear.[37]

The question arises whether relatives of those interred in Tuam could contend that their rights pursuant to Article 3 ECHR have been violated. Whether any such claim would be successful

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[35] *Edwards v. UK* [2002] ECHR 303.

[36] [2004] 1 WLR 807.

[37] See *In Re McCaughey* ([2011] UKSC 20) where Lord Phillips reflected on the *Silih* judgment [(2009) 49 EHHR 372] of the Grand Chamber:

> I believe that the most significant feature of the decision ... is that it makes it quite clear that the Article 2 procedural obligation is not an obligation that continues indefinitely ... [j]ust because there has been a historic failure to comply with the procedural obligation imposed by Article 2 it does not follow that there is an obligation to satisfy that obligation now. In so far as Article 2 imposes any obligation, this is a new free-standing obligation that arises by reason of current events. The relevant event in these appeals is the fact that the coroner is to hold an inquest into [the applicants'] deaths. *Silih* ... establishes that this event gives rise to a free standing obligation to ensure that the inquest satisfies the procedural requirements of Article 2.

However in that same judgment, Baroness Hale doubted whether the decision grounded any free-standing right to open a new investigation. See also *Re McGuigan* [2017] NIQB 96.

would depend on the specific set of facts prevailing in each individual case as a minimum level of severity must be achieved.

In order to ensure the effective vindication of the abovementioned ECHR rights, there appears to be an inferred duty on the Irish State to collect, as far as reasonably possible, the remains of those interred at Tuam. The Tuam site, according to the Expert Technical Report, will test the boundaries of forensic investigation in every regard. The Expert Technical Group, due to the varied nature of the complexities at the site in Tuam, notes the limitations of the forensic possibilities involved in excavation and examination on the site. It states that given that the site holds a group of collectively interred individuals, "it may only ever be possible to provide collective answers", and the potential to identify individuals interred there poses many challenges. These limitations therefore must be borne in mind and where the State fails to collect remains for these reasons, it is unlikely to fall foul of its duty where it takes all reasonable steps to investigate the possibility of retrieval and, if proportionate and justified, undertakes reasonable measures to retrieve the bodies in question.

International Human Rights Law: The UN Frameworks

International human rights law also warrants consideration. The Universal Declaration of Human Rights (UDHR) is crucial in this regard. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations. It sets out the fundamental human rights that are to be universally protected. These are enforced through supervision and reporting by expert bodies, some of which may also deal with individual complaints. The state has an obligation to respect, protect and fulfil the rights guaranteed in these instruments pursuant to section 1 and as a member of the United Nations since 1955, Ireland is expected to uphold its principles, and to protect the rights set out in international treaties through its laws, policies and practices.

Customary International Humanitarian Law

The international human rights norms may not be directly relevant to this review, as Ireland has been quite slow to ratify the relevant instruments. The older humanitarian law is also not directly legally applicable, as they are legal norms that are active only when death occurred in, and as a result of, wartime atrocities, although the jurisprudence on dignity and State

custom and practice may shed light on the requirement of the Irish constitution in this regard discussed later.

Much of the material included in this section is either human rights in times of war (customary international humanitarian rights), or instances of 'gross' or 'systemic' violations of human rights (under the various human rights frameworks of the United Nations). It is therefore subject to a number of qualifications.

Firstly, the UDHR is generally regarded as not legally binding.

The two International Covenants [the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)] were not in existence until 1966, and Ireland did not ratify both until 1989. Ratification is key to legal effect in a particular jurisdiction. It is not clear therefore that there were any legally recognisable breaches of human rights in the 1920 to 1960 period. Moreover, it is not clear whether the right to know – which seems to be the legally strongest right – can be based on breaches of human rights before the state ratified the relevant instruments (as it cannot be stated at the time they were breaches).

In summary, if it was not a breach at the time, it is difficult to legally determine it so retrospectively. Therefore, there may be very limited grounds for the right to know which is parasitic upon the basic rights in the UN Charter (the conceptual instrument combining the UN Declaration and both Covenants together).

If inhuman or degrading treatment and violations of privacy can be characterised as continuing, it may constitute a violation of the CAT, ICCPR or CEDAW.

The most relevant jurisprudence on this matter relates to Enforced Disappearance. This is the most fruitful area of international human rights law to review, as it has an express right to truth/right of victims and their families to know. It is also closely tied to the ICCPR which, as stated above, Ireland ratified in 1989. It seems there may not be a requirement that the ICCPR was ratified by the member state when the 'disappearances' took place. There are interesting parallels between the experience in South America, where much of this law emerged, and the experience of the institutional abuse of women and children in settings such

as the mother and baby homes. It should be noted, however, that Ireland has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance, although it codifies what is already implied in many international human rights instruments to which Ireland is a party.

Status of International Obligations

It is important to bear in mind that the obligations imposed on the State by international agreements occur and are enforceable, if at all, under international law only. Article 29.6 of the Constitution provides that:

> No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.

The Supreme Court explained in *McD v. L*[38] that this means that:

> The obligations undertaken by a government which has ratified the Convention arise under international law and not national law. Accordingly those obligations reside at international level and in principle the state is not answerable before the national courts for a breach of an obligation under the Convention unless express provision is duly made in national legislation for such liability.[39]

This means that even if it could be factually established that a breach of obligations under these international agreements has occurred in Tuam, this would not provide a right of action under Irish law or before an Irish court in respect of that breach.

The Irish Constitution

Irish case law confirms the importance of dignity under the Constitution and, in particular, the importance attached to the circumstances associated with a person's death. Clearly, this is of potential significance in the Tuam context. It raises the question as to whether there was a failure to take account of considerations of the dignity of the deceased children in the circumstances of their burial; and whether, if so, this would give rise to a breach of the Constitution? Applying the reasoning in *PP v. HSE*, there is an argument that constitutional considerations of dignity may have continued to be engaged after the deceased children had passed away. If that is the case, the questions then raised include how, to what acts and for

[38] [2010] 2 IR 199.
[39] At p. 247.

what period of time, those considerations continued to apply. As the decision in *Fleming* indicates, there may also be a distinct question as to whether – assuming considerations of dignity did apply to the burial and may continue to apply thereafter – the circumstances give rise to an enforceable constitutional right or claim, whether on the part of the deceased or of other persons.

On this last question, Irish law recognises a cause of action for breach of constitutional rights, insofar as the right breached is not vindicated by other legal mechanisms.[40] Importantly, where a person is incapable of asserting a right on his/her own behalf, the Irish courts have recognised that the right can be asserted by another appropriate person.[41] As such, if this is a breach of constitutional rights and is not addressed by the law of torts (discussed below), a question arises as to whether there could potentially be an action in respect of a breach of constitutional rights, which would be actionable at the suit of the families of the deceased, or appropriate other parties, on behalf of the deceased.

While the decision of the Supreme Court in *Fleming* confirms that the values of autonomy and dignity are not absolute, the analysis in *Ward of Court* indicates that the right to life and the related constitutional commitment to dignity extend to the manner and process of dying. Moreover, the High Court decision in *PP v. HSE* suggests that considerations of dignity may be capable of applying after the point of death.

The capacity of rights to be asserted on the part of the deceased could be a challenge in an Irish context. The recent Article 40.3.3° Supreme Court decision in *M* places considerable emphasis on the inability of the unborn to invoke constitutional rights because it has not been born and is therefore not a rights-holder. The corollary of the concept of rights-holder that emerges in that judgment (and that is consistent with some judicial decisions in recent cases about whether non-citizens are necessarily rights-holders) might be that deceased are not rights-holders for constitutional purposes. This would probably place the deceased in a position of being entitled to respect, but not to have specific rights under the Constitution invoked on their behalf.

[40] *Meskell v. Córas Iompair Éireann* [1973] IR 121, *Hanrahan v. Merck Sharpe and Dohme (Ireland) Ltd.* [1988] ILRM 629.
[41] *SPUC v. Coogan (No.1)* [1989] 1 IR 734. The Society for the Protection of Unborn Life was entitled to litigate to protect the right to life of the unborn.

The rights that could be invoked to challenge any prosecutions brought include the right to a trial within a reasonable time. The courts may be reluctant to require the State to take steps if those steps are unlikely to produce any practical benefit.

The report of the Expert Technical Group also raises significant practical concerns about the results that would be obtained from any exhumation or retrieval. The obligations imposed on the State by the Constitution are to defend and vindicate the personal rights of the citizen "as far as practicable". The decision in *PP v. HSE* highlights the important point in this context that the Constitution does not require the taking of steps to promote or vindicate a constitutional value (in that case the right to life of the unborn) if those steps will not produce any practical benefit. This suggests that the views expressed in the expert report should be given weight in considering the steps to be taken in this matter.

It should be stated that there may be a countervailing dignity interest in disturbing the burial site. That could also be a factor that a court would weigh in assessing the practical benefits of exhumation. If there are countervailing constitutional considerations which may incline against exhumation, the fact that exhumation may not produce any practical benefits may weaken any claim that it is constitutionally required.

Finally, there is a general judicial reluctance to litigate matters after several decades, even though attitudes may have changed to the practices in question. On a practical level, a major problem for a claimant in any litigation could be the apparent indication that these deaths were registered. This makes it much more difficult to argue that there was a lack of knowledge or concealment. There might be a separate issue about the circumstances of the burials although this might run into factual problems if the indication was that it was known in the local area about the burials.

Statute Law

It may be the case that all deaths which took place at the Tuam Mother and Baby Home were duly notified to the registrar. There is no doubt, in any event, that a clear statutory duty existed in respect of such notification. Auditing the obligation to register a death should be considered in the context of Tuam. This might be undertaken by matching the death certificates to the number of juvenile human remains.

Common Law

At common law, the body of law derived from judicial decisions rather than statute or constitutions, there has long since been recognition of the right to a decent burial, and of a range of rights and duties concerning dead bodies. The common law of England and Ireland was a unified body of law until 1922. After that, Irish common law diverged in various ways, although in certain respects the common law in each jurisdiction remained the same. Because of the nature of this topic, many of the key common law precedents date from before 1922, and thus the English cases can be taken as a strong indication of the common law in both England and Ireland. Precedents from other common law jurisdictions such as Australia, Canada and the United States, are also of assistance in stating what, precisely, the common law of Ireland is in this area, and what it was in the relevant period.

It seems that the operators of the Mother and Baby Home at Tuam may have been under a common law duty to bury those who died under their roof. This duty to bury incorporates a duty to bury decently and with dignity, in a Christian burial.[42]

A question that arises in the present review is whether the original actions of the operators of the Tuam Mother and Baby Home could have constituted prevention of a lawful and decent burial. Moreover, were the relevant authorities to refuse to exhume, sort and bury the remains, could this constitute a continuing offence of prevention of a lawful and decent burial? In contrast to the tortious claim considered below, this crime does not require there to be any identifiable family member who is affected by the failure to bury.

One option which may merit further consideration is whether there is an inherent jurisdiction on the part of the High Court to determine whether and how the remains should be dealt with. There is some (although limited) support from other jurisdictions for the proposition that the courts retain a common law power to determine disputes concerning the duty to dispose of the body of the deceased. In the New Zealand Supreme Court decision of *Takamore v. Clarke*,[43] Elias CJ suggested that "where there is a dispute as to burial, either party (meaning personal representatives) has standing to bring the dispute to the High Court for resolution".

[42] It is probably the case that the modern duty to bury is not solely one of Christian burial but rather about burial reasonably appropriate to the deceased person's known values and religious practices. At the relevant time, it seems that Christian burial would have been the appropriate entitlement.
[43] [2012] NZSC 116.

The High Court of England and Wales reached a similar conclusion in *Oldham MBC v. Makin*[44] where a dispute arose as to the manner and timing of the disposal of the remains of the Moors Murderer, Ian Stewart-Brady. While the Court decided the matter on other grounds, it observed that:

> In my judgment, the court does have an inherent jurisdiction to direct how the body of a deceased person should be disposed of. The court will normally, as I have said, be deciding between the competing wishes of different sets of relatives, and will only need to decide who should be responsible for disposal rather than what method of disposal should be employed. I cannot see, however, why the court's inherent jurisdiction over estates is not sufficiently extensive to allow it, in a proper case, to give directions as to the method by which a deceased's body should be disposed of.

Perhaps most relevantly, the High Court of England and Wales held in *In re K* that it had an inherent jurisdiction to authorise arrangements to be made for the disposal of a child's body where the parents had neglected to make any arrangements.[45]

It should be emphasised that this does not necessarily mean that the Irish courts have such an inherent power, or that it would be engaged in the case of the Tuam deceased. Aside from the fact that these cases provide limited persuasive authority for the existence of such a power, the courts in those cases are dealing with situations where there is a dispute between personal representatives of an estate; and where the body remains to be dealt with. The legal context of any application here might be quite different. There is also the obvious factual difference that the question at Tuam would be one not of burial but of possible exhumation and re-burial. Nonetheless, the reasoning of the courts in these cases is based in part on the existence of a common law duty to dispose of remains. As discussed in Chapter 5 of my Report it is arguable that duty is engaged and/or may have been breached in the situation in Tuam.

[44] [2017] EWHC 2543.
[45] [2017] 4 WLR 112.

RECOMMENDATIONS

1. Recommendations Relating to the Rights of the Child in a Digital Environment

(a) Relevant stakeholders in Ireland such as children, parents, teachers, and state authorities should be made aware of the 2018 Council of Europe guidelines on the rights of the child in the digital environment.

(b) Relevant stakeholders should also be made aware of the Council of Europe *Guide to Human Rights for Internet Users* and of the fact that children's rights in the digital environment is one of the seven pillars of that document.

(c) Relevant stakeholders should further be made aware of the Council of Europe's 2017 document *It's Our World: Children's views on how to protect their rights in the digital environment – Report on child consultations* and the fact that children wish to have much greater guidance from schools and other authorities on how to stay safe and exercise their rights online.

(d) Authorities should ensure that all policies concerning children in the digital environment are based on the CRC general principles: the principle of the best interests of the child as the primary consideration in all decisions affecting the child; the right of children to be heard; the right to life survival and development, and the principle of non-discrimination.

(e) The 2018 Council of Europe recommendations document emphasises that the internet introduces many opportunities to children, but it also exposes them to risks that may affect their well-being and their enjoyment of human rights. Irish authorities should ensure that all policies concerning children adequately reflect the protection of children but also the freedom rights of children such as the right to information and the right to freedom of expression.

(f) In particular, children should receive education on the digital environment which enables them to protect themselves from threats to their privacy and welfare.

(g) Authorities should make efforts to raise awareness of the *Council of Europe Internet Literacy Handbook* for children, parents, teachers and others responsible for helping children access the internet and for their safety.

(h) The Council of Europe documents and approaches should in particular be considered and relied upon for the production of the next Action Plan for Online Safety in Ireland.

2. Recommendations Relating to Fundamental Rights and Children in Ireland

(a) Efforts should be continued to achieve a combined approach to tackle child poverty levels in Ireland, using income supports and access to affordable services, particularly with regard to housing, health and education.

(b) Guidance is needed for accompanying the Joint Protocol on Missing Children regarding specific steps to take when the child missing is a third country national who arrives in Ireland without a parent or guardian.

(c) Ireland should put in place a system of guardianship akin to that which applies for all other unaccompanied minors in the care of the State. The role of the guardian should be made clear.

(d) As noted in numerous other Rapporteur reports, the system of Direct Provision for asylum seekers in Ireland should be abolished.

(e) Ireland should opt into Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

(f) Ireland should update the operating protocol put in place in 2009 between the Child and Family Agency (CFA) and An Garda Síochána regarding unaccompanied children going missing.

3. Recommendations Relating to Emerging Issues in the United Kingdom

(a) Relevant practitioners, legislators and policy-makers should be made aware of the recent decisions of the UK Supreme Court on 'habitual residence' for the purpose of the Hague Convention on the Civil Aspects of International Child Abduction 1980.

(b) In particular, they should be made aware of how the interpretation of 'habitual residence' is evolving in the case law in neighbouring jurisdictions. The following principles emerge from an analysis of the relevant case law:

- Habitual residence is primarily a question of fact to be determined by relevant circumstances rather than a pre-determined set of rules.
- A child does not automatically have the same habitual residence as his/her parents.
- One must look at the practical connection between the child and the country in question.
- One parent can, deciding on his/her own to take the child abroad, cause a change of habitual residence (but not necessarily).
- When looking at whether a move has caused a change of habitual residence, look at the degree of connection with the previous place, before the move.
- One must look at stability not permanence – that is, integration rather than length of time.
- The child doesn't need to be fully integrated to become habitually resident somewhere.
- Habitual residence can, sometimes, change quite quickly after a move.
- When the child is older, then the question of how integrated he/she is in his/her environment must be considered more than the surface features of his/her life there, and the state of mind of the child may affect whether residence is habitual.
- Where there is an intention to live in a country for a limited period, this will not rule out the children becoming habitually resident there. The important question is whether there exists a quality of stability necessary to prove residence, not whether it is intended to be permanent.

- The deeper the child's integration in the state from which he/she has been removed, probably the slower his/her achievement of the degree of integration required for habitual residence in the new state.

- The greater the pre-planning of the move by the adults, including plans for the child's day-to-day life in the new state, probably the faster the achievement of the required degree of integration required for habitual residence in the new state.

- If all the central members of the child's life were to have moved to the new state with him/her, probably the faster his/her achievement of the integration required for habitual residence in the new state and, conversely, if any remained behind this would mean an ongoing link with the old state, and this would likely mean slower achievement of integration required for habitual residence in the new state.

- Matters such as return air-tickets, obtaining citizenship and a G.P. are relevant, but may be trumped (in determining habitual residence) by every day matters such as engagement in social life matters such as a playgroup and family life.

- The 1980 Hague Convention cannot be invoked if, by the time of the alleged wrongful removal or retention, the child has become habitually resident in the requested state.

- There can be wrongful retention *before* the expiry of the period of absence agreed by the parents.

4. Recommendations Relating to Voluntary Care in a Child Protection Context: Recent Developments in the UK

(a) Law and practice should be examined in Ireland to ensure that parents are being made aware of their rights and responsibilities where they are asked to agree to the accommodation of their children in circumstances similar to *Williams v. Hackney*.

(b) The CFA should always provide a clear explanatory document to inform parents of their rights and the CFAs responsibilities when a child is received into voluntary care under section 4 of the Child Care Act 1991.

(c) Social workers should be prepared to ensure that parents fully understand their rights and the CFAs responsibilities when a child is received into voluntary care.

5. Recommendations Relating to UN Developments

Children in Street Situations in Ireland

(a) A child rights-based approach should be taken to the rights and needs of children in street situations in Ireland.

(b) Ireland should produce a holistic and long-term strategy and make the necessary budget allocations for children in street situations.

(c) Children in street situations should participate in developing and implementing these strategies.

(d) Information about such children should be collected in Ireland in order to decide how best to uphold their rights.

(e) Laws and policies should be assessed in Ireland to establish how they can be improved to meet the rights and needs of children in street situations.

(f) Private parties such as businesses must be held to account by the state to ensure that they are upholding human rights.

(g) Comprehensive national child protection systems need to assist children in street situations and appreciate their specific needs.

(h) Authorities should ensure basic training on child rights and children in street situations for professionals who come into contact with children in street situations

(i) Children in street situations must have access to basic services such as health and education.

(j) Clear monitoring and accountability mechanisms should be created.

(k) Children should have access to individual complaints mechanisms, by themselves and/or by adult representatives, and to both judicial and non-judicial redress.

(l) Particular attention should be paid to the civil and political rights of children in street situations in Ireland, for example they should be supported to be heard and to form organisations of their own.

(m) It must be ensured that children enjoy their right to live somewhere in security, peace and dignity.

6. Recommendations Relating to General Comment No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence

General

(a) Ireland must better invest in the measures needed for adolescents to enjoy their rights.

(b) Data should be collected and disaggregated by age so that it can inform policy and identify gaps in the allocation of resources for adolescents.

(c) Policies should not simply consider children as a general group, but alternatively separate out adolescents where appropriate, in order to guarantee the realisation of the rights of this group.

(d) In forming policies and laws concerning adolescents, balance is needed between respecting adolescents' evolving capacities and protecting them appropriately. Factors which must be considered when it comes to adolescent decision-making include "the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacity" (para. 20 of the general comment on adolescence).

(e) Conditions which result in discrimination against adolescents on any grounds must be eliminated. Some differentiation of treatment between adults and adolescents is necessary, but the criteria for such differentiation must be reasonable and objective with a legitimate aim.

Discrimination

(f) The general principles of the CRC should guide all policies and actions concerning adolescents. In particular, states should facilitate the ability of adolescents to make decisions in line with their evolving capacities, and facilitate the right of adolescents to participate in decision-making affecting them.

(g) Adolescents should receive citizenship and human rights education, and there should also be training and awareness-raising for key adults including parents, professionals working for adolescents and policymakers.

(h) There should be greater awareness of adolescents requiring particular attention.

(i) Ireland must invest in measures to empower girls, and to challenge harmful gender norms. Clear measures must exist in laws, policies and programmes to guarantee girls equal rights as compared with boys.

(j) Ireland must combat negative perceptions of boys, and must promote positive masculinities.

(k) Measures must be introduced to overcome barriers and to guarantee equality for adolescents with disabilities. They must also enjoy supported decision-making so that they can actively participate in all matters concerning them.

(l) Ireland must repeal all laws discriminating against people based on their sexual orientation, gender identity or intersex status and protect all lesbian, gay, bisexual, transgender and intersex (LGBTI) adolescents from violence, discrimination or bullying. It must engage in public awareness-raising, and implement relevant support measures. (Ireland has made very significant progress in this area, a process which has been led by the current Minister for Children, Katherine Zappone TD.)

(m) Ireland must introduce measures to support such adolescents to enjoy their cultural identities and to enjoy (and contribute actively to) family and community life.

Strategies

(n) In Ireland, a framework should be established for realising the rights of children during adolescence, which should include a national strategy rooted in the CRC; implementation monitoring of legislation, policy and services; data collection; budgetary commitments, training for all relevant professionals, dissemination of information about children's rights, and particular efforts for the rights of those in marginalised situations.

(o) As recommended in my previous reports, minimum ages should be reviewed to ensure that they achieve the correct balance between protection and recognising the evolving capacities of adolescents.

(p) Children's civil and political rights must be considered, such as freedom of expression and freedom of religion. It must be ensured that schools and other institutions appreciate that freedom of religion is a right of the child and that children have choices with regard to attendance in religious instruction classes.

(q) There must be legal recognition of the right of adolescents to establish clubs and organisations, to form online networks, and to join political parties and trade unions.

(r) The right of children to privacy must be respected and where breaches of privacy take place, for example in the digital environment, adolescents should have access to redress.

(s) Adolescents should be involved in initiatives aimed at progressing online safety.

Other Areas

(t) Adolescents in alternative care must have confidential complaints mechanisms and as they leave care they must have support gaining access to employment and housing and they must have psychological support.

(u) Factors known to promote resilience and to protect against mental ill health such as strong relationships with key adults, a suitable standard of living, access to high quality secondary education, freedom from violence, and opportunities for decision-

making must be understood and prioritised. Over-medicalisation and institutionalisation should be avoided.

(v) All adolescents in Ireland should have access to free, confidential, and non-discriminatory sexual and reproductive health services which are responsive to the needs of adolescents. Stigma around adolescent girls, girls with disabilities and LGBTI adolescents in gaining access to such services should be tackled.

(w) Ireland should put in place adequate prevention, harm-reduction and dependence treatment services. There should be sufficient budgetary allocation for this. Punitive or repressive drug control policies should be replaced with treatment and care.

(x) Proactive measures must be taken to end discrimination of marginalised groups such as Travellers in gaining access to education.

(y) In Ireland, adolescents should be detained separately from adults. Ireland should raise progressively the age of criminal responsibility to 18 years.

7. Recommendations Relating to Female Genital Mutilation and Non-Refoulement before the Committee on the Rights of the Child

Relevant practitioners such as lawyers and policy-makers should be made aware of the *IAM (on behalf of KYM) v. Denmark* judgment of the Committee on the Rights of the Child and that:

- A child's right to be free from violence under Article 19 CRC is not dependent on a parent's willingness to resist social pressure.
- The 'principle of precaution' should be considered when evaluating the risk of harm to the child: where there is 'reasonable doubt' about the receiving/home state protecting the child against practices such as FGM, the child should not be returned.
- The children's rights perspective, as well as the individual circumstances of the mother and child, should be the primary focus in decisions about whether to return children to states where they may be at risk of harm.

8. Recommendations Relating to UN CEDAW Committee: Ireland's Compliance with the Convention on the Elimination of All Forms of Discrimination Against Women

General

(a) Section 14 of the Equal Status Acts 2000-2015 should be amended to ensure that an effective remedy is accessible where discrimination has a legislative basis.

Violence against Women

(b) Data on all forms of gender-based violence against women should be collected and existing efforts to combat gender-based violence against women should be intensified.

(c) Ireland should implement more effectively existing legislation on trafficking in persons and enhance collaboration with NGOs to make sure that victims of trafficking are identified at an early stage, and provided assistance. Greater efforts should be made to prosecute those suspected of trafficking. Programmes for women who wish to leave prostitution should be implemented including exit programmes and alternative income-generating opportunities.

(d) Ireland should expedite the ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention).

Education and Employment

(e) Strategies should be strengthened in Ireland to address sexism in the field of education.

(f) Compulsory and standardised age-appropriate education should be provided on sexual and reproductive health and rights in the school curricula.

(g) Action should be taken to better address the low levels of educational attainment among Traveller, Roma and migrant women, including through special measures such as scholarships, and career counselling on educational plans and processes.

(h) The impact of the habitual residence condition should be assessed, as this hinders entitlement to child benefit payments, particularly for Roma and migrant women.

9. Recommendations Relating to UN CAT Committee: Ireland's Compliance with the UN Convention Against Torture

It must be ensured that there is an investigation and prosecution of the crime of removing a girl from the state for the purpose of female genital mutilation, and increased efforts should be made to deter this practice.

10. Recommendations Relating to the Revised General Scheme of the Child Care (Amendment) Bill 2018

(a) The Child Care (Amendment) Bill should be drafted and published forthwith, along the lines of the Revised General Scheme, with the corresponding infrastructure put in place.

(b) Consideration should be given to the inclusion of a mandatory requirement to appoint a GAL in all complex child care proceedings, except where the child is a party to proceedings where discretion should remain with the individual judge hearing the case.

(c) Provision should be made to require that GALs undergo training specific to their role, in additional to the work and educational experience required in the Revised Scheme.

11. Recommendations Relating to Mental Health and Children

All approved centres within the meaning of the Mental Health Act 2001 should be made aware of the decision in *P.L.*, ensure they act in accordance with the strict provisions of the 2001 Act and apply the decision in *P.L.* to situations concerning adults and children alike.

12. Recommendations Relating to Social Welfare Entitlements and Child Refugees

The legislative response to the Court of Appeal decision in *Agha (a minor) v. Minister for Social Protection* should be expedited so that the necessary rectifying provisions are introduced as soon as possible to assist the children at the centre of the Court of Appeal's finding.

13. Recommendations Relating to the Children and Family Relationships (Amendment) Act 2018

(a) The commencement of the Children and Family Relationships (Amendment) Act 2018 must take place as soon as possible, to enable the operation of the substantive measures concerning parentage in cases of donor-assisted human reproduction contained within Parts 2 and 3 of the 2015 Act.

(b) Recommendations made previously in my Tenth Report surrounding commencement issues should be considered.

14. Recommendations Relating to the Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018

(a) It is recommended that the position concerning the ruling of mediated agreements where the child's views have been ascertained in the preparation of such an agreement be clarified in amending legislation. Specifically, it is suggested that a subsection be inserted into section 24 of the 1964 Act to provide that the Court may make a mediated agreement an order of Court, without separately assessing the child's views, where it is satisfied that the child's views have been considered in the making of the mediated agreement.

(b) It is recommended that regulations akin to the Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 similarly be introduced concerning experts appointed under section 32(1)(a) of the 1964 Act.

(c) It is recommended that state-funding be established for all expert reports ordered in private family law proceedings in a systematic and accessible way. A specific body should be set up to deal with the funding of such reports to which those persons with limited resources can approach in order to obtain state funding for any reports ordered by the courts in their cases.

15. Recommendations Relating to the Domestic Violence Act 2018 and the Criminal Law (Extraterritorial Jurisdiction) Bill 2018

(a) For the avoidance of any doubt, a broad definition of "communicating (including by electronic means)" should be inserted into the Domestic Violence Act 2018 clarifying that "communicating" includes phone calls, text messages and emails; communication through social media sites, including Facebook and Instagram; online messaging services; and mobile phone applications such as "whatsapp" and "snapchat".

(b) Children, having regard to their age and maturity, should be given the power and authority to make applications for protection and safety orders in their own right – without having to rely on a parent or the CFA to make an application on their behalf. Consideration needs to be given to including such a power within the 2018 Act, by way of amending legislation if necessary.

(c) On a practical level, it is recommended that facilities be put in place within all family law courts to realise the protection given by section 25 of the Domestic Violence Act concerning the giving of evidence through TV-link. Steps should be taken to ensure all family law courts are equipped to allow the giving of evidence in this manner.

(d) I reiterate my recommendation that child contact centres be established on a national scale and that these centres be state-funded, with the needs and wishes of the child being the core focus of their operation.

(e) The new Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 are to be welcomed for providing much needed regulation in this area – applicable to reports under section 32(1)(b) of the 1964 Act, as well as reports ordered under section 27 of the Domestic Violence Act 2018. It is recommended, however, that

state-funding for expert reports in a systematic and accessible manner be introduced to assist those who are unable to fund the preparation of such reports.

(f) The commencement of the Domestic Violence Act 2018 on 1 January 2019 is to be welcomed. Efforts should now be made to ensure that the Criminal Law (Extraterritorial Jurisdiction) Bill 2018 be facilitated with an early passage through the Dáil and commenced immediately thereafter. Once this is completed, it is recommended that Ireland ratify the Istanbul Convention.

16. Recommendations Relating to Article 42A and the Child Care Act 1991

A "best interests" provision similar to that contained in section 19 of the Adoption Act 2010 and section 31 of the Guardianship of Infants Act 1964 should be included in the Child Care Act 1991 – to fully realise the constitutional mandate in Article 42A.4.1°, having regard to recent judgments of the superior courts.

17. Recommendations Relating to the Detention of Young Persons

(a) It is recommended that all steps necessary be taken to address any non-compliance findings of the 2018 HIQA Inspection Report into the Oberstown Children Detention Campus forthwith.

(b) It is recommended that the contents of the Action Plan prepared on 17 September 2018 in response to the Inspection Report be adhered to in order to ensure that the Oberstown Campus meets the National Standards and Criteria for Children Detention Schools.

Bail Supervision Scheme

(c) The Bail Supervision Scheme (BSS), now in its third year of operation, should be expanded to operate in other locations across the country, preventing discrimination based on geographical location.

(d) The scope of the Scheme should be extended forthwith to increase the numbers participating on the Scheme. The amount of young people permitted to access the BSS should at the very least be doubled.

18. Recommendations Relating to the Online World and Children

(a) The recommendations contained within "Responding to Child Sexual Abuse – A follow up Review from the Garda Inspectorate" should be followed in full and active steps taken to ensure the effective implementation of these recommendations as soon as possible, with the assistance of the Implementation Group.

(b) The Child Abuse Image Database (CAID) should be employed in this jurisdiction to assist in the investigation of online child sex abuse cases. Its benefits are apparent from the content of the Review from the Garda Inspectorate. It is recommended that training in its use be provided forthwith and that it be operative as soon as practicable.

(c) The criminal legislation should be amended to provide for a power to compel any person who appears to have lawful access to a computer/device to provide to a member of An Garda Síochána a password/encryption key/code in order to operate that computer/device. Failure to comply with the request made by An Garda Síochána should amount to a criminal offence.

(d) This power to require passwords/codes should operate without the necessity for obtaining a warrant, where the investigating member holds a reasonable belief both in relation to the device and in relation to the person in respect of whom the request has been made.

Online Safety

(e) Detailed consideration should be given to the content of the Committee of Minister's Recommendation on the rights of the child in the digital environment and steps should be taken in this jurisdiction to follow the guidelines contained therein.

(f) The publication of the National Action Plan for Online Safety for 2018–2019 is to be welcomed and it is recommended that steps should be taken to ensure the 25 actions described therein are implemented effectively.

(g) The national communications campaign, "Be Safe Online", and any advertising/communication strategies supporting the campaign should be monitored closely to gauge their reach, impact and efficacy.

(h) The proposed Online Safety Act should be progressed without delay.

(i) Consideration should be given to the proposal made by CyberSafeIreland concerning the appointment of "digital safety champions" in schools across Ireland.

(j) Efforts should be made to consider policy actions that could be initiated to encourage placing limits on screentime for children and young people.

19. Recommendations Relating to International Instruments and Cybercrime

(a) It is recommended that increased reporting of cybercrime be emphasised at a national level. This will provide a true reflection of cybercrime in this jurisdiction which in turn will justify increased resources and enable those resources to target the right areas – ultimately assisting in the overall prevention of crime. A national campaign that both heightens awareness of cybercrime and promotes the reporting of such crime should therefore be established as soon as possible.

(b) Having signed both the Convention against Cybercrime (the Budapest Convention) and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention), it is imperative that Ireland ratify both Conventions forthwith without reservation.

(c) The ratification of the Budapest and Lanzarote Conventions ought to be carried out in such a manner so as to ensure that the greatest level of protection to be afforded to children under these instruments is provided for in our domestic legislation, having

regard to the positive obligation on States to protect children from cybercrime, as held in *K.U. v. Finland*.

(d) Close regard should be had to the progress of the Electronic Evidence Regulation and any necessary preparations for its introduction should be commenced.

(e) Any further legislation introduced in this jurisdiction at a national level to combat cybercrime must balance the public interest in tackling crime with competing considerations of fundamental rights and ensure the application of the rule of law requirements. Over-criminalisation should be avoided and a preference for specific powers demonstrated.

(f) It is recommended that Ireland make submissions to the European Commission concerning the current form of the proposed E-Privacy Regulation, requesting that the wording be amended to ensure that specialist software which tracks child sexual abuse imagery still be permitted to operate. A specific exemption so that this type of technology can continue to legally operate may suffice.

20. Recommendations Relating to the Criminal Justice (Victims of Crime) Act 2017

(a) It is recommended that child victims of any crime have free access to State-funded legal advice during the pre-trial process.

(b) Careful consideration should be given to the possibility of expanding the provision of legal representation during criminal proceedings to child victims as a distinct category requiring additional protection, while ensuring that the rights of the accused are not impacted.

21. Recommendations Relating to Sexual Exploitation and Children

(a) It is recommended that ratification of the Second Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography occurs in early 2019, as anticipated.

(b) It is recommended that in the short-term, consideration be given to the statement made by the Special Rapporteur following her visit to this jurisdiction and efforts commenced to respond to the succinct recommendations highlighted therein.

(c) In the longer-term, steps need to be taken to deal adequately with the issues raised in her report once it is received by the government.

TUAM REPORT

22. Recommendations Relating to the European Convention on Human Rights (ECHR)

Application of Article 8 principles

(a) Article 8 of the ECHR may be of relevance in relation to the particular set of circumstances arising from the discovery of juvenile remains at Tuam. Article 8 has been broadly interpreted, providing family members of deceased persons with a substantial number of rights capable of assertion. While these rights are not absolute, and may be proportionately interfered with, their existence is of considerable importance and the State should be careful to ensure no illegitimate infringement of such rights. Family members may possess the right to have their loved one's body returned to them. Moreover, relatives may have a right to know the fate of their family members, including information surrounding the death and/or burial of their loved ones. A failure to provide relatives with definite and/or credible information may fall foul of the positive obligation under Article 8, even where the death occurred before the Convention came into force in the relevant county, where the failure to provide information continues following the coming into force of the ECHR.

(b) Irish authorities are required to carry out their functions in a manner compatible with the ECHR and Article 8 rights in particular must be positively vindicated. Regard should be given to the distress and anguish of family members seeking information surrounding the death and/or burial of their loved ones. Nonetheless, it should also be borne in mind that there may be limits to the information which can or must be provided for the purposes of complying with Article 8. The decisions of the European Court of Human Rights (ECtHR) confirm that Article 8 rights include information

concerning the fate and place of burial of the deceased but it may not necessarily extend to additional matters (although these may be covered by Articles 2 and 3 ECHR).

(c) The Article 8 case law of the ECtHR has been concerned so far with negative interferences on the part of the State with the right of family members to the return or disposal of bodies, or to information about their disposal. The Court does not yet appear to have considered whether Article 8 imposes a more extensive positive obligation on the part of State authorities to assist or ensure that a burial takes place in the particular manner desired by the family.

(d) Any Article 8 ECHR right should be considered having regard to the extreme delicacy of any exhumation and further investigation at the Tuam site, as determined by the Expert Technical Group (ETG). The report of the ETG states that: "There are a number of factors that make this situation unique: The forensic requirement of the site; The 'significant' quantities of juvenile remains; The commingled or intermixed state of the remains; The position of the remains within subsurface chambers, with limited access." The report[46] concludes that the comingled state of the remains renders identification "particularly challenging". Moreover, the ETG states there is a "risk of destruction to human remains" that raises ethical issues.

(e) In terms of pursuing any claim for violation of Convention rights, it is the family members alone who are capable of asserting these rights. The deceased no longer possess human rights and they are not capable of asserting same.

Articles 2 and 3 ECHR

As with Article 8, the ECtHR has interpreted Article 2 as placing a positive obligation on States. Procedurally, there exists an obligation upon States to effectively investigate a killing or suspicious death within their territory. Article 3 prohibits torture, inhuman or degrading treatment or punishment. A similar obligation to investigate arises out of Article

[46] Report of the Expert Technical Group, December 2017, (i).

3 ECHR. Where inhuman or degrading treatment is alleged, a State has a duty to investigate a complaint made.

Duty to investigate incidents which took place before the ECHR came into force

(a) The ECHR duty to investigate incidents may include incidents that happened some time ago. It is, however, a more limited duty in relation to historical incidents which occurred before the State in question signed the Convention. Nevertheless, relatives of the deceased should be involved in the investigation to a sufficient degree to safeguard their legitimate interests.[47]

(b) The ECtHR has stated that its temporal jurisdiction to review a State's compliance with its procedural obligation under Article 2 was not open-ended where the deaths had occurred before the date the Convention entered into force in respect of that State. In such cases, the Court has jurisdiction only in respect of procedural acts or omissions in the period subsequent to the Convention's entry into force, provided there was a "genuine connection" between the death as the triggering event and the entry into force. For a "genuine connection" to be established, the period between the death and the entry into force had to have been reasonably short, no more than 10 years, and a major part of the investigation had or ought to have been carried out after the date of entry into force. The emergence of new, credible information about such past events, however, may trigger the duty to investigate.

(c) The question arises whether relatives of those interred in Tuam could contend that their rights pursuant to Article 3 ECHR have been violated. Whether any such claim would be successful would depend on the specific set of facts prevailing in each individual case as a minimum level of severity must be achieved.

(d) In order to ensure the effective vindication of the abovementioned ECHR rights, there appears to be an inferred duty on the Irish State to collect, as far as reasonably possible, the remains of those interred at Tuam. The Tuam site, according to the Expert Technical Report, will test the boundaries of forensic investigation in every

[47] *Edwards v. UK* [2002] ECHR 303.

regard. The Expert Technical Group, due to the varied nature of the complexities at the site in Tuam, notes the limitations of the forensic possibilities involved in excavation and examination on the site. It states that given that the site holds a group of collectively interred individuals, "it may only ever be possible to provide collective answers", and the potential to identify individuals interred there poses many challenges. These limitations therefore must be borne in mind and where the State fails to collect remains for these reasons, it is unlikely to fall foul of its duty where it takes all reasonable steps to investigate the possibility of retrieval and, if proportionate and justified, undertakes reasonable measures to retrieve the bodies in question.

International Human Rights Law

(a) The international human rights norms may not be directly relevant, as Ireland has been quite slow to ratify the relevant instruments. The older humanitarian law is also not directly legally applicable, as they are legal norms that are active only when death occurred in, and as a result of, wartime atrocities, although the jurisprudence on dignity and State custom and practice may shed light on the requirement of the Irish constitution in this regard (discussed later).

(b) Much of the material included in the customary international humanitarian section of the report is either human rights in times of war (customary international humanitarian rights), or instances of 'gross' or 'systemic' violations of human rights (under the various human rights frameworks of the United Nations). It is therefore subject to a number of qualifications. Firstly, the UDHR is generally regarded as not legally binding. Furthermore, the two International Covenants (the ICCPR and ICESCR) were not in existence until 1966, and Ireland did not ratify both until 1989. Ratification is key to legal effect in a particular jurisdiction. It is not clear therefore that there were any legally recognisable breaches of human rights in the 1920 to 1960 period. Moreover, it is not clear whether the right to know – which seems to be the legally strongest right – can be based on breaches of human rights before the state ratified the relevant instruments (as it cannot be stated at the time they were breaches). In summary, if it was not a breach at the time, it is difficult to legally determine it so retrospectively. Therefore, there may be very limited grounds for the right to know

which is parasitic upon the basic rights in the UN Charter (the conceptual instrument combining the UN Declaration and both Covenants together).

(c) If inhuman or degrading treatment and violations of privacy can be characterised as continuing, it may constitute a violation of the UNCAT, ICCPR or CEDAW.

(d) The most relevant jurisprudence on this matter relates to Enforced Disappearance. This is the most fruitful area of international human rights law to review, as it has an express right to truth/right of victims and their families to know. It is also closely tied to the ICCPR which, as stated above, Ireland ratified in 1989. It seems there may not be a requirement that the ICCPR was ratified by the member state when the 'disappearances' took place. There are interesting parallels between the experience in South America, where much of this law emerged, and the experience of the institutional abuse of women and children in settings such as the mother and baby homes. It should be noted, however, that Ireland has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance, although it codifies what is already implied in many international human rights instruments to which Ireland is a party.

Status of International Agreements

It is important to bear in mind that the obligations imposed on the State by international agreements occur and are enforceable, if at all, under international law only. Article 29.6 of the Constitution provides that:

> No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.

The Irish Constitution

(a) Irish case law confirms the importance of dignity under the Constitution and, in particular, the importance attached to the circumstances associated with a person's death. Clearly, this is of potential significance in the Tuam context. It raises the question as to whether there was a failure to take account of considerations of the dignity of the deceased children in the circumstances of their burial; and whether, if

so, this would give rise to a breach of the Constitution? There may also be a distinct question as to whether – assuming considerations of dignity did apply to the burial and may continue to apply thereafter – the circumstances give rise to an enforceable constitutional right or claim, whether on the part of the deceased or of other persons.

(b) While the decision of the Supreme Court in *Fleming* confirms that the values of autonomy and dignity are not absolute, the analysis in *Ward of Court* indicates that the right to life and the related constitutional commitment to dignity extend to the manner and process of dying. Moreover, the High Court decision in *PP v. HSE* suggests that considerations of dignity may be capable of applying after the point of death.

(c) The capacity of rights to be asserted on the part of the deceased could be a challenge in an Irish context. The recent Article 40.3.3° Supreme Court decision in *M* places considerable emphasis on the inability of the unborn to invoke constitutional rights because it has not been born and is therefore not a rights-holder. The corollary of the concept of rights-holder that emerges in that judgment (and that is consistent with some judicial decisions in recent cases about whether non-citizens are necessarily rights-holders) might be that deceased are not rights-holders for constitutional purposes. This would probably place the deceased in a position of being entitled to respect, but not to have specific rights under the Constitution invoked on their behalf.

(d) The report of the Expert Technical Group also raises significant practical concerns about the results that would be obtained from any exhumation or retrieval. The obligations imposed on the State by the Constitution are to defend and vindicate the personal rights of the citizen "as far as practicable". The decision in *PP v. HSE* highlights the important point in this context that the Constitution does not require the taking of steps to promote or vindicate a constitutional value (in that case the right to life of the unborn) if those steps will not produce any practical benefit. This suggests that the views expressed in the expert report should be given weight in considering the steps to be taken in this matter.

(e) It also should be stated that there may be a countervailing dignity interest in disturbing the burial site. That could also be a factor that a court would weigh in

assessing the practical benefits of exhumation. If there are countervailing constitutional considerations which may incline against exhumation, the fact that exhumation may not produce any practical benefits may weaken any claim that it is constitutionally required.

Statute Law

It may be the case that all deaths which took place at the Tuam Mother and Baby Home were duly notified to the registrar. There is no doubt, in any event, that a clear statutory duty existed in respect of such notification. Auditing the obligation to register a death should be considered in the context of Tuam. This might be undertaken by matching the death certificates to the number of juvenile human remains.

Common Law

(a) At common law, the body of law derived from judicial decisions rather than statute or constitutions, there has long since been recognition of the right to a decent burial, and of a range of rights and duties concerning dead bodies. It seems that the operators of the Mother and Baby Home at Tuam may have been under a common law duty to bury those who died under their roof. This duty to bury incorporates a duty to bury decently and with dignity, in a Christian burial.[48]

(b) A question that arises is whether the original actions of the operators of the Tuam Mother and Baby Home could have constituted prevention of a lawful and decent burial. Moreover, were the relevant authorities to refuse to exhume, sort and bury the remains, could this constitute a continuing offence of prevention of a lawful and decent burial? In contrast to the tortious claim considered below, this crime does not require there to be any identifiable family member who is affected by the failure to bury.

[48] It is probably the case that the modern duty to bury is not solely one of Christian burial but rather about burial reasonably appropriate to the deceased person's known values and religious practices. At the relevant time, it seems that Christian burial would have been the appropriate entitlement.

(c) One option which may merit further consideration is whether there is an inherent jurisdiction on the part of the High Court to determine whether and how the remains should be dealt with. There is some (although limited) support from other jurisdictions for the proposition that the courts retain a common law power to determine disputes concerning the duty to dispose of the body of the deceased. The legal context of any application here might be quite different. There is also the obvious factual difference that the question at Tuam would be one not of burial but of possible exhumation and re-burial. Nonetheless, the reasoning of the courts in these cases is based in part on the existence of a common law duty to dispose of remains. As discussed elsewhere in Chapter 5 of this Report it is arguable that duty is engaged and/or may have been breached in the situation in Tuam.

SECTION 1: INTERNATIONAL DEVELOPMENTS

1.1 RIGHTS OF THE CHILD IN A DIGITAL ENVIRONMENT

The digital environment creates opportunities for and risks to the well-being and to the enjoyment of human rights. This is true for children as it is for all groups. A new Recommendation was adopted in 2018 by the Council of Europe's Committee of Ministers which aims to better respect, protect and fulfil the rights of the child in the digital environment.[49] The text provides comprehensive guidelines for action by European governments and is based on international and European legal instruments. It is recommended that governments review their legislation, policies and practices to adequately address children's digital rights across the spectrum of children's rights. There is also an emphasis on States ensuring that business enterprises and other key partners uphold human rights obligations and that these private entities are held to account where they are in breach of these standards. The content of this Recommendation is examined at this juncture, whereas the relationship between children and online safety in a criminal context is discussed further in Section 4.2 of my Report.[50]

Council of Europe Guidelines on the Rights of the Child in a Digital Environment

In the document, the 'general principles' of the UN Convention on the Rights of the Child (CRC) are emphasised – the guiding principles of that instrument which are to be considered in the implementation of all other rights: the principle of the best interests of the child as the primary consideration in all decisions affecting the child; the right of children to be heard; the right to life survival and development, and the principle of non-discrimination. In all actions concerning children online, the recommendations state, the best interests of the child must be a primary consideration. States should make every effort, when assessing the best interests of a child, to balance protection with rights such as freedom of expression, information and participation. It is noted that the capacities of children evolve gradually from birth to age 18 and that individuals develop at different paces. Policies and practices in relation to the digital

[49] Council of Europe, *Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment: Recommendation CM/Rec (2018)7 of the Committee of Ministers* (Council of Europe, 2018).
[50] See Section 4.2 below.

environment must respond to different needs. Policies should, for example, be adapted to the rights and needs of adolescents and these would likely differ significantly from policies adopted for younger children.

In the recommendations it is also stated that rights are to be granted without discrimination of any kind. It is recognised that the digital environment comes with both risks and benefits, and that targeted measures may be necessary for children in vulnerable situations. It is also emphasised that children have the right to be heard and for their views to be given due weight in accordance with age and maturity in accordance with CRC Article 12. States and other stakeholders should therefore provide children with information on their digital rights in a form appropriate to children's developmental stages and circumstances, including on their participation rights. States should also provide opportunities for children and parents/carers to express themselves through the digital environment as well as through face-to-face participation and inform children of support mechanisms as well as procedures for complaints and remedies/redress where their rights are violated.

States and other relevant stakeholders must work with children to develop, implement and evaluate the legislation, policies, and other mechanisms, which are produced with the aim of respecting, protecting and fulfilling the rights of the child in the digital environment.

The recommendations cover the duty on states to engage all relevant stakeholders, in particular pointing to education systems, child protection and care systems, public institutions and business enterprises and civil society stakeholders. Of course, children themselves and their parents or other carers must also be engaged with in order to effectively implement obligations concerning the digital environment.

The document emphasises that where children have inadequate access to the digital environment, this will likely affect their ability to fully enjoy their human rights. States should therefore ensure that there is adequate, affordable and secure access for children to devices. Connectivity should be ensured as should digital content specifically intended for children. This should be available in dedicated public places and should be provided free of charge.

The recommendations focus strongly on the civil and political rights of children in the digital environment. Rights such as freedom of assembly and association, information and expression are highlighted and it is emphasised that states must provide information on "the rights of the child, including in the digital environment; on news; on health; and on sexuality, among other resources of benefit to them" as a particular priority. In addition to this it is stated that attention should be paid not just to children's access to, but also their presence and portrayal in, media online.[51]

The recommendations also consider restrictions on children's right to freedom of expression and information in the digital environment, stating that where restrictions occur, they should comply with international human rights standards. This should include measures to ensure that children are informed of restrictions which may be in place, such as content filtering.

That said, the recommendations outline that specific measures must be taken to ensure that children are protected from premature exposure to the digital environment. It is acknowledged that children face risks in the digital environment and they require special protection online. For this reason, they need to be educated about how best to avoid risks, and also how to steer clear of danger and how to get maximum benefit from their use of the internet. Children must therefore become 'digital citizens' (digital citizenship refers to how one should behave while using digital technology online):

> States should promote the development of digital literacy, including media and information literacies and digital citizenship education, to ensure that children have the competence to engage in the digital environment wisely and the resilience to cope with its associated risks. Digital literacy education should be included in the basic education curriculum from the earliest years, taking into account children's evolving capacities.[52]

Possible risks, the document continues, include online grooming, cybercrime, cyberbullying, data protection issues and child sexual abuse material. Yet where children receive the right education from the State, from internet service providers and other educators, these risks can be avoided successfully and children can take advantage of the internet's many opportunities.

[51] Para. 20.
[52] Para. 41.

States should assess on a regular basis any risks of harm posed by digital technology to children's health, considering the fast pace at which developments happen in that field.

The recommendations state that measures should be taken to ensure that children are protected from commercial exploitation in the digital environment. States must ensure that advertising and marketing is age-appropriate. Business enterprises must not engage in unfair commercial practices towards children, and must be required to ensure that it is clear to children where communication constitutes digital advertising and marketing.

It is also stated that laws and policies related to the digital environment should be assessed at the stage of drafting regarding the potential impact on children's enjoyment of human rights. States should review laws and policies at regular intervals, and update legal frameworks to support children's rights in the digital environment.

A comprehensive legal framework should provide for preventive and protective measures in the digital environment. All forms of violence, exploitation and abuse should be prohibited and legal frameworks should encompass all unlawful acts which can be committed in the digital environment, bearing in mind the emergence of new technologies.

There should also exist a clear legal and regulatory environment to assist businesses and other stakeholders meet their responsibility to children's rights in the digital environment throughout their operations. Clear avenues should exist for children or their legal representatives to seek compensation from perpetrators for violations of their rights.

States should take a comprehensive strategic national approach to children in the digital environment, and ensure that policies and measures are consistent and in line with children's rights. This could involve the adoption of a strategy or action plan. Specific attention could also be ensured to children's rights in the digital environment in existing action plans, strategies and policies.

Children's views should contribute to the formulation of such plans, and children should be informed about how their views influenced the decision-making process. Measures should be taken to widely disseminate information on adopted strategies or action plans and these

initiatives should be informed by up-to-date evidence about children's experiences, emerging trends and opportunities/risks in the digital environment.

Other Council of Europe Guidance

Fundamental freedoms fully apply offline and online, as is emphasised in the Council of Europe's 2014 *Guide to Human Rights for Internet Users*.[53] This Guide provides information about rights and freedoms in the context of the internet. It outlines how the rights can be relied and acted upon, as well as remedies which can be accessed. It is an evolving document and is updated periodically. It is based on the European Convention on Human Rights and other Council of Europe conventions and instruments that deal with various aspects of human rights protection and is informed by the continuous interpretation of these rights by the European Court of Human Rights and other relevant legal instruments and standards.

The guide was designed as a tool to assist individuals facing difficulties in exercising their rights online; to help governments to protect and respect human rights; to start national discussions on rights online; and to encourage the private sector to respect the human rights of individuals they contract with. The guide emphasises the protection of the right to freedom of expression, access to information, the right to freedom of assembly, protection from cybercrime, the right to a private life, and the protection of personal data. It makes the protection of children one of its seven main pillars.

The first pillar is non-discrimination. It outlines that one should not be disconnected from the internet against one's will, save when it is decided by a court. Contractual disputes which lead to discontinuation should be a measure of last resort. Access to the internet should be affordable and non-discriminatory. Access to internet content, applications and services should be as effective as possible and public authorities should make reasonable efforts to facilitate access to the internet for those in rural and geographically remote areas, those on a low income and those with special needs or disabilities.

The second pillar is the right to seek, receive and impart information and ideas of your choice without interference and regardless of frontiers. This refers to the freedom to express oneself

[53] Council of Europe, *Guide to Human Rights for Internet Users* (Council of Europe, 2014).

online and to access information and the opinions and expressions of others. There may be restrictions concerning the incitement of discrimination, hatred or violence but they must be lawful, narrow and have court oversight.

The third pillar is the right to peacefully assemble and associate with others using the Internet. This means that one can choose any website or other service in order to take part in social groups and assemblies and that one can use the internet to exercise rights to form and join trade unions. There is also a right to protest peacefully online though one may face legal consequences if the protest leads to service disruption.

The fourth pillar is the right to private and family life on the internet. In using the internet personal data is regularly processed. Both public authorities and private companies are under an obligation to respect rules and procedures when your personal data is processed. You should be informed when personal data is processed and/or transferred to third parties and you must not be subject to general surveillance or interception measures. Your privacy may be interfered with in certain circumstances, such as for a criminal investigation.

The fifth pillar is the right to education, including access to knowledge. There should be online access to education and to content which is cultural, scientific and scholarly, though payment may be required for rights holders' work. Publicly funded research and cultural works should be in the public domain on the internet where possible. Digital education and knowledge should be accessible in order to exercise rights and freedoms on the internet. Such education includes the teaching of skills to work with a broad range of internet tools, including the skills to critically analyse the trustworthiness of content.

The sixth pillar is the right of children and young people to all the rights and freedoms outlined in the guide, as well as special protection and guidance when using the internet because of their age. It is outlined that children have the right to freely express views and to participate in society. They also should receive information in a language appropriate for their age and training about safe use of the internet, including on how to protect privacy, from teachers, educators and parents or guardians.

In particular, children should be made aware that content created on the internet about a child may be accessible worldwide and could challenge children's privacy or otherwise harm their

rights now or at a later stage in their life. Material should be removed or deleted within a reasonably short period of time where children or their legal guardians request this. Clear information should be provided to children about online content that is illegal, such as online harassment, and that children may report apparently illegal content. Children should also have special protection from interference with their welfare, particularly regarding sexual exploitation and abuse on the internet and other forms of cybercrime. Children have the right to education which enables them to protect themselves from such threats.

The seventh pillar concerns the right to an effective remedy when your human rights have been restricted or violated. Such remedies should be available, accessible, affordable and provide appropriate redress. They can be provided by internet service providers, public authorities or national human rights institutions. Remedies may include inquiries, explanations, a correction, an apology, or compensation. In practice, this means providers and authorities should inform users about rights, freedoms and possible remedies. National authorities must protect individuals from criminal activity and offences related to the internet, and authorities must investigate and take appropriate action. For those facing criminal charges relating to the internet, they have the right to a fair trial within a reasonable time by an independent court.

The Council of Europe also has an *Internet Literacy Handbook*[54] which is a tool for children, parents, teachers and policy makers to use the internet safely, and for educating about opportunities and risks. The first edition of the *Internet Literacy Handbook* was issued in 2003 and the most recent was issued in 2017. It takes into account the many changes in the digital environment in the past few years, for example considering new concepts of digital citizenship and digital parenting. It includes 26 fact sheets arranged under six thematic headings.

The first section concerns connecting to the internet and other basics, advising for example to secure connections by setting up a firewall, by setting a password for the Wi-Fi router, and setting up 'guest' accounts on devices that are used by children. Secondly, the guide considers connecting ideas and people through email, social media etc. It is advised that steps

[54] The Council of Europe, *Internet Literacy Handbook* (Council of Europe, 2017), available at https://edoc.coe.int/en/internet/7515-internet-literacy-handbook.html.

are taken to protect your online privacy and that content used online is in accordance with copyright law. The third concerns participating in the knowledge society (searching for information), prompting users to consider the accuracy of information found online. The other areas are: internet for everyone (e.g. digital parenting); addressing internet challenges (e.g. cybercrime and online harassment); and looking forward (e.g. artificial intelligence and virtual reality).

European Strategy for a Better Internet for Children

In 2012, the European Commission set out a *European Strategy for a Better Internet for Children*[55] to assist children in achieving the digital skills they need to safely benefit from being online. It also aims to achieve interactive, creative and educational online content. The strategy sets out the aim of a series of actions based on the following primary goals:

- Stimulate the production of creative and educational online content for children as well as promoting positive online experiences for young children;
- Scaling up awareness and empowerment, including teaching of digital literacy and online safety in all EU schools;
- Create a safe environment for children through age-appropriate privacy settings, wider use of parental controls and age rating and content classification;
- Combat child sexual abuse material online and child sexual exploitation.[56]

The strategy brings together the European Commission and Member States with the private sector (for example mobile phone operators, handset manufacturers and providers of social networking services) with the purpose of achieving concrete solutions to challenges for children online.

Children's Own Views on the Digital Environment in Europe

The Council of Europe has also considered children's own views in the digital environment, producing in 2017 *It's Our World: Children's views on how to protect their rights in the digital environment – Report on child consultations*.[57] It was found that despite the diverse backgrounds of the children taking part in the eight states examined, children held the same

[55] European Commission, *European Strategy for a Better Internet for Children* (European Commission, 2012).
[56] https://ec.europa.eu/digital-single-market/en/content/creating-better-internet-kids-0.
[57] Council of Europe, *It's Our World: Children's views on how to protect their rights in the digital environment – Report on child consultations* (Council of Europe, 2017).

views and made similar recommendations in relation to various issues concerning the digital environment.

It was found that children were somewhat aware of the existence of children's rights, but that there was a wide variation on knowledge about the content of the rights. Children felt that, as they got older, they were getting more capable and had a better understanding of the digital environment. They expect support from parents and other adults in accordance with their age and maturity; and believe that the use of "parental control" was sometimes justifiable for them.

Children who felt more likely to be subject to discrimination and those who were more likely to be vulnerable – such as unaccompanied minors and children with disabilities – mentioned equality as an overarching principle. Children with learning disabilities for example emphasised the lack of available public and other spaces for them to access the internet and digital literacy, and Roma children emphasised hate speech about Roma which they experience on the internet.

It was found that modern children live very much in the digital environment, and they perceive a fine line (and significant cross-over) between the offline and online worlds. Online and offline interactions can be connected and can have the same effect on children. For example regarding bullying between peers, such bullying can continue in the digital environment once children are physically apart.

Children make reference to a need for support from parents and others, but emphasised that they need support which is balanced and not overly restrictive or protective: they wish to have both trust and attention as in other aspects of their lives. Children all agreed that access to the internet should be available to everyone, without discrimination, and many were of the opinion that access should be available free of charge, at the very least in public places. That said, children interviewed did feel that children are more vulnerable, so access to the internet should be in line with children receiving education and literacy as well as support from parents and other adults.

Children felt that internet access was important for many reasons: for learning, playing, socialising, and expressing themselves. They emphasised that terms and conditions regulating access to websites should be more child-friendly, and in understandable language.

Children were aware of their right to play, though they had different views about what the right involved. Some children felt that they should have unlimited time online, but other children felt that they should have an hour or a number of hours. Children frequently expressed worry about safety online, for example concerning the effects of violent online games and the dangers when meeting strangers online. One of their main concerns was that they feared that their photos would be misused.

Children were very aware of the potential consequences of sharing content online, for example losing control over the use of their material and the affect that this may have on "real life". They proposed the restriction of access to images and the imposing of stronger control of social media sites. Younger children raised the matter of cameras in toys.

Children frequently raised the issue of respect for private and family life. Particularly vulnerable groups, such as asylum-seeker children, emphasised the need to stay in touch with family. Children were aware that digital identities could be false yet many were not worried about encountering new individuals online. Very few children would even consider arranging meetings with strangers met online.

The most highly shared concern among children from all countries examined was the lack of digital literacy education in their school curriculum. In practice, children reported, they self-taught everything about the digital environment, yet they still expected that they should acquire knowledge on safety online, digital and privacy rights, and assessment of false information at school. They even recommended that websites and applications should be established for educational purposes, and eventually integrated into formal education.

Children often expressed that they did not know what to do nor whom to approach if they needed help. They stated strongly that they expected more information on the potential risks of the digital environment and greater guidance from schools.

Ireland Action Plan for Online Safety 2018 - 2019

The Irish Government produced its first Action Plan for Online Safety in July 2018. The Action Plan is discussed further in Section 4 of my report with reference to recent criminal developments that have taken place on a national level. The main aim of this action plan is to establish and implement actions over an 18 month period, which will improve online safety for everyone in Ireland. It has five goals and 25 specific actions (outlined below). It is presented as the first step in a holistic Government approach "which is particularly important for an issue that spans so many different Departments, and deals with such a wide range of concerns." A single access point has been introduced on gov.ie through which all relevant resources will be made available. It is targeted at a variety of user groups such as children, parents and teachers.

The Action Plan emphasises that stakeholders such as individuals, parents, educators, industry and law enforcement must all play a role in making the internet safer and that collaboration with other countries at EU and international level is also crucial.

The Action Plan is centred on five goals:

- Goal 1: Online Safety for All
- Goal 2: Better Supports
- Goal 3: Stronger Protections
- Goal 4: Influencing Policy
- Goal 5: Building our Understanding

The Action Plan sets out 25 specific actions to be progressed during 2018 and 2019 as set out below:

1. Create a single online access point on gov.ie through which all available Online Safety resources can be accessed;
2. Review, consolidate and augment resources to support Online Safety;
3. Equip teachers to embed digital awareness and digital citizenship in their practice;
4. Encourage non users of the internet to develop computer and online skills through community based classes;
5. Support enhanced curriculum development;
6. Foster collaboration with parents;
7. Support student participation in safer internet day activities and peer-to-peer initiatives;

8. Develop online and telephone signposting tools and explore the provision of remote online supports for mental health;
9. Develop awareness training to build resilience and peer support;
10. In line with the EU better internet for kids strategy, promote best practice standards for quality content for children;
11. Legislate for new criminal offences with the support of the Oireachtas;
12. Ensure that Online Safety is specifically accounted for in statutory child safeguarding statements;
13. Strengthen links and processes with industry for removing illegal and harmful material;
14. Work with online platforms based in Ireland to advance Online Safety measures;
15. Work with industry to develop a practical guide for online platforms and interactive services to support best practice in Online Safety in design;
16. Work with EU and international partners to actively promote Online Safety;
17. Revise the regulatory framework for on demand audio visual media services;
18. Work with the Joint Oireachtas Committee in relation to the Digital Safety Commissioner Bill 2017;
19. Publish an annual safer internet report;
20. Establish a new National Advisory Council for Online Safety;
21. Support the implementation of the Action Plan through consultation with children and young people;
22. Ensure that offline and on-line responsibilities are aligned with effective whole of government coordination;
23. Ensure political oversight of the implementation of this plan;
24. Refocus the Office for Internet Safety;
25. Ensure appropriate funding and resourcing targeted at Online Safety initiatives is in place.

There are some key activities outlined in the Action Plan. A youth hub will be developed, for example, to represent the student voice in digital safety. Resources for parents will be adapted and new tools for parents of pre-schoolers will be created. It is specified that teachers will be reminded of online safety awareness, and Government will work with the Teaching Council to introduce specific training into frameworks for trainees. Digital learning centres will also be created in public libraries with the purpose of ensuring that everyone has access to knowledge.

The plan sets out that there will be an interactive digital resource created for primary school children, and that online safety will be a major part of the curriculum for schools. There will also be consultations with parents, students and educators about phone use in schools. Anti-bullying training sessions will be provided to the National Parents Council. Mental health help will be better signposted via online and telephone tools and online therapy sessions will possibly be established. Digitally available peer support and resilience-building will also become available.

There will be stronger protections, such as legislating for new criminal offences relating to online harassment, revenge porn and online stalking. Statutory statements around child safeguarding will include explicit consideration of online safety. The Government will attempt to enhance efforts to tackle the use of images of child abuse, and work with online platforms (such as Facebook) to advance safety measures, and produce a best-practice guide for online platforms and digital services.

It is outlined that Ireland will work with the EU to tackle online safety challenges. It is also specified that the Government will work with the Joint Oireachtas Committee in relation to the Digital Safety Commissioner Bill 2017, a Bill which sought to legislate for reforms regarding protection in the digital environment, including the appointment of a Digital Safety Commissioner. It is further outlined that an annual *Safer Internet* report will be published and a new national advisory council will be established for online safety. It will be created from a varied base, including industry, academia, children and parents. There will also be consultation of young people in Ireland on the Action Plan.

A sponsors group will be created to implement the action plan and all government departments will be involved. A cabinet committee will report on progress and will be chaired by An Taoiseach. A Minister of State will be given the task of linking all the Government bodies together. A key aim of the plan is ensuring that appropriate funding and resourcing is allocated.

The strategy constitutes a positive step to achieving a more holistic, joined-up, modern and effective approach to digital access and safety. Children feature prominently and many of the elements outlined in the Action Plan reflect the factors and recommendations highlighted in the Council of Europe documents and the consultation with children alluded to above. In particular the need for education through schools about safety online is well reflected. The strategy explicitly cites the *European Strategy for a Better Internet for Children*. It does not, however, cite any of the Council of Europe documents outlined above. Nor does it refer to the UN Convention on the Rights of the Child, or any other aspects of the international human rights framework (although a study examining the position of children's rights in education for professionals is mentioned at p.49). Further analysis with regard to the Action Plan is contained within Section 4.2 of this report.

Recommendations

Relevant stakeholders in Ireland such as children, parents, teachers, and state authorities should be made aware of the Council of Europe Guidelines on the rights of the child in the digital environment.

Relevant Stakeholders should also be made aware of the Council of Europe Guide to Human Rights for Internet Users and of the fact that children's rights in the digital environment is one of the seven pillars of that document.

Relevant Stakeholders should further be made aware of the Council of Europe's 2017 document It's Our World: Children's views on how to protect their rights in the digital environment – Report on child consultations and the fact that children wish to have much greater guidance from schools and other authorities on how to stay safe and exercise their rights online.

Authorities should ensure that all policies concerning children in the digital environment are based on the CRC general principles: the principle of the best interests of the child as the primary consideration in all decisions affecting the child; the right of children to be heard; the right to life survival and development, and the principle of non-discrimination.

The 2018 Council of Europe recommendations document emphasises that the internet introduces many opportunities to children, but it also exposes them to risks that may affect their well-being and their enjoyment of human rights. Irish authorities should ensure that all policies concerning children adequately reflect the protection of children but also the freedom rights of children such as the right to information and the right to freedom of expression.

In particular, children should receive education on the digital environment which enables them to protect themselves from threats to their privacy and welfare.

Authorities should make efforts to raise awareness of the Council of Europe Internet Literacy Handbook for children, parents, teachers and others responsible for helping children access the internet and for their safety.

The Council of Europe documents and approaches should in particular be considered and relied upon for the production of the next Action Plan for Online Safety in Ireland.

1.2 SUSTAINABLE DEVELOPMENT GOALS, CHILDREN IN MIGRATION AND DIRECTIVE 2016/80

In this part of section 1, I consider children's rights in Ireland in the context of a European Union fundamental rights framework. I discuss Ireland's Sustainable Development Goals National Implementation Plan 2018–2020 which provides a whole-of-government approach to implement the 17 Sustainable Development Goals and contains an ambitious strategy to guide Ireland to fully achieve these goals at home by 2030. I also outline measures in Ireland for children in migration, including the operating protocol regarding unaccompanied children going missing, and the procedures for unaccompanied minors upon their arrival in the jurisdiction. Regarding procedural safeguards for children who are suspects in criminal proceedings, I note the failure to opt into Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

Sustainable Development Goals - SDGs

The Sustainable Development Goals National Implementation Plan 2018–2020 was launched by Denis Naughten, the former Minister for Communications, Climate Action and Environment in April 2018.[58] The National Implementation Plan and and the National Participation Strategy are a direct response to the United Nations 2030 Agenda for Sustainable Development and serves to demonstrate Ireland's ongoing commitment to the 2030 Agenda.

[58] https://dccae.gov.ie/en-ie/news-and-media/publications/Documents/26/DCCAE-National-Impletation-Plan.pdf.

The National Implementation Plan 2018–2020 provides a whole-of-government approach to implement the 17 Sustainable Development Goals (SDGs) and contains an ambitious strategy to guide Ireland to fully achieve these goals at home by 2030, as well as support the implementation of the SDGs around the world. It also contains the commitment of the Irish Government to document the specific SDGs to which each current and new Government policy relates.

There are four strategic priorities that will be put in place to guide implementation:

- Awareness – To promote public awareness of the SDGs, the Plan includes a number of actions specifically aimed at communicating how the SDGs relate to everyday life and how people and communities across the country can all contribute towards achieving the Goals;
- Participation – The Plan provides meaningful opportunities for stakeholders to engage and contribute to the implementation of the Goals, through follow-up and review processes, as well as a participatory approach to reporting on any progress made;
- Support – Communities and organisations will be encouraged and supported in all and any efforts made to contribute toward meeting the SDGs;
- Policy Alignment – The Plan aims to align national policy with the SDGs, identifying opportunities for policy coherence.

Within the National Implementation Plan, a vision is put forward for Ireland by the year 2030. In particular, with regard to children, the picture is of a country where the rights of all children and young people are respected, protected and fulfilled; where their voices are heard and where they are supported to realise their full potential. The aim is to reduce at least by half, the proportion of children living in poverty. The Plan cites as a National Policy Key Objective that all our children are: active and healthy; achieving their full potential; safe and protected from harm; economically secure and have economic opportunity; and connected, respected and contributing to their world.

On 17 April 2018, the Sustainable Ireland *National Conference on the Sustainable Development Goals, Human Development and Inequalities* was held. The Conference provided an opportunity to engage government representatives and major stakeholders in dialogue on how Agenda 2030 is being implemented in this jurisdiction.

In June 2018, *Global Ireland: Ireland's Global Footprint to 2025* was published by An Taoiseach.[59] This initiative sets out a plan to double Ireland's worldwide scope and impact by 2025. It commits the Government to publishing a new international development policy and to progress towards the United Nations target of providing 0.7% of Gross National Income (GNI) in Official Development Assistance (ODA) by 2030. The intention is to strategically position Ireland's international development policy to significantly increase the impact Ireland has in the world, contributing to the reduction of poverty and building Ireland's leadership role in transforming our world, including implementation of the Sustainable Development Goals. The Global Ireland initiative commits Ireland to a range of measures and seeks to deliver a variety of benefits.

Outside of Ireland, the development co-operation programme, Irish Aid, operates to assist the implementation of the SDGs. In July 2018, Irish Aid published a new White paper, *Transforming Our World – Help Ireland Make a Difference.*[60] This is a public consultation paper which encourages written submissions and participation in public meetings. It aims to inform the development of a new international development policy in 2018.

Ireland's first sustainable progress report was delivered to the United Nations in July 2018. Minister Naughten presented Ireland's Voluntary National Review (VNR) to the UN High-level Political Forum on Sustainable Development.[61]

Youth delegates also spoke at the VNR. They highlighted findings from their report on young people and the SDGs, "A Generation for Change",[62] published in early 2018 following a year long process of consultation with the young people of Ireland, through surveys and consultations at youth events around the country.

While not introduced in 2018, *Better Outcomes, Brighter Futures: the National Policy Framework for Children & Young People 2014-2020*, remains in place. This was the first overarching national policy framework for children and young people with the aim of

[59] https://merrionstreet.ie/MerrionStreet/en/ImageLibrary/20180622_Global_Ireland.pdf.
[60] https://www.irishaid.ie/about-us/policy-for-international-development/.
[61] https://www.dccae.gov.ie/en-ie/environment/topics/sustainable-development/sustainable-development-goals/Pages/Voluntary-National-Review-2018.aspx.
[62] http://www.youth.ie/sites/youth.ie/files/GeneratioForChange_UN_Dels_Report.pdf.

coordinating policy across government to achieve better outcomes for children. In October 2017, the Department of Employment Affairs and Social Protection published the Whole of Government Approach to Tackling Child Poverty under the Better Outcomes Brighter Futures framework.[63] This paper emphasises the need for a combined approach to tackle child poverty levels in Ireland, using income supports and access to affordable services, particularly with regard to housing, health and education.

The National Action Plan for Social Inclusion 2007–2016 identified a wide range of actions and interventions to be put in place to specifically target poverty and achieve the National Social Target for Poverty Reduction. The Plan was updated from 2015 until 2017, with a particular focus upon modernising the social protection system. The Department of Employment Affairs and Social Protection has developed a new National Action Plan for Social Inclusion 2018 – 2021. A consultation process took place which was open to both organisations and individuals. It closed on 16 March 2018 and the new Plan was published in November 2018. The Social Inclusion Forum (SIF) was established by the Government to monitor and implement the National Action Plan. The Social Inclusion Division of the Department of Employment Affairs and Social Protection is responsible for organising the Forum. The Forum enables engagement between officials from Government departments, community and voluntary organisations, as well as individuals experiencing poverty. It is held annually and was held in May 2018. A conference report is prepared thereafter and laid before both Houses of the Oireachtas.

In Autumn 2017, ECO-UNESCO launched Youth for the Future: Environmental Youth Summit 2017 - 2018. This was a new initiative to empower young people to interact with policy makers, assisting the achievement of the Sustainable Development Goals. It involved a number of events, projects and training for young Irish and European people aged 15 to 19, ultimately giving the participants the skills needed to influence the implementation of the SDGs.

[63] http://www.welfare.ie/en/downloads/WholeOfGovernmentApproachToTacklingChildPoverty_BOBF_Final.pdf.

Children in Migration

There have been no significant developments in 2018 in relation to unaccompanied children going missing in Ireland.

The operating protocol regarding unaccompanied children going missing remains essentially that put in place in 2009 between the Child and Family Agency (CFA) and An Garda Síochána. The Joint Protocol on Missing Children makes clear the roles and responsibilities of each agency when children go missing from State care, including unaccompanied children. The protocol requires each child in care to have an Absence Management Plan, which operates as a risk assessment tool and gives carers guidelines to follow should a child go missing. Care staff are required to contact the local Garda station without delay and a "Missing Child from Care Report" is completed for all referrals to An Garda Síochána. The Garda National Immigration Bureau (GNIB) is also notified for unaccompanied minors. An Garda Síochána must treat the referral as a high risk missing person and a missing person's report and photograph of the child is distributed to the CFA. If in the child's best interests, a decision may be made to put the child's name and photograph on the missing children's website. Once An Garda Síochána has been notified, it is responsible for investigating the minor's disappearance. This necessarily includes entering alerts of missing persons on national, European and International databases.

The Joint Protocol relates to all missing children from care, including unaccompanied minors, but there is no guidance therein regarding specific steps to take when the child missing is a third country national who arrived in Ireland without a parent or guardian.

Legislative, policy or other measures regarding the appointment of guardians for unaccompanied children

In Ireland, the Separated Children Seeking Asylum Service (SCSAS) of the Child and Family Agency is primarily responsible for the delivery of services to unaccompanied children seeking asylum. Each unaccompanied minor is allocated a social worker upon his/her arrival in the jurisdiction. This dedicated social worker is responsible for representing the minor and his or her interests. An initial assessment takes place which is multidisciplinary in nature and involves a medical examination, educational assessment and a child protection risk

assessment. A care plan is developed and the dedicated social worker is responsible for implementing that individualised care plan. The child will enter the asylum process if the social work assessment indicates that an asylum application is in the child's best interests and this application, once made, will be sponsored by the social worker assigned to him/her on arrival.

While other EU Member States use a system of guardianship akin to that which applies for all other unaccompanied minors in the care of the State, Ireland does not. While provision is made in the Child Care Act 1991 for the appointment of a guardian *ad litem* to represent the child in court during care proceedings, this step is taken rarely in practice for unaccompanied minors.[64] The Social Work Team for Separated Children Seeking Asylum has commented that appointing a guardian, in addition to a designated social worker, could be confusing for the young person. There therefore have been no legislative, policy or other measures during 2018 concerning the appointment of guardians for unaccompanied minors.

It is worth noting that the "Approaches to Unaccompanied Minors Following Status Determination in the EU plus Norway", Synthesis Report for the European Migration Network Study, published in July 2018, stated that one of the most common areas for improvement of guardianship arrangements for unaccompanied minors include clarifying the role of the guardian – as often this is not fully clear to the persons so acting within the Member State. It included Ireland as a State where the role of the guardian (namely the designated social worker) required clarification.[65]

Legislative, policy or other measures regarding the reception conditions of unaccompanied children and of children with families

From 2010 onwards, there have been significant improvements in the care and reception of unaccompanied minors in Ireland. The practice of placing newly arrived unaccompanied children in hostel accommodation has ended and now, the reception of unaccompanied minors in Ireland is governed by the "equity of care" principle. This principle requires unaccompanied migrant children to be treated akin to other children in the care of the State.

[64] "Approaches to Unaccompanied Minors Following Status Determination in the EU plus Norway" *Synthesis Report for the EMN Study*, July 2018 at para 2.5.
[65] Ibid., at para.2.5.3.

All unaccompanied minors are now placed in supported lodgings, foster care or residential placements provided by the CFA from its list of carers or secured by private agencies.[66] Unaccompanied children under 12 years of age are placed with a foster family on arrival whereas those over the age of 12 years are placed initially in one of three residential intake units in Dublin.[67] It should be noted that while it appears standard practice for separated minors over 12 to be placed in residential placements, this type of accommodation for children over 12 is usually the last resort for the general population of children in care. The equity of care principle therefore may be required to be applied more strenuously.

For children who arrive in Ireland with their families, they are placed in Direct Provision accommodation. While they remain in the company of their family, Direct Provision is an unnatural family environment and parents are unable to promote the rules and customs of their family in the upbringing of their children due to the restrictions of living in Direct Provision centres. As of July 2018, there were 1,485 children in the Direct Provision System in Ireland.[68] It is hoped, however, that there will soon be real improvement with regard to the reception conditions for children with their families as a result of recent legislative developments.

The recast Reception Conditions Directive 2013/33/EU sets down the standards for the reception of asylum applications. It seeks to ensure better and consistent standards of reception for asylum seekers throughout the EU, and concerns access to housing, food, clothing, health care, education for children and access to employment.

It remained the choice of each Member State as to whether they opted into the Directive. On 21 November 2017, the Minister for Justice and Equality announced the decision that Ireland would opt in. This decision was reached partly as a response to the judgment of the Irish Supreme Court in *NHV v. Minister for Justice and Equality & Others*.[69] In this case, the Court put an end to the absolute prohibition on asylum seekers' access to the Irish labour

[66] Quinn, Joyce & Gusciute, *Policies and Practices on Unaccompanied Minors in Ireland*, (November 2014, European Migration Network Ireland.
[67] See https://www.tusla.ie/services/alternative-care/separated-children/.
[68] https://www.irishrefugeecouncil.ie/children-and-young-people/children-in-direct-provision-accommodation.
[69] [2017] IESC 35.

market. On 9 February 2018, the Supreme Court formally held that the absolute ban that had been in place on asylum seekers' entering employment was unconstitutional.

On 6 July 2018, Directive 2013/33/EU was given effect in Irish law by virtue of Statutory Instrument No. 230 of 2018. Ireland has therefore transposed the recast Reception Conditions Directive into Irish law by adopting the European Communities (Reception Conditions) Regulations 2018.

Prior to the commencement of the EC (Reception Conditions) Regulations 2018, asylum seekers could only enter the Irish workforce pursuant to the relevant law governing employment permits, meaning that they could not secure jobs that an EEA national could fill; they could only apply for employment where the salary was in excess of €30,000 annually; an application fee was due for a permit; and 60 different work areas were unavailable to applicants. This was tantamount to an absolute ban.

The Regulations now place standard reception conditions on a statutory footing in the State. Pursuant to Regulation 11, asylum seekers may request a "labour market access permission", to allow them to seek employment or engage in self-employment, subject to certain conditions. A minor, under 18, may apply for a permission to allow him or her to obtain work in accordance with the 2018 Regulations and the Protection of Young Persons (Employment) Act 1996.

The Regulations will furthermore necessitate an overhaul of the current Direct Provision System. Regulation 7 requires the State to designate a reception centre where material conditions will be provided to an individual asylum seeker, taking into account considerations of family unity, public interest, public order and efficient processing of his/her application.

Regulation 10 concerns unaccompanied minors. It provides that the CFA shall be the representative of an unaccompanied minor in respect of whom it is providing care and protection, and shall represent and assist the unaccompanied minor so as to enable him or her to benefit from his or her entitlements, and to comply with his or her obligations, under these Regulations. The Child Care Act 1991 (as amended), the Child and Family Agency Act 2013, the Children First Act 2015 and other enactments relating to the care and welfare of persons

who have not attained the age of 18 years apply to unaccompanied minors. The CFA must designate an employee, or such other individual as it may determine, to perform the functions of a representative under this Regulation, informing the minor of this appointment without delay. The CFA is obliged to endeavour to trace the unaccompanied minor's family.

Following the enactment of the Regulations, in August 2018, the Department of Justice and Equality announced a public consultation process on draft national standards for direct provision centres. The draft *National Standards for accommodation offered to people in the protection process* were open for public consultation.[70] Such National Standards have long since been sought by numerous NGOs as well as the Working Group on Standards in Direct Provision which had recommended the setting up of a Standards Advisory Group to ensure that the standards in accommodation provided by the Irish State are suitable for the needs of those persons who are seeking Ireland's protection. The Standards Advisory Group was duly established and is made up of interdepartmental staff, members of NGOs and representative groups. The Standards Advisory Group developed the draft National Standards.

The consultation process on draft National Standards is therefore a welcome development. They are intended to meet Ireland's obligations under the recast Reception Conditions Directive and the standards required by European Asylum Support Office (EASO) Guidance on Reception Conditions: Operational Standards and Indicators. The standards promote equality, prevent discrimination and protect the human rights of asylum seekers, whether adults or children.

These standards will govern the services that are provided to those in the protection process. The standards will apply to the living conditions and services provided to residents within accommodation centres and apply to service providers contracted by the Reception and Integration Agency (RIA) to operate and manage accommodation centres.

Specifically, with reference to children, a Child Safeguarding Statement is contained within the National Standards. This sets out the service to be provided to children in particular. It contains the principles and procedures to be observed in order to ensure, as far as practicable,

[70] http://www.justice.ie/en/JELR/Draft_National_Standards_for_accommodation_centres.pdf/Files/Draft_National_Standards_for_accommodation_centres.pdf.

that a child availing of the service is safe from harm. The Child Safeguarding Statement provides an overview of the measures that an organisation must have in place to ensure that children are protected from harm.

The introduction of the EC (Reception Conditions) Regulations 2018 is a legislative measure which it can be anticipated will have a positive impact on the protection Ireland gives to unaccompanied children. The Regulations promote the best interests of the child and serve to give some guidance on assessing this principle. According to Regulation 9, in the application of these Regulations to all minors, the best interests of the child shall be a primary consideration. Furthermore, it specifies what must be taken into account when assessing the best interests of the child in question - namely, regard shall be had to:

(a) the possibility of family unity;
(b) the minor's well-being and social development, taking into account the minor's background;
(c) safety and security considerations, in particular where there is a possibility of the minor being a victim of human trafficking;
(d) the views of the minor in accordance with his or her age and maturity.

The Regulations were introduced in July 2018 and it is expected that the emphasis on children will be of benefit to those arriving within the jurisdiction.

With regard to the educational rights and development of all migrant children, the continuation of a number of schemes to assist young refugees in Ireland is undoubtedly positive. To assist young migrants with their school work, the "Study Buddy Homework Club", set up by the CDETB (City of Dublin Education and Training Board) Youth and Education Service for Refugees and Migrants, continues to run two evenings per week during school term-time. It offers a safe and supportive environment to young migrants to receive assistance with their homework or other areas of their school work, through the use of volunteers. This can help students with specific subjects, Junior or Leaving Certificate preparation or provides more general help with English across the curriculum.

The Migrant Access Programme (MAP), run by the Youth and Education Service for Refugees and Migrants, similarly supports the integration of unaccompanied migrants into the Irish education system. This acts as a transitional programme in order to prepare migrant children for mainstream education in Ireland. A minor is placed in a group according to

his/her level of English and receives 20 hours per week of classes on four core modules, as well as additional language exchange classes. Once completed, the Youth and Education Service provides a report on the child's progress and makes recommendations which assist the overall care plan for the child and enables the minor to transition to mainstream education if possible.

Procedural safeguards for children who are suspects in criminal proceedings

Ireland decided not to participate in the adoption of Directive 2016/800, in the application of Protocol No. 21 to the Lisbon Treaty on procedural safeguards for children who are suspects or accused persons in criminal proceedings. It has therefore not opted into this Directive and thus no legislative measures have been taken during 2018 for the transposition of this Directive.

Recommendations

Efforts should be continued to achieve a combined approach to tackle child poverty levels in Ireland, using income supports and access to affordable services, particularly with regard to housing, health and education.

Guidance is needed for accompanying the Joint Protocol on Missing Children regarding specific steps to take when the child missing is a third country national who arrives in Ireland without a parent or guardian.

Ireland should put in place a system of guardianship akin to that which applies for all other unaccompanied minors in the care of the State. The role of the guardian should be made clear.

As noted in numerous other Rapporteur reports, the system of Direct Provision for asylum seekers in Ireland should be abolished.

Ireland should opt into Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

Ireland should update the operating protocol put in place in 2009 between the Child and Family Agency and An Garda Síochána regarding unaccompanied children going missing.

1.3 EMERGING ISSUES IN THE UNITED KINGDOM

There have been some interesting recent decisions of the UK Supreme Court on 'habitual residence' for the purpose of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the 1980 Hague Convention).

It is in breach of the 1980 Hague Convention to remove a child without permission from a country of origin ('home state') in which another person (usually the 'left behind parent') has rights of contact or residence with that child. The purpose of the 1980 Hague Convention is to "secure the prompt return of children wrongfully removed to or retained in any Contracting State".[71] That the child is 'habitually resident' in the country to which he/she is taken ('destination state') is a defence under that the 1980 Hague Convention. Where a child is habitually resident depends on the unique facts of each case and may change over time.

What is Habitual Residence?

The UK Supreme Court stated in *A v. A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)*[72] that it is desirable for the courts of England and Wales to approach habitual residence in a manner similar to that of the Court of Justice of the European Union. That court held in proceedings brought by A[73] that habitual residence is about the totality of the circumstances in a particular case. It held that habitual residence:

> [m]ust be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for

[71] Article 1.
[72] [2013] UKSC 60.
[73] Case C-523/07 [2010] Fam 42.

> the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.[74]

The Court of Justice of the European Union has also in *Mercredi v. Chaffe* stated that in order to establish where a child is habitually resident, as well as the physical presence of the child in a state "other factors must also make it clear that that presence is not in any way temporary or intermittent."[75]

In England and Wales, the domestic courts have emphasised that habitual residence is primarily a question of fact to be determined by relevant circumstances rather than a pre-determined set of rules.[76] Moreover, a child does not automatically have the same habitual residence as his/her parents.[77] In *B (A Minor: Habitual Residence),*[78] Hayden J. summarised the meaning of habitual residence as being all about the child's life "and not about a parental dispute. It is a factual exploration". He gave guidance on this issue, and his conclusions can be summarised as follows: It is partly about where and how well the child is integrated; it all depends on the facts; one must look at the practical connection between the child and the country in question; one parent can, deciding on his/her own to take the child abroad, cause a change of habitual residence (but not necessarily); a child usually has the same habitual residence as the parent, especially a younger child, but it depends on a number of factors; the parental intention is relevant, but isn't necessarily the whole answer; a child almost always has habitual residence somewhere; when looking at whether a move has caused a change of habitual residence, look at the degree of connection with the previous place, before the move; look at stability not permanence – that is, integration rather than length of time; the child doesn't need to be fully integrated to become habitually resident somewhere; habitual residence can, sometimes, change quite quickly after a move.[79]

The case of *In the Matter of KL (A Child)*[80] concerned an appeal by a father to the UK Supreme Court in proceedings under the 1980 Hague Convention. It concerned the approach

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[74] Para. 42.
[75] Case C-497/10 PPU, [2012] Fam 22, para. 49.
[76] See e.g. *Re J (A Minor)(Abduction: Custody Rights)* [1990] 2 AC 562.
[77] See e.g. *Re M (Abduction: Habitual residence)* [1996] 1 FLR 887, CA at 891.
[78] [2016] EWHC 2174 (Fam).
[79] See further http://www.transparencyproject.org.uk/habitual-residence-sloppy-explanations-of-the-law-about-child-abduction/.
[80] [2013] UKSC 75.

to be taken by UK courts to the return of a child brought to the UK under the order of a foreign court, where that order was later overturned on appeal.

The father was a US citizen and the mother had indefinite leave to remain in the UK. The case concerned a 7-year-old boy, born in Texas and a US citizen. On their divorce in 2008 the mother removed the child to London in breach of agreed contact arrangements. She was compelled by the courts to return with the child to the US in 2010, where she successfully applied to the Federal District Court for an order under the Hague Convention that the boy had been habitually resident in the UK and that the father was wrongfully retaining him in the US.

This decision that the father was wrongfully retaining the child in the US was described by Thorpe LJ as "bizarre in the extreme" and an appeal court later overturned the order, stating that the boy had in fact been habitually resident in the US. The mother was ordered to return the child to the US in August 2012, but she did not comply with the order. The father then issued proceedings under the Hague Convention in the UK. His applications were dismissed at first instance but the Supreme Court granted permission to appeal on the grounds that the mother's retention of the child after August 2012 was wrongful and that the child was habitually resident in the US. Another ground argued by the father was that the UK court should have exercised its inherent jurisdiction to return the child to the US, even if not required to return the child under the 1980 Hague Convention.

The UK Supreme Court held that the child was habitually resident in the UK, but that he should be returned under the Court's inherent jurisdiction. In the decision, the child's habitual residence at the point when the mother had disobeyed the Texan return order was considered. The uniform understanding of the concept of habitual residence was applied, extracted from the Supreme Court decision in *A v. A*[81] and consistent with the decision of the Court of Justice of the European Union in *Mercredi v. Chaffe*.[82] Parental intention, the Supreme Court held, plays a part in establishing the habitual residence of a child, but it will be one of many factors relevant to the question of whether there was a sufficient degree of stability to amount to a change of habitual residence for the child. The court considered the father's argument

[81] [2013] UKSC 60.
[82] [2012] Fam 22.

that the child could not acquire habitual residence where he was living in a foreign country in accordance with an order that was under appeal. The Supreme Court held that to accept this argument would be to place a legal gloss on the factual concept. The court continued, neither mother nor child considered the return 'home' to the UK as temporary, despite the pending appeal. The child had become integrated into a social and family environment since 2011 and the trial judge had been entitled to find that the child was habitually resident in the UK.

The father was nonetheless successful in his appeal on the basis that the court should exercise its inherent jurisdiction to return the child to the US in any case. The correct question for the judge was whether it was in the child's best interests to have the dispute determined in the US or the UK. The Supreme Court held that this boy was a Texan child missing the opportunity to develop a relationship with his father and his birth country. The child would not suffer harm through a return to Texas.

In the case of *In Re LC (Children*),[83] the role of the child's state of mind was considered by the UK Supreme Court in relation to the question of the child's habitual residence. The family had been living in the UK but on the breakdown of the marriage the Spanish mother had taken her four children to live in Spain. The children returned to the UK for a holiday with the father after five months. The children were not returned to Spain and the mother sought their summary return under the 1980 Hague Convention. This was resisted by the father on the basis of the argument that the children had not been habitually resident in Spain on the date that he had kept them in the UK. He alternatively argued that the older children objected to being returned (another ground which may be used as a defence against the presumption in favour of the return of children wrongfully retained).

The judge found that the children had in fact been habitually resident in Spain and that their retention in the UK had been unlawful. It was also found that the oldest child, nearing 13 years, did object to the return to Spain and had the required age and maturity to have his views considered, but in any case the Court decided to order the return of the children.

The Supreme Court, on the appeal of the father, considered the matter of habitual residence. The father argued amongst other things that the trial court had failed to take into account the

[83] [2014] UKSC 1.

statements of the three children to the CAFCASS officer (the representative of the wishes and interests of the children) that they had never considered Spain to be their home. The Supreme Court commented that where a child goes lawfully to live with a parent in a state where the parent is habitually resident, it will be very unusual for that child not to acquire habitual residence in that state also. However, when the child is older, particularly an adolescent or of equivalent maturity, and perhaps also where the child's residence with the parent is not of a long duration, then the question of how integrated he/she is in his/her environment must consider "more than the surface features of her life there".[84] The state of mind of the child may affect whether residence is habitual.

There was some disagreement amongst the judges as to whether the same would apply to younger children, a minority of the court were of the opinion that it would. The decision was in any case set aside for the habitual residence of all the children to be considered together. The Family Court dismissed the mother's application for the return of the children, holding that they had not in fact lost their habitual residence in the UK.

The case of *AR v. RN (Scotland)*[85] concerned a UK Supreme Court judgment determining whether to order the return to France two children living with their mother in Scotland since 2013. The children had been born in France and had lived there before their move to Scotland. The family had decided to leave France (for example selling their house). The mother moved to Scotland, where the maternal grandparents resided, for a period of maternity leave whilst the father remained in France for a period. The mother had ultimately stayed in Scotland on finding out about the father's infidelity and the consequent break down of their relationship.

The Supreme Court held that the focus of the trial judge was entirely on whether there had been a joint decision to move permanently to Scotland, and that the trial judge considered elements of their lives continuing in France such as business interests. This demonstrated a failure to apply the correct approach. Parental intentions in relation to residence in the country in question are a relevant factor, but they are not the only relevant factor. Where there is an absence of a joint parental intention to settle permanently in a state, this is by no

[84] Para. 64.
[85] [2015] UKSC 35.

means decisive. Neither is it decisive where there is an intention to live in a country for a limited period – this will not rule out the children becoming habitually resident there. The important question is whether there is a quality of stability necessary to prove residence, not whether it is intended to be permanent. Yet the trial judge focused exclusively on this latter question. This led to a neglect of the ample evidence about the stability of the lives of the mother and children in Scotland, and their degree of integration into the environment (both social and familial) there. The Supreme Court held that the children had been habitually resident in Scotland (and in doing so overturned the successful appeal of the father from the lower court).

The case of *In the Matter of B (A Child)*[86] concerned an appeal to the Supreme Court by a non-biological mother against the decision that the court did not have jurisdiction to deal with an application seeking return of a child removed to Pakistan. The girl at the centre of the appeal (B) was a British national aged seven years, conceived by donor sperm at a licensed clinic. The respondent (a British national of Pakistani ethnicity) was the child's biological mother and was previously in a same-sex relationship with the appellant but not legally partnered. The biological mother undertook most of the child's care but the appellant also helped care for her.

When the relationship broke down, the respondent moved to Pakistan. Although the appellant did not consent to it, B's removal to Pakistan was lawful as the appellant did not legally have parental responsibility for the child though in practice they were joint parents. The appellant applied to the courts for 'shared residence' with the child (i.e. an arrangement whereby the child would jointly live with both parents).

Although this was not a case taken under the 1980 Hague Convention, the court considered the matter of 'habitual residence' in relation to what orders the court may have jurisdiction to make. The Court of Appeal had held that the child had lost habitual residence in England due to the parental intention to leave the jurisdiction (previously a primary consideration[87]), but the Supreme Court held that this was no longer the correct approach. That approach would afford "a dispositive effect inconsistent with the child-focussed European concept now

[86] [2016] UKSC 4.
[87] *In re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 564.

adopted in England and Wales." Instead the Court preferred to see habitual residence like a see-saw "when a child gains a new habitual residence, he loses his old one." Lord Wilson stated that the correct question is whether the child had achieved the required degree of disengagement from her English environment. He concluded that, when looked at holistically, she had not, and she therefore retained habitual residence in England.

Lord Wilson set out some guidelines for determining habitual residence:

(a) The deeper the child's integration in the state from which she has been removed, probably the slower her achievement of the degree of integration required for habitual residence in the new state;

(b) The greater pre-planning of the move by the adults, including plans for the child's day-to-day life in the new state, probably the faster the achievement of the required degree of integration required for habitual residence in the new state; and

(c) If all the central members of the child's life were to have moved to the new state with her, probably the faster the child's achievement of the integration required for habitual residence in the new state and, conversely, if any remained behind this would mean an ongoing link with the old state, and this would likely mean slower achievement of integration required for habitual residence in the new state.

The case of *Re N (Hague Convention - Habitual Residence)*[88] was an England and Wales High Court case which concerned a two-year-old girl, N. Her mother (of dual Canadian/British nationality) sought her return to Canada, from where she claimed N was wrongfully retained by her English father.

In 2014, N was born in England. The mother, it is reported, found motherhood difficult and preferred working long hours to parenting. In 2015, the couple separated but then decided to make a fresh start in Canada. They stayed with the mother's family but in late 2015 the relationship was in trouble and the mother moved out. The couple separated in February 2016 and in April 2016 the father and child returned to England, on the understanding that he would return with the child by 16 August 2016. The father claimed the mother later stated the child could remain in England indefinitely.

[88] [2017] EWHC 63 (Fam).

In July 2016 in Canada the mother gave birth to the parties' second child, who was placed in foster care by social services due to concerns about the mother's mental health. In October 2016 the mother made an application for the return of N.

The England and Wales High Court had to determine where N was habitually resident, taking into consideration parental intent and the importance of considering the stability of arrangements. In determining that N was habitually resident in England the court stated that; the trip to Canada had involved different intentions for the parents (the mother thought it was permanent, the father thought it was something to try out); they had travelled on a return air-ticket and the return date was 26 April 2016; the mother had obtained Canadian citizenship and a General Practitioner (G.P.) for N, but no playgroup; there was instability for the family; the mother was absent from N's life for extended periods.

The court concluded that the formal steps of obtaining citizenship and a G.P. for N did not represent real social and family integration:

> There is no evidence whatsoever that N integrated socially or otherwise, to any degree at all, outside of the home – there was no nursery, no playgroup, indeed no evidence of any life at all.[89]

In contrast, N was born and raised in England; and she had ongoing family and social links there. The court also considered the detached relationship between mother and child, and concluded that N was habitually resident in England.

In *Re C (Children: Anticipatory Retention)*,[90] the Supreme Court's decision was that:

(1) The 1980 Hague Convention cannot be invoked if, by the time of the alleged wrongful removal or retention, the child has become habitually resident in the requested state, and;
(2) There can be wrongful retention *before* the expiry of the period of absence agreed by the parents.

In this case a married man and woman with two children had, until 2015, been living together in Australia. The mother held British citizenship and wanted to make a trip to England with the children in 2015. The father initially agreed that they would stay for eight weeks, and at

[89] Para. 32.
[90] [2018] UKSC 8.

the end of this period then agreed to a year. The mother and children had remained in England ever since. Between late 2015 and 2016 the father asked about the children's expected date of return and the mother indicated that she did not yet know.

The father made an application in the High Court under the 1980 Hague Convention. There was disagreement over the issue of when the mother had decided not to return to Australia. The judge held that the children were habitually resident in England by the end of June 2016 and so mandatory summary (immediate) return was unavailable under the 1980 Hague Convention. The judge accepted the mother's evidence, however, that she did not have the intention before April 2016 not to return to Australia.

The issues in the appeal to the Supreme Court were:

(1) Where a child becomes habitually resident in the destination state *before* the act relied on as a wrongful removal or retention occurs, what is the effect on an application under the 1980 Hague Convention?

(2) Where a child is removed from his/her home state with the agreement of the left-behind parent for a limited period, is it possible to have a wrongful retention *before* that agreed period of absence expires (which is referred to as 'repudiatory retention')?

The father did not succeed in his application to have the children summarily returned because the children's habitual residence was now the UK. This was in spite of the fact that the Supreme Court held that there was a repudiatory retention.

On the first point, the father had argued that summary return is available even if, by the time of the act relied on as a wrongful removal or retention, a child is habitually resident in the state where the application for return is made. The Supreme Court found that this argument goes against the general scheme of the 1980 Hague Convention, which is designed to prevent wrongful removal or retention and also to defeat 'forum-shopping' by ensuring that the merits of a case are to be decided by the courts of the child's place of habitual residence. In this case, the place of habitual residence was held to be the UK and therefore it was not possible to return the children somewhere else for the purpose of deciding the merits of the case.

On the second point, the court considered the fact that there is no generally accepted international practice or authority on 'repudiatory retention', though it has been recognised in some jurisdictions. The Court reasoned that it is desirable to prompt a change of mind in the retaining parent, and this is a reason in favour of recognising a repudiatory retention when and if it occurs. There is a 12 month time limit in which the 'left behind parent' can seek a mandatory summary return, and the Court clarified that this runs from the point at which a repudiatory retention occurs. The court also specified that the 12 month period may pass before the left behind parent is even aware of the repudiatory retention. This is for the purpose of, in the child's best interest, limiting mandatory summary return. Once the 12 month period is over, summary return is discretionary rather than mandatory.

The Court considered the concern that repudiatory retention may make applications under the 1980 Hague Convention longer and more complicated. It was reasoned, however, that judges in the Family Division of England and Wales are accustomed to preventing matters in applications from straying outside the relevant issues.

The court concluded that repudiatory retention is possible in law. It was undesirable to attempt to establish an exhaustive definition of proof or evidence. It is necessary to have an objectively identifiable act to establish repudiation, but it need not be communicated to the left-behind parent nor is it necessary to identify an exact date. The court held that in this present case, there was no wrongful retention, as it was accepted that the mother did not have the intention before April 2016 not to return to Australia. The children were not unlawfully retained before April 2016 as the mother's internal thinking could not by itself amount to unlawful retention.

Recommendations

Relevant practitioners, legislators and policy-makers should be made aware of the recent decisions of the UK Supreme Court on 'habitual residence' for the purpose of the Hague Convention on the Civil Aspects of International Child Abduction 1980.

In particular, they should be made aware of how the interpretation of 'habitual residence' is evolving in the neighbouring jurisdiction. The following principles emerge from an analysis of the recent case-law:

- *Habitual residence is primarily a question of fact to be determined by relevant circumstances rather than a pre-determined set of rules.*

- *A child does not automatically have the same habitual residence as his/her parents.*

- *One must look at the practical connection between the child and the country in question.*

- *One parent can, deciding on his/her own to take the child abroad, cause a change of habitual residence (but not necessarily).*

- *When looking at whether a move has caused a change of habitual residence, look at the degree of connection with the previous place, before the move.*

- *One must look at stability not permanence – that is, integration rather than length of time.*

- *The child doesn't need to be fully integrated to become habitually resident somewhere.*

- *Habitual residence can, sometimes, change quite quickly after a move.*

- *When the child is older, then the question of how integrated he/she is in his/her environment must be considered more than the surface features of his/her life there, and the state of mind of the child may affect whether residence is habitual.*

- *Where there is an intention to live in a country for a limited period, this will not rule out the children becoming habitually resident there. The important question is whether there is a quality of stability necessary to prove residence, not whether it is intended to be permanent.*

- *The deeper the child's integration in the state from which he/she has been removed, probably the slower his/her achievement of the degree of integration required for habitual residence in the new state.*

- *The greater the pre-planning of the move by the adults, including plans for the child's day-to-day life in the new state, probably the faster the achievement of the required degree of integration required for habitual residence in the new state.*

- *If all the central members of the child's life were to have moved to the new state with him/her, probably the faster his/her achievement of the integration required for habitual residence in the new state and, conversely, if any remained behind this would mean an ongoing link with the old state, and this would likely mean slower achievement of integration required for habitual residence in the new state.*

- *Matters such as return air-tickets, obtaining citizenship and a G.P. are relevant, but may be trumped (in determining habitual residence) by every day matters such as engagement in social life matters such as a playgroup and family life.*

- *The 1980 Hague Convention cannot be invoked if, by the time of the alleged wrongful removal or retention, the child has become habitually resident in the requested state.*

- *There can be wrongful retention before the expiry of the period of absence agreed by the parents.*

1.4 VOLUNTARY CARE IN A CHILD PROTECTION CONTEXT: RECENT DEVELOPMENTS IN THE UNITED KINGDOM

The case of *Williams and another (Appellants) v. London Borough of Hackney (Respondent)*[91] concerned an appeal to the UK Supreme Court regarding the lawfulness of the accommodation of the appellants' children by the respondent local authority under section 20 of the Children Act 1989. Section 20 refers to the duty of local authorities to provide accommodation for a "child in need" and has been a difficult provision for courts to define and for professionals and others to apply and understand.

The question in *Williams* related to the limits of a local authority's powers and duties to provide accommodation for children in need under section 20 of the Children Act 1989 without the sanction of a court order. As the Court put it:

> Specifically, what is the local authority to do if the parents ask for their accommodated children to be returned to them but the local authority perceive that there are obstacles to doing so?[92]

The appellants claimed that the local authority had breached their right to family life under Article 8 of the European Convention on Human Rights.

The Supreme Court dismissed the appeal, and held that the appellants did not object nor did they unequivocally request the immediate return of the children. The children's continued accommodation under section 20 consequently had a lawful basis.

[91] [2018] UKSC 37.
[92] Para. 1.

In the process, the Supreme Court clarified the correct interpretation and application of section 20 of the Children Act 1989 in different circumstances; re-emphasised best practice guidance for social workers and made comments on how those representing parents should best protect their clients' interests. It is a very interesting decision and may prove to be of assistance in the application of sections 4 and 5 of the Child Care Act 1991.

Section 20 of the Children Act 1989

Section 20 of the Children Act 1989 states:

Provision of accommodation for children: general

(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of-
  (a) there being no person who has parental responsibility for him;
  (b) his being lost or having been abandoned; or
  (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

(3) Every local authority shall provide accommodation for any child in need within their area who has reached the age of 16 and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation.

(4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare.

(5) A local authority may provide accommodation for any person who has reached the age of 16 but is under 21 in any community home which takes children who have reached the age of 16 if they consider that to do so would safeguard or promote his welfare.

(7) A local authority may not provide accommodation under this section for any child if any person who
  (a) has parental responsibility for him; and
  (b) is willing and able to-
    (i) provide accommodation for him; or
    (ii) arrange for accommodation to be provided for him, objects.

(8) Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section.

(9) Subsections (7) and (8) do not apply while any person-

(a) who is named in a child arrangements order as a person with whom the child is to live;
(aa) who is a special guardian of the child; or
(b) who has care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children,
agrees to the child being looked after in accommodation provided by or on behalf of the local authority.

Facts of the Case

The 12-year-old son of Mr and Mrs Williams was caught shoplifting and he informed police that he had no lunch money and that he was beaten by his father. Authorities found the family home in "an unhygienic and dangerous state" and consequently removed the couple's eight children. The children were provided accommodation by local authorities in various placements.

The parents were arrested and interviewed and the next day they were released on bail. A condition of their bail was that neither parent was allowed to have unsupervised contact with any of their children in order "to prevent interference with possible victims of crime".[93] They signed a 'safeguarding agreement' at council offices as well as consent to accommodation of their eight children. The trial court had found that their consent was not informed when doing so.

The parents attended council offices and requested the return of their children the day after the police powers expired. They were told that they did not have permission to take their children home and they then engaged solicitors. These representatives wrote to the council seeking the timescales for the children returning, should they not be sent home by authorities in the following days. The council visited the parents' house within days of the letters being sent, and found the house clean and improved. The Council wrote to the solicitors notifying them that care proceedings would not be brought, but that a date for the children to be returned could not be provided because of the bail conditions. However, the local authority panel decided that, in order for the children to return, the parents' bail conditions needed to be altered or removed.

[93] Para. 5.

The police refused to vary the parents' bail conditions (first because the relevant officer was on leave and then because a case conference was pending) and nothing occurred concerning reunifying the family for about a month and a half. A senior officer of the council negotiated with police to vary the bail conditions and the children returned home after approximately two months in various foster homes.

The appellants argued to the Supreme Court there was no lawful basis for the children's accommodation after the date of the expiry of police protection. The Supreme Court however upheld the Court of Appeal's decision that there was a lawful basis. Lady Hale gave the judgment and laid out some points on the differing approaches to the issue of consent in the context of accommodation of a child in need under the Children Act 1989:

(1) There is no explicit requirement for 'parental consent' to a local authority accommodating a child. A child may be abandoned, for example. A local authority must have a court order to interfere with a person's exercise of parental responsibility against their will, however. Only the police can remove, without a court order, a child from a parent who is looking after the child and wishes to continue to do so. The local authority cannot do this.

(2) If a parent agrees to the removal or accommodation of a child, the parent is simply temporarily delegating the exercise of parental responsibility to the local authority – the term 'consent' may be confusing. This delegation must however be real and voluntary, or the local authority has no power to interfere with parental responsibility by removing the child. Several cases are cited as examples of what is *not* real and voluntary: In *Coventry City Council v. C, B, CA and CH*,[94] a baby was removed from the mother on the day of her birth. The mother had undergone surgery, had been given morphine, and had first refused to give consent. The best way to ensure real and voluntary delegation, the Supreme Court held, is by informing parents of their rights under section 20, though a parent's delegation can be "real and voluntary" without being fully "informed"'. In *Williams v. Hackney*,[95] for example, it was stated that "there can be a delegation of the exercise of parental authority even without the parent being 'fully informed', provided that the parent's action is voluntary".

The Supreme Court also emphasised that there is also a distinction between delegating parental responsibility directly from a parent's care and delegating parental responsibility after the removal of the child. Where the child has already been accommodated, as in the present case, the situation should be viewed in terms of subsections 20(7) and 20(8) rather than it being an initial delegation of the exercise of parental responsibility. The court could not say that the parents

[94] [2012] EWHC 2190 (Fam).
[95] [2018] UKSC 37.

had made an unequivocal request for the return of the children when they had gone to the Council's offices on their release from police custody.[96]

(3) It is very different to remove a child from a parent's care as compared with authorities stepping in to look after a child who is not in the care of a parent:

> The active consent or delegation of a parent who is not in fact looking after or offering to look after the child is not required, any more than it is when there is no-one with parental responsibility or the child is abandoned or lost. But the local authority's duty and power are subject to the later provisions of the section, in particular, to subsections (7) to (11).

Local authorities should, as a matter of good practice, give parents clear information about the authority's actions and responsibilities, and what the parents' rights are. This should include the rights of parents under subsections (7) and (8), and also their rights under other provisions of the Children Act 1989. For example in paragraph 15 of Schedule 2, parents are entitled to know the whereabouts of their child.

Parents may ask the local authority to accommodate a child and authorities will have a duty to do so if the circumstances fall within section 20(1), and the power to do so if they fall within section 20(4). This again can be seen as a temporary delegation of the exercise of parental responsibility. The section does not make explicit reference to 'informed consent', but subsections (7) to (11) apply and once again it is good practice that parents should be given clear information about their rights and the local authority's responsibilities.

(4) Subsection 20(7) means that a local authority cannot accommodate a child if someone with parental responsibility objects, and if he/she is willing and able to accommodate the child *or* to arrange for someone else to do so. The Supreme Court continued:

> If the local authority consider the proposed arrangements, not merely unsuitable, but likely to cause the child significant harm, they should apply for an emergency protection order.

The person with parental responsibility need not give notice to remove a child from accommodation provided by or for the local authority at any time. If a parent unequivocally requires the return of the child, the local authority must either return the child, or obtain police protection or an emergency protection order.

(5) Where a parent's unequivocal request for return of an accommodated child is refused, a parent can physically remove the child or take Habeas Corpus proceedings. It is far preferable, however, for the local authority to promptly honour the unequivocal request. Lady Hale stated that this case is a reminder of the benefits of cooperation:

[96] See para. 56.

> [T]he parents were fortunate enough to have the advice and assistance of some experienced and very sensible solicitors and wise enough to offer their complete co-operation to improve matters in the home and allay the Council's concerns. The solicitors were obviously trying to achieve the return of all eight children as quickly as possible on a collaborative basis, rather than to push the Council into issuing care proceedings which would probably have delayed matters much longer ... The result was a happy outcome for all concerned.[97]

(6) There is nothing in section 20 to necessarily limit the child's time in local authority accommodation. However, there are a variety of duties which local authorities have towards the children they accommodate. Their general duties towards looked after children are laid out in section 22 of the Children Act 1989. There are duties to safeguard and promote children's welfare; the duty to assess a child's "needs for services to achieve or maintain a reasonable standard of health or development" (the Care Planning, Placement and Case Review (England) Regulations 2010, SI 2010/959) and prepare a care plan which must record the arrangements made to meet the child's needs and the long term plan for his/her upbringing. It is not a breach of section 20 to keep a child in local authority accommodation for a long period without bringing care proceedings. It may, however, be a breach of other duties under the Act and Regulations or it may be unreasonable in public law terms to do so. It may also breach rights under Article 8 of the European Convention on Human Rights.

Going Forward in England and Wales after Williams

More may be expected of England and Wales social work professionals after *Williams v. Hackney* to ensure they go further in informing parents of rights and duties. It has been suggested that[98] social services departments in local authorities may wish to produce a clear document to inform parents of their rights and the local authority's responsibility in these kinds of circumstances. The judgment is also instructive in an Irish context, having regard to sections 4 and 5 of the Child Care Act 1991, as amended.

[97] Para. 59.
[98] Tom Harrill, *Williams v. Hackney: Real and Voluntary Delegation of Parental Responsibility* (St Ives Chambers, 2018).

Recommendations

Law and practice should be examined in Ireland to ensure that parents are being made aware of their rights and responsibilities where they are asked to agree to the accommodation of their children in circumstances similar to Williams v. Hackney.[99]

The CFA should always provide a clear explanatory document to inform parents of their rights and the CFAs responsibilities when a child is received into voluntary care under section 4 of the Child Care Act 1991.[100]

Social workers should be prepared to ensure that parents fully understand their rights and the CFAs responsibilities when a child is received into voluntary care.

1.5 UN DEVELOPMENTS

A. Committee on the Rights of the Child: General Comment No. 21 (2017) on Children in Street Situations

The Irish position considers that any child found to be living on the streets is considered as needing care and protection, and following a social work assessment of the child's situation, an application may be made for the child to be taken into care.

The UN Committee on the Rights of the Child recently produced General Comment No. 21 (2017) on children in street situations.[101] Although the UNCRC does not explicitly refer to children in street situations, the Committee states "all of its provisions are applicable to children in street situations who experience violations of a large majority of the Convention's articles". In this General Comment, the Committee on the Rights of the Child gives authoritative guidance to States on how to develop comprehensive, long-term national

[99] The Department of Children and Youth Affairs is currently examining voluntary care, including law and practice, in the context of the Review of the Child Care Act 1991.
[100] The "Withdrawal of Voluntary Consent Form for Admission to Care" used by Tusla includes a checkbox to show that the parent has read the accompanying information leaflet related to voluntary care. It is Tusla's national policy that written consent always be sought and relevant information provided to the parent.
[101] *General Comment No. 21 (2017) on children in street situations* CRC/C/GC/21 (20 June 2017).

strategies to protect and promote the rights of children in street situations in line with the CRC.

Introduction

There are children in street situations in every state including Ireland, whether it is because they are homeless and consequently spend much time in the streets, they beg on the streets, or they otherwise try to earn money on the streets. The nature of children's time on the streets, and the amount of time spent physically on the street vary significantly from child to child. It is not known how many children are in street situations as data is not systematically collected. This data gap can render these children invisible, and this tends to lead to a failure to develop appropriate policies, or measures being developed which are short-term.

Children in street situations can vary widely in terms of age, sex, ethnicity, nationality, disability and sexual orientation, which means that they will have different experiences, and face diverse risks and needs. In the drafting process, a total of 327 children and young people who are in street situations from 32 countries were consulted through seven regional consultations. Some comments from the children included:

> Respect us as human beings"; "I would like for people who have never lived on the streets to see us as persons with pride, like normal people"; "It's not about getting us off the streets and into shelters. It's about giving us a status"; "Governments should not say we should not be on the streets. They should not harass us if on the streets. We should be accepted"; "Living on the street does not mean that we cannot have rights"; "The street leaves its mark: either you get out or you don't"; "We don't want help, charity, pity. Governments should work with the community to give us rights. We're not asking for charity. I want to become someone to fend for myself"; "[People] should give us a chance to use our gifts and talents to achieve our dreams"; "Give us the opportunity to change our story".[102]

The comment takes a broad approach to the definition of street situations:

> In the general comment, the term "children in street situations" is used to comprise:
> (a) children who depend on the streets to live and/or work, whether alone, with peers or with family; and
> (b) a wider population of children who have formed strong connections with public spaces and for whom the street plays a vital role in their everyday lives and identities. This wider population includes children

[102] Para. 1.

> who periodically, but not always, live and/or work on the streets and children who do not live or work on the streets but who regularly accompany their peers, siblings or family in the streets. Concerning children in street situations, "being in public spaces" is understood to include spending a significant amount of time on streets or in street markets, public parks, public community spaces, squares and bus and train stations. It does not include public buildings such as schools, hospitals or other comparable institutions.[103]

Approaches to the Rights and Needs of Children in Street Situations

The Committee goes on to point out that there are different approaches which can be taken to children in street situations. When a child rights approach is taken, the child is respected as a rights holder and children's views are often sought in decisions made about them. In a welfare approach however, the "rescue" of children is attempted as the child is perceived to be an object or victim from the street. Decisions are therefore most likely made for the child without due consideration for her or his views. A repressive approach involves a perception of the child as delinquent. The welfare and repressive approaches do not take into account the child as a rights holder, and often lead to the forcible removal of children from the streets. This, the Committee states, further violates their rights. To apply the CRC, it is essential to use a child rights approach.

It is outlined that in a child rights approach, the *process* of achieving children's rights is as important as the end result. Such an approach emphasises "respect for the dignity, life, survival, well-being, health, development, participation and non-discrimination of the child as a rights holder".[104]

The Committee points out that UNICEF stipulate that a child rights approach:

(a) Furthers the reali[s]ation of child rights as established in the Convention and other international human rights instruments;
(b) Uses child rights standards and principles from the Convention and other international human rights instruments to guide behaviour, actions, policies and programmes, particularly: non-discrimination; the best interests of the child; the right to life, survival and development; the right to be heard and taken seriously;

[103] Para. 4.
[104] Para. 10.

and the child's right to be guided in the exercise of his or her rights by caregivers, parents and community members, in line with the child's evolving capacities;

(c) Builds the capacity of children as rights holders to claim their rights and the capacity of duty bearers to fulfil their obligations to children.[105]

The Committee makes the point that children in street situations are often distrustful of adult intervention in their lives, as they have experienced abusive treatment by adults in the past. This has led them to be unwilling to give up the hard-won autonomy which they have, though it may be limited. Children's rights approaches value full respect for the autonomy of children in street situations, including working with them to find alternatives to depending on the streets. Their resilience and capabilities are supported, and their agency in decision-making is increased. They are empowered as socioeconomic, political and cultural agents. It appreciates their existing strengths and the valuable contributions they make to their own lives as well as those of their communities. The Committee states that taking a child rights approach is not just morally and legally important, but also the most sustainable approach for achieving long-term solutions for children in street situations, as the realities of these children's lives can be recognised and appreciated.

Taking Steps for the Rights and Needs of Children in Street Situations

States are urged by the Committee to adopt holistic and long-term strategies and make the necessary budget allocations to meet the rights and needs of children in street situations. Children in street situations themselves should participate in developing and implementing these strategies, as they are experts in their own lives. States should as a first step collect information about such children in their country and then take a cross-sectoral approach to understanding how policy in one area in turn affects children in street situations, for example finance and education.

The Committee also refers to assessing how laws and policies can be improved to meet the rights and needs of children in street situations. States should immediately remove provisions that discriminate against children or their parents or family; abolish removal from streets and offences that criminalise children in street situations, such as begging and breach of curfews. States should review laws concerning children, to ensure that they are based on a child rights

[105] Para. 11.

approach and that they specifically address children in street situations. There should be enabling policies, mandates, operating procedures, guidelines, service delivery, oversight and enforcement mechanisms in relation to these pieces of legislation, and measures should be developed in collaboration with key stakeholders, including children themselves.

State and non-State actors should be involved in strategies for children in street situations. The State is the primary duty bearer, and has an obligation to help parents or other caregivers to secure the living conditions necessary for meeting the rights and the proper development needs of children. Private parties such as businesses must be held to account by the state to ensure that they are upholding human rights.

The general comment links the matter of children in street situations to that of children in care, specifying that States must ensure that there are follow-up mechanisms for children in both alternative care settings and in street situations as they enter adulthood at the age of 18 – there should not be an abrupt termination of support and services. Comprehensive national child protection systems need to assist children in street situations and appreciate their specific needs. There must be a continuum of care across all relevant contexts: "prevention, early intervention, street outreach, helplines, drop-in centres, day-care centres, temporary residential care, family reunification, foster care, independent living or other short- or long-term care options."

States should ensure basic training on child rights and children in street situations for professionals who come into contact with children in street situations (the examples of those in policymaking, law enforcement, justice, education, health, social work and psychology are provided). Those working with children in street situations as a part of their mandate (e.g. street-based social workers and child protection units of An Garda Síochána) should have in-depth training, and "street walks" must be one such method, as must attitudinal and behavioural change.

States should ensure that children in street situations can access basic services such as health and education. Specialised services on the street should involve trained social workers with street connections to help children reconnect with family, local community services and wider society. Children should not necessarily renounce their street connections, but rather, the intervention should support them to access their rights. Detailed understanding of local

contexts is crucial to gain individualised support for children. There should exist local-level, partnership-based and specialised interventions which take a child rights approach. Child-friendly cities and communities should be achieved, which contribute to an atmosphere of acceptance for children in street situations, as well as providing them with social networks and community-based protection systems.

There should also exist clear monitoring and accountability mechanisms for legislation, policies and services that are transparent and robustly enforced. States should also support the participation of children in street situations in this regard – there should be coalitions of State and non-State actors, there could also exist committees or working groups that focus on children in street situations. Children's rights ombudspersons and other national human rights institutions must be easily accessible to children in street situations. They should also have the right to effective legal and other remedies, including legal representation where their rights are violated. Children should have access to individual complaints mechanisms, by themselves and/or by adult representatives, and to both judicial and non-judicial redress.

Strategies and approaches must consider the principles of the CRC: Non-discrimination[106]– this is one of the main causes of children ending up in street situations, because of their ethnic or other background. They are then discriminated against on the basis that they have connections with the street, and this will have lifelong negative consequences. The Committee interprets "other status" under Article 2 of the Convention to include the street situation of a child or family. Children have mentioned the discriminatory attitudes of professionals such as police and the barrier these pose to enjoyment of their rights. States are told that this requires proactive measures to ensure effective equal opportunities for all children, such as measures aimed at redressing a situation of substantive inequality. Systemic discrimination requires legal and policy change. Awareness-raising and educational measures must also be in place to counter discriminatory attitudes.

Another principle is the best interests of the child.[107] The obligation to apply this is fundamental to a child rights approach, to secure a holistic approach to children in street situations and to promote their human dignity. Authorities must take into account the nuances

[106] CRC Article 2.
[107] Article 3(1).

of vulnerability of each child in a street situation, as each child is unique. "Vulnerability" should be considered together with the resilience of individual children in street situations. The right to life, survival and development is another principle.[108] Children in street situations face threats to their lives in some states by state agents; by adults or peers, child labour, traffic accidents, substance abuse, and a lack of access to adequate nutrition, health care and shelter. The right to life should be interpreted broadly and include an individual's entitlement to enjoy a life with dignity. Children's civil and political rights are relevant to the right to life but also their economic, social and cultural rights. The right to life encompasses the minimum conditions for a life with dignity. Growing up in conditions of absolute poverty threatens the right of children to survival and undermines the basic quality of life. States' must give careful attention to the behaviours and lifestyles of children in street situations when aiming to progress their rights, even if their lifestyles do not conform to prevailing cultural norms – the realities of children in street situations must be acknowledged.

The right to be heard and to have their views given due weight[109] is the final general principle to be considered. Children in street situations face particular barriers which States must make proactive efforts to overcome. Children in street situations should be provided with an enabling environment to be heard, for example in proceedings concerning them; in community and national levels in policy and programme formation as well as implementation and monitoring. States should also listen to relevant adults and encourage children in street situations to form their own child-led organisations and initiatives, which will create space for meaningful participation and representation.

Importantly, the Committee outlines how civil and political rights are crucial for children in street situations. For children in street situations to claim their rights, the right to freedom of association and to peaceful assembly are essential. For example, working children's unions and child-led associations are an important part of children accessing their rights. However, there is regularly a lack of political space afforded to children to speak out. Children in street situations are often particularly affected by this as they often lack connections with a trustworthy adult, and adults are often required to legally register an organisation (and therefore children themselves cannot). Children in street situations may also be exploited and

[108] Article 6.
[109] Article 12.

coerced to take part in political demonstrations, though this is no reason to curtail their association rights. CRC Article 15 requires States to empower children in street situations to exercise their participation rights and counter co-option and manipulation by adults.

CRC Article 27(3) stipulates that States should ensure that all children have a standard of living adequate for their physical, mental, spiritual and moral development. This is particularly important to prevent children ending up in street situations and to fulfil the rights of children already in that situation. States must assist parents and others to implement this right and provide material assistance and support programmes where needed, particularly with regard to nutrition, clothing and housing. Regarding nutrition, clothing and housing, there is no leeway for the discretion of States. These and other essentials must be provided to the maximum extent of States parties' available resources.

The right to housing is a crucial component of CRC Article 27 and is particularly relevant for children in street situations. The Committee on Economic, Social and Cultural Rights has interpreted the right broadly as the right to live somewhere in security, peace and dignity. "Adequacy" of living conditions requires attention to: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.

Children in Street Situations in Ireland

- *A child rights-based approach approach should be taken to the rights and needs of children in street situations in Ireland.*

- *Ireland should produce a holistic and long-term strategy and make the necessary budget allocations for children in street situations.*

- *Children in street situations should participate in developing and implementing these strategies.*

- *Information about such children should be collected in Ireland in order to decide how best to uphold their rights.*

- *Laws and policies should be assessed in Ireland to establish how they can be improved to meet the rights and needs of children in street situations.*

- *Private parties such as businesses must be held to account by the state to ensure that they are upholding human rights.*

- *Comprehensive national child protection systems need to assist children in street situations and appreciate their specific needs.*

- *Authorities should ensure basic training on child rights and children in street situations for professionals who come into contact with children in street situations*

- *Children in street situations must have access to basic services such as health and education.*

- *Clear monitoring and accountability mechanisms should be created.*

- *Children should have access to individual complaints mechanisms, by themselves and/or by adult representatives, and to both judicial and non-judicial redress.*

- *Particular attention should be paid to the civil and political rights of children in street situations in Ireland, for example they should be supported to be heard and to form organisations of their own.*

- *It must be ensured that children enjoy their right to live somewhere in security, peace and dignity.*

B. General Comment No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence

Another recent General Comment from the Committee is No. 20 (2016) on the implementation of the rights of the child during adolescence.[110] This general comment provides guidance to States on how to ensure the realization of the rights of children during adolescence, highlighting the importance of a human rights-based approach which respects the dignity and agency of adolescents; their participation in their own lives; their health, well-being and development; and the progression of their human rights, without discrimination. It seeks to call attention to the opportunities afforded by, as well as the challenges faced, during adolescence. It aims for greater awareness of the situation of adolescents, greater recognition for their evolving capacities, and for investment for this particular group to ensure the realisation of their rights.

Appreciating Adolescence

The Convention on the Rights of the Child defines a child as everybody below the age of 18 years, unless there are relevant laws applicable where majority is attained earlier. The CRC therefore applies to all those under 18, but the needs of an infant will be very different to those of an adolescent. It is increasingly recognised that there should be greater specificity therefore on what the differences will be, and on the issues which are most relevant to adolescents in particular.

In particular in this General Comment, the Committee emphasises that the implementation of rights should take account of children's development and their evolving capacities. It is stated that:

> Adolescence is a life stage characterized by growing opportunities, capacities, aspirations, energy and creativity, but also significant vulnerability. Adolescents are agents of change and a key asset and resource with the potential to contribute positively to their families, communities and countries.[111]

[110] General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence CRC/C/GC/20 (06 December 2016).
[111] Para. 2.

Globally, it is emphasised, adolescents contribute positively in many areas of their communities, including in health and education campaigns, family support, peer education, community development, and creative arts. They make contributions towards peace, human rights as well as environmental and climate justice. Many drive digital and social media environments, and still others have great potential in terms of political engagement and monitoring accountability.

The Committee emphasises however that the potential of adolescents can be unmet, as States regularly do not invest in the measures needed for adolescents to enjoy their rights. States often do not disaggregate data by age and sex, and therefore such information does not inform policy or identify gaps in the allocation of resources for adolescents. Policies which take children as a general group, without separating out adolescents, are inadequate to guarantee the realisation of the rights of this group. This affects individual adolescent development, but also affects social and economic development.

Adolescence, the Committee emphasises, is not easily defined, and individuals reach maturity at different ages. Not just biology but also one's environment affects the transition from adolescence to adulthood, as there is significant variation across cultures regarding the expectations of adolescents and the criteria for entry into adult activities. International bodies employ a variety of age ranges to define adolescence. Adolescence is not defined in this general comment, but the period of childhood from 10 years until the 18th birthday is considered.

Understanding Adolescence

The Committee emphasises that there is a "powerful case" for focusing on adolescents as a group to promote their rights, to overcome the challenges they face in growing up in a complex world, and to strengthen their potential contribution to positive social transformation.

It is pointed out that adolescents develop rapidly, though this stage is not as widely understood as the development which occurs in early years. Adolescence is a unique stage of human development and involves rapid growth, increased cognitive ability and puberty.

Adolescents transition from dependency to greater autonomy and they begin to form their own identities based on complex interactions with family, culture and other factors.

In the general comment it is emphasised that we must recognise the impact that every period of life has on subsequent stages, including adolescence. It should be seen as a valuable period of childhood in its own right, but also as a crucial time of change and an opportunity for improving life chances. Good childhood experiences assist with optimal development for young people, and negative childhood experiences can be offset by positive and supportive opportunities during adolescence. Adolescence can mean exposure to many risks including substance use, violence and abuse, and economic exploitation. Adolescents need education and support to navigate these risks and challenges such as poverty and inequality, pressure to perform in school and security crises. States must invest in measures to strengthen the capacities of adolescents to face such challenges.

General Principles of the Convention

In the general comment, the general principles of the Convention are emphasised as being important in understanding the process of implementation of adolescents' rights.

The Committee emphasises the need to value adolescence as a developmental stage of childhood and notes with regret that there is frequently a negative characterisation of adolescence. This, the Committee states, can lead to a narrow focus on the needs and experiences of adolescents. Instead, there should be a commitment to building environments conducive to achieving the rights of adolescents and to supporting their development. The Committee states that approaches should involve adolescents themselves and build on strengths and on the contributions that adolescents make to families and communities, and the supports that they need to do this.

The Committee refers to the fact that states must build capacity of adolescents to make free, informed decisions; to build on strengths and recognise the contribution that adolescents make to their lives and the lives of others, acknowledging the factors that promote the resilience and development of adolescents.

Factors are listed which are known to promote the resilience and healthy development of adolescents:

(a) strong relationships with and support from the key adults in their lives;
(b) opportunities for participation and decision-making;
(c) problem-solving and coping skills;
(d) safe and healthy local environments;
(e) respect for individuality; and
(f) opportunities for building and sustaining friendships.[112]

The principle of respect for the evolving capacities of the child is also prominent in this general comment. This principle addresses the process through which children gradually gain competencies, understanding and the ability to take responsibility and to exercise their rights. The Committee states that: "the more a child knows and understands, the more his or her parents will have to transform direction and guidance into reminders and gradually to an exchange on an equal footing."[113] Yet this does not mean that states lose obligations to guarantee protection for adolescents. The relative inexperience and lack of power of adolescents can mean that adolescents are vulnerable to violations of their rights. Engaging adolescents in identifying potential risks and creating programmes to mitigate them will be most effective. Balance is needed between respecting adolescents' evolving capacities and protecting them appropriately. Therefore there are a number of factors which must be considered to achieve this balance, the Committee states, when it comes to adolescent decision-making, "including the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacity."[114]

The Committee also considers the principle of non-discrimination. During this period, adolescents can be seen as dangerous or hostile and they may face incarceration or violence as a consequence of their adolescent status. Then paradoxically, they are also treated as incapable of making decisions about their lives. Conditions which result in discrimination against adolescents on any grounds must be eliminated. Some differentiation of treatment between adults and adolescents is necessary, but the criteria for such differentiation must be

[112] Para. 17.
[113] Para. 18.
[114] Para. 20.

“reasonable and objective” if the aim is to achieve a purpose that is legitimate under the Convention.

The next general principle considered is the principle of the best interest of the child. Children have the right to have their best interests taken into account in all matters, and it applies to children as individuals and as a group. The principle of the best interests of the child, including adolescents, should be taken as a primary consideration in the implementation of the Convention, including legislation, policies, budgetary decisions, economic and social planning. States must also ensure that due weight is given to the views of adolescents when best interests decisions are being made.

The right to be heard and to have weight given to views is another general principle. Adolescents have the right to express views on all matters of concern to them, for example, in decisions relating to their education, health, and family life. Adolescents must also be involved in the development and implementation of all relevant legislation, policies and services affecting them, for example at school and at all levels from the community to an international level. Adolescents must be able to participate in political and civil engagement whereby they can negotiate and advocate for the realisation of their rights. Policies should be enacted to increase opportunities for political participation, and adolescents must be supported to form organisations for this purpose. Where states lower the voting age to under 18 years, measures should be in place to support adolescents to understand, and fulfil their role as active citizens. Adolescents should receive citizenship and human rights education, and there should also be training and awareness-raising for key adults including parents, professionals working for adolescents and policymakers. In this regard, I welcome the decision of the Government to put a proposal to the Irish people to amend the Constitution reducing the voting age.

Categories of Adolescents

The Committee points to adolescents requiring specific attention, as they particularly experience vulnerabilities and violations of their rights.

The first point is that during adolescence, gender inequalities become more relevant. Serious violations of girls' rights include child marriage, female genital mutilation, abuse, exploitation and trafficking. Girls frequently have a lower status in society which can result in a lack of access to education, decreased opportunities for sports, leisure and income generation. Girls report lower levels of health and life satisfaction indicators in many countries as compared with boys. States must invest therefore in measures to empower girls, and to challenge harmful gender norms. Clear measures must exist in laws, policies and programmes to guarantee girls equal rights as compared with boys.

There must also be particular consideration for the unique needs of boys, particularly as traditional concepts of masculinity which are linked to violence and dominance will negatively affect boys' rights. Also, ignoring their vulnerability to abuse and exploitation will also deny them protective services. States must combat negative perceptions of boys, and must promote positive masculinities. Boys and men must be engaged (as well as girls and women) in all measures which seek to achieve gender equality.

Adolescents with disabilities, the Committee states, are often excluded from opportunities available to others and can face prejudice, exclusion, social isolation and discrimination. They can miss out on social, educational and professional opportunities and therefore their right to freedom from poverty can be affected. They are disproportionately affected by physical and sexual violence, and often denied access to justice. Measures must be introduced to overcome such barriers, and to guarantee equality for adolescents with disabilities. They must also enjoy supported decision-making so that they can actively participate in all matters concerning them.

Lesbian, gay, bisexual, transgender and intersex (LGBTI) adolescents, the Committee continues, also commonly face persecution, abuse and discrimination. This can lead to low self-esteem, depression, suicide and homelessness. All adolescents have the right to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy. States must repeal all laws discriminating against people based on their sexual orientation, gender identity or intersex status and protect all LGBTI adolescents from violence, discrimination or bullying. They must engage in public awareness-raising, and implement relevant support measures. Ireland has made very significant progress in this area

having published a LGBTI+ National Youth Strategy, a process which has been led by the current Minister for Children, Katherine Zappone TD.

The rights of minority and indigenous adolescents are also identified for particular attention by the Committee as they will likely face greater levels of discrimination, social exclusion, and marginalisation than the general population. They will therefore likely face greater levels of poverty, mental health issues, and poor educational outcomes. States parties must therefore introduce measures to support such adolescents to enjoy their cultural identities and to enjoy (and contribute actively to) family and community life.

Implementing the Rights of Adolescents

The Committee draws attention to the obligations of states to establish a framework for realising the rights of children during adolescence, in which children themselves should have a say. The Committee points to:

(a) Comprehensive and multisectoral national strategies rooted in the Convention, with a dedicated focus on adolescents, to address the structural social and economic roots underlying the rights violations adolescents face and ensure a coordinated approach across government ministries;
(b) Monitoring implementation to ensure that the rights of adolescents are respected in legislation, policy and services;
(c) Collecting data disaggregated at a minimum by age, sex, disability, ethnicity and socioeconomic condition, to render the lives of adolescents visible;[115]
(d) Transparent budgetary commitments to ensure that adolescents are duly considered when balancing competing spending priorities and complying with the principles of sufficiency, effectiveness, efficiency and equality;
(e) Training for all professionals working with and for adolescents on the Convention and its associated obligations, with a focus on the competencies needed to work with adolescents in accordance with their evolving capacities;
(f) Dissemination of accessible information about children's rights and how to exercise them through, inter alia, the school curriculum, the media, including digital media, and public information materials, making particular efforts to reach out to adolescents in marginalized situations.[116]

The Committee makes specific reference to minimum ages, and states that legislation should exist at domestic level which recognises the rights of adolescents to take increasing

[115] The Committee recommends that States agree on common indicators against which to monitor progress in the implementation of adolescents' rights.
[116] Para. 37.

responsibility for decisions in their lives. States must introduce minimum legal age limits, which consider both the right to protection, and also respect for the evolving capacities of adolescents in areas such as health treatment, consent to adoption, and applications to family courts. Children below these minimum ages should also have opportunities to demonstrate understanding also. Adolescents of similar ages should not be criminalised for consensual and non-exploitative sexual activity.

Civil Rights and Freedoms

The Committee emphasises children's civil and political rights, such as freedom of expression. Parents must provide appropriate guidance but should not interfere with adolescents' rights in this regard. Adolescents also have the right to seek and impart information, for example, through books, newspapers, digital and audio visual media.

Article 14 of the CRC highlights the right of the child to freedom of religion and the duties of parents to provide direction to the child bearing in mind evolving capacities. It is emphasised that the right to freedom of religion is the right of the child rather than the parent. It is stated that schools and other institutions must also respect this right and children should have choices with regard to attendance in religious instruction classes.

Freedom of association is also emphasised for adolescents, who will spend an increasing amount of time with peers. This is of benefit socially and developmentally, promoting skills crucial for relationships and employment. States must respect and facilitate adolescents' right to freedom of association and peaceful assembly. There must be legal recognition of the right of adolescents to establish clubs and organisations, to form online networks, and to join political parties and trade unions.

The right to privacy is also emphasised. As the Committee states, violations of privacy in adolescence is a real concern, particularly in the areas of medical advice; adolescents in institutions; correspondence and other communications. Adolescents must, for example, have access to records relating to them held in institutions for the purpose of education, health-care and justice. Where breaches of privacy take place, for example in the digital environment, adolescents should have access to redress.

The Committee states that access to information is crucial for adolescents, including on the internet. States must ensure that adolescents have access to media and equal access to digital citizenship. Training and support should be available for adolescents as part of the education curriculum to develop adolescents' digital literacy skills. The risks of the digital environment include online fraud, violence and hate speech, cyberbullying and child pornography. That said, this should not restrict adolescents' access to the digital environment, rather holistic strategies should promote their safety. Adolescents should be involved in initiatives aimed at progressing online safety.

Other Matters

The Committee also stresses that States adolescents in alternative care require greater investment and support. Institutionalisation must be a measure of last resort for protection reasons – foster and small homes, regular reviews of adolescents' individual situations, and educational support must be prioritised and children must have a real voice in the processes affecting them.[117] Confidential complaints mechanisms and justice should be accessible to adolescents in care. Measures must be adopted to support the independence of adolescents in alternative care. Their particular vulnerabilities as they become old enough to leave care should be understood and adolescents must have support in preparing for the transition. They must have support gaining access to employment and housing and they must have psychological support.

The Committee considers the mental health issues which can affect some adolescents such as suicide, self-harm and eating disorders:

> Such problems arise from a complex interplay of genetic, biological, personality and environmental causes and are compounded by, for example, experiences of conflict, displacement, discrimination, bullying and social exclusion, as well as pressures concerning body image and a culture of "perfection".[118]

The Committee notes the factors which are known to promote resilience and to protect against mental ill health such as strong relationships with key adults, a suitable standard of

[117] In an Irish context, 92% of children in care are in family placements. The largest residential unit cares for 6 adolescents. In practice, this number is usually less.
[118] Para. 58.

living, access to high quality secondary education, freedom from violence, and opportunities for decision-making. Over-medicalisation and institutionalisation must be avoided, and an approach based on public health adopted. States must implement a comprehensive multisector response, through parents, peers, the wider family and schools as well as trained staff.

All adolescents must have access to free, confidential, and non-discriminatory sexual and reproductive health services which are responsive to the needs of adolescents. Stigma around adolescent girls, girls with disabilities and LGBTI adolescents in gaining access to such services must be tackled. States are urged to decriminalise abortion and to ensure that adolescents have access to safe abortion and post-abortion services – legislation should be reviewed to guarantee the best interests of pregnant adolescents and that their views are respected in abortion-related decisions. Regarding sex education, the Committee states that:

> Age-appropriate, comprehensive and inclusive sexual and reproductive health education, based on scientific evidence and human rights standards and developed with adolescents, should be part of the mandatory school curriculum and reach out-of-school adolescents. Attention should be given to gender equality, sexual diversity, sexual and reproductive health rights, responsible parenthood and sexual behaviour and violence prevention, as well as to preventing early pregnancy and sexually transmitted infections.[119]

The Committee also considers drug use and the fact that adolescents can be at a higher risk of drug-related harm than adults. States must protect adolescents from drug use by putting in place prevention, harm-reduction and dependence treatment services. There must be sufficient budgetary allocation for this. Punitive or repressive drug control policies must be replaced with treatment and care.

Education investment must target those who often do not attain educationally as much as other groups. In Ireland traveller children have high levels of early school leaving, as I have noted in previous reports. Proactive measures must be taken to end discrimination of marginalised groups in gaining access to education, the Committee states, and recommends "establishing cash transfer programmes, respecting minority and indigenous cultures and children from all religious communities, promoting inclusive education for children with disabilities, combating bullying and discriminatory attitudes within the education system and

[119] Para. 61.

providing education in refugee camps."[120] Schools must also adopt flexibility so that adolescents may combine work and family care responsibilities with their schooling which they often have to shoulder. Adequate opportunities to complete education must also be provided for those who have already left school.

The Committee also considers the rights of adolescents who may come into contact with justice systems. In particular their status both as victims and perpetrators of crimes is mentioned – states must introduce "comprehensive juvenile justice policies that emphasi[s]e restorative justice, diversion from judicial proceedings, alternative measures to detention and preventive interventions, to tackle social factors and root causes" related to crime. Rehabilitation and reintegration should be the focus of initiatives. Detention must be a measure of last resort, for the shortest time possible, and adolescents should be detained separately from adults. States should raise progressively the age of criminal responsibility to 18 years.

Recommendations

General

Ireland must better invest in the measures needed for adolescents to enjoy their rights.

Data should be collected and disaggregated by age so that it can inform policy and identify gaps in the allocation of resources for adolescents.

Policies should not simply consider children as a general group, but alternatively separate out adolescents where appropriate, in order to guarantee the realisation of the rights of this group.

In forming policies and laws concerning adolescents, balance is needed between respecting adolescents' evolving capacities and protecting them appropriately. Factors which must be considered when it comes to adolescent decision-making include "the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that

[120] Para. 70.

competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacity."[121]

Conditions which result in discrimination against adolescents on any grounds must be eliminated. Some differentiation of treatment between adults and adolescents is necessary, but the criteria for such differentiation must be reasonable and objective with a legitimate aim.

Discrimination

The general principles of the CRC should guide all policies and actions concerning adolescents. In particular, states should facilitate the ability of adolescents to make decisions in line with their evolving capacities, and facilitate the right of adolescents to participate in decision-making affecting them.

Adolescents should receive citizenship and human rights education, and there should also be training and awareness-raising for key adults including parents, professionals working for adolescents and policymakers.

There should be greater awareness of adolescents requiring particular attention.

Ireland must invest in measures to empower girls, and to challenge harmful gender norms. Clear measures must exist in laws, policies and programmes to guarantee girls equal rights as compared with boys.

Ireland must combat negative perceptions of boys, and must promote positive masculinities.

Measures must be introduced to overcome barriers and to guarantee equality for adolescents with disabilities. They must also enjoy supported decision-making so that they can actively participate in all matters concerning them.

Ireland must repeal all laws discriminating against people based on their sexual orientation, gender identity or intersex status and protect all LGBTI adolescents from violence,

[121] Para. 20 of the General Comment on adolescence.

discrimination or bullying. It must engage in public awareness-raising, and implement relevant support measures. Ireland has made very significant progress in this area, a process which has been led by the current Minister for Children, Katherine Zappone TD.

Ireland must introduce measures to support such adolescents to enjoy their cultural identities and to enjoy (and contribute actively to) family and community life.

Strategies

In Ireland, a framework should be established for realising the rights of children during adolescence, which should include a national strategy rooted in the CRC; implementation monitoring of legislation, policy and services; data collection; budgetary commitments, training for all relevant professionals, dissemination of information about children's rights, and particular efforts for the rights of those in marginalised situations.

As recommended in my previous reports, minimum ages should be reviewed to ensure that they achieve the correct balance between protection and recognising the evolving capacities of adolescents.

Children's civil and political rights must be considered, such as freedom of expression and freedom of religion. It must be ensured that schools and other institutions appreciate that freedom of religion is a right of the child and that children have choices with regard to attendance in religious instruction classes.

There must be legal recognition of the right of adolescents to establish clubs and organisations, to form online networks, and to join political parties and trade unions.

The right of children to privacy must be respected and where breaches of privacy take place, for example in the digital environment, adolescents should have access to redress.

Adolescents should be involved in initiatives aimed at progressing online safety.

Other Areas

Adolescents in alternative care must have confidential complaints mechanisms and as they leave care they must have support gaining access to employment and housing and they must have psychological support.

Factors known to promote resilience and to protect against mental ill health such as strong relationships with key adults, a suitable standard of living, access to high quality secondary education, freedom from violence, and opportunities for decision-making must be understood and prioritised. Overmedicalisation and institutionalisation should be avoided.

All adolescents in Ireland should have access to free, confidential, and non-discriminatory sexual and reproductive health services which are responsive to the needs of adolescents. Stigma around adolescent girls, girls with disabilities and LGBTI adolescents in gaining access to such services should be tackled.

Ireland should put in place adequate prevention, harm-reduction and dependence treatment services, there should be sufficient budgetary allocation for this. Punitive or repressive drug control policies should be replaced with treatment and care.

Proactive measures must be taken to end discrimination of marginalised groups such as Travellers in gaining access to education.

In Ireland, adolescents should be detained separately from adults. Ireland should raise progressively the age of criminal responsibility to 18 years.

C. Female Genital Mutilation and Non-Refoulement before the Committee on the Rights of the Child

The Committee on the Rights of the Child published its first views in January 2018 under the third Optional Protocol, the communications procedure whereby individuals can take complaints under the CRC. The case of *IAM (on behalf of KYM) v. Denmark* is an important development in relation to the CRC. It concerns international children's rights approaches and *non-refoulement* – the practice of not forcibly returning refugees or asylum seekers to countries in which they are likely to be subjected to persecution.

The Facts of the Case

The petitioner was a Somali national, who along with her daughter was the subject of a deportation order to the Puntland State of Somalia. She and her husband entered Denmark in 2014, without valid travel documents, and applied for asylum. The application of the husband was rejected and he was transferred to Sweden under the EU's Dublin Regulations. The woman was six months pregnant by the time her application was denied by the Danish Immigration Service, which ordered that she be deported to Somalia. She appealed the decision to the Refugee Appeal Board (RAB) by which time she had given birth. She argued that if she were deported, she ran the risk of being killed for marrying her husband without familial consent. She also argued that her daughter would be at risk of female genital mutilation (FGM). Her appeal was rejected by the RAB. It ordered that the mother and her daughter were to be deported to Somalia. A complaint was filed with the UN Committee on the Rights of the Child by the mother on behalf of herself and her daughter as she had exhausted all the domestic remedies.

The Complaint before the Committee on the Rights of the Child

The mother argued that a return to Somalia would violate Articles 1, 2, 3 and 19 of the CRC because her daughter would be at risk of FGM in that jurisdiction. The *non-refoulement* principle is applicable under the CRC, she argued, as it "has extraterritorial effects". Under Article 19 of the CRC, the state has a duty to protect children in its jurisdiction from violence and the state must hold as a primary consideration the best interests of the child under Article 3 of the CRC.

The mother argued that the social pressures would be too great to withstand in Somalia where 98% of women have been subjected to FGM, and would inhibit her ability to protect her daughter from FGM. She argued that though FGM was prohibited by law in Somalia, it was still widely practised in the Puntland State where this law does not appear to have been enforced. As she had married a man they did not approve of, her family would not protect her, she claimed. Denmark must therefore, under Article 3 of the CRC, act in her daughter's best interests and allow the mother and daughter to remain in Denmark.

Denmark argued, however, that only where a child was exposed to a real risk of irreversible harm would a violation of Article 19 of the CRC occur; and the petitioner had failed to establish that this was the case should her daughter be returned to the Puntland State of Somalia. The most relevant issue, Denmark argued, was whether the mother had the willingness and ability to protect her daughter from FGM in Somalia. By leaving Somalia and travelling to Europe, she had demonstrated her independence and personal strength. She should therefore be able to resist social pressure in her home state, and protect her daughter from FGM.

The CRC's Conclusion

The Committee considered the CRC's Article 3 best interests principle – it should be a primary consideration in decisions affecting children. States should ensure, within a procedure and with proper safeguards, that if a child is to be returned to countries from where their families have originated, it must be sure that "the child, upon return, will be safe and provided with proper care and enjoyment of rights."[122]

The Committee considered Denmark's arguments about the mother's independence, but emphasised that children's rights to be free from violence under Article 19 CRC is not dependent on a parent's willingness to resist social pressure. The 'principle of precaution' should be considered when evaluating the risk of harm to the child: where there is 'reasonable doubt' about the receiving/home state protecting the child against practices such as FGM, the child should not be returned.

Denmark, the Committee concluded, therefore failed to adequately take the best interests of the child into account during the process of assessing the risk of harm. Denmark failed to take proper safeguards to ensure the well-being of this child on return. The facts, the Committee stated, indicated that there had been a violation of Articles 3 and 19 of the CRC. Therefore Denmark had to refrain from returning the child and her mother to Somalia.

[122] The 2017 Joint General Comment of the Committee on the Rights of Migrant Workers (CMW) and the CRC No. 3/22, para. 11.8.

The children's rights perspective, as well as the individual circumstances of the mother and child, were the primary focus of the Committee in its determination on whether it was acceptable from a CRC perspective to order the return of the mother and child to Somalia. The authorities in Denmark relied however, not on the best interests principle and the individual circumstances of mother and child, but rather on its own report on FGM in Somalia.

The case of *IAM (on behalf of KYM) v. Denmark* demonstrates that states must ensure that risk, when considering the return of a child to the state from which her family has originated, must be evaluated in a manner which considers the position of the individuals involved, and in an age and gender-sensitive manner. Such evaluation must take account of the specific forms of persecution from a children's rights perspective.

Recommendations

Relevant practitioners such as lawyers and policy-makers should be made aware of the IAM (on behalf of KYM) v. Denmark judgment of the Committee on the Rights of the Child and that:

- *A child's right to be free from violence under Article 19 CRC is not dependent on a parent's willingness to resist social pressure.*
- *The 'principle of precaution' should be considered when evaluating the risk of harm to the child: where there is 'reasonable doubt' about the receiving/home state protecting the child against practices such as FGM, the child should not be returned.*
- *The children's rights perspective, as well as the individual circumstances of the mother and child, should be the primary focus in decisions about whether to return children to states where they may be at risk of harm.*

D. UN CEDAW Committee: Ireland's Compliance with the Convention on the Elimination of All Forms of Discrimination Against Women

The UN Committee on the Convention for the Elimination of Discrimination Against Women (CEDAW) monitors compliance of states with that instrument. In 2017, it published it's 'concluding observations' – a comprehensive assessment on the record of the state – on

women's rights in Ireland. The previous examination of Ireland's record had been conducted in 2005.

Ireland's Progress

The Committee first noted Ireland's progress on a number of fronts. The Paternity Leave and Benefit Act, in 2016, which introduced paid statutory leave for new fathers was noted, as was the Gender Recognition Act 2015, which provides that, from 16 years, the preferred gender of an individual will be fully recognised by the State for all purposes. The Committee also acknowledged the Children and Family Relationships Act 2015, which protects the rights of children of diverse families in relation to guardianship and custody and the Criminal Justice (Female Genital Mutilation) Act 2012.

The Committee welcomed Ireland's efforts to improve the policy framework which aims to promote gender equality and to progress the elimination of discrimination against women. The adoption of the second National Action Plan on Women, Peace and Security (2015-2018) was noted. This Plan aims to "[s]trengthen women's leadership and participation in decision-making in conflict and post-conflict situations; Ensure that a gender perspective is incorporated into Ireland's engagement in overseas humanitarian and development aid, peace-keeping, governance, post-conflict activities and interventions; Bolster Ireland's ongoing work on protection from and prevention of gender-based violence; Leverage Ireland's participation in global and regional fora to champion the implementation of the Women, Peace and Security resolution".[123]

The Committee also noted the National Sexual Health Strategy (2015-2020) which is a nationally coordinated approach to address sexual health and wellbeing in Ireland. It focuses on the importance of developing a healthy attitude to sexuality in young people and of building on that into adulthood and older age. The strategic goals of the Strategy are: Everyone receiving comprehensive and age-appropriate sexual health education/information and access to appropriate prevention and promotion services; Accessible and quality sexual health services, targeted to need, to be available to everyone; High quality sexual health

[123] Ireland's National Action Plan on Women, Peace and Security (2015-2018) at 6.

information availability to underpin policy, practice, service planning and strategic monitoring. The aims of the strategy are to improve sexual health and wellbeing and to reduce negative sexual health outcomes. The Strategy focuses on the domains of Sexual Health Promotion; Education and Prevention; Sexual Health Services and Sexual Health Intelligence. It prioritises actions relating to education/supporting parents, teachers and youth workers; communication and information; and governance and structures.[124]

The Committee also praised Ireland for ratifying or acceding to international instruments such as the Optional Protocol to the Convention on the Rights of the Child on a communications procedure; the Domestic Workers Convention, 2011 (No. 189) of the International Labour Organization, in 2014 and the UN Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention against Transnational Organized Crime.

The Constitution and Equality

The Committee noted the discriminatory provision in Article 41.2 of the Constitution which states that: "In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved." It described it as perpetuating "traditional stereotypical views of the social roles and responsibilities of women and men in the family and in society at large."[125] The Committee urged the amendment of Article 41.2 of the Constitution to remove the stereotypical language on the role of women in the home. There are intentions to hold a referendum to propose removing this provision, a development which is very much to be welcomed.[126]

The Committee had observations about the equality framework in Ireland, expressing concern that section 14 of the Equal Status Acts 2000-2015 prevents the use of the equality framework to challenge discriminatory laws. The Committee also noted that legislation which discriminates against women, or disproportionately impacts women in a negative way, does

[124] Ireland's National Sexual Health Strategy 2015-2020.
[125] Para. 11.
[126] See http://www.justice.ie/en/JELR/Pages/PR18000277.

not fall within the scope of the Equal Status Acts 2000-2015. Section 14 of the Equal Status Acts 2000-2015 should therefore be amended, the Committee stated, to ensure that an effective remedy is available for discrimination that has a legislative basis.

Access to Justice

The Committee focused on historical abuses of women and girls in relation to Magdalen Laundries, Mother and Baby Homes and the medical procedure of symphysiotomy, and noted that it had been examined by other UN human rights mechanisms such as the Human Rights Committee[127] and the Committee Against Torture[128] yet many issues remain unresolved.
The efforts made by Ireland to resolve issues surrounding these historical abuses of women were noted, but the Committee expressed regret that many recommendations of UN Committees have not been implemented. The Committee stated:

(a) That, notwithstanding the establishment of a non-statutory Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries and the adoption of the Redress for Women Resident in Certain Institutions Act of 2015, the State party has failed to establish an independent, thorough and effective investigation, in line with international standards, into all allegations of abuse, ill-treatment or neglect of women and children in the Magdalen Laundries in order to establish the role of the State and the church in the perpetration of the alleged violations;
(b) That, notwithstanding the publication of the Walsh and Murphy reports and the establishment of an ex gratia scheme in 2014, no effort has been made to establish an independent investigation to identify, prosecute and punish the perpetrators who performed the medical procedure of symphysiotomy without the consent of women;
(c) That the scope of the terms of reference for the Commission of Investigation into Mother and Baby Homes and Certain Related Matters is narrow such that it does not cover all homes and analogous institutions, and therefore may not address the whole spectrum of abuses perpetrated against women and girls.[129]

The Committee emphasised that the failure to adequately deal with historical abuses has a continuing effect on the rights of the victims of those violations. The Committee advised that prompt, independent and thorough investigations be conducted into all historical abuses, in line with international human rights standards. Perpetrators of violations of women's rights

[127] CCPR/C/IRL/CO/4.
[128] CAT/C/IRL/CO/1.
[129] Para. 14.

should be prosecuted and punished, and all victims/survivors of such abuse should obtain an effective remedy. This should include "appropriate compensation, official apologies, restitution, satisfaction and rehabilitative services."[130] The Committee further stated that information should be provided in Ireland's next periodic report under the CEDAW mechanism on the measures taken to ensure the rights of victims in this regard.

Gender-Based Violence against Women

The Committee noted efforts in Ireland to address gender-based violence against women, in particular mentioning the development of the Second National Strategy on Domestic, Sexual and Gender-based Violence 2016-2021 and the establishment of Tusla (the Child and Family Agency), which coordinates services for victims of domestic and sexual violence. The Committee also noted the steps being taken in Ireland to ratify the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention).

The Committee expressed concern however that there is a lack of gender-disaggregated data on gender-based violence against women (including domestic violence); that domestic violence is not criminalised and there is no specific definition of domestic violence in Ireland's legislation; and that there was a failure to address psychological, emotional and economic violence (although this issue has now been addressed in the Domestic Violence Act 2018). The Committee also pointed to a lack of legal protection against modern threats such as online stalking and harassment; and budgetary cuts to vital organisations such as women's shelters.

The Committee recommended that Ireland:

(a) Ensure that the National Office for the Prevention of Domestic, Sexual and Gender-based Violence and relevant institutions implement the "gold standard" so that data on all forms of gender-based violence against women, including domestic violence, is systematically collected and analysed and that it is disaggregated by, inter alia, age, ethnicity and relationship with the perpetrator;
(b) Intensify existing efforts to combat gender-based violence against women, including domestic violence, by ensuring that prosecutors and the police are

[130] Para. 15.

properly trained to identify, investigate and prosecute cases of gender-based violence, including domestic violence, particularly targeting Traveller, Roma and migrant women and girls;

(c) Criminali[s]e domestic violence and introduce a specific definition of domestic violence and other emerging forms of gender-based violence, such as online stalking and harassment;

(d) Provide adequate financial resources to non-governmental organi[s]ations that provide services to victims of gender-based violence, including domestic violence;

(e) Expedite the ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention).[131]

The Committee considered trafficking and prostitution in Ireland, welcoming Ireland's efforts to combat trafficking in persons, including via the adoption of the Criminal Law (Human Trafficking) Act in 2008, which creates specific offences to criminalise trafficking in persons for purposes of sexual or labour exploitation. The Committee expressed concern however that Ireland remains a source and destination country for the trafficking of women and girls for purposes of sexual and/or labour exploitation and criminal activity. It noted, in particular, the low prosecution and conviction rates in cases of trafficking in persons.

It was recommended that Ireland implement more effectively existing legislation on trafficking in persons by making sure that cases are adequately investigated and that the perpetrators are adequately punished. Ireland must enhance collaboration with NGOs to make sure that victims of trafficking are identified at an early stage, and provided assistance. The Committee noted the Criminal Law (Sexual Offences) Act 2017, which criminalises the purchase of sexual services. The Committee was concerned at the lack of information on how existing laws have an impact in addressing the exploitation of prostitutes in Ireland however, and recommended that information be provided in the next periodic report, after a review of the Criminal Law (Sexual Offences) Act 2017 on its impact in addressing the exploitation of prostitutes in the State party and that programmes for women who wish to leave prostitution should be implemented including exit programmes and alternative income-generating opportunities.

[131] Para. 27.

It is important to acknowledge that considerable progress has been made in this area since the publication of the 2017 concluding observations. Of particular importance is the commencement of the Domestic Violence Act 2018.

Education and Employment

The Committee welcomed measures taken to improve women's and girls' access to education, noting the Better Outcomes, Brighter Futures (2014-2020) framework (this acknowledges the need to pay particular attention to the need to develop girls' skills in science, technology, engineering and mathematics) and the number of academic institutions signed up to the Athena SWAN Charter (this seeks to advance women's careers in science, technology, engineering and mathematics).

The Committee expressed concern, however, about reports of stereotypes and sexism in the field of education, and a lack of measures to curb this; the fact that the apprenticeship training programme attracts few women and girls; the fact that sexuality education curriculum is left at the discretion of institutions to deliver, and therefore is often taught in a narrow way within courses on biology and religion. The Committee also noted the low levels of education amongst Traveller, Roma and migrant women and girls.

The Committee made recommendations that strategies be strengthened in Ireland to address sexism in the field of education which prevents women excelling in academia; that a gender-neutral approach to apprenticeships be taken; and that compulsory and standardised age-appropriate education be provided on sexual and reproductive health and rights in the school curricula. This should include comprehensive sex education for adolescent girls and boys, and it should cover responsible sexual behaviours and focus on preventing early pregnancies. Sexuality education should be scientifically objective and its delivery by schools should be closely monitored and evaluated. Action must be taken to better address the low levels of educational attainment among Traveller, Roma and migrant women, including through special measures such as scholarships, and career counselling on educational plans and processes.

Health

The Committee expressed concern about how 'austerity' has affected women in Ireland, particularly those belonging to disadvantaged groups who happen to be dependent on social budgets. It was emphasised that the habitual residence condition poses an obstacle to entitlement to child benefit payments by Roma and migrant women. The Committee called upon Ireland to increase efforts aimed at economic recovery in a way that addresses the impact of austerity measures on social benefits for women. The impact of the habitual residence condition should be assessed, as this hinders entitlement to child benefit payments, particularly for Roma and migrant women.

Recommendations

General

Section 14 of the Equal Status Acts 2000-2015 should be amended to ensure that an effective remedy is accessible where discrimination has a legislative basis.

Violence Against Women

Data on all forms of gender-based violence against women should be collected and existing efforts to combat gender-based violence against women should be intensified.

Adequate financial resources should be provided to organisations that provide services to victims of gender-based violence.

Ireland should implement more effectively existing legislation on trafficking in persons and enhance collaboration with NGOs to make sure that victims of trafficking are identified at an early stage, and provided assistance. Greater efforts should be made to prosecute those suspected of trafficking. Programmes for women who wish to leave prostitution should be implemented, including exit programmes and alternative income-generating opportunities.

Ireland should expedite the ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention).

Education and Employment

Strategies should be strengthened in Ireland to address sexism in the field of education.

Compulsory and standardised age-appropriate education should be provided on sexual and reproductive health and rights in the school curricula.

Action should be taken to better address the low levels of educational attainment among Traveller, Roma and migrant women, including through special measures such as scholarships, and career counselling on educational plans and processes.

The impact of the habitual residence condition should be assessed, as this hinders entitlement to child benefit payments, particularly for Roma and migrant women.

E. UN CAT Committee: Ireland's Compliance with the UN Convention Against Torture

In 2017, the UN Committee against Torture, which monitors compliance of states with the UN Convention Against Torture (CAT), published its' 'concluding observations' – a comprehensive assessment on the record of the state – on Ireland's compliance with the CAT. It was the second examination of Ireland's record by the Committee. There were a number of areas concerning children's rights which were examined by the Committee.

Institutional Abuse

The Committee expressed concern that its recommendations on the implementation of the recommendations of the report of the Commission to Inquire into Child Abuse (the Ryan Report) have been only partially implemented.

The Committee noted the provision of redress to over 15,000 victims by the Residential Institutions Redress Board. Yet the Committee stated that it remains concerned about the absence of prosecutions and convictions of perpetrators and the lack of intention to continue to deliver funding for assistance to victims beyond 2019.

The Committee recommended that Ireland should:

(a) Encourage victims of abuse suffered in residential institutions to cooperate with An Garda Síochána and ensure that all participants in the Redress Scheme are aware that they are not "gagged" from doing so;
(b) Collect data on all criminal investigations undertaken by An Garda Síochána into allegations of abuse at institutions dealt with in the Ryan Report, as well as on whether these resulted in prosecutions and convictions, and any sentences handed down to perpetrators, and include this information in the State party's next report to the Committee;
(c) Ensure that the State party continues to fulfil its obligation to ensure that victims of torture or ill-treatment obtain redress, including the means for as full a rehabilitation as possible.[132]

The Committee also considered the investigations, accountability and redress relating to abuses of women and girls in the Magdalene Laundries, but again expressed concern at the lack of prosecutions of perpetrators. The Committee in particular expressed concern at the relationship of the state with private institutions and "reports that the State party has not undertaken sufficient efforts to uncover all available evidence of abuses held by private institutions, nor taken adequate steps to ensure that victims are able to access information that could support their claims". Ireland should conduct an investigation into allegations of ill-treatment of women with the power to compel the production of all evidence, and if appropriate, ensure the punishment of perpetrators.

The Committee also considered institutional abuses in Mother and Baby Homes, noting the creation of a Commission of Investigation into Mother and Baby Homes in February 2015. The Committee urged an independent, thorough, and effective investigation into all allegations of ill-treatment in such institutions, including cases of forced adoption. Perpetrators of any such acts should be prosecuted and punished and all victims of violations of the Convention obtain redress.

Female Genital Mutilation

The Committee welcomed the adoption in Ireland of legislation criminalising the removal of a girl from the state for the purpose of female genital mutilation (FGM). It is also now a

[132] Para. 24.

crime to fail to report such action to authorities. The Committee expressed concern, however, at reports that this legislation has not been used for prosecuting perpetrators, in spite of the fact that the number of women affected by FGM in the state has increased.

Recommendation

It must be ensured that there is an investigation and prosecution of the crime of removing a girl from the state for the purpose of female genital mutilation, and increased efforts should be made to deter this practice.

SECTION 2: DOMESTIC DEVELOPMENTS

2.1 REVISED GENERAL SCHEME OF THE CHILD CARE (AMENDMENT) BILL 2018

2.1.1 Introduction

The General Scheme of the Child Care (Amendment) Bill 2017 was published in January 2017. It provides for the reform of the guardian *ad litem* service in child care proceedings. Guardians *ad litem* (GALs) perform an important role within such proceedings, providing valuable advice to the court and support for the children they represent. They are a crucial mechanism for hearing the views of the child in public law cases.

In December 2017, a decision was made by the government to revise the General Scheme in order to establish the new guardian *ad litem* service within an executive office of the Department of Children and Youth Affairs. The revision also sought to address the recommendations made by the Joint Oireachtas Committee on Children and Youth Affairs on the content of the General Scheme - the Committee having provided helpful pre-legislative scrutiny of the General Scheme.

2.1.2 Existing position with regard to GALs

Pursuant to section 26 of the Child Care Act 1991 in its current form, a guardian *ad litem* may be appointed in the course of child care proceedings. Such an appointment may be made when the child is not a party to the proceedings, where the court views it to be in the child's best interests and in the interests of justice to make the appointment. This is therefore at the discretion of the individual judge and appointments are ad hoc, varying from case to case.

There are, however, certain matters in relation to which the 1991 Act is silent upon. It does not define the criteria for appointment nor the qualifications or experience required of a guardian. There is no guidance as to the role, status and function of a guardian *ad litem* in child care proceedings or appropriate support for and management of guardians. The profession as a whole remains unregulated and there is no nationwide panel of GALs. There

is no system in place for the appointment of legal representation for GALs and this is usually a matter for the individual GAL, with representation being employed where required on a case-by-case basis. These deficiencies need to be addressed.

The existing ad hoc use of GALs in child care proceedings in this jurisdiction is in stark contrast to the organised child's guardian service operational in England and Wales. This is managed by a non-departmental public body, known as the Children and Family Court Advisory and Support Services (CAFCASS), which is accountable to the Secretary of State in the Ministry of Justice. CAFCASS represents children in family court cases and places children's needs, wishes and feelings first, making sure their voices are heard at the heart of the family court setting, and that decisions are made in their best interests. It is completely independent of the courts, social services, education and health authorities and all similar agencies. There have long since been calls for a similar model to be established within this jurisdiction, to independently manage and deliver a guardian *ad litem* service for children.

Calls for Reform

Calls for reform of section 26 of the 1991 Act have been made for a significant period of time, in particular following the insertion of Article 42A into the Irish Constitution. This Constitutional provision creates a higher onus on the State to have a framework in place to realise the protection for the rights of children contained therein – especially the voice of the child. Failure to listen to children has often resulted in a failure to protect them from abuse and neglect.

I have previously called for regulation of the guardian *ad litem* service - to define the role and function of guardians, to ensure value for money in expenditure on this integral service and to address geographical injustice in relation to the provision of the service. The discretionary element of the appointment of guardians has led to an uneven appointment of GALs across geographical areas. This was exhibited in a study by the Child Care Law Reporting Project. In 1,200 child protection cases which came before the courts over a 3-year period, a GAL was appointed in just over half of these cases but there was inconsistency based on the location of the courts. While in 70% of cases in Dublin a GAL was appointed, the figure was significantly lower in other areas of the county – being just 13% in Galway and 17% in Cork.

The Ombudsman for Children's Office (OCO) similarly called for reform of this area. In its observations to the Department of Children and Youth Affairs Consultation Paper on preparing a policy approach to reform GAL proceedings, the OCO emphasised that a GAL service should be child-centred, accessible in principle to any child affected by care proceedings, independent, accountable and transparent.[133]

General Scheme of the Child Care (Amendment) Bill 2017

The General Scheme of the Child Care (Amendment) Bill 2017 was designed to replace the existing content of section 26 of the Child Care Act 1991. The overall aim was to ensure that the guardian *ad litem* service could be provided to the greatest number of children and young people, to enable their voices to be heard in child care proceedings. This was achieved through the use of a legislative presumption, namely a presumption in favour of the appointment of a guardian *ad litem* in all child care proceedings. Where the court declined to make such an appointment, the General Scheme required reasons to be given for this decision. Furthermore, in all High Court Special Care proceedings, a guardian had to be appointed. The General Scheme clarified that the role of the guardian *ad litem* was to inform the court of the child's views and to advise the court as to what, in the guardians' own professional opinion, was in the child's best interests.

Specifically, the General Scheme provided for the establishment of a nationally organised, managed and delivered guardian *ad litem* service by way of public procurement. The Minister for Children and Youth Affairs was to be the contract holder for the service, with her Department closely monitoring the service for effectiveness and efficiency. This service was to be independent from the Child and Family Agency (CFA), and the CFA was not to have any role in governance or overnight, but the CFA was to make periodic block payments to the service provider for GAL costs in accordance with the terms of the contract.

This national service was therefore to provide guardians to the courts, supporting their practice, while monitoring performance. Legal advice was to be provided to guardians *ad litem* through the national service, by way of an in-house legal facility. Access to legal

[133] Ombudsman for Children's Office, *Observations on a Consultation Paper by the Department of Children and Youth Affairs on preparing a Policy Approach to Reform of Guardian ad Litem Arrangements in Proceedings under the Child Care Act 1991* [2015].

representation for GALs was to be more transparent and formalised. This, therefore, would make it simpler to arrange legal representation for a guardian *ad litem* where required, with the introduction of standardised fees for such representation.

The General Scheme sought to ensure that the service provided by guardians *ad litem* was of high quality and sustainable into the future. In this way, the General Scheme set out the qualifications required of a person to act as a guardian *ad litem.* The person was required to have a qualification in social work or psychology and had to have a minimum of five years' post graduate experience of working in the areas of child welfare and child protection.

To address the need to clarify the role and duties of guardians *ad litem,* Head 5 of the General Scheme detailed the function of GALs. It stated that the function of a guardian was to enhance the decision-making capacity of the court by informing the court of the child's views and advising the court on what was in the child's best interests in the proceedings. To exercise this function, the GAL was to promote the child's voice, regard his or her best interests as the paramount consideration, ensure that the child was informed of matters relevant to the proceedings, provide the court with an assessment of the child's situation as requested, respond to any specific question posed by the court and bring to the court's attention any matter pertinent to the proceedings.

The General Scheme also removed the existing automatic prohibition on dual representation – that is, that a GAL cannot be appointed where a child is party to the proceedings. Currently, pursuant to section 26(4) of the Child Care Act 1991, a child cannot have a guardian *ad litem* and be party to proceedings at the same time. The General Scheme favoured a position where it was for the court to determine whether or not the GAL should continue or cease to act when the child became a party to the proceedings. This was a welcome development, in line with the UN Convention on the Rights of the Child (CRC) Committee's recommendation that a child requires both legal representation and the appointment of a GAL in proceedings which involve the determination of the child's best interests.

Shortcomings of original General Scheme

The publication of the General Scheme of the Child Care (Amendment) Bill was widely welcomed. The Ombudsman for Children's Office noted with approval the objective of the General Scheme to ensure that the GAL service could be brought to the greatest number of young people, hailing the establishment of a nationally organised and managed guardian *ad litem* service as a crucial step towards ensuring that children and their rights are placed at the centre of judicial proceedings affecting them.[134]

Pre-legislative scrutiny of the General Scheme in its original form was undertaken by the Joint Oireachtas Committee. The Joint Oireachtas Committee received submissions from numerous organisations. It submitted its report to the Minster for Children and Youth Affairs in May 2017. A number of recommendations were made therein, which prompted the Minister to reconsider the manner in which the national guardian *ad litem* service should be established.

The first key recommendation made by the Committee was that the national guardian *ad litem* service be set up under a statutory body, rather than being subject to a public procurement process as provided for in the General Scheme. In its submission to the Joint Oireachtas Committee, the Law Society was not in favour of public procurement of services to be engaged under contract by the Minister for Children and Youth Affairs, taking the view that this could result in a "fragmented approach which prevents the establishment of the principles which underpin the service such as consistency, transparency and cost effectiveness".[135] Similarly the OCO recommended the establishment of a statutory body, entirely independent from any government department or agency, capable of long-term consistency and sustainability.

The second recommendation was that Tulsa, the Child and Family Agency, not be involved in the provision of the service whatsoever. In its original form, as previously stated, the General Scheme envisaged independence between the GAL service and Tusla but required

[134] Ombudsman for Children's Office, *Submission to the Joint Committee on Children and Youth Affairs in relation to the General Scheme of the Child Care (Amendment) Bill 2017*, 29 March 2017.
[135] Law Society Submission, *General Scheme of the Child Care (Amendment) Bill 2017,* Joint Oireachtas Committee on Children and Youth Affairs, March 2017 at p.5.

Tusla to make periodic block payments to the national service provider for GAL costs. Even this limited involvement could contribute to a perception of a conflict of interest or lack of independence on the part of the guardian *ad litem* service and should be avoided. The Law Society similarly recommended that funding be provided by a source other than the CFA, to promote independence and to ensure that the costs incurred by a GAL are not borne by an agency that is party to the proceedings.

In its submission to the Joint Oireachtas Committee, the OCO and Barnardos were critical of the principles that underpinned the General Scheme. For instance, in Head 3, provision was made for the establishment of a national guardian *ad litem* service citing the enhancement of the decision-making capacity of the courts as the reasoning behind the service. In Head 5, the function of a GAL was cited as being to enhance the decision-making capacity of the court and in the explanatory note to Head 4, it was stated that the service was to be established to support *the courts* in child care proceedings. In its original form, therefore, the General Scheme focused on the value of the GAL service to the *court*, rather than being first and foremost a service to give effect to the constitutional and international rights of *children*.[136] Both organisations recommended that these provisions be adjusted so that access to a guardian *ad litem* was framed as the right of a child in respect of whom care proceedings have been brought, rather than simply being of assistance to the courts – a benefit that is a naturally occurring result of the former. Barnardos recommended a description of the GAL's function that focuses on the child and involves a positive obligation to the child.[137]

Revised General Scheme

As a result of the abovementioned recommendations, Minister Zappone sought and obtained approval from Government to establish a new national guardian *ad litem* service, within an Executive Office of the Department of Children and Youth Affairs. It is anticipated that this will be done on an interim basis and the long-term arrangements for the office will be dealt within the context of the proposed transition to a Family Courts system. The setting up of an Executive Office within the Department of Children and Youth Affairs prevents Tusla from

[136] Ombudsman for Children's Office, *Submission to the Joint Committee on Children and Youth Affairs in relation to the General Scheme of the Child Care (Amendment) Bill 2017*, 29 March 2017 at p.6.
[137] Barnardos, *Submission to the Joint Oireachtas Committee on Children and Youth Affairs Re: General Scheme of the Child Care (Amendment) Bill*, 8 March 2017.

having a role in this service, as per the second recommendation of the Joint Oireachtas Committee. This approach thus addresses the two recommendations of the Joint Committee. The aim is to "…deliver an effective, quality assured, and standardised front-line service for children in child care proceedings."[138]

On 20 February 2018, a revised General Scheme was approved and published. As well as reflecting the aforementioned amendments to the original General Scheme, the revised Scheme improves the powers of guardians in certain circumstances. Head 4(3) gives GALs the power to make enquiries orally or in writing of any person, including the parents of the child. They may cross-examine parties and witnesses in certain circumstances and make applications to the court on matters concerning the welfare of the child, for instance applying to court seeking a direction to procure copies of existing reports of any person relating to the child or to procure new or revised reports. The presumption in favour of appointment of a guardian *ad litem* remains in place, with the additional requirement that where a court refuses to appoint a guardian, it must state how it intends to hear the views of the child in question. As well as the mandatory appointment of a guardian for Special Care proceedings, the Revised Scheme requires the appointment of a guardian in all proceedings under the section 25 of the Mental Health Act 2001, which concerns the involuntary admission of a child who has a mental disorder to an approved centre.

Following the concerns raised by the OCO about the general principles behind the establishment of a national GAL service, the Revised General Scheme shows an improved emphasis upon the child's right to the appointment of a GAL, rather than prioritising the benefit of a GAL to the courts. Head 3, which provides for the establishment of a national guardian *ad litem* service, no longer states solely that the service will enhance the decision making of the courts. It now cities three roles of the national GAL service:

(a) to enable and facilitate the child's views to be heard in proceedings under the Child Care Act 1991;
(b) to enhance the decision-making capacity of the Courts regarding the child's views and best interests in such proceedings; and
(c) to support guardians *ad litem* in carrying out their functions under Head 4.

[138] "Reform of Guardian ad litem arrangements in child care proceedings" at https://www.dcya.gov.ie/docs/Reform_of_Guardian_ad_litem_arrangements_in_child_care_proce/3969.htm, accessed 30 September 2018.

Similarly, in the explanatory note to Head 4, where originally it was stated that the national GAL service was to be established solely to support the courts in child care proceedings, in the Revised Scheme it now states that the core objective and focus of a GAL is to inform the Court of any views expressed by the child and make recommendations on what, in his or her professional opinion, is in the child's best interests. Head 5, which sets out the function of a guardian, no longer solely refers to the function as being to enhance the court's capacity to reach a decision – instead, the function of a GAL is defined clearly as to inform the court of the child's views and make recommendations to the court on what is in the child's best interests, having considered those views. Overall, the content of the Revised Scheme takes the focus away from the practicality of a GAL in assisting the judiciary in its decision-making in care proceedings and promotes the crucial role of a GAL as being to assist a child in exercising his or her rights.

The qualifications required to act as a guardian have also been broadened in the Revised Scheme. Under the original General Scheme, a guardian was required to have a qualification in social work or psychology and have a minimum of five years' post graduate experience of working in the areas of child welfare and child protection. Under the 2018 Revised General Scheme, a qualification in social care or psychiatry are also specified as types of qualifications that a guardian may have. The addition of these areas of expertise allows the guardian *ad litem* service to be more diverse and will promote a more specific response to the particular needs of each individual child at issue. This inter-disciplinary approach is to be welcomed, but the question arises as to whether GALs should have initial and continuing professional training in order to take on the role of a guardian. The Ombudsman for Children's Office recommended that provision should be included in the Bill to require all guardians to undergo initial and ongoing professional training specific to the role. This is not contained within the Revised Scheme however. It is thus recommended that ongoing professional training be included in the Bill to be drafted as it would undoubtedly be of benefit to all concerned persons – the child, GAL, and the judiciary – for guardians to receive training specific to their role, apart from the general educational and work experience which they must possess to be available for appointment.

The Revised Scheme provides crucial guidance to GALs in the performance of their duties. It contains a list of factors to which the guardian is to have regard in determining what is in the best interests of the child, reflecting the list of factors contained in section 31 of the

Guardianship of Infants Act 1964, as inserted by the Children and Family Relationships Act, 2015. This promotes a continuity between public and private family law, allowing the best interests test to be applied harmoniously. The comprehensive criteria used to establish the best interests of children in private law cases have thus been incorporated into any consideration of the best interests of children in this legislation.

Further progress awaited

A Bill will therefore be drafted along the lines of the revised General Scheme. No Bill as of yet has been drafted. It is recommended that all efforts be made for the Child Care (Amendment) Bill to be published forthwith to ensure the prompt improvement of the current unsatisfactory position with regard to the GAL system in Ireland.

It is further recommended that infrastructure be developed and be put in place to launch the new GAL service as soon as possible and pending the publication and enactment of the Bill, all steps should be taken to establish the new system so that it is ready to operate as soon as the Bill is enacted. The Department of Children and Youth Affairs is currently carrying out an engagement process, liaising with government departments, agencies, children's rights groups and children themselves, and has established an Expert Reference Panel. This process aims to provide advice and opinion to the Department on key aspects of the new GAL service. It is estimated that the engagement process will take up to 18 months to complete and the information gleaned from this process should be utilised to inform the infrastructure required for the new service.

Overall, the revisions made to the General Scheme are to be broadly welcomed and a clear improvement can be seen from a children's right perspective when a comparison is drawn with the content of the original General Scheme.

In particular, the legislative presumption in favour of the appointment of a GAL contained within the Revised General Scheme, along with the obligation on the judiciary to state how the views of the child will be ascertained in the event of non-appointment, is a welcome step. This reflects the content of Article 42A and exhibits appropriate legislative development to give effect to this Constitutional responsibility to hear the voice of the child. The question remains, however, as to whether the legislative presumption in favour of the appointment of a

guardian goes far enough. It is noteworthy that for all Special Care proceedings in the High Court, the Scheme mandates the appointment of a GAL. The same appointment is not demanded in care proceedings in the District or Circuit Court and appointment may be refused once the court explains the alternative method through which the child's views can be heard. Arguably, the appointment of a GAL is the most appropriate, beneficial and practical way of ascertaining the voice of the child, with minimal trauma for the child involved. I believe that the Constitutional imperative to hear the child's voice requires the appointment of a GAL in complex cases and leaving any discretion to the individual judge should be avoided in such cases, except in circumstances where a child is joined as a party to the proceedings. In those circumstances, the court should determine whether or not the GAL should continue to act. Consideration, therefore, should be given to providing for the mandatory appointment of GALs in all complex child care proceedings in the Child Care (Amendment) Bill as published. This would provide the best possible protection for children's rights in such difficult proceedings concerning them.

Recommendations

The Child Care (Amendment) Bill should be drafted and published forthwith, along the lines of the Revised General Scheme, with the corresponding infrastructure put in place.

Consideration should be given to the inclusion of a mandatory requirement to appoint a GAL in complex child care proceedings, except where the child is a party to proceedings where discretion should remain with the individual judge hearing the case.

Provision should be made to require GALs undergo training specific to their role, in additional to the work and educational experience required in the Revised Scheme.

2.2 MENTAL HEALTH AND CHILDREN

In *P.L. v. Clinical Director of St Patrick's University Hospital & Others*,[139] the Court of Appeal was asked to consider the question as to when a voluntary patient may leave a psychiatric institution having regard to the provisions of section 23 of the Mental Health Act

[139] [2018] IECA 29.

2001. Section 23 of the 2001 Act concerns the power to prevent a voluntary patient from leaving an approved centre under the Act.

P.L., the applicant, was a voluntary patient in the respondent hospital. He brought judicial review proceedings, seeking a declaration that the refusal of the respondent hospital to permit him to leave was unlawful. In the High Court, Peart J. refused to grant the relief sought and the applicant appealed to the Court of Appeal.

Sections 23 and 24 of the Mental Health Act 2001

Section 23 of the Mental Health Act 2001 concerns the power to prevent a voluntary patient from leaving an approved centre. It provides;

(1) Where a person (other than a child) who is being treated in an approved centre as a voluntary patient indicates at any time that he or she wishes to leave the approved centre, then, if a consultant psychiatrist, registered medical practitioner or registered nurse on the staff of the approved centre is of opinion that the person is suffering from a mental disorder, he or she may detain the person for a period not exceeding 24 hours or such shorter period as may be prescribed, beginning at the time aforesaid.

(2) Where the parents of a child who is being treated in an approved centre as a voluntary patient, or either of them, or a person acting in loco parentis indicates that he or she wishes to remove the child from the approved centre and a consultant psychiatrist, registered medical practitioner or registered nurse on the staff of the approved centre is of opinion that the child is suffering from a mental disorder, the child may be detained and placed in the custody of the Health Service Executive.

(3) Where a child is detained in accordance with this section the Health Service Executive shall, unless it returns the child to his or her parents, or either of them, or a person acting in loco parentis, make an application under section 25 at the next sitting of the District Court held in the same district court district or, in the event that the next such sitting is not due to be held within 3 days of the date on which the child is placed in the care of the Health Service Executive, at a sitting of the District Court, which has been specially arranged, held within the said 3 days, and the health board shall retain custody of the child pending the hearing of that application.

(4) The provisions of section 13(4) of the Child Care Act 1991 shall apply to the making of an application in respect of a child to whom this section applies with any necessary modifications.

Section 24 of the Act goes on to state:

(1) Where a person (other than a child) is detained pursuant to section 23, the consultant psychiatrist responsible for the care and treatment of the person prior to his or her detention shall either discharge the person or arrange for him or her to be examined by another consultant psychiatrist who is not a spouse, civil partner or relative of the person.

(2) If, following such an examination, the second-mentioned consultant psychiatrist—
   (a) is satisfied that the person is suffering from a mental disorder, he or she shall issue a certificate in writing in a form specified by the Commission stating that he or she is of opinion that because of such mental disorder the person should be detained in the approved centre, or
   (b) is not so satisfied, he or she shall issue a certificate in writing in a form specified by the Commission stating that he or she is of opinion that the person should not be detained and the person shall thereupon be discharged.

(3) Where a certificate is issued under subsection (2)(a), the consultant psychiatrist responsible for the care and treatment of the person immediately before his or her detention under section 23 shall make an admission order in a form specified by the Commission for the reception, detention and treatment of the person in the approved centre.

(4) The provisions of sections 15 to 22 shall apply to a person detained under this section as they apply to a person detained under section 14 with any necessary modifications.

(5) For the purpose of carrying out an examination under subsection (2), the consultant psychiatrist concerned shall be entitled to take charge of the person concerned for the period of 24 hours referred to in section 23.

(6) References in this section to the consultant psychiatrist responsible for the care and treatment of the person include references to a consultant psychiatrist acting on behalf of the first-mentioned consultant psychiatrist.

Sections 23 and 24 therefore give a hospital's medical and nursing personnel the power to effect a short term detention of a voluntary patient who expresses a desire to leave the hospital for a period not exceeding 24 hours. The person who is detained under section 23(1) must be examined by a consultant psychiatrist within that period who may direct his or her detention if the psychiatrist is satisfied that the patient is suffering from a mental disorder.

Background

The applicant was a voluntary patient in St. Patrick's Hospital. He admitted himself in August 2011 following a psychotic episode and he was placed in the Special Care Unit ('SCU'). During his time therein, he demonstrated aggressive, violent and inappropriate behaviour. Nevertheless, he accepted medication and a care plan was devised. On 13 September 2011, he expressed a desire to leave the hospital. At this stage, the provisions of section 23 of the 2001 Act were invoked, so that he was not legally free to leave the hospital. As required by section 24 of the Act, he was then examined by a consultant psychiatrist, who formed the opinion that the applicant was suffering from a mental disorder. As also required by section 24, the applicant was examined by a second consultant psychiatrist who also formed the view that he should be detained. An admissions order was signed and affirmed by the Mental Health Tribunal. He was subsequently detained under a renewal order, until 12 October 2011 when the consultant psychiatrist revoked the order, finding that he was no longer suffering from a mental disorder. The applicant was therefore discharged pursuant to the provisions of that section.

Thereafter, he was considered once again to be a voluntary patient. He was, however, not discharged in the ordinary sense of that term despite expressing an intention to leave. He did not leave the hospital, nor was he invited or allowed to leave. He remained in the SCU, a locked ward, and even though technically a voluntary patient, he was not free to leave. He was awaiting completion of a risk assessment prior to a proposed transfer to Sligo General Hospital.

On 21 November, the High Court granted leave to seek judicial review based on events that had occurred up until that point in time. On that date, however, his condition deteriorated due to a failure to take his medication. He tried to leave the hospital on three separate occasions by jumping over the wall and he had to be restrained and sedated. On 22 November 2011, following a consultation with a consultant psychiatrist, he initially agreed to remain in the SCU, however he later indicated that he was withdrawing his consent to remaining as a voluntary basis. The consultant psychiatrist decided to make an order under section 23 of the Act detaining the applicant to allow an assessment be carried out pursuant to section 24, taking the view that his acute symptoms of psychoses were re-emerging. The second consultant, however, did not form the view that the applicant required to be admitted pursuant

of section 24 of the Act. He noted that the applicant had agreed to engage in further treatment as a voluntary patient, remaining in the SCU.

Legal basis for detention?

The question, therefore, under consideration by the Court was whether there was a legal basis for the decision to restrain the applicant from leaving the hospital on 21 November 2011 in circumstances where section 23 was not invoked on that day. Was he, as a voluntary patient, free in law to leave the secure unit when he attempted to do so on 21 November 2011?

On behalf of the applicant, it was argued that there was no lawful basis for his detention and that the result of this was that he had been detained without the benefit of the various protections afforded to those detained under the 2001 Act. It was argued by the hospital that the provisions of section 23 implied that hospital personnel could refuse to allow a voluntary patient to leave in order to persuade him/her to stay or to obtain an initial assessment that he/she was suffering from a mental disorder and that it could do so without invoking the provisions of that section.

At the outset, Hogan J. acknowledged that all medical staff involved in the care of the applicant were trying to ensure that he obtained the best and most appropriate treatment. Nevertheless, the Court noted that there was no doubt that the applicant was prevented from leaving the hospital on 21 November 2011. This was clearly an interference with his personal liberty, which would be unlawful unless there was a legal basis for same.

Decision

Allowing the appeal and overturning the judgment of the High Court, Hogan J. found that a lawful basis did not exist under the Act for keeping the applicant detained against his wishes. He stated that absent the exercise of the section 23 power, he could not conclude that the decision to restrain the applicant from leaving the hospital on 21 November 2011 was a lawful one. He stated that had the Oireachtas intended that a hospital could restrain a voluntary patient from leaving by first insisting on conducting an examination as to whether he/she was suffering from a mental disorder prior to exercising the section 23 power, one imagines that it would have expressly so provided. The Court stated that a voluntary patient

who seeks to leave a secure unit at a psychiatric institution remains free to do so at any time and may not be restrained by the hospital save in accordance with the provisions of section 23 of the 2001 Act. The hospital, however, could lawfully attempt to persuade a patient not to leave, but this must involve persuasion and not restraint. While reasonable restraints may be necessary where the patient is seeking to leave in an unsafe manner – such as climbing over the garden wall – the hospital could not prevent a voluntary patient leaving at any appropriate time and by appropriate means.

The Court of Appeal therefore held that a voluntary patient who expresses a desire to leave a secure unit at an approved centre remains free in principle to do so at any convenient time and may not be restrained by the hospital from leaving save in accordance with the provisions of section 23 of the 2001 Act.

Impact on children

The legal position in relation to children differs somewhat to that in place pursuant to the 2001 Act in relation to adults. A "child" is defined under the Mental Health Act 2001 as a person under the age of 18 years other than a person who is or has been married.[140] Section 23(1) as set out above describes the law in relation to persons *other than children*, providing that where such a person is being treated as a voluntary patient in an approved centre and he or she wishes to leave, then if a medical practitioner is of the opinion that the person is suffering from a mental disorder, he or she may be detained for a 24 hour period. During this 24 hour period, the person will be either discharged by his/her consultant psychiatrist or his/her consultant will arrange for him or her to be examined by another psychiatrist and if that second consultant is satisfied that the person is suffering from a mental disorder, the person may be admitted and detained.

Sections 23(2) and (3) concern children who are voluntary patients in an approved centre. The majority of children who require in-patient treatment for a mental illness or disorder are admitted at the request of their parents/guardians. In some circumstances, however, the child's parent and/or guardian may wish to remove his/her child from the approved centre. Where this occurs, section 23(2) of the 2001Act may be invoked. It provides that if the

[140] Section 2, Mental Health Act 2001.

parents/persons acting in loco parentis of the child wish to remove the child from the approved centre, and a medical practitioner is of the opinion that the child is suffering from a mental disorder, the child may be detained in the approved centre and placed in the custody of the HSE. The HSE is then obliged to have the child examined by a consultant psychiatrist. If the HSE is satisfied that the child is suffering from a mental disorder requiring treatment that he or she is unlikely to receive unless he/she is admitted involuntarily; it must make an application to the District Court at the next sitting of that court in the same district or if there is no sitting within 3 days, at a sitting of the District Court which has been specially arranged and held within 3 days. The HSE retains custody of the child pending the hearing of that application. If the Court is not satisfied that the child has a mental disorder requiring treatment, it must release the child back into the custody of a parent or a person acting in loco parentis.

While the decision in *P.L. v. Clinical Director of St. Patrick's University Hospital & Others*[141] concerned section 23(1) of the 2001 Act specifically and the facts of that case related to an adult who was a voluntary patient in the hospital, I believe that the overarching principle enunciated therein is similarly applicable to cases involving children. This would mean that where the parents and/or guardians of a child who is a voluntary patient in an approved centre revoke their consent to the child remaining in the approved centre, it is not permissible to restrain the removal of this child from the hospital, unless section 23(2) is invoked by the approved centre. This prevents the unlawful detention of children and is in line with Article 37(b) of the United Nations Convention on the Rights of the Child (CRC), which states that no child shall be deprived of his or her liberty unlawfully or arbitrarily and that the admission of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. This also has due regard for the Constitutional rights of the family under Articles 41 and 42 of the Constitution.

While it is accepted, therefore, that the detention of children under section 23(2) is carried out in order to provide appropriate treatment for the child in question in each particular case, the deprivation of liberty inherent in the operation of this provision must be in accordance with law. If section 23(2) of the Act is not invoked, but the parents are not permitted to remove the child from the approved centre, the child is being detained unlawfully, without the benefit

[141] [2018] IECA 29.

of the safeguards provided for in the 2001 Act. It is recommended, therefore, that all approved centres under the 2001 Act ensure they act in accordance with the strict provisions of the 2001 Act, take heed of the decision in *P.L.*, and apply the decision to situations concerning adults and children alike.

Recommendation

All approved centres within the meaning of the Mental Health Act 2001 should be made aware of the decision in P.L., ensure they act in accordance with the strict provisions of the 2001 Act and apply the decision in P.L. to situations concerning adults and children alike.

2.3 SOCIAL WELFARE ENTITLEMENTS AND CHILD REFUGEES

In May 2018, in *Agha (a minor) v. Minister for Social Protection*,[142] the Court of Appeal delivered an important decision concerning the issuing of social welfare payments for the benefit of children seeking refugee status. The Court considered two related appeals, namely the Agha and Osinuga appeals, where the parents of the relevant children involved were refused payment of child benefit due to their immigration status.

Child benefit is a monthly payment which is made to the parents or guardians of children under 16 years of age. It is also paid for children under 18 years of age if they are in full-time education, full-time training or have a disability and cannot support themselves. To qualify for child benefit, a parent is required to be habitually resident in the jurisdiction. Section 246 of the Social Welfare Consolidation Act 2005, as amended, states that a person who has not been granted permission to remain in the State shall not be regarded as being habitually resident.

With regard to the appeal of the Agha family, the parents were Afghan nationals who arrived in Ireland in 2008. Upon their arrival, they resided within the direct provision system. They had four children. The oldest was born in Pakistan in 2006, the middle two children were born in Ireland in 2008 and 2009, and their youngest, Daniel, was born in Ireland on 5 April 2013. The parents made applications for asylum in 2013. In December 2014, the Refugee

[142] [2018] IECA 155.

Appeals Tribunal issued a decision declaring Daniel a refugee. This decision was communicated by letter dated 8 January 2015. The other members of the family then applied for family re-unification and permission to remain was granted to all family members in September 2015. The mother had originally applied for child benefit in respect of all four children in February 2015 and this was refused on the basis that she was not habitually resident in the State as she was awaiting the decision on the residency application. A subsequent application for child benefit made after permission to remain was granted in September 2015 was successful. The question raised in this appeal was whether child benefit was payable in respect of the four children of the family from the date of their application for refugee status in 2013, or whether for their youngest child, Daniel, child benefit was payable from the date of his recognition as a refugee in January 2015.

In relation to the Osinuga appeal, the applicant, Ms Osagie, was a Nigerian citizen who entered Ireland in 2013 and applied for asylum in November 2014. She had a child with Mr Osinuga, a naturalised Irish citizen, in December 2014. The child, Victoria, is an Irish citizen from birth. Ms Osagie applied for child benefit for Victoria in October 2015 and this was refused on the ground that the mother did not have a right to reside in the State. Both Victoria and her mother were residing in the direct provision system. The issue raised in the Osinuga appeal was whether the mother was entitled to child benefit when she made her application to the Minister for Social Protection in October 2015, that is, whether the Oireachtas can deprive a citizen of entitlement to child benefit by reason of the immigration status of her mother, the adult claimant?

In the High Court, White J. held that the statutory exclusion contained in section 246 of the Social Welfare Consolidation Act 2005 preventing the payment of child benefit prior to the grant of status to the parents was not unconstitutional. He thus held that the failure to pay backdated child benefit was not a breach of EU law or a breach of Article 23 of the Geneva Convention. Both Aghan and Osinuga appealed the High Court decision to the Court of Appeal. Hogan J. delivered the judgment of the Court of Appeal.

With regard to the Osinuga appeal, Hogan J. noted at the outset the fact that Victoria is an Irish citizen resident in the State. She thus has a strong claim to be treated in the same fashion as similar young citizens who are also resident in the State. He held that this position

is "*especially true in the case of a basic universal payment designed ultimately for the benefit of children*".[143] He went on to state:

> This brings us to the second and critical question: can the exclusion of Irish citizen children from access to child benefit be justified objectively on the ground that at the relevant time the qualifying parent did not have an entitlement to reside in the State and that her immigration status was thereby uncertain? It is true that the exclusion of persons with such an uncertain status serves important public policy and immigration goals by, e.g., serving to deter opportunistic asylum claims and generally by reducing the attractiveness of the State as a destination for what is sometimes described as welfare tourism…[144]

Nevertheless, he found:

> …In the present case, however, the restrictions are at best indirect and bar the making of a payment designed for the benefit of the citizen child in order to deter opportunistic asylum claims which its parents might make. In that respect, therefore, the statutory exclusion seeks in effect to deter the conduct of the parent but at the expense of a payment designed for the benefit of the child. This in itself points to an inherent unfairness and lack of proportionality in the legislative scheme of exclusion from what is otherwise a universal benefit scheme otherwise payable in respect of all children resident in the State.[145]

The Court of Appeal, therefore, held that the State could not provide an objective justification for excluding the child, Victoria, an Irish citizen, from eligibility for child benefit prior to the grant of status to her mother in January 2016. It therefore held that this statutory exclusion constituted a breach of the equality provisions of Article 40.1 of the Irish Constitution. The relevant provisions of the Social Welfare Consolidation Act 2005 which prevented the payment of child benefit in respect of an Irish citizen child resident in the State solely by reason of the immigration status of the parent claiming such benefit were thus found to be unconstitutional.

In relation to the Agha appeal, the requirement that the qualifying parent must have a legal entitlement to reside in the State was not found to be unconstitutional. In this case, as Daniel was not a citizen, his entitlement to reside in the State was purely contingent on a statutory entitlement to which the State may attach conditions, one of which is that any parent who claims that benefit must also have an entitlement to reside in the State. The Court noted that

[143] [2018] IECA 155 at para. 33.
[144] Ibid., at para. 34.
[145] Ibid., at para. 36.

Article 28 of the Qualification Directive[146] provides that there is no right to social security benefits prior to the grant of refugee or subsidiary protection status; accordingly, with the exception of Daniel, the mother was not entitled to claim such benefits in respect of the other three children prior to the family reunification decision. As Daniel was recognised as a refugee in January 2015, Ms Agha was entitled to child benefit payment in respect of him as and from that date in accordance with Article 28 of the Qualification Directive.

This decision of the Court of Appeal has served to clarify the law on social welfare payments that may be made in favour of child refugees and child citizens whose parents do not have status in this jurisdiction. It held that sections 246(6) and 246(7) of the Social Welfare Consolidation Act 2005 were unconstitutional. A parent will therefore be entitled to receive child benefit for his/her child, where the child is an Irish citizen and where both the parent and the child live in Ireland, even where the parent's status in Ireland is still uncertain and he/she has not yet been granted leave to remain. The finding of unconstitutionality was reached on the basis of the right to equality protected in the Irish Constitution as under the impugned provision, Irish citizen children who are resident in the State are not treated equally. If one child is not awarded child benefit due to the immigration status of his/her parent, that child is being treated differently to other children. The Court of Appeal recognised that the State has an interest in making a contribution to the welfare of all children, regardless of their parental circumstances, and that the basic standard child benefit payment is intended for the benefit of the child. On the other hand, the Court took the view that where the child for whose benefit the social welfare payment is sought is not an Irish citizen, the State is permitted to withhold the payment of child benefit to a parent who did not yet have the right to reside in the State prior to the granting of refugee status to the child.

Overall, the decision in *Agha (a minor) v. Minister for Social Protection* is to be welcomed. It is effective in promoting the "no poverty" Sustainable Development Goal, discussed in section 1 of this report, as well as serving to highlight and promote the right to equality for children, as protected by the Irish Constitution. It can be anticipated that the impact of this decision will be far-reaching and in practical terms, it will greatly assist many families, particularly those who remain in direct provision in light of the lengthy waiting times for asylum applications.

[146] Council Directive 2004/83/EC.

The Court determined that the declaration of unconstitutionality in relation to the relevant provisions of the Social Welfare Consolidation Act 2005 was to take effect from 1 February 2019. It did not take immediate effect from when the decision was made. This suspension of its declaration of unconstitutionality was for two reasons.[147] First, due to the financial implications of an immediate declaration, the suspension gives the Minister for Finance time to make any appropriate revisions to budgetary arrangements. Secondly, the Court stated that it was difficult for it to craft a declaration of unconstitutionality due to the language and structure of the impugned provisions such that would prevent those unentitled from wrongly claiming a benefit. The Court, therefore, suspended the declaration to allow the legislature a period of time to prepare the necessary rectifying legislation to deal with the outcome of this decision. The applicants in this case were entitled to backdated child benefit immediately, however, all other parents in similar positions had to wait until the formal finding of unconstitutionality was made early in 2019. While the reasoning behind the suspended declaration is understandable, it must be recognised that children for whose support child benefit should be payable were still not in receipt of this payment pending the introduction of the anticipated amending legislation. Practically, this continues to negatively impact the families concerned and will continue to cause financial strain until the situation is rectified. It is recommended, therefore, that the legislative response to this decision be expedited so that the necessary provisions are introduced as soon as possible to assist the children at the centre of the Court of Appeal's finding.

Recommendation

The legislative response to the Court of Appeal decision in Agha (a minor) v. Minister for Social Protection should be expedited so that the necessary rectifying provisions are introduced as soon as possible to assist the children at the centre of the Court of Appeal's finding.

[147] See McAuley, A., "An Old Dog Teaching Itself a New Trick – The Irish Courts, Adjournments & Suspended Declarations of Unconstitutionality" *School of Law and Government, Dublin City University,* available at https://wc2018.ipsa.org/sites/default/files/ipsa-events/wc2018/papers/paper-101873-2018-07-24t0020081000.pdf for a discussion regarding suspended declarations of unconstitutionality.

2.4 CHILDREN AND FAMILY RELATIONSHIPS (AMENDMENT) ACT 2018

The Children and Family Relationships (Amendment) Act 2018 is a short, technical Act enacted on 24 July 2018 to rectify certain minor errors contained within the Children and Family Relationships Act 2015. Its commencement is expected to allow the related parts of the 2015 Act concerning donor-assisted human reproduction to be initiated.

The Children and Family Relationships Act 2015 (the "2015 Act") was passed by the Dáil in April 2015. One of the most significant family law developments in Ireland in decades, the 2015 Act signalled a move away from the exclusive concept of the family based on marriage to ensure that the law in this jurisdiction also places protection around the diverse types of modern families that exist in Irish society today. On 12 January 2016, the Children and Family Relationships Act 2015 (Commencement of Certain Provisions) Order 2016 was signed.[148] This commencement order appointed 18th January 2016 as the day upon which various provisions of the Act were to come into operation. Among the important sections that have been commenced are the guardianship provisions, the reforms in relation to access and custody, the enforcement order regime, the new maintenance obligations and the "best interests" provisions. Not all of the Act, however, has been commenced and in particular, those parts of the 2015 Act relating to donor-assisted human reproduction are yet to be commenced.

This refers to Parts 2 and 3 of the Act and any other separate sections dealing with matters relating to assisted human reproduction. Part 2 of the Act establishes a scheme for the attribution of parental status where a child is born through donor-assisted human reproduction ("DAHR"). Part 3 of the Act establishes a scheme which requires that only gametes (eggs and sperm) from identifiable rather than anonymous donors may lawfully be used in Ireland, and sets out general obligations of DAHR facilities. It is important to note that the 2015 Act only deals with DAHR procedures where the intending mother carries the pregnancy and gives birth to the child. It thus applies to heterosexual couples, female same-sex couples and a single woman undergoing a DAHR procedure. It, however, does not provide a comprehensive scheme of regulation for all forms of assisted human reproduction and large

[148] S.I. No. 12 of 2016.

areas in this field will remain entirely unregulated even after the commencement of the 2015 Act. Surrogacy, for instance, falls outside the scope of the Act. The power to commence Parts 2 and 3 of the Act is placed upon the Minister for Health.[149] At present, over 3 years after the passing of the 2015 Act, it is yet to be fully operative.

The 2018 Act and the amendments made to the 2015 Act set out therein concern Parts 2 and 3 of the Children and Family Relationships Act 2015 only. No substantive changes are included in the 2018 Act and the policy intention behind the relevant provisions of the 2015 Act remain the same. Its purpose is simply to correct typographical and technical errors in the 2015 Act, which will facilitate the subsequent commencement of Parts 2 and 3.

In total, the 2018 Act is comprised of five sections, the pertinent sections being sections 2, 3 and 4. Section 2 amends section 4(a)(ii) of the principal Act relating to the definition of "donor". An incorrect reference to "section 26(6)" was included therein, and this is replaced with a reference to "section 26(5)". Section 26(5) of the 2015 Act refers to gametes that are subject to a transition period of three years, during which those acquired on an anonymous basis prior to the commencement of Parts 2 and 3 of the Act may be used in a donor-assisted human reproduction procedure in the State, subject to certain conditions. In the original Act, the incorrect subsection of section 26 was referenced therein and this amendment simply resolves that matter.

Sections 3 and 4 amend sections 14 and 16 of the principal Act respectively. These sections concern consents to be given for the use of an embryo in a DAHR procedure or a further DAHR procedure. They have been amended to provide that the Minister for Health may make regulations under these sections concerning the necessary consents required for such procedures "in such form as may be prescribed".

These purely technical amendments are therefore to be welcomed, particularly if they serve to escalate the commencement of the aforementioned much-awaited Parts of the 2015 Act. On 17 July 2018, in introducing the Bill to be read a Second Time in the Seanad, Minister Harris recognised that further delays in commencing Parts 2 and 3 of the Act would "…*have an impact on the rights of the most vulnerable individuals in donor-assisted human reproduction*

[149] Section 1(6), Children and Family Relationships Act, 2015.

procedures, namely, children." He stated that once this Bill had been enacted, it was his intention to commence Parts 2 and 3 of the 2015 Act. At present, however, the commencement of both the amending 2018 Act and the remainder of the Principal Act are still awaited. It is recommended, therefore, that commencement of both Acts be prioritised without any further delay to immediately clarify and regulate the legal parentage of donor-conceived children. In this regard, it might also be helpful if consideration is again given to the issues raised previously in Section 3 of my Tenth Report surrounding commencement and the DAHR provisions of the 2015 Act.[150]

Recommendations

The commencement of the Children and Family Relationships (Amendment) Act 2018 must take place as soon as possible, to enable the operation of the substantive measures concerning parentage in cases of donor-assisted human reproduction contained within Parts 2 and 3 of the 2015 Act.

Recommendations made previously in my Tenth Report surrounding commencement issues should be considered.

2.5 GUARDIANSHIP OF INFANTS ACT 1964 (CHILD'S VIEWS EXPERT) REGULATIONS 2018

The Children and Family Relationships Act 2015 substantially expanded the jurisdiction of the court to order expert reports in family law proceedings. It inserted Part V into the Guardianship of Infants Act 1964. Section 32 thereof concerns the procurement of two new types of expert reports, under section 32(1)(a) and section 32(1)(b) of the Act respectively.

These reports have been discussed in considerable detail in my Tenth Report. Section 32(1)(a) of the 1964 Act, as inserted by section 63 of the 2015 Act provides for the procurement of an expert report by the court in writing on *any question affecting the welfare of a child*. In practice, this is a lengthier, more detailed report than a report ordered under section 32(1)(b). Section 32(1)(b) is the second new type of expert report introduced by

[150] See Dr. Geoffrey Shannon, *Tenth Report of the Special Rapporteur on Child Protection* (2017).

section 63 of the 2015 Act. It empowers any court to appoint a 'child's views expert' where it is deemed desirable or necessary to do so. This type of report differs from that covered by section 32(1)(a), which is broader, allowing the court to request a report on a question affecting the welfare of the child. Instead, the sole purpose of the appointment of the expert under section 32(1)(b) is to express the wishes of the child either generally or in respect of specific questions on which the court may seek the child's views. In this way, it is a more tailored report geared toward putting before the court the views of the child, without the necessity for an in-depth analysis of other matters or general welfare concerns.

The duties and functions of the 'child's views expert' are set out under section 32(6). Section 32(6)(a) provides that it is the duty of the expert to ascertain the maturity of the child and, under section 32(6)(b) where requested by the court, the expert is to ascertain the capacity of the child to form his or her own views on the matters that are the subject of proceedings. Where the expert finds that the child is capable of forming his or her own views on the matters that are at issue, the expert must ascertain these views and put them before the court in a report – pursuant to section 32(6)(c). This provision in particular vindicates the right of the child to be heard in court proceedings. The expert must ensure that the views expressed by the child are put fully before the court. Where the expert finds that the child is incapable of forming his or her views on the matters that are the subject of the proceedings, the expert will also report this to the court.

Sections 32(10) and (11) of the 1964 Act give power to the Minister for Justice and Equality, in consultation with the Minister for Children and Youth Affairs, to introduce regulations to provide for the qualifications and experience required of an expert appointed under this section, to set out the fees and allowable expenses that may be charged by such an expert, to provide for the minimum standards that shall apply to the performance by an expert of his or her functions under this section and also to deal with such other matters as may be necessary to ensure that experts are capable of performing their functions. While section 32 of the Act came into operation some time ago – on 18 January 2016 - no regulations were introduced at the time of its commencement. This, as I have highlighted previously, has caused particular operational difficulties – specifically with regard to the costs of the reports ordered under section 32 of the Act. In relation to fees, section 32(9) of the Act merely provides that the fees and expenses of an expert appointed under section 32(1)(a) or 32(1)(b) shall be paid by the party or parties to the proceedings and in such proportions as the court may determine.

The expert's fee for the preparation of such a report can range considerably and may be in the region of €1,000 - €4,000, with the shorter section 32(1)(b) reports being at the lower end of the scale. The costs of such reports can therefore be prohibitive and sometimes the court will take the view that it is not an option to order a report in a particular case if the parties cannot discharge the expert's fees. A child should not be prevented from having his or her views heard in such matters concerning them by reason of the limited financial resources of his or her parents. This discriminates against children from families with smaller incomes and is simply unacceptable. The Legal Aid Board, in certain circumstances, has aided this situation. Where clients are in receipt of a legal aid certificate under the District Court Private Practitioners Scheme, in some cases the Legal Aid Board will extend that certificate to cover expert or professional reports. In practice, however, this is operated in an *ad hoc* manner and in some cases the Board will only pay a proportion or a contribution towards the costs of an expert report and either an expert will have to be located who will accept a reduced fee or the client will have to pay the remainder.

The new Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 have therefore been introduced to improve the current situation and complement the legislation.[151] These regulations came into operation on 1 January 2019 and apply to experts appointed under section 32(1)(b) only – namely those appointed to determine and convey the child's views to the court, rather than experts appointed for the preparation of a report under section 32(1)(a). Regulation 3 thereof provides a list of those persons who may be appointed as an expert under section 32(1)(b), namely:

- a psychiatrist who has practiced child and adolescent psychiatry for a relevant period;
- a psychologist who has practiced child and adolescent psychology for a relevant period;
- a social care worker who has engaged in the practice of the profession of social care worker, as it relates to the provision of social care services to children, for a relevant period;
- a registered teacher who has taught children for a relevant period.

The "relevant period" refers to a period of not less than 5 years within the 10 years immediately preceding the expert's appointment. The regulations further set out the minimum

[151] SI No. 587 of 2018. These Regulations were signed on 20 December 2018 and came into operation on 1 January 2019.

standards to apply to an expert in performing his or her functions, promoting the independence of the expert, highlighting his or her role as being a facilitator of the free expression by the child of his or her views, as well as ascertaining whether any such views expressed are so expressed as a result of undue influence.

The above detail in respect of both the expertise and qualifications of experts, as well as the standards to apply to them in carrying out their role, is welcome – to give greater certainty and transparency in the appointment of experts. In essence, the exact type of experts permitted to undertake the task of preparing these reports is now defined, and the persons so appointed to determine and convey the views of a child to the Court must have these qualifications. This is therefore now a required proof. It is apparent from the list set out above that suitably qualified mediators are not included therein. Often mediators assist parties in reaching mediation agreements, which can later be ruled by the Court – the content thereof being recorded in a formal court order. Children may be involved, subject to their age and maturity, in the preparation of such mediated agreements – expressing their views to the mediator concerned. Suitably qualified mediators with relevant experience, however, cannot prepare a section 32(1)(b) report according to the new regulations. Nor is there any provision in the 1964 Act to provide that mediated agreements concerning guardianship, custody and access matters in which the views of the child have been ascertained through the mediation process can be recognised as fulfilling the Court's duty to consider the views and wishes of the child.

This lack of consideration for the mediation process may create problems when mediation agreements come to be ruled by the Court. The absence of consideration for mediation is particularly problematic in light of the recent Mediation Act 2017 which actively seeks to emphasise and promote mediation as an alternative way of resolving disputes in civil proceedings, including family law proceedings. Section 24 of the Guardianship of Infants Act 1964 provides as follows:

> Where —
>
> (a) the parties to a dispute relating to the welfare of a child enter into an agreement in writing that includes —
>
> (i) a provision whereby one party undertakes, or both parties undertake, to take custody of the child, or
>
> (ii) a provision governing the rights of access of parties,
>
> and

(b) an application is made by any party to the court for an order making the agreement a rule of court,

the court may make such an order if it is satisfied that the agreement is a fair and reasonable one which in all the circumstances adequately protects the interests of the parties and the child, and such order shall, insofar as it relates to a provision specified in subparagraph (i) or (ii) of paragraph (a), be deemed to be an order under section 11(2)(a) or 11B as appropriate.

This provision therefore allows agreements, including mediated agreements, to be received by the Court and orders made in terms thereof. Having regard to the Act and the Regulations, however, it would seem that mediated agreements, which have involved children expressing their views to the meditator, cannot be ruled with confidence under section 24 of the 1964 Act, especially if enforcement of the arrangements in the agreement (under Council Regulation 2201/2003) could be challenged subsequently. A mediator is not a person who can convey the child's views to the court under section 32(1)(b). Thus, unless the Court formally and directly enquires as to the child's views in a separate process, it cannot rule a mediated agreement of this kind. It must be queried whether such an outcome was intended by the Oireachtas. To require that the Court must seek the views of children directly in an application under section 24 to rule a mediated agreement, where the children's views had been already ascertained in the process of reaching said agreement, is impractical and superfluous. It has the effect of subjecting children to two separate processes on the same issues, causing an unnecessary revisiting of matters for the children concerned. Further, as the children had already been consulted and had expressed their views in the mediation process, the requirement for their views to be assessed in another manner serves to undermine the mediation process itself. The position on this issue therefore must be clarified in amending legislation. I suggest that a subsection be inserted into section 24 of the 1964 Act to provide that the Court may make a mediated agreement an order of Court, without separately assessing the child's views, where it is satisfied that the child's views have been considered in the making of the mediated agreement. The Court should be left with a discretion to refuse to rule such a mediated agreement where it is not satisfied that the views of the child were ascertained and considered adequately therein. The inclusion of such a provision actually encourages mediation as an all-encompassing process by which an agreement can be reached on guardianship, custody and access matters with the views of the child in relation to same assessed, to the satisfaction of the Court.

The new regulations assist in ameliorating some of the difficulties that have arisen in the last two years concerning the costs associated with the appointment of such experts under the 1964 Act. For these more concise section 32(1)(b) reports concerning the views of the child – specific maximum fees have been set by the regulations that an expert may charge. The regulations specify that the maximum fee of €325 is payable for the performance by an expert of his or her functions specified under section 32(6) of the Act, as well as a maximum amount of €250 in expenses for an appearance before the court as a witness in the proceedings concerned. These regulations thus appropriately address the concerns regarding the high cost of reports, making them more affordable. This should reduce situations arising where reports are not ordered because the parties to the proceedings simply cannot afford to discharge the costs of their preparation. It similarly prevents costs escalating beyond control.

Overall, therefore, the introduction of the Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 will serve to benefit the parties to family law proceedings and particularly the children involved. The regulations, however, only make provision for experts appointed under section 32(1)(b) and do not apply to those appointed under section 32(1)(a). It seems a strange anomaly to introduce regulations for experts in the preparation of one type of report, but not the other. It is recommended therefore that regulations similarly be introduced concerning experts appointed under section 32(1)(a) of the 1964 Act.

While the regulations are to be welcomed and costs are now to be set at certain more manageable levels, a definitive plan is still required for the funding of such reports where the parties to the proceedings simply do not have the requisite financial resources, even those as specified by the regulations, as well as the more expensive section 32(1)(a) reports. It is recommended, therefore, that state-funding for expert reports in a systematic and accessible way be introduced. A body should be established to deal with the funding of such reports, as is envisaged with guardians *ad litem*. Those persons with limited resources should be able to approach this body to obtain state funding for such reports as ordered by the courts in their cases. This should be a separate entity from the legal aid regime, as many lay litigants may require financial assistance for the preparation of a report ordered by the court in their case but they do not have or want legal aid. What proportion of the costs of the report that the person will be expected to contribute, if any, should be determined by this body on a means-tested basis. The remainder should be claimed directly from the state by the expert.

Recommendations

It is recommended that the position concerning the ruling of mediated agreements where the child's views have been ascertained in the preparation of such an agreement be clarified in amending legislation. Specifically, it is suggested that a subsection be inserted into section 24 of the 1964 Act to provide that the Court may make a mediated agreement an order of Court, without separately assessing the child's views, where it is satisfied that the child's views have been considered in the making of the mediated agreement.

It is recommended that regulations akin to the Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 similarly be introduced concerning experts appointed under section 32(1)(a) of the 1964 Act.

It is recommended that state-funding be established for all expert reports ordered in private family law proceedings in a systematic and accessible way. A specific body should be set up to deal with the funding of such reports to which those persons with limited resources can approach in order to obtain state funding for any reports ordered by the courts in their cases.

2.6 THE DOMESTIC VIOLENCE ACT 2018 AND THE CRIMINAL LAW (EXTRATERRITORIAL JURISDICTION) BILL 2018

The Domestic Violence Act 2018

In this jurisdiction, the legal regime which aimed to combat domestic violence was originally contained within the Domestic Violence Act 1996. The 1996 Act had been amended a number of times, most significantly in 2002 with the Domestic Violence (Amendment) Act 2002. On 3 February 2017, new legislation was published in the form of the Domestic Violence Bill 2017 – amending, updating and consolidating the law in relation to domestic violence, replacing the existing domestic violence legislation with a comprehensive new regime set out clearly in one piece of legislation. The provisions of the Bill were analysed in full in my last report.[152] The Domestic Violence Act 2018 was enacted on 8 May 2018 and

[152] See Dr. Geoffrey Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (2018).

its passing into law is to be broadly welcomed. On 1 January 2019, the provisions of the Domestic Violence Act 2018 were commenced by the Minister for Justice and Equality.

A number of crucial reforms are contained within the 2018 Act, providing increased protection for victims of domestic violence – including children. As discussed below, however, there remain certain areas in the Act within which improvements can be made to secure heightened protection for victims of domestic violence and children in particular.

Court orders

Significant changes have taken place concerning the orders that may be issued by the court for the protection of applicants. Part 2 of the Act concerns court proceedings, providing for the different orders that can be applied for under the legislation and dealing with the procedural aspects of court proceedings issued under the Act.

Safety orders, and the temporary, interim version of same – known as protection orders – were previously provided for in the Domestic Violence Act 1996, as amended. These are orders which prevent the person against whom they are made from using or threatening violence against, molesting or putting in fear the applicant or a dependent person. They also prevent the respondent from watching or besetting the place where the applicant resides. Under the 1996 Act, an application for a safety/protection order could be brought by a spouse, former spouse, civil partner or former civil partner of the respondent; by a person who lived with the respondent in an intimate and committed relationship prior to the application; by a person who had a child with the respondent; by a parent of an adult respondent; and by a person who lived with the respondent, the basis of which was not primarily contractual. Once the applicant fell within one of the abovementioned categories, a temporary protection order or a safety order could be made where the court was of the opinion that there were reasonable grounds for believing that the safety or welfare of the application or a dependent person so required.

Sections 6 and 10 of the 2018 Act now deal with safety and protection orders respectively. They provide for an expansion of the categories of persons who may apply for these orders. Under the previous legislation, for persons in romantic relationships, where the parties did not have a child together, an application for a safety order could only be made if the applicant

had lived with the respondent in an intimate and committed relationship prior to the application. Thus, where a couple did not have a child together, the parties had to have resided together before the application could be made by the applicant. Only cohabitants and former cohabitants were therefore eligible to seek such protection from the courts and there was no defined length of cohabitation required. In the Domestic Violence Act 2018, this category of applicant has been widened to provide that an applicant may be a person who is *"…not the spouse or civil partner of the respondent and is not related to the respondent within a prohibited degree of relationship, but was in an intimate relationship with the respondent prior to the application for the safety order".* The cohabitation requirement is removed and all that is needed is for the parties to have been in an intimate relationship before the application is made. This is a welcome inclusion in the Act and means that in practice, anybody in an "intimate relationship" can now apply for a safety or protection order. It is important to note that a relationship does not cease to be intimate by reason only of the fact that it is no longer sexual in nature. While earlier iterations of the Domestic Violence Bill required parties to be in an *"intimate and committed"* relationship to be eligible for these orders, the Act as enacted merely requires the relationship to be an intimate one. This prevents preliminarily disputes as to whether the relationship between the applicant and respondent was "committed" – and allows a similarly broader reach in this regard. The new Domestic Violence Act thus recognises that domestic violence takes place in relationships, whether or not the parties are cohabiting, and that victims of such abuse within dating relationships also deserve and require such protection. Furthermore, the applicant's children may also be at risk. While the parties may not be cohabiting, the nature of such an intimate relationship usually envisages the parties spending considerable time with one another, in public or within either of their homes, giving ample opportunity for abuse to occur which children may witness and/or experience. This expansion of the law in this regard is therefore welcome progress to address the lacuna in protection for victims of domestic violence and their children.

The power to grant a barring order was previously provided for in section 3 of the Domestic Violence Act 1996, as amended. A barring order is similar to a safety order, however crucially it also directs the respondent to leave a place where the applicant or a dependent resides and prohibits them from entering said place. Only certain categories of persons can apply for barring orders and given their interference with the property rights of respondents, these categories are more limited than those applicants who may apply for a safety order.

Essentially, pursuant to section 3(1) of the 1996 Act, a spouse, former spouse, civil partner, former civil partner or a parent of an adult respondent may apply for a barring order. Cohabitants could only apply where they had lived with the respondent in an intimate and committed relationship for at least a period of six months in aggregate during the period of nine months immediately prior to the application for a barring order, and only if they had a greater or equal property interest in the relevant property compared with the respondent. The main change in the 2018 Act concerning barring orders is the removal of this six-month minimum cohabitation requirement in cases involving persons in cohabiting relationships. The Act provides that there is no minimum cohabitation period for cohabitant applicants, but the proprietary criterion remains in place. Section 7(1) of the Act simply requires the applicant to have "lived with the respondent in an intimate relationship prior to the application for a barring order…". This brings a broader spectrum of cohabiting couples within the barring order regime. Requiring no minimum period of cohabitation has regard to the on/off nature of some relationships, deals with situations where one party may work abroad for certain periods of time and prevents preliminary disputes from arising in relation to the precise length of cohabitation of the parties (which often occur where, for social welfare purposes, the parties have not been legally cohabiting). Once the parties are cohabiting prior to the application, one of them may now apply for a barring order.

In the 1996 Domestic Violence Act, as amended, provision was made for the granting of interim barring orders on a temporary basis where there was an immediate risk of significant harm to the applicant or any dependent person and the granting of a protection order (temporary safety order) did not suffice. These orders are often made *ex parte*, and as such, the order only is in place for 8 working days – thereafter an *inter partes* hearing on the full barring order takes place. Only those entitled to apply for a barring order may apply for an interim barring order. The court cannot grant an interim barring order in respect of a cohabitant or a parent of an adult respondent unless the applicant has a greater or equal property interest in the relevant property. The 2018 Act continues the existing interim barring order regime as provided for under the previous legislation. It also, however, introduces a new measure, namely an "emergency barring order". It is set out in section 9 of the Act. It does not apply to spouses and civil partners as they have the benefit of interim barring orders. An applicant who is the parent of the adult respondent or who has been cohabiting with the respondent in an intimate relationship prior to the date of the application, can apply and be granted an emergency barring order even where the applicant has no property interest in

respect of the relevant property or where his/her interest is less than that of the respondent. This provision is described by Frances Fitzgerald as geared toward putting *"life and limb ahead of property"* and allows a person in a dangerous situation to obtain a temporary barring order even if he/she has no rights to the property. The duration of the emergency barring order gives the applicant time to organise alternative accommodation in safety where the property requirement will prevent him/her from obtaining a full barring order. This is an important new provision which was necessary to enable Ireland to ratify the Istanbul Convention. On an *ex parte* basis, these orders can also only remain in place for 8 days. Their introduction is to be welcomed to deal with urgent situations, allowing victims of domestic violence temporary protection in their residence, despite their lack of proprietary interest in same, giving them time to make alternative arrangements, access supports and remove belongings without fear. The children involved in such situations will similarly be protected from witnessing or experiencing further abusive behaviour and/or the hostility and tension that may often accompany the separation of households.

Under the 2018 Act, the behaviours prohibited by the various court orders that may be granted remain the same. Additionally, however, the 2018 Act allows the court to also prohibit the respondent from *"following or communicating (including by electronic means) with the applicant or the dependent person."* This is intended to improve the protection given by a domestic violence order, and it takes into account the abuse, harassment and intimidation that can take place through communication technology. Unfortunately, however, as raised previously in my last report, no definition of "communicating (including by electronic means)" is set out in the Act. While the word "communicating" when read alongside "including by electronic means"[153] may allow the court a broad discretion to include phone calls, text messages and emails; the exact scope of this provision is not defined. To ensure that communication through social media sites, including Facebook and Instagram, online messaging services, and mobile phone applications such as "whatsapp" and "snapchat" come within this provision, it is again recommended that a broad and all-encompassing definition of "communicating (including by electronic means)" is inserted into the Act, through amending legislation, if necessary.

[153] See section 6(2)(c) of the 2018 Act.

Section 29 of the 2018 Act also allows a court to recommend that the respondent to a successful barring, safety or emergency barring order application engage in a perpetrator programme, addiction service, counselling or psychotherapy service or a financial planning programme. This is a new addition to the Act, not originally included in the previous drafts of the Bill. It allows the court to make one of the aforementioned recommendations and it may subsequently consider the engagement of the respondent with such services and any outcomes of such engagement if renewing, discharging or varying an order in the future, or when considering an appeal from the granting of an order. The views of the applicant, however, will have to be garnered in any such case where the court considers the engagement of the respondent in any such programme or service. I believe this provision is beneficial for all parties involved as in using it, the Court is not only protecting the applicant by granting the order sought but is actually directing same toward addressing the root of the offending behaviour. Where a recommendation is made by the court and it is followed by the respondent, this ultimately may have the effect of ameliorating the offending behaviour, preventing any breaches of the order made and protecting children from witnessing or experiencing any further domestic violence. Such a provision seeks to rehabilitate and support the respondent, and if taken up fully by the person in question, will undoubtedly serve to benefit the family as a whole long-term, and in particular any children involved.

As previously addressed in my Eleventh Report, the 2018 Act fails to permit children to apply for domestic violence orders in their own right. An adult can apply for an order for their own protection or solely for the protection of a "dependent person", or both. A dependent person means any child of the applicant and/or respondent or in respect of whom either is *in loco parentis*, who is not of full age or if of full age, is suffering from a mental or physical disability to such an extent that it is not reasonably possible for him or her to live independently of the applicant. The CFA may also apply for certain orders on behalf of a person or a dependent whose safety or welfare it believes to be at risk of violence and who is being deterred or prevented from making an application because of this risk of violence. While children therefore are somewhat covered by these provisions, there exists no stand-alone section to enable a child, under the age of majority, to apply for an order under the Act. A sixteen-year-old, for instance, cannot apply for an order against an estranged parent with whom he/she does not reside nor can a young person under 18 in a dating relationship seek an order for his/her protection against his/her abusive partner.

The opportunity to give children, in certain circumstances, the power to make applications for their own benefit under the Domestic Violence Act has therefore not been taken within the 2018 Act. I must reiterate my recommendation that children, having regard to their age and maturity, be given the power and authority to make applications for protection and safety orders in their own right – without having to rely on a parent or the CFA to make an application on their behalf. This would recognise that at times, there may not be a person who is a parent or *in loco parentis* to a child who is willing or able to take action to protect him/her and that some especially vulnerable children may have no choice but to take action to protect themselves.

Court procedures

The Domestic Violence Act 2018 introduces new measures to assist in making the legal process easier for applicants. It is expected that these measures will operate in tandem with the safeguards provided for in the Criminal Justice (Victims of Crime) Act 2018 which focus on the protective procedures in place for victims in criminal proceedings. Section 26 of the Act allows for an applicant to be accompanied to court by a person of his or her choice, in addition to his or her legal representative, such as a support worker. Section 25 provides for the giving of evidence via live television link. It states that in civil proceedings under this Act, a person (other than the respondent) may give evidence through a live television link:

- where that person has not attained the age of 18 years, unless the court sees good reason to the contrary;
- in any other case, with the leave of the court.

From a child protection perspective, therefore, it presumes that a minor will give evidence through live TV link. This is a welcome development. Given their youth, children are often intimidated by court proceedings. This is heightened in family law applications by reason of the delicate nature of applications involving their family members and is compounded by the fact that in applications for the abovementioned orders, the child may be in fear of the respondent or worried about the repercussions of giving evidence. Having the option to give their evidence through live TV link is a helpful means of protecting children from the additional trauma of court proceedings where they have also been a victim of or witness to violence within their home or family life. While the emphasis on protecting children from

the intimidating courtroom environment is a trend that has been seen in criminal legislation for some time, this proposal is a welcome addition in the civil side of legal proceedings.

At this juncture, it is recommended that facilities be put in place to realise the protection given by this section of the Act. On a practical level, many family law courts are not equipped to allow the giving of evidence in this manner. While certain criminal courts have had such facilities to enable live TV-link evidence in place for some time, such as those situated within the Criminal Courts of Justice, the family law District and Circuit Courts located at Dolphin and Phoenix House in Dublin, for instance, are not so equipped or prepared at present. The Act does permit the transfer of proceedings where live TV link facilitates are not in operation in one circuit or district court to another court where those facilities are in operation, but this necessarily involves delays in such proceedings which are far from ideal for all parties concerned. Steps therefore need to be taken to ensure this provision can effectively and practically be utilised by children, and other applicants/witnesses where applicable. A lack of operational facilities cannot be allowed to prevent the proper working of this protective measure.

Section 27 of the Domestic Violence Act concerns the voice of a child in domestic violence court proceedings. In applications for full orders under the domestic violence legislation,[154] the court may, having regard to the age and maturity of the child, ascertain the views of the child prior to deciding whether or not to make the order in so far as that order relates to the child.[155] In this regard, the court may appoint an expert to determine and convey to the court the child's views. This only applies where an applicant is seeking an order for the protection of his/her child, whether wholly or partly. It will thus not impact proceedings where the applicant is simply seeking an order for his/her own protection alone. In considering whether to appoint an expert, the court is required to have particular regard to the age and maturity of the child; any previous report made under this section in respect of the child; whether such a report will assist the expression by the child of his or her views in the proceedings; and the best interests of the child. Enabling a child's views in domestic violence proceedings to be heard through the report of an expert – usually a child psychologist or family therapist – is a positive step, as expert reports are regarded as a preferable way to ascertain the wishes of the

[154] This section therefore does not apply to interim applications – namely applications for an interim or emergency barring order or protection order.
[155] Section 27(1) of the Domestic Violence Act 2018.

child, without the child being exposed to the pressure of having to come to court and either give evidence or speak directly with the presiding judge. A similar power of appointment is contained in section 32 of the Guardianship of Infants Act 1964, as inserted by the Children and Family Relationships Act 2015. This applies to proceedings concerning guardianship, access and custody matters in relation to a child.

Section 27(6) of the 2018 Act states that regulations made under section 32 of the 1964 Act concerning experts to be appointed under section 32(1)(b) of that Act shall equally apply to experts appointed under the 2018 Act. The new Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 thus are applicable.[156] These regulations commenced on 1 January 2019 and apply to experts appointed under section 32(1)(b) only – namely those appointed to determine and convey the child's views to the court, rather than experts appointed for the preparation of a report under section 32(1)(a) - the typically longer report from an expert in writing on any question affecting the welfare of the child. The regulations should assist in ameliorating the operational difficulties that have occurred with the appointment of such experts under the 1964 Act and that have been similarly anticipated with the appointment of experts under the 2018 Act, specifically with regard to the cost of such reports. For these more concise reports concerning the views of the child – specific maximum fees have been set by the regulations that an expert may charge. While reports in private family law proceedings can range anywhere between €1,000 - €4,000, the regulations specify that the maximum fee of €325 is payable for the performance by an expert of his or her functions specified under section 32(6) of the Act, as well as a maximum amount of €250 in expenses for appearance before the court as a witness in the proceedings concerned. These regulations appropriately address the concerns regarding the high cost of reports, making them more affordable. This should reduce situations arising where reports are not ordered because the parties to the proceedings simply cannot afford to discharge the costs of their preparation. It similarly prevents costs escalating beyond control.

Nonetheless, while the regulations set out reasonable costs for the preparation of child's views reports, even these amounts remain too high for some parties. Many persons are legally aided, in receipt of social welfare, and their means would not enable them to pay even this amount for an expert report. The Legal Aid Board, in certain circumstances, has aided

[156] These Regulations were signed on 20 December 2018 and came into operation on 1 January 2019.

this situation by making a contribution towards the cost of the reports. Ultimately, however, the current *ad hoc* system where access to such reports is either entirely dependent on the financial status of the parents or subject to the approval of the Legal Aid Board on a case-by-case basis is unsustainable in light of the increasing tendency of the judiciary to require and order such reports. The introduction of the 2018 regulations are therefore to be welcomed, but a concrete plan is still required for the general funding of section 32(1)(b) type reports where the parties to the proceedings do not have the requisite financial resources. It is recommended that state-funding for expert reports in a systematic and accessible manner be introduced.

On a practical level, an issue arises concerning the relationship between the respondent to a domestic violence order and the child concerned, where that respondent is a parent of the child. In some cases, it is in the best interests of the child that this relationship be maintained, and same may be desired by the child, despite an order being made. The Act, however, only provides for the views of the child to be ascertained in the course of the domestic violence proceedings. It is silent on what happens afterwards and there exists no framework within this jurisdiction by way of facilities or practical supports to maintain parent-child relationships where an order is made. In such circumstances, often safe supervised access is the most suitable form of access in order to protect the child from the risk of abuse by the respondent parent. Yet, there is a real lack of facilities available for supervised access in this jurisdiction. Often, the abused parent or one of his/her family members is designated by the court as the supervisor of access – there being no other option available to the family. This creates the opportunity for further abuse, or at the very least leads to further conflict between the parties involved, negatively impacting the child who is seeking to enjoy access with his/her parent. As recognised in my previous report, Barnardos has called for "…formal, supported contact facilities for post-separation contact in domestic abuse cases" and recommends the establishment of a national system of Child Contact Centres to facilitate post-separation contact for victims of domestic abuse.[157] I reiterate my endorsement of this proposal and submit that the public-funding of such centres is crucial. The provision of such centres will serve to benefit the child – ensuring he or she is in a safe, stress-free in environment for access, while at the same time allowing his or her relationship to be maintained with the parent in question. Qualified and trained staff would initially supervise

[157] Barnardos (2016) *What's the Harm? A child-centred response to domestic violence*.

access within the centre but would over time facilitate access in a less-formalised setting within the community. These contact centres should be aimed toward supporting the parent who is availing of the supervised service – through the provision of anger-management classes; parenting courses and counselling, with the aim being to reduce the requirement for supervision should all progress well. Ultimately, I recommend that child contact centres should be state-funded, preventing any strain on the resources of the family, with the needs and wishes of the child being the core focus of their operation.

Section 16 of the Act contains a novel provision to protect children from the trauma of cross-examination in certain circumstances. It provides that where a person under the age of 18 is giving evidence in an application for an order under the Domestic Violence Act, and either the applicant or the respondent proposes to cross-examine the child personally, the court must direct that the applicant or the respondent, as the case may be, may not personally cross-examine the witness unless the court is of the opinion that the interests of justice require the applicant or respondent to conduct the cross-examination personally. This will serve to prevent the applicant or respondent in many cases from personally questioning the child, thereby reducing some of the trauma for the child of giving evidence in such proceedings. Given the relatively informal nature of family law and the high number of lay litigants, it is envisaged that this section will serve to limit the circumstances in which an applicant/respondent may personally examine a vulnerable witness under 18.

Commencement

The provisions of the Domestic Violence Act 2018 were commenced on 1 January 2019. They are therefore now in operation and can be utilised by victims of abuse.

The provisions of the 2018 Act are necessary to enable Ireland to ratify the Council of Europe Convention on preventing and combatting violence against women and domestic violence, known as the Istanbul Convention, which Ireland signed in November 2015. The Istanbul Convention is an important legal instrument aimed toward tackling sexual and domestic violence, the purpose being to protect women from all forms of violence and prevent, prosecute and eliminate violence against women. It requires its contracting States to design a comprehensive framework of policies and measures for the protection of and assistance to all victims of such violence. In order to enable Ireland to ratify the Convention, the Government

approved an action plan consisting of 18 actions that were identified as necessary to enable ratification, as set out in the Second National Strategy on Domestic, Sexual and Gender-based Violence, published in January 2016. As mentioned above, the enactment of the Domestic Violence Act 2018 was one such action contained within the action plan.

The Criminal Law (Extraterritorial Jurisdiction) Bill 2018

A further piece of legislation required in order for Ireland to ratify the Istanbul Convention is the enactment of the Criminal Law (Extraterritorial Jurisdiction) Bill 2018. On 19 December 2018, the Minister for Justice introduced the Criminal Law (Extraterritorial Jurisdiction) Bill 2018 into the Seanad. He stated that *"this is the last piece of the legislative jigsaw required to enable Ireland to ratify the Istanbul Convention on combating violence against women and domestic violence. The majority of the actions necessary are contained in the Domestic Violence Act, which passed earlier this year."*

The Criminal Law (Extraterritorial Jurisdiction) Bill 2018 creates extraterritorial jurisdiction over certain criminal offences, extending the Irish criminal law to certain conduct engaged in abroad. It applies to certain "relevant" violent and sexual offences only, namely particular offences contained in the Non-Fatal Offences against the Person Act 1997, sexual assault and aggravated sexual assault pursuant to sections 2 and 3 of the Criminal Law (Rape) (Amendment) Act 1990, as well as rape, section 4 rape under the 1990 Act, murder and manslaughter. This means that where such an offence is committed outside the State by Irish citizens and residents, they can be prosecuted within the State in respect of such an offence. In this vein, section 3 of the Bill provides that it is an offence for an Irish citizen or resident to commit a relevant offence in a Convention State, where that offence is also an offence in the Convention State in which it took place. "Convention State" refers to a state, other than Ireland, that is a party to the Istanbul Convention. Proceedings for an offence under section 3 may be taken in any place in the State.

While it is anticipated that the extraterritorial jurisdiction proposed in the Bill and powers created thereunder will rarely need to be invoked, it is a crucial mechanism to have in place for countries that have ratified the Istanbul Convention – ensuring that offenders cannot avoid prosecution by reason of their location. While the Convention is primarily concerned with

tackling violence against women, the Bill's provisions apply to offences committed by both men and women outside Ireland to ensure equality of treatment.

The Bill is the last step in the Government's 18 step Action Plan, approved in October 2015, to enable Ireland to ratify the Istanbul Convention. The early passage of the Bill will therefore allow Ireland to ratify the Istanbul Convention – hopefully in early 2019. It is recommended therefore that all efforts be made to ensure the early passage and commencement of the Criminal Law (Extraterritorial Jurisdiction) Bill 2018.

Recommendations

For the avoidance of any doubt, a broad definition of "communicating (including by electronic means)" should be inserted into the Domestic Violence Act 2018 clarifying that "communicating" includes phone calls, text messages and emails; communication through social media sites, including Facebook and Instagram; online messaging services; and mobile phone applications such as "whatsapp" and "snapchat".

Children, having regard to their age and maturity, should be given the power and authority to make applications for protection and safety orders in their own right – without having to rely on a parent or the CFA to make an application on their behalf. Consideration needs to be given to including such a power within the 2018 Act, by way of amending legislation if necessary.

On a practical level, it is recommended that facilities be put in place within all family law courts to realise the protection given by section 25 of the Domestic Violence Act concerning the giving of evidence through TV-link. Steps should be taken to ensure all family law courts are equipped to allow the giving of evidence in this manner.

I reiterate my recommendation that child contact centres be established on a national scale and that these centres be state-funded, with the needs and wishes of the child being the core focus of their operation.

The new Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 are to be welcomed for providing much needed regulation in this area – applicable to reports under

section 32(1)(b) of the 1964 Act, as well as reports ordered under section 27 of the Domestic Violence Act 2018. It is recommended, however, that state-funding for expert reports in a systematic and accessible manner be introduced to assist those who are unable to fund the preparation of such reports.

The commencement of the Domestic Violence Act 2018 on 1 January 2019 is to be welcomed. Efforts should now be made to ensure that the Criminal Law (Extraterritorial Jurisdiction) Bill 2018 be facilitated with an early passage through the Dáil and commenced immediately thereafter. Once this is completed, it is recommended that Ireland ratify the Istanbul Convention.

2.7 ARTICLE 42A AND THE CHILD CARE ACT 1991

The Child Care Act 1991 is the main piece of Irish legislation governing the welfare of children who are in need of care and protection. It places significant statutory obligations on the Child and Family Agency, Tusla, to promote the welfare of children who are not receiving adequate care and protection. Currently, the Child Care Act 1991 is over a quarter of a century old. While a detailed and comprehensive piece of legislation, governing *inter alia* the circumstances of voluntary care arrangements; court applications for emergency, interim and full care orders; and situations of foster and residential care, the 1991 Act requires updating to ensure that the legal regime in respect of the care of children in this jurisdiction reflects modern society and the changes that Ireland has undergone in recent years. Section 3 of my Eleventh Report conducts a full review of the 1991 Act, making recommendations where necessary in order to further strengthen child protection in this jurisdiction.[158] In light of recent decisions of the superior courts, a further recommendation can now be made.

At the outset, it is important to note that the 1991 Act pre-dates the introduction of Article 42A into the Constitution. The Thirty-First Amendment of the Constitution (Children) Act 2012 was signed into law on 28 April, 2015. It inserts Article 42A into the Constitution, which heightens the need to safeguard and vindicate the rights of our children; emphasises the paramountcy of the best interests of the child and promotes the voice of children in

[158] See Dr. Geoffrey Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (2018).

proceedings concerning them. Ultimately, the content of the 1991 Act must be updated to reflect the provisions of Article 42A and this requirement has been highlighted in the recent decision of Simons J., delivered on 21 December 2018, in *A Foster Mother v. CFA*.[159]

This case concerned judicial review proceedings taken by the child's former foster mother. The child in question had been born prematurely, suffered from serious health complications and spent its first few months in hospital. Thereafter, the child was placed in the care of its foster mother for thirteen months, before being placed with prospective adoptive parents in April 2018. The former foster mother brought judicial review proceedings, alleging that the procedures leading to the termination of the foster care arrangement with her and the transfer of the child to the care of the prospective adoptive parents were not in accordance with law. In particular, she alleged that the statutory report prepared by the CFA for the Adoption Authority of Ireland was deficient, failing to include an up-to-date medical and psychological assessment of the child and failing to communicate to the Authority that she wished to be considered as an adoptive parent. She alleged that the transition of the child to the care of the prospective adoptive parents should not have been done when the child was recovering from major surgery. She also alleged that no proper consideration was given to her request to be considered as an adoptive parent.

While initially the foster mother sought the return of the child to her care, ultimately during the course of the proceedings all parties agreed that it was in the best interests of the child that the child remain in the care of the prospective adoptive parents. The foster mother thus sought declaratory relief, specifically a declaration to the effect that there was a historic failure to have regard to the child's best interests in March and April 2018. She alleged that the events of March and April 2018 gave rise to a breach of Article 42A of the Constitution itself, as well as a breach of section 19 of the Adoption Act 2010, as amended, by the CFA in failing to consider the best interests of the child.

Article 42A.4.1° of the Constitution provides as follows:

> 4 1° Provision shall be made by law that in the resolution of all proceedings—

[159] [2018] IEHC 762.

(i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
(ii) concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

Section 19 of the Adoption Act provides:

19. (1) In any matter, application or proceedings under this Act which is, or are, before —
(a) the Authority, or
(b) any court,
the Authority or the court, as the case may be, shall regard the best interests of the child as the paramount consideration in the resolution of such matter, application or proceedings.

(2) In determining for the purposes of subsection (1) what is in the best interests of the child, the Authority or the court, as the case may be, shall have regard to all of the factors or circumstances that it considers relevant to the child who is the subject of the matter, application or proceedings concerned including —
(a) the child's age and maturity,
(b) the physical, psychological and emotional needs of the child,
(c) the likely effect of adoption on the child,
(d) the child's views on his or her proposed adoption,
(e) the child's social, intellectual and educational needs,
(f) the child's upbringing and care,
(g) the child's relationship with his or her parent, guardian or relative, as the case may be, and
(h) any other particular circumstances pertaining to the child concerned.

In the course of his judgment, Simons J. analysed the extent, if any, to which Article 42A.4.1° can be relied upon directly, as opposed to through the medium of legislation. He noted that this issue was recently considered by the Supreme Court in *In the matter of JB (A minor)*.[160]

[160] [2018] IESC 30.

In the case of *In the matter of JB (A minor)*, both the majority and minority judgments of the Court addressed whether Article 42A itself could be relied upon, although the Court recognised that the discussion therein was *obiter dicta*. The Court specifically referred with approval to the dicta of O'Donnell J. set out at paragraphs [5] to [7] of that judgment:

> …Article 42A.4.1° does not stand alone. It was introduced as part of an amendment designed to ensure that the Constitution was more clearly child-centred. For that reason, for example, the new Article 42A.1 states explicitly that the State recognises and affirms "the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights". As I understand it, the amendment as a whole was directed towards a perceived approach of statutory and constitutional interpretation as a matter of history, which was considered to be unsatisfactory in principle, and to give rise to potentially unsatisfactory results. That is because it was considered that issues in relation to children could be skewed by the emphasis placed by the Constitution as originally enacted on the family as the natural and primary educator of children, and as a moral institution possessing rights anterior and superior to positive law, which might lead to cases being resolved a way which subordinated the interests of the child to that of a family, and in effect, therefore, of parents. This occurred perhaps most clearly in the field of the possible adoption of children born to married parents, or parents who were subsequently married. Article 42A can therefore be seen as a restating of the balance, acknowledging in explicit terms the individual rights of children, and indeed explicitly permitting the adoption of children whatever the marital status of their parents. In that context, Article 42A.4 was unremarkable, and perhaps the least significant aspect of the amendment. It is unnecessary at this stage to consider whether concerns as to the interpretation of the Constitution were justified, or to what extent any unhappy outcomes were the consequence of the text of the Constitution or the interpretation applied to it. However, the very fact that there were concerns as to the interpretation and application of the pre-2015 provisions is itself a warning against further glosses of the new provisions.
>
> While I appreciate the attraction of placing some rhetorical reliance in this case on an Article of the Constitution making reference to the best interests of the child in adoption proceedings, I do not think that in truth Article 42A.4.1° can be usefully called in aid in the resolution of a case like the present. First, as McKechnie J. observes, the constitutional obligation contained in Art.42A.4.1° has been complied with. It is, explicitly, a requirement to introduce into legislation dealing with proceedings in the specified areas a provision requiring that the interests of the child be considered paramount: that is, superior to other interests that might be engaged. Such a provision is, however, set out in unambiguous terms by s. 19 of the Act of 2010. Furthermore, I consider the requirement that "provision shall be made by law" is not merely a well-worn constitutional phrase, but rather has substantive importance. This is so because the 'best interests of the child' is a phrase with a long history in the law relating to children. There is near universal agreement on the merit of the test, but considerable scope for vehement disagreement on

> what the test implies in a particular case, whether between parents and children, parents themselves, relatives, social workers, lawyers, and indeed judges. The best interests test involves both broad societal judgments and individualised determinations in a particular case. In the context of a statute, it does not authorise the court to exceed the statutory limitations of the decision making process: rather, it means that, within the area in which a court has to make a decision, where there is a discretion, the decision should be made on the basis that the paramount consideration should be the best interests of the child, rather than the interests of parents, relatives, or the State itself. Article 42A.4.1° now underpins that. However, the area for decision making in which those considerations apply is defined by the statute.
>
> If it were otherwise, then the effect of Article 42A.4.1°, far from being modest, would be dramatic, since it would mean that in the area of adoption, guardianship, custody and access, the legislation could be reduced to a simple provision that orders may be made or refused whenever it would be in the best interests of the child to do so, in the view of a court. This would be undesirable at a practical level, and also at the level of principle, since it would remove the Oireachtas almost entirely from the area.

While the Court noted that the decision of O'Donnell J. in that case was a dissenting one on the substantive issue, Simons J. stated that this did not mean the sentiments expressed by him as set out above were different from those expressed in the majority judgments in that case. The Court viewed O'Donnell J.'s statements explaining the relationship between the constitutional imperative and the legislation giving effect to that imperative as representing a correct statement of the law. It concluded, therefore, that the foster mother's allegation in this case - that there was a failure to have regard to the best interests of the child - needed to be assessed by reference to the legislation giving effect to Article 42A, namely section 19 of the Adoption Act 2010, rather than by relying directly on the Constitution. This, Simons J. held, is especially so where there was no complaint in this case that section 19 did not give proper effect to Article 42A.4.1. The Court stated that the Oireachtas had given effect to the constitutional imperative in section 19 of the 2010 Act (as inserted by section 9 of the Adoption (Amendment) Act 2017) by prescribing criteria to inform the concept of the "best interests of the child".

In determining the case, the Court concluded that the proceedings were inadmissible by reason of delay – the judicial review proceedings having been issued outside the three month time limit. An application to extend time was refused on the basis that the foster mother had the benefit of legal advice throughout March and April 2018 and having been a key participant in those events, she should have moved her application for review within three

months of the date upon which the child was removed from her care. It stated that if it were to embark on a consideration of the robustness of the statutory report prepared by the CFA for the Adoption Authority; *"…it just might lead to a finding that the report was deficient, and that, as a consequence, the authorisation was also deficient. This could then produce an outcome whereby a shadow might be cast over the legal basis for the child's care with the prospective adoptive parents. Such an outcome would not be in the best interests of the child. All of the evidence before the court confirms that the child is thriving and that the adoptive parents are providing a loving and caring home for the child."* The Court declined to make any declarations as to the historic events. Simons J. concluded that the making of the declarations sought in the present case would serve no useful purpose and may actually be detrimental to the best interests of the child in circumstances where none of the parties wished the Court to do anything which might imperil the continued placement of the child with the prospective adoptive parents. The case was therefore dismissed.

The judgment of Simons J. in this case, and his approval of O'Donnell J.'s dicta in the case of *In the Matter of JB (A Minor)* makes it clear that there is an obligation on the Oireachtas by virtue of Article 42A of the Constitution to ensure its legislation gives effect to the constitutional imperative contained therein. In the area of adoption law, this has been done within section 19 of the Adoption Act 2010, which was inserted by virtue of section 9 of the Adoption (Amendment) Act 2017. The High Court in *A Foster Mother v. CFA* duly recognised that the Oireachtas had "properly exercised its legislative function by fleshing out the constitutional imperative by prescribing criteria to inform the concept of "best interests of the child"" – referring to the criteria enunciated in section 19(2) to which the Adoption Authority or the Court must have regard in determining what is in the best interests of the child.

A similar approach has been taken by the legislature in guardianship, access and custody proceedings. Section 3 of the Guardianship of Infants Act 1964 (as amended by the Children and Family Relationships Act 2015) requires the best interests of the child to be regarded as the paramount consideration in all guardianship, access and custody proceedings. Section 31 of the 1964 Act was similarly inserted by the 2015 Act to explain what the best interests requirement in section 3 of the 1964 Act entailed. It provides that a court, when determining what is in the best interests of a child must have regard to all the factors or circumstances that

it regards as relevant to the child concerned and his or her family. The factors and circumstances referred to include:[161]

a) the benefit to the child of having a meaningful relationship with both of the child's parents;
b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);
c) the physical, psychological and emotional needs of the child taking into consideration the child's age and stage of development and the likely effect on him of any change of circumstances;
d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and with other relatives and the desirability of preserving and strengthening such relationships;
e) the child's religious, spiritual, cultural and linguistic upbringing and needs;
f) the child's social, intellectual and educational upbringing and needs;
g) the child's age and any special characteristics;
h) any harm which the child has suffered or is at risk of suffering, including harm as a result of family violence, and the protection of the child's safety and psychological well-being;
i) any plans proposed for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the child's guardians and parents agreeing to such arrangements and co-operating with each other;
j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent and to maintain and foster relationships between the child and relatives of the child;
k) the capacity of each person in respect of whom an application is made under this part:
    (i) to care for and meet the needs of the child;
    (ii) to communicate and co-operate on issues relating to the child, and;
    (iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates.

These are rational and desirable criteria for a court to consider when hearing an application in relation to guardianship, custody, upbringing of or access to a child – providing crucial guidance as to what must be considered when ascertaining the best interests of the child concerned.

The approach taken in adoption law and private family law proceedings therefore has not yet been replicated within public child care proceedings. As discussed above, the Child Care Act 1991 requires updating in numerous respects and recommendations for improvement are put

[161] These are set out in section 31(2) of the 1964 Act, as inserted by section 63 of the 2015 Act.

forward more fully in my last report. Having regard to the two aforementioned 2018 judgments, however, a further recommendation must be made. In its current form, the 1991 Act lacks a provision commensurate to those contained in the Adoption Act 2010 and the Guardianship of Infants Act 1964 – setting out that the best interest of the child is the paramount consideration to be considered by the CFA in the performance of its duties and functions and by the Court in considering any proceedings issued under the 1991 Act, and providing a similar list of guiding criteria to which regard should be had by the CFA and/or the Court as applicable in determining what is in the best interest of the child. Both of the decisions from High and Supreme Court delivered this year can be said to indicate a requirement upon the legislature to fully exercise its legislative function by "fleshing out" the constitutional mandate in Article 42A.4.1. This necessarily requires prescribed criteria to be set out in all relevant legislation to inform the concept of 'best interests of the child'. The Child Care Act 1991 lacks such prescribed criteria at present when compared with other legislation concerning children. Section 24 thereof simply provides that in any proceedings before a court under the 1991 Act in relation to the care and protection of a child, the court shall (a) regard the welfare of the child as the first and paramount consideration and (b) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child. This clearly lacks the detail contained within other statutes and focuses on the "welfare" of the child rather than his or her "best interests" as required under Article 42A.4.1 of the Constitution. It is therefore recommended that immediate amendment of the 1991 Act takes place to include a similar best interests provision to section 19(2) of the Adoption Act 2010 and section 31 of the Guardianship of Infants Act 1964.

Recommendation

A "best interests" provision similar to that contained in section 19 of the Adoption Act 2010 and section 31 of the Guardianship of Infants Act 1964 should be included in the Child Care Act 1991 – to fully realise the constitutional mandate in Article 42A.4.1°, having regard to recent judgments of the superior courts.

2.8 BREXIT AND CHILD AND FAMILY LAW

The UK is scheduled to leave the EU on 29 March 2019, having invoked Article 50 of the Lisbon Treaty in March 2017. After lengthy negotiations, a withdrawal agreement has been reached between the EU and the UK, which is currently awaiting approval by the British Parliament. Whether the withdrawal agreement will survive the parliamentary ratification process in the UK remains to be seen. The impact of Brexit has dominated the media in recent months and in light of same, the question as to how Britain's decision to leave the EU will affect the international operation of child and family law arises.

In the realm of family law, two EU measures are particularly important, Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, known as Brussels II *bis*, and the Maintenance Regulation 4/2009. As the UK has been a member of the European Union since 1973, the relevant EU Regulations have been applicable in its dealings with Ireland thus far as they take precedence as between Member States.

The Maintenance Regulation provides rules for jurisdiction of maintenance claims, including provisions concerning how to deal with competing maintenance claims between courts in different countries, and governs the enforcement of maintenance obligations, providing for a single procedure for enforcing an award made in one EU member state in another such state. It also allows couples to agree in advance under which country's laws any future maintenance claims will be heard. Brussels II *bis* similarly provides rules of jurisdiction to regulate which country's court can hear cases concerning matrimonial breakdown – such as divorces and judicial separations – as well as cases concerning matters of parental responsibility. It allows orders made in one member state to be recognised and enforced in other member states and provides a fast and easy mechanism to ensure the return of a child if a parent removes a child from one member state to another without permission. Following Britain's exit from the EU, these EU family law instruments based on the principle of mutual recognition will no longer apply cross-border between the UK and EU/EEA. The Maintenance and Brussels II *bis* Regulations will cease to have effect.

International treaties will, however, remain in place. In its technical note on a no-deal Brexit, the UK Government has committed to repealing the existing EU rules in this area and

switching to the relevant Hague Conventions.[162] The UK is bound by a number of International Conventions in the realm of family law. Of particular importance is the 1980 Convention on the Civil Aspects of International Child Abduction, the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and the 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. Ireland is similarly bound, thus it is anticipated that these Conventions will significantly remove the vacuum which will be left when EU laws no longer have effect in the UK.

The 1996 Hague Convention, for instance, is similar to Brussels II *bis* mentioned above. The rules of recognition and enforcement contained therein are broadly similar to those under Brussels II *bis*, although there are differences which will have an impact on the procedural law and reciprocity. It is expected that the 1996 Hague Convention will be utilised between Ireland and the UK in private family law disputes such as where custody and access orders made in one country are sought to be recognised and enforced in the other. That said, the 1996 Hague Convention lacks, for example, the automatic enforcement of access orders under Article 41 of Brussels II bis.

The 1996 Hague Convention will also be used in public law cases such as cross-border special care applications. Child abduction cases will be dealt with under the 1980 Hague Convention.

One issue worthy of consideration is the fact that the Protection of Children (Hague Convention) Act 2000[163] came into operation on 1 January 2011. It appears that the Protection of Children (Hague Convention) Act 2000 (Section 15) Order[164] does not include the United Kingdom. This anomaly merits consideration.

[162] https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal.
[163] Number 37 of 2000.
[164] S.I. No. 682 of 2010.

A shortcoming of the Hague Convention framework is the fact that there is no overarching court to adjudicate on the provisions in the Hague Conventions equivalent to the Court of Justice of the European Union. This is likely to lead to divergent approaches in the application of the Hague Conventions.

The position regarding divorces and legal separations is more complicated. The 1970 Hague Convention on Recognition of Divorces and Legal Separations deals with the recognition of divorces and separations, but enforcement is left to the national state and many EU states, including Ireland, have not ratified the 1970 Convention. Rules concerning jurisdiction are not prescribed therein, and this may lead to conflicts of jurisdiction with parallel proceedings in different countries.

While the abovementioned international treaties will remain in place, the reality is that enforcing orders in the UK post-Brexit will be more complicated, time consuming and expensive for the parties involved. Jurisdictional issues are likely to arise and in the absence of applicable international conventions, the rules of national law will apply between Ireland and the UK. In the alternative to relying on these international instruments, the UK may seek to negotiate bilateral or multilateral treaties with EU Member States. In this regard, in its White Paper on the future UK-EU relationship,[165] the UK Government signalled its intention to re-join the Lugano Convention. The Lugano Convention, in addition to providing for the recognition and enforcement of judgments in civil and commercial matters, also regulates the recognition and enforcement of maintenance obligations among EFTA states and between EFTA states and EU member states. The UK will need to be invited to become a member, and EU and EFTA states will have to ratify its accession. Furthermore, in its White Paper, the UK Government has indicated its intention to negotiate a treaty with the EU on matters relating to civil justice and cooperation in family law. Whether these steps will be taken remains to be seen. Without any doubt, however, the cross-border nature of child and family law will face many challenges post-Brexit and Ireland must be prepared for same.

[165] White Paper, *The Future Relationship between the United Kingdom and the European Union*, July 2018 available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf.

SECTION 3: DOMESTIC CASE LAW

3.1 INTRODUCTION

This Section considers certain important decisions of the Irish courts made or published during 2018 in which issues relating to child protection or children's rights have emerged. Whilst legislative and policy developments in child protection and welfare are important, so too are developments emanating from the courts. It is the courts that interpret and apply the law in relation to child protection and welfare, hence the commensurate need to monitor and consider developments in this field also.

The issues that have arisen in the cases that are examined in this Section include: developments in Hague Convention/child abduction cases; considerations concerning the transfer of jurisdiction pursuant to Article 15 of Brussels II *bis*; enforcement of foreign care orders under Brussels II *bis*; recognition and enforcement of foreign orders of parental responsibility to which no international conventions apply; the mandatory obligation to complete an assessment of need under the Disability Act 2005; the requirement for sufficiently clear findings of fact to allow the High Court reach conclusions in a case stated; the standards expected of lay litigants in court proceedings; fair procedures in care order hearings, including the proportionality of emergency care orders; whether special care order applications have to be heard in camera; and the legal test to justify breach of patient confidentiality. Cases are considered and grouped by Court.

Further, the judgment of the Court of Justice of the European Union following references by the Irish Court of Appeal in two cases, *Hampshire County Council v. C.E. and N.E., CFA and The Attorney General*[166] and *Hampshire County Council v. C.E. and N.E., CFA and The Attorney General*[167] is also discussed.

[166] [2018] IECA 154.
[167] [2018] IECA 157.

3.2 COURT OF JUSTICE

3.2.1 Hampshire County Council v. C.E. and N.E., CFA and the Attorney General[168]

In the case of *Hampshire County Council v. C.E. and N.E., CFA and The Attorney General*, the enforcement of foreign care orders was at issue. Here, the Court of Appeal considered questions raised concerning the scope and operation of Council Regulation No. 2201/2013 in the context of an appeal of the decision of the High Court, dated 18 January 2018. It referred three questions to the Court of Justice of the European Union on this issue.

In this case, C.E. and N.E. were UK nationals who arrived in Ireland by ferry on 5 September 2017 with three young children, one of whom had been born in the UK two days previously. C.E. was the mother of all three children, whereas N.E. was the father of only the new-born child. Prior to their arrival in this State, the two older children were the subject of interim care orders made in the UK. In its judgment, the Court referred to C.E. and N.E. as "the parents" for convenience notwithstanding that N.E. was not the father of the two older children.

On 8 September 2017, the English High Court granted an order making all three children wards of court and directing that the children be returned to the custody of Hampshire County Council. Meanwhile, Hampshire County Council made contact with the CFA outlining their concerns and the family were located by the Gardaí. On 11 September 2018, the CFA made an unannounced visit to the family's home. Nothing of concern was found by the CFA on this visit or any subsequent visit. The parents were advised by a social worker that Hampshire County Council may apply to have the return order recognised in Ireland by way of a High Court application and that the CFA would be applying for an interim care order based on the concerns received from Hampshire social services.

On 14 September 2017, the District Court granted interim care orders in respect of the three children with the consent of the parents on a without prejudice basis. The parents were expressly informed that Hampshire County Council would be seeking to enforce the return order by way of an *ex parte* application to the High Court. On 21 September 2017, the Irish

[168] [2018] IECA 154.

High Court recognised the English High Court's order and Creedon J. ordered that same be enforced in this jurisdiction. On the same day, the Order was furnished to the CFA and the children were handed over to social workers from Hampshire County Council. They were then returned to the UK by ferry. The parents were informed of this development only after the children had left the jurisdiction. Hampshire County Council social workers had requested the CFA not to contact them as they were considered to be a flight risk. The parents were formally served with the *ex parte* High Court order on 22 September 2017.

On 24 November 2017, the parents sought to appeal the order of Creedon J. In a decision made on 18 January 2018, Reynolds J. held that they were out of time to lodge an appeal. The Court found that in view of the provisions of Article 33(5) of Brussels II *bis*, there was no jurisdiction to extend time for such an appeal. The parents then appealed this decision to the Court of Appeal. This case was treated with urgency as adoption proceedings had been instituted in respect of the children in the UK. Hampshire County Council was a party to the appeal proceedings, but it elected not to take part in the appeal citing financial reasons. While the CFA was joined to the proceedings it also decided not to participate in the appeal. Given the absence of Hampshire County Council who did not defend its action or attend the hearing, and due to the difficult questions concerning the interpretation of Brussels II *bis* arising in this case, the Court invited the Attorney General to appear and make submissions. The Attorney was represented by Counsel who attended and made appropriate submissions to the Court.

The Court considered the recognition and enforcement of foreign judgments pursuant to Brussels II *bis.* It noted that pursuant to Brussels II *bis*, the grounds by which the enforceability of a foreign judgment can be challenged are strictly limited and confined to those grounds set out in Article 23. Hogan J. considered the procedure for enforcement. This involves an *ex parte* application in the first instance to the court of the judgment enforcing state and Article 31 makes it clear that the neither the person against whom enforcement is sought, nor the child shall, at this stage of the proceedings, be entitled to make any submissions. Following the judgment of Humphreys J. in *Bedford Borough Council v. M.*,[169] Hogan J. noted that given the *ex parte* nature of the enforcement order at this stage, the enforcement order is of a necessity a provisional one and that the parents may appeal the

[169] [2017] IEHC 583.

decision to the High Court pursuant to Article 33. The "appeal" therefore, is more usefully regarded as an application to set aside a provisional order made *ex parte*, rather than an appeal in the conventional sense.

As a preliminary issue, the Court considered whether the order of the English High Court was within the scope of the Brussels II *bis* regulation. If it was not, then the enforcement rules of Brussels II *bis* did not apply. The Court noted that the Regulation applies to matters relating to parental responsibility, in particular the rights of custody and access, guardianship and curatorship. Based on existing case-law, the Court noted that the taking of a child into wardship falls squarely within the scope of the Regulation. The issue, however, was with the part of the English Order that directed the return of the children to the UK. On behalf of the parents, it was argued that enforcing the English Order by-passes the inherent safeguards contained in Hague Convention procedures envisaged by Article 11 of the Regulation. In Hague Convention proceedings, the applicant would have to bring its application on notice to the party alleged to have wrongfully removed the children and an order for the return of the children would only be made on an *ex parte* basis in wholly exceptional circumstances. Furthermore, the grounds to resist enforcement are broader under the Hague system as compared with Article 23 of Brussels II *bis*. For these reasons, it was contended that the enforcement of the English Order wrongfully circumvents Article 11 of the Regulation and by extension, the entire Hague system.

The Court of Appeal took the view that this case thus raised an important issue concerning the scope and interpretation of the Regulation, not previously considered by the Court of Justice. It thus referred the following question to the CJEU pursuant to Article 267 TFEU:

> (i) Where it is alleged that children have been wrongfully taken from the country of their habitual residence by their parents and/or other family members in breach of a court order obtained by a public authority of that State, may that public authority apply to have any court order directing the return of the children to that jurisdiction enforced pursuant to the provisions of Chapter III of Council Regulation (EC) No. 2201/2003 or would this amount to a wrongful circumvention of Article 11 of that Regulation and the 1980 Hague Convention or would otherwise amount to an abuse of rights or law on the part of the authority concerned?

The Court then went on to consider the remaining issues in the appeal, assuming that the return order was properly the subject of an enforcement order. It first considered whether the

procedure adopted by Hampshire County Council had the effect of compromising the procedural rights of the parents. Order 42A of the Rules of the Superior Courts was considered by the Court. The Court noted that appeals brought against an enforcement order may not have a suspensive effect. While this means that the very action of lodging an appeal cannot in itself have a suspensive effect, it did not mean that a stay cannot be granted by the court. In this case, the Court of Appeal noted that the parents had no meaningful opportunity of applying for a stay because the children had been taken from the jurisdiction before they were served with the enforcement proceedings. The Court considered Order 42A, r.15(3), which provides that a party wishing to execute a judgment must produce to the appropriate officer an affidavit of service of the relevant order. In this case, no affidavit of service in respect of the parents was produced to the CFA prior to the handing of the children to social workers attached to Hampshire County Council, signalling non-compliance with Order 42A.

Hogan J. commented that it seems to be a practice that social workers attached to the UK travel to Ireland for the purposes of arranging the return of the children after the making of an *ex parte* enforcement order but *before* the parents are served with the proceedings. The Court stated that this was an unlawful practice, in breach of the constitutional guarantee of fair procedures.

The Court thus held that the actions of Hampshire County Council in returning the children to the UK after the making of the enforcement order but before the parents were served compromised the procedural rights of the parents to object to the making of that enforcement order in the first place and to apply, if necessary, for a stay.

Next, the Court considered the issue of delay by the parents. The High Court enforcement order was served on the parents on 22 September 2017. Pursuant to Article 35(5) of the Regulation, there was a two-month time period for their appeal as they were habitually resident in the UK at the date of service. Their appeal however, was lodged two days late, on 24 November 2017. The Court of Appeal thus considered whether it had jurisdiction to extend the time to appeal, and if so, whether that jurisdiction might be exercised in the plaintiff's favour.

Considering domestic law only, the Court noted that it enjoys an inherent jurisdiction to extend time to appeal. Applying the test set out in *Eire Continental* to the present case, the

Court concluded it would have been disposed to grant the parents an extension of time if only domestic law applied. The Court then assessed whether there is a jurisdiction under Article 33(5) to extend time to appeal. In particular, the judgment of Gross L.J. in *Christofi v. National Bank of Greece*[170] was considered, in which it was held that there was no jurisdiction to extend time under Article 43(5) of Regulation 44/2001 (couched in the same terms as Article 33(5) of Regulation 2201/2003), save for exceptional cases amounting to a breach of Article 6 ECHR. There were, however, differences between that case and the present case particularly due to the actions of Hampshire County Council in frustrating the operation of key safeguards contained in Chapter III of Brussels II *bis* and Order 42A by depriving the parents of a right to apply for a stay either in the English or Irish courts. The Court thus deemed it necessary to refer two further questions to the CJEU, namely:

> (i) [I]n a case concerning the enforcement provisions of Council Regulation (EC) 2201/2003 is there a jurisdiction to extend time for the purposes of Art. 33(5) where the delays are essentially de minimis and an extension of time would otherwise have been granted by reference to national procedural law?
>
> (ii) [W]ithout prejudice to question (ii) where a foreign public authority removes the children, the subject matter of the dispute, from the jurisdiction of a Member State pursuant to an enforcement order made ex parte in accordance with Article 31 of Council Regulation (EC) 2201/2003 but before the service of such order on the parents thereby depriving them of their rights to apply for a stay of such an order pending an appeal, does such conduct compromise the "parents" entitlement under Article 6 ECHR or Article 47 such that an extension of time (for the purposes of Art. 33(5)) of that Regulation should otherwise be granted?

This appeal therefore raises important questions concerning the scope and operation of Brussels II *bis*, in relation to the enforcement of a foreign care order. It was adjourned pending the outcome of the CJEU referral.

3.2.2 Hampshire County Council v. C.E. and N.E., CFA and The Attorney General[171]

Following the abovementioned first decision by the Court of Appeal in this case and pending the outcome of the aforementioned CJEU referral, an application for an interlocutory injunction was subsequently made by the parents of the children. In *Hampshire County Council v. C.E. and N.E., CFA and The Attorney General*, the Court of Appeal considered

[170] [2018] EWCA Civ. 413.
[171] [2018] IECA 157.

this application. The parents of the three children involved sought an order restraining Hampshire County Council from proceeding with the adoption of the children. Hampshire County Council again did not participate in the matter, aside from filing a statement of position with the Court.

Considering the application for an injunction, Hogan J. queried whether the Irish Court of Appeal had jurisdiction to grant an interlocutory injunction against Hampshire County Council. The Court noted that Article 29.8 of the Constitution provides that the State may only exercise extra-territorial jurisdiction in accordance with the 'generally recognised principles of international law'. Ordinarily, therefore, an Irish Court cannot grant an injunction directed at a British Local Authority or English Court restraining them from proceeding with the adoption of a child, since this would interfere with the internal administrative, executive and judicial sovereignty of the UK which was not permitted by the generally accepted principles of international law.

In this case, however, Hampshire County Council elected to seek the protection of the Irish Courts under Brussels II *bis*. The children were then wrongfully removed from Ireland prior to the enforcement proceedings having been served on their parents. If the Court were to grant the injunction sought restraining the adoption of the children, this would simply serve to maintain the status quo pending the determination as to whether or not the English High Court order providing for the return of the children was entitled to recognition and enforcement in this State. The Court noted that usually it would not be required to grant this type of far-reaching relief against a public body as that body would invariably take part in the proceedings and agree to abide by the order of the Court. This, however, had not been the Court's experience of Hampshire County Council.

In cases such as this, therefore, Hogan J. stated that the Court's jurisdiction is to act *in personam* – to ensure the mutual rights and interests of the parties are adequately protected. The Court said that save for an issue of EU law that arose, it considered it appropriate to grant an injunction directed *in personam* to Hampshire County Council *qua* party to the present proceedings restraining it from proceeding with the adoption of the children pending the outcome of the appeal for three reasons; because the Council has not participated in the appeal, due to the weighty issues of law raised by the parents which had already been referred to the CJEU and due to the irreversibility of any adoption order that might be made.

The issue of EU law, however, prevented the Court from granting the relief sought. It was argued by the Attorney General that the Court did not have jurisdiction to grant the injunction sought in this case under the Brussels/Lugano system as it would amount in substance to a form of anti-suit injunction of the kind prohibited by the Court of Justice in Case C-159/02 *Turner v. Grovit*.[172] In *Turner v. Grovit*, the CJEU held that anti-suit injunctions, or injunctions intended to prohibit a person from commencing or continuing proceedings before the courts of another Member State, were incompatible with Regulation 2201/2003 as they do not observe the principle that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it. As the adoption process in England is court-led or court-supervised, it was submitted that making the order sought in this case would in substance restrain Hampshire County Council from commencing court proceedings in England in relation to the children. While the Court of Appeal was not convinced that the rationale in *Turner v. Grovit* applied to the present case, it accepted that the matter was not clear-cut.

Hogan J. thus determined that it was necessary that the Court should refer the following further question to the CJEU on an urgent basis, namely:

> Whether it is compatible with EU law and, specifically, the provisions of Council Regulation (EC) 2201/2003, for the courts of one Member State to grant an interlocutory injunction (protective measures) directed *in personam* at the public body of another Member State preventing that body arranging for the adoption of children in the courts of that other Member State where the *in personam* injunction arises from the necessity to protect the rights of the parties in enforcement proceedings arising under Chapter III of the 2003 Regulation?

The application for an injunction thus was adjourned pending the CJEU response to the further question referred.

3.2.3 Hampshire County Council v. CE and N.E., CFA and The Attorney General [173]

On 19 September 2018, the Court of Justice delivered its judgment in both referrals in *Hampshire County Council v. CE and NE*.

[172] [2004] E.C.R. I-3565.
[173] [2018] EUECJ C-325/18PPU.

The Court of Justice held that Hampshire County Council could enforce the order of the English Court seeking the return of the children to that jurisdiction under Brussels II *bis* and did not have to obtain a return order under the 1980 Hague Convention. It stated that Council Regulation 2201/2003 must be interpreted as meaning that, where it is alleged that children have been wrongfully removed, the decision of a court of the Member State in which those children were habitually resident, directing that those children be returned and which is entailed by a decision dealing with parental responsibility, may be declared enforceable in the host Member State in accordance with the general provisions of the Regulation. However, the procedure by which the Council obtained an enforcement order *ex parte* in the Irish High Court and enforced that order prior to serving the declaration of enforceability on the parents concerned was found not to be in accordance with Article 33(1) of Regulation 2201/2003. This provision requires service on the parents prior to enforcement, which would have enabled the parents to apply for a stay on the *ex parte* enforcement order. The Court stated that the requirement of service, with the associated transmission of information about an appeal, ensures that the party against whom enforcement is sought has a right to an effective remedy.

In relation to the time-limit for lodging an appeal, the parents in the within case had appealed against the *ex parte* enforcement order two days outside the eight week time limit under Council Regulation 2201/2003. The Court of Appeal had queried whether it had jurisdiction to extend time where the delays are essentially *de minimis* and an extension of time would otherwise have been granted by reference to national procedural law. The Court of Justice stated that the national court had no power to extend the time limit. It discussed the benefits of limitation periods to fulfil the function of ensuring legal certainty and noted that it is consistent with a child's best interests for decisions concerning that child to be open to challenge for a limited period only. It stated that while the decision of the High Court authorising enforcement was served on the parents' in this case after its enforcement and they were deprived of their right to seek a stay of the return order, that infringement of their rights had no effect on the period for bringing an appeal which commenced when that decision was served on them.

With regard to the injunction application, the Court of Justice held that the National Court was entitled to grant an injunction against Hampshire County Council placing the children for adoption. The CJEU stated that the injunction such as that sought by the parents in this case

had neither the purpose nor the effect of preventing Hampshire County Council from seising an English court in respect of the same subject matter as that of the dispute pending before the Irish courts, since a judicial adoption procedure commenced or continued in the UK has a subject matter distinct from those of the proceedings. It held that Regulation 2201/2003 did not preclude the granting of protective measures in the form of an injunction and found that adoption proceedings do not fall within the scope of the Regulation.

3.3 SUPREME COURT

3.3.1 G v. The Child and Family Agency[174]

In *G v. The Child and Family Agency*, the appellant's three youngest children had been taken into the care of the CFA. This situation was expected to last until they had reached adulthood. The appellant was dissatisfied with the access arrangements in place for visits with her children as a group, insofar as she was limited to approximately five hours per year of family access where all three children were present.

The appellant therefore, first sought to judicially review the Circuit Court orders, made in February of 2015, confirming the abovementioned visitation arrangements. She was refused leave on the grounds that she had not made out a stateable case and her application was made out of time. In October 2015 and January 2016, the applicant requested from the CFA an increase in access to her children. She made specific proposals in respect of same. By letter dated 27 January 2016, her request for additional access was declined by the CFA. The appellant then sought to judicially review the Circuit Court order and the letter of 27 January 2016. Humphreys J. granted leave. The substantive judicial review hearing was heard before Heneghan J. on 7 October 2016 and the High Court refused the reliefs sought. The appellant sought and was granted leave to appeal directly to the Supreme Court.

In the Supreme Court, a number of issues were raised. First, whether an earlier refusal of leave to seek judicial review renders the matters raised *res judicata* at a subsequent application and/or whether a subsequent application, following a previous refusal, would amount to an abuse of process; and second, whether the letter of 27 January 2016 contained a

[174] [2018] IESC 28.

decision amenable to judicial review. The court also considered the availability of alternative remedies to the applicant. The judgment of the Supreme Court was delivered by McKechnie J. Ultimately, the appeal was dismissed.

On the first issue, the Court stated that an *ex parte* leave application and the adjudication thereon does not give rise to a 'final' decision 'on the merits' or 'between the parties'. The absence of any one of these factors would be fatal to the application of *res judicata*, and thus it obviously cannot apply where none of them are satisfied. Therefore, the Court stated that the doctrine of *res judicata* cannot act as a *per se* bar to prevent a subsequent application for leave where an applicant has previously been unsuccessful at that stage. Accordingly, a second or renewed leave application for judicial review should be dealt with on the basis of the judge's discretion, as this is by far the more appropriate method of dealing with this issue:

> It appears to me that the correct approach is that the discretion of the court should not be prescriptively circumscribed when hearing a second application. To do so might not only involve setting out certain criteria to reflect the variable factors which cases to date have identified as being relevant, but would also involve an attempt to anticipate future situations, the details of which are not, and by definition cannot be, self-evident. Matters other than those presently discernable from existing case law are sure to emerge, even if only rarely and in unusual circumstances. Any rigid course might therefore create an unnecessary precedential bar for those hearing such applications. Accordingly, I believe that a broad discretion is the approach most likely to yield a just result having regard to individual interests and those of the administration of justice.[175]

However, while the second application might not be *res judicata*, the Court stated it nevertheless could be struck out if it was an abuse of process. Considering the facts of this case, the Court concluded that an attempt to seek further review on the same grounds without any change in circumstances was an abuse of process.

Secondly, the Court considered the letter sent by the CFA to the appellant confirming access arrangements. It stated that the appropriate manner in which to address this issue is to consider whether the letter affected any legal rights of Ms. G, or, alternatively, whether she has suffered a real or possible prejudice in consequence of its terms. Either way, the Court noted that the appellant can only succeed if the letter contains a 'decision', as legally understood in the present context, in the first place. Having regard to the content of the letter,

[175] [2018] IESC 28, at para. 76.

the Court held that this letter was not a decision capable of review, as it merely confirmed existing arrangements.

Importantly, the Court considered alternative remedies open to the applicant. It noted that any person who is dissatisfied with the access arrangements made by the CFA may apply to the District Court, pursuant to section 37(2) of the 1991 Act, and that court may (a) make such order as it thinks proper regarding access to the child by that person, and (b) vary or discharge that order on the application of any person. Judicial review is a discretionary remedy. Thus, the Court held that where a *prima facie* case has been made out – which, was not the case here in any event – the High Court may refuse to grant relief where a more appropriate remedy is available:

> It remains open to the appellant to make an application under that section and this, it seems to me, is the appropriate avenue by which to pursue the increased family access which Ms. G clearly wishes to have to her children. Indeed, it should be said that in the circumstances of this case, section 37 represents not only an alternative remedy, but a palpably superior remedy.[176]

This case therefore makes it clear that the existence of an alternative remedy, such as in this case section 37 of the Child Care Act 1991, enables a court to exercise its discretion to refuse leave to bring judicial review proceedings.

3.4 COURT OF APPEAL

3.4.1 P.M. v. V.H.[177]

In *P.M. v. V.H.*, the Court of Appeal considered preliminary issues concerning the jurisdiction of the High Court in a case where one parent is seeking to enforce a foreign custody order in this jurisdiction and where no international instrument is applicable to those foreign orders in order to secure summary recognition and enforcement.

In May 2017, the applicant, the father of E., issued proceedings seeking an order recognising and enforcing the orders of Kent County Family Court, Rhode Island, United States of

[176] Ibid., at para.111.
[177] [2018] IECA 4.

America. These orders were made in August 2016 and granted the father custody of E. They also directed that E. be returned forthwith from this jurisdiction to Rhode Island. In July 2017, the mother issued a motion for the determination of two questions of law by preliminary issue: (i) whether the Irish courts have exclusive jurisdiction in relation to all issues of parental responsibility where a child is habitually resident in this jurisdiction and (ii) whether the High Court had any jurisdiction to hear and determine the father's claim in the within proceedings. These preliminary issues were heard in July 2017 and Reynolds J. in the High Court, delivered her judgment in September 2017. The High Court rejected the mother's arguments regarding each preliminary issue and the mother appealed to the Court of Appeal.

By way of background, the parties married in Ireland in 1996. The mother was Irish and the father was a U.S. citizen, of EU origin. Soon after their marriage, they moved to the U.S. There are three children of the marriage; however these proceedings concerned only their youngest child E., aged 13. Throughout the marriage, the parties resided in the U.S. Their relationship broke down in 2006 and they were granted a decree of divorce by Rhode Island Family Court in October 2008. In their divorce, joint custody was granted to the parties, with physical placement to the mother, and the Court approved an agreement that the mother would return with the children to Ireland, with access to the father. The October 2008 judgment provided that the case should remain under the jurisdiction of the Rhode Island Family Court and "…shall be reviewed by the Court within 30 days of this date or at such other times as designated by the Court."

The mother relocated to Ireland in 2009 with the three children and access arrangements with the father worked reasonably well until 2014. In April 2014, the CFA became involved with the family in Ireland, monitoring welfare concerns. In July 2014, when the children were on scheduled summer access with their father, he reactivated the 2008 proceedings, issuing an *ex parte* motion seeking to modify the 2008 judgment and in particular, seeking custody of the children. He initially obtained an *ex parte* order to that effect, which was later vacated, and at the hearing of the motion in September 2014, the Rhode Island Court reinstated the order of October 2008. E. returned to Ireland once the *ex parte* order was vacated and her habitual residence in Ireland continued. The eldest child, P., remained in the U.S., while C., their second eldest child, returned to the care of her mother in Ireland. While the hearing of the father's motion was pending in Rhode Island, the mother issued Hague Convention

proceedings in Ireland for the return of the children. These proceedings were stayed pending the hearing of the Rhode Island Courts in September 2014, with Baker J. noting that the preliminary question as to whether the Rhode Island Courts have jurisdiction to hear an application relating to the children was before that Court.

In 2015, the relationship between the mother and C. deteriorated. C. moved to Rhode Island to live with her father. He again issued a motion to modify the 2008 order seeking custody of C. Initially, the Family Court of Rhode Island declined to make orders on grounds of *forum non conveniens*, but on appeal, the Supreme Court of Rhode Island reversed that decision for the limited purpose of conducting a hearing on the father's emergency application to modify custody of C. only. In Ireland, the CFA had issued care proceedings in respect of C., and after engagement with the CFA, the Rhode Island Family Court duly modified the custody of C., placing her in the care of her father.

In 2016, the father once more re-entered the proceedings in Rhode Island, seeking custody of E. A custody hearing took place in August 2016, following comprehensive family evaluations, assessments and interviews. The psychological assessment of E. concluded that her best interests warranted that she live in Rhode Island with her father and siblings and the Rhode Island Court thus granted custody to the father and directed that she be returned to the U.S. by her mother. The mother did not comply with said orders. Ultimately, therefore, the within proceedings were issued by the father in May 2017 seeking the recognition and enforcement of the Rhode Island orders made in 2016. The proceedings were issued under Article 41 of the Constitution, the Guardianship of Infants Act 1964, as amended, and under the inherent jurisdiction of the High Court.

Two preliminary issues were determined by the High Court in this case concerning its jurisdiction. First, the mother argued that the Irish Courts have exclusive jurisdiction regarding matters of parental responsibility where the child is habitually resident in this State by virtue of Article 8 of Brussels II *bis*. She contended therefore that the Irish courts could not waive jurisdiction in favour of the courts of another state and accordingly, could not recognise or enforce foreign orders made concerning E. Secondly, the mother contended that the High Court had no original jurisdiction in proceedings brought pursuant to the Guardianship of Infants Act 1964. She argued that by reason of statutory devolution arising

from section 15 of the Courts Act 1981, the District and Circuit Courts have exclusive jurisdiction to hear and determine the substantive application.

In the High Court, Reynolds J. did not accept either of the mother's arguments. The Court noted that the mother had fully participated and was legally represented in the Rhode Island proceedings, which were contested. It also noted that the mother had previously invoked the issue of jurisdiction in the Hague Convention proceedings that she had brought in the Irish High Court, but that she had not appealed the decision of Baker J. staying those proceedings pending determination of the issues before the Rhode Island Courts. The Court noted that the issue of jurisdiction was ultimately decided by the Rhode Island Supreme Court – proceedings in which the mother fully engaged and was legally represented. Accordingly, the Court held that the mother was estopped from raising this issue of jurisdiction again. The Court also rejected the argument that the High Court did not have original jurisdiction to consider proceedings under the 1964 Act, noting that the mother herself had sought relief under that Act in her earlier proceedings. The High Court concluded that the mother's contentions in relation to both preliminary issues undermined the principles of cooperation between courts and the reliefs sought by her would be tantamount to a complete failure of the principles of the comity of courts.

The mother appealed this decision and the Court of Appeal considered each preliminary issue in full. In answer to the first issue, it concluded that the Irish Courts, the State of the child's habitual residence, have full and primary jurisdiction to make determinations regarding all aspects of the child's best interests and welfare after such inquires as are deemed fit are made. The existence of foreign orders does not delimit or circumscribe that jurisdiction in any material respect. The mother's argument that the Irish Courts have no jurisdiction to recognise and enforce the Rhode Island order because of the child's habitual residence in this State at the date of institution of these enforcement proceedings was held not to be a correct proposition in law. The Irish Court was seised of the case in assessing the best interests of the child in accordance with the Constitution and the relevant legislation and was not delimited in making its determination by the foreign order. The Court was required to consider all material evidence it deemed relevant in assessing the child's best interests, including material that was before the court of another jurisdiction which had recently considered the child's welfare and made orders.

With regard to issue two, the Court held that it was appropriate in all the circumstances that the High Court hears the case, having regard to the rules of comity and the respect to be extended to foreign orders made after such a comprehensive process. It stated that the aspect of the case which sought recognition of foreign orders invoked the inherent jurisdiction of the High Court, notwithstanding that the said orders could only be recognised and enforced to the extent that the trial judge who heard the substantive case was satisfied that they were in the best interests of the child.

The Court reached the following further conclusions:

- that the child was habitually resident in Ireland and was so resident at the time the within proceedings were issued;
- that Article 8 of Brussels II *bis* was accordingly engaged and the Irish Courts had jurisdiction regarding matters of parental responsibility pertaining to the child, notwithstanding the fact that the U.S. was not a party to Brussels II *bis;* the protections afforded to her under the said Regulation were not diluted where transnational issues arose concerning her welfare;
- that the issue of jurisdiction in this case must be determined on the specific facts of the case, without regard to the Hague Convention on International Child Abduction – which cannot be invoked to seek the summary return of the child to Rhode Island because she was not habitually resident in Rhode Ireland – or without regard to the Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility 1996 – which cannot apply as the U.S. has not yet ratified that Convention.

It held that in applications such as that before the Court in these proceedings, i.e. an application pertaining to the welfare of a minor who is habitually resident in this jurisdiction, the best interests of the child are paramount. At paragraph 115, the Court stated:

> When confronted with an application pertaining to the welfare of a minor who is habitually resident in this jurisdiction, the best interests of the child are paramount since the 2012 Constitutional Amendment Article 42A and coming into operation of s.45 of the Children and Family Relationships Act 2015 on 18th January 2016. Further, Part V of the Guardianship of Infants Act 1964 which was inserted into the latter Act by s.63 of the Children and Family Relationships Act of 2015 sets out some guidelines to assist a court in determining for the purposes of the 1964 Act what is in the best interests of a child.

It noted that section 31(4) of the 1964 Act, as amended, allows a parent's conduct to be considered by the Court only to the extent that it is relevant to the child's welfare and best interests. The Court noted, therefore, that generally estoppel should not be invoked to delimit any aspects of a court's consideration of issues of welfare.

The Court held that the recognition and enforcement of the Rhode Island orders is one option for the High Court after full consideration of the case. The existence of these foreign orders made by the courts of a state in respect of which no international instrument can be used to secure summary recognition and enforcement does not prevent the Irish Court from making a substantially similar order at the conclusion of a full welfare hearing, having regard to all factors concerning the best interests of the child. The Court thus allowed the appeal to the extent outlined above.

Finally, the Court noted that the determination of the two questions raised in the mother's preliminary application were unlikely to shorten the proceedings or dispose of the action. In general, therefore, the Court of Appeal stated that given the need for expedition in cases involving the welfare of any child, the use of preliminary applications to determine points of law in such cases should be avoided save in the most exceptional of circumstances.

3.4.2 A.M.Q. v. K.J. (otherwise K.A.) and Anor[178]

In *A.M.Q. v. K.J. (otherwise K.A.) and Anor*, the applicant father sought the return of three children to Pakistan. The parties, both Pakistani nationals, lived in Ireland for a substantial period of time and their three children were born here. In the summer of 2014, the parents decided to move to Pakistan. They lived there with the children until November 2015, when the children returned to Ireland with their mother. Thus, with the exception of 15 months, they lived in Ireland for all of their lives. Relations deteriorated between the parties, the mother alleged she was physically abused by the father, and the children experienced difficulties in adjusting to their new schools. The father obtained an order from the Guardian Court in Lahore on 2 May 2015 restraining the removal of the children from Pakistan. The mother maintained that she was unaware of the existence of such orders and returned to Ireland with the children in November 2015. The father followed and issued proceedings seeking the return of the children.

The High Court proceedings commenced on 11 November 2015, but did not conclude until 26 May 2017, with the substantive hearing taking place over 10 days between March 2016 and March 2017. The trial judge refused to make orders for the return of the children to

[178] [2018] IECA 97.

Pakistan. While it was recognised that the children had a degree of connection with Pakistan, that this link to Pakistan should be encouraged and that the children were habitually resident in Pakistan at the time the mother removed them from that State, ultimately the Court found that the children had a more substantial degree of connection with Ireland.

The father appealed to the Court of Appeal against the refusal of the High Court to order the summary return of the three children habitually resident in Pakistan to that State. A number of grounds were relied upon in the appeal and on behalf of the father. It was argued, *inter alia*, that the delays in the conduct of the case in the High Court were unconscionable; that the High Court should have had greater regard to the existence of family law proceedings which had been instituted before the Pakistan courts; that the return of the children ought to have been ordered pursuant to the principle of the comity of courts; and that the Court should have had regard to the fact that the Hague Convention on International Child Abduction of 1980 had come into force in Pakistan on 1 March 2017 prior to the delivery of judgment by the High Court judge on 26 May 2017.

In its decision, the Court of Appeal first considered whether the case was covered by the Hague Convention, as the father placed great emphasis on the fact that the children had been taken to Ireland in breach of an order of the Lahore court. With regard to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in relation to Parental Responsibility and Measures for the Protection of Children (1996), the Court noted that Pakistan has not acceded to the 1996 Hague Convention. It therefore did not apply to this case. The Court stated that while Pakistan acceded to the Hague Convention on International Child Abduction 1980 on 1 March 2017, Article 35 thereof provides that the Convention 'shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in these States.' In the case of Pakistan, the Court held that this means that only judgments rendered there after the entry into force of the 1980 Convention on 1 March 2017 come within the scope of the 1980 Convention. Thus in relation to the present case, the Court held that the orders made by the Guardian Court in Lahore in May 2015 fall outside the scope of the 1980 Convention, precisely because they pre-date the accession of Pakistan to that Convention by almost two years. Neither Hague Convention, therefore, was found to be applicable to this case. In such a non-Hague case, the Court stated that the constitutional considerations contained in Article 42A.4 of the Constitution come to be fore – namely, the best interests of the children and their views.

The Court of Appeal agreed with the trial judge that the children were habitually resident in Pakistan at the time the mother removed them from that State. It noted that the couple had agreed to travel to Pakistan for the express purpose of making a new life there in August 2014 and however unhappy the wife or the children were there, it could not be said that the family's presence in Pakistan during this period prior to the children's return to Ireland was simply temporary or transient.

The Court also stated that the orders of the Lahore court were entitled to considerable weight and respect, as a matter of judicial comity, and as they were made in a State in which the children were habitually resident. That said, certain matters took from their weight – for instance, that the orders appeared to have been interim ones, not pronounced after a full hearing.

The Court of Appeal went on to consider what are the best interests of the children. It noted the evidence of the children's attachment to Ireland, the comprehensive report as to their welfare which was conducted in this jurisdiction and that their preference was to remain in Ireland. The Court noted that the children were removed from their country of habitual residence in breach of the Lahore orders and that the Court of Appeal has consistently given effect to foreign custody orders and directed the return of such children in wrongful removal cases arising under the Brussels II Regulation, the 1980 Hague Convention and in non-Hague cases. This case, however, contained three critical differences to pre-existing case-law – the fact that the children here were older (16, 13 and 10), that they had been raised and reared in Ireland for the majority of their lives and that they had expressed a clear wish to remain in Ireland with their mother. These factors, the Court held, justified a different approach in this case. The Court thus concluded:

> Summing up at this point, therefore, it is clear that while appropriate weight and respect must be afforded to the orders of the Pakistani courts, the decisive considerations in a non-Hague case are those mandated by Article 42A of the Constitution (and, by extension, the 1964 Act), namely, the best interests of the children and, in this case, the views of the children, particularly the older two children. These considerations all point to the children remaining in Ireland and to the refusals of the reliefs now sought by the father for the return of the children to Pakistan.[179]

[179] Ibid., at para.46.

Considering the father's argument that the proceedings had been unduly delayed in the High Court – being detrimental to the children's welfare but also creating an environment where the continuous residency of the children in Ireland had become almost a *fait accompli* and prejudiced his application, the Court stated as a general rule the judge seised of a non-Convention case should endeavour to adhere, by analogy, to the 1980 Hague Convention timeframe of six weeks – save in exceptional circumstances or for just cause. Acknowledging that delays occurred in this case which objectively were unacceptable, the Court stated that:

> As Article 42A of the Constitution itself makes clear, the welfare of children in cases of this kind is paramount and the efficient dispatch of litigation involving child welfare must be regarded as part of the constitutional obligation placed upon the judiciary to ensure that the commitments contained in Article 42 are meaningful and real.[180]

While the Court found that the father's complaint regarding the delay must be upheld, it held that this in itself was not a ground for setting aside the High Court order. Despite the significant delays, the Court took the view that the focus of the trial judge was on the individual children in the particular circumstances of this case. Notwithstanding the circumstances surrounding their being brought into this jurisdiction at the beginning of November 2015, in reality they were returning to an environment and society with which they were completely familiar. The trial judge applied the checklist specified in the Guardianship of Infants Act 1964 as amended and there was full compliance with Article 42A of the Constitution which, *inter alia*, gives effect to Article 12 of the UN Convention on the Rights of the Child. Accordingly, the Court held that the trial judge was entitled to have regard to the very significant practical consequences for the children of a return to the jurisdiction of the Courts of Pakistan, a course of action to which they were each separately and individually implacably opposed.

Ultimately, the Court of Appeal held that having reviewed the transcripts, heard key elements of the digital audio recording of the hearing and reviewed the authorities, legal arguments and submissions of the parties, to remit the matter for a rehearing would not be in the interests of the children or the parties and would be wholly unlikely to lead to an alternative outcome. It held that the welfare of the children required that the appeal be dismissed.

[180] Ibid., at para.50.

The Court further held that where proceedings before the High Court involve an international dimension regarding children it is imperative that a pro-active case management approach is adopted from the first time the case appears in the High Court list to ensure that no adventitious advantage is conferred on the fleeing parent nor any injurious impact or prejudice visited upon a left-behind parent by virtue of the passage of time and unwarranted delays. It is not correct to say, as was suggested on behalf of the mother, that since the 1980 Hague Convention was not engaged in this case that expedition was not a consideration.

While the Court of Appeal therefore was critical of the delays in hearing this case, it held that the High Court was correct to conduct an inquiry as to whether it would be in the best interests of the children to return them to Pakistan as the removal was not covered by any international instrument.

3.4.3 E.E. v. The Child and Family Agency[181]

In *E.E. v. The Child and Family Agency*, the CFA appealed the judgment of the High Court delivered in November 2016, and approved on 31 January 2017.

This case concerned child sex abuse allegations against a father, E.E. He had two children by two different women. In 2013, a complaint was made by his older child that he had regularly sexually abused her in a non-contact manner. As a result, the mother of his younger child refused all unsupervised contact between the father and his younger child. Under section 3 of the Child Care Act 1991, an investigation was initiated by the CFA in November 2013. As part of the investigation, the older child was interviewed by specialist interviewers at St. Clare's Unit, Temple Street Hospital. The first instance investigation concluded with a report on 11 November 2014, which found that the father had committed child sexual abuse and recommended that he not have any unsupervised contact with children. The father was offered an appeal, which he immediately indicated he wished to pursue. He met with the CFA appeal panel, comprised of two independent social workers, in December 2015 and requested an opportunity to cross-examine the older child, now an adult. The CFA appeal panel refused this request, inviting him to submit written questions for the older child. In May 2016, the father's solicitor wrote to the CFA appeal panel and the CFA Legal Services

[181] [2018] IECA 159.

Department seeking cross-examination and threatening judicial review proceedings if same was not afforded. In July 2016, the CFA Legal Services Department replied stating the conduct of the appeal panel was not a matter for the CFA and asserting that written questions would be sufficient to meet the requirements of fair procedures.

The father thus applied for leave to seek judicial review. In a telescoped hearing, in which the application for leave and the review itself were heard together, he was successful. The High Court, *inter alia*, made a declaration that the CFA was obliged to set aside its First Instance Examination Report and further, that it was obliged to allow the father's appeal to the appeal panel in the event that it failed to provide him with the right to cross-examine the complainant within two months of the perfection of the order. It also ordered that the CFA be restrained from any further action relating to the investigation or from relying on the first instance decision until the right to cross-examine had been afforded.

The CFA appealed the decision of the High Court to the Court of Appeal, arguing as a preliminary issue that the application for judicial review was premature as the appeal process had not yet been concluded.

Considering this issue, the Court of Appeal noted that for a Court to proceed where the application is premature, it will be usurping the function of the respondent body which is actually charged with the task of doing so. The Court stated that principles to guide it in resolving the issue of prematurity in judicial review applications are set out in *Rowland v. An Post*.[182] The questions for the Court therefore were (1) has the process herein gone irremediably wrong and (2) will any adverse conclusion thus reached be bound to be unsustainable in law. In considering these two questions, the Court had to have regard to the fact that the decision makers herein have a significant margin of appreciation as to how their investigation is to be conducted, including determining the precise requirement for cross-examination that might be needed to ensure procedural fairness.

In considering the first question, the Court stated this was difficult to answer. It noted that through these proceedings, the father had stopped the appeal process at a point where it was on the brink of conclusion. The appeal body maintained its position that it would not

[182] [2017] 1 IESC 20.

facilitate cross-examination of the complainant by the applicant and the complainant would not consent to be cross-examined. The appeal body had asked the applicant to furnish a list of questions in lieu of cross-examination and had undertaken to revert to him with any answers it received. Thus, although on the brink of conclusion, the Court said that it was conceivable that the answers to questions by the complainant and the applicant's response thereto could change the appeal body's decision as to whether to uphold the first instance decision. The Court noted that it was not argued by the applicant that there was a constitutional right to cross-examine in every case involving an adult complainant, but that there was in the circumstances of this case. It said that in this way, the first question asked above crosses over to the second. The Court posed the question - if the appeal body maintained its position on cross-examination after it received written questions from the father, the answers of the complainant and any response thereto, could it then be successfully argued that such a decision would be unsustainable in law? The Court did not believe so. Allowing the CFA to have a wide margin of appreciation, arguably the offer of written questions, answers and a response thereto would meet the requirements of constitutional justice in this case. Taking into account the impasse reached on the cross-examination issue and the duty on the CFA to conclude investigations, the Court found it highly probable that any determination made by the CFA would be sustainable in law.

It stated, therefore, that the answers to questions (1) and (2) taken together is that, as the proposed *modus operandi* of the appeal group on the question of cross-examination cannot be condemned as sure to lead to a decision unsustainable in law, then the process had not gone irremediably wrong.

The Court of Appeal thus held the application for judicial review must fail and it allowed the appeal. In its decision, it noted that the investigation of child abuse is particularly sensitive for all parties involved. It advised that the process should be conducted as expeditiously as possible in one single set of proceedings. Only after completion, including the appeal process, should an application for judicial review be considered. It is clear, therefore that a court should only intervene in an ongoing child abuse investigation if it is demonstrated that the process had gone irredeemably wrong. Moreover, it is also be necessary to show that any adverse conclusion reached would be found to be unsustainable in law.

3.4.4 M.S. v. A.R.[183]

In *M.S. v. A.R.*, the appellant mother appealed the decision of the High Court, made on 29 January 2018, directing the summary return of two children to Poland pursuant to the 1980 Hague Convention.

This case concerned two children aged 8 and 4. Their parents were Polish nationals who resided in Ireland and never married. Both children were born in Ireland. At all material times, the children and both parties were resident in Ireland until mid-November 2015 when the parties' relationship broke down and the father, with the knowledge and consent of the mother, removed the children to Poland. The father argued this departure from Ireland was permanent, whereas the mother contended that the children were to stay in Poland on a temporary basis only. The children lived in Poland with their father from November 2015 for in or around a period of one year. The mother visited on a number of occasions, maintained Skype contact and alleged her access was impeded. In early November 2016, she instituted Hague Convention proceedings in Poland for the return of the children to Ireland. The proceedings were dismissed and before her appeal was heard, she returned to Ireland with the children on 7 January 2017. It was not disputed that the removal of the children took place without the father's consent and that the children were habitually resident in Poland at the time of removal. Under Polish law, the father and mother are the holders of equal rights of custody.

The father issued the within Hague Convention proceedings seeking the summary return of the children to Poland. In the High Court, the trial judge considered the case on affidavit and the report of the court-appointed psychologist, which conveyed the views of the older child. He found that the children were habitually resident in Poland at the time of their removal and that the father, under applicable Polish law, was the holder of rights of custody under Article 3 of the Convention.

The mother claimed that under Article 13(b), there was a grave risk that the children would be exposed to physical or psychological harm or be otherwise placed in an intolerable situation if they were returned to Poland. She also claimed that the court should exercise its

[183] [2018] IECA 181.

discretion to refuse to return the children because the older child objected and he had attained an age and degree of maturity at which that objection should be taken into account. The High Court noted that the older child objected to returning to live in Poland because his father allegedly beat him, screamed at him and grabbed at him from time-to-time. The Court considered the objection made by the older child to his return to Poland and his father's custody and his preference to remain in Ireland with his mother and sibling. It held that this child had attained a degree of maturity at which it was appropriate to take his views into account and that there was no reason not to accept that the child's views are those expressed in the report. However, the Court stated that the full nature and extent of the reality of his life with his father in Poland and his relationship with his father prior to his departure for Poland was, in its view, not reflected in the short report of the interview submitted. This was particularly so in light of the fact that his mother was satisfied to leave him in the care of his father in November 2015.

The Court thus directed the summary return of the minors to Poland, concluding that the mother had not made out a case that the children were at a grave risk of physical or psychological harm or would be otherwise placed in an intolerable situation if returned to Poland.

The mother appealed this decision. She relied on Article 13 of the Hague Convention, which provides that the court 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 his views.

Article 13 provides as follows:

> 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.

The Court of Appeal held that the trial judge erred in imposing a requirement that grave risk of an intolerable situation had to be proven before a discretion could be exercised to refuse a return to Poland arising from the proven objection of the older child to being returned to Poland. It stated that the "child's objections" part of Article 13 is to be read independently of the rest of the Article and in particular Article 13(b). It stated that the intensity of the older child's objections about a return to Poland and the reasons given were significant factors in the discretionary equation having due regard to Article 13 of the Convention. When considered in light of Article 12 of the UN Convention on the Rights of the Child together with Brussels II *bis*, they were of such a nature that they weighed very heavily against a return.

The Court noted the close relationship between siblings and the fact that they provide important familial continuity for each other. In circumstances where the objections of the older child warranted that his summary return to Poland be refused therefore, it found that to return the younger child alone, severing the child from her mother and only sibling, would place her in an intolerable situation within the meaning of Article 13(b) of the Hague Convention. "Intolerable" when applied to a child was held to mean a situation which this particular child in these particular circumstances should not be expected to tolerate. Thus the Court of Appeal held that the exercise of discretion in this case favoured refusing a summary return of the children to Poland. It allowed the appeal and substituted the High Court order with an order dismissing the father's application for the return of the children to Poland.

In this case, therefore, the Court of Appeal held that it was incorrect to state that grave risk or an intolerable situation were preconditions to the High Court exercising its discretion to refuse a return on the basis of the objections of the child. It is important to note that on 11 October 2018, the Supreme Court allowed leave to appeal against the Order of the Court of Appeal.

3.4.5 V.R. v. C. O'N.[184]

In *V.R. v. C. O'N.*, the appellant father appealed the High Court decision to direct the return of the child to Australia pursuant to the Hague Convention.

Prior to considering the appellate decision, it is worth first considering the High Court judgment of Ní Raifeartaigh J. in this case, *V.R. v. C. O'N.*[185] In the High Court, the mother made an application seeking the summary return of a child to Australia. The mother was Australian and the father was Irish. The child was born in 2008 in Ireland. In October 2010, the mother obtained an order giving her permission to relocate to Australia with the child and she moved shortly thereafter. In February 2015, the Australian Family Court made an order providing that the parents retain equal shared parental responsibility; that the child live with the mother and made specific arrangements regarding access to his father, including when the father is outside Australia.

The father moved to Australia in 2013 and having obtained a series of visas, stayed until January 2017, when all these visas came to an end. He then returned to Ireland. A question arose as to whether the father overstayed in Australia on a visa but the Court concluded that it appeared probable on the evidence that he had always complied with his visa requirements and was never unlawfully in Australia.

In September 2017, the father applied for an eVisitor visa, which was refused. As he did not get a visa, he collected the child in the airport and brought him to Ireland for an agreed holiday period which was to end on 29 November 2017. The father, however, did not return the child. On 15 January 2018, therefore, these proceedings were issued by the mother seeking the return of the child pursuant to the Hague Convention.

It was not in dispute that the child had been habitually resident in Australia and was wrongfully retained in Ireland since the end of November 2017. The father resisted the return order mandated by Article 12 of the Hague Convention, relying on Article 13(b) of the Convention – namely that there was a grave risk that his or her return would expose the child

[184] [2018] IECA 220.
[185] [2018] IEHC 316.

to physical or psychological harm or otherwise place the child in an intolerable situation. He also relied on Article 20 - *the return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms*. At the centre of the father's case was a submission that there was 'a very strong likelihood' that the father would not get a visa to enter Australia in the future with the probable consequence of rupturing the father/son relationship and creating a situation that would be intolerable for the child.

Considering the relevant authorities, the Court stated the following at paragraph 28:

> Having regard to the above authorities setting out the general principles, it is clear that in a case where the article 13(b) defence is raised, the various policies underlying article 13(b) of the Hague Convention may be to a degree in conflict with each other. The threshold for establishing a grave risk of an intolerable situation for the child is a high one, but the Court must factor in to an appropriate degree the best interests of the particular child. The decision as to the appropriate balance between the various interests and policies is a nuanced and delicate one which will depend upon the particular facts of each case.

Ní Raifeartaigh J. then considered the authorities in which what she termed the 'abducting' parent had visa or other difficulties with regard to re-entering the jurisdiction from which the child was taken and in particular the judgment of the English Court of Appeal in *Re W. (Child Abduction: Intolerable Situation)*.[186] The Court set out its conclusions on those authorities and their applicability at paragraph 35:

> It seems to me that the authorities referred to above suggest that it is only in rare circumstances that visa or similar problems on the part of the 'abducting' parent are permitted to stand in the way of an order for return in a Hague Convention case. The striking features of the W case, in which return was refused, were that the children were very young (aged 5 and 3), their mother had always been their primary caregiver, and there was a high degree of certainty about the fact that she would not be permitted re-entry to the United States on a visa because she had overstayed by 1 year on a previous occasion. Accordingly, these very young children would have faced the prospect of being separated for an indeterminate period from their primary carer if an order for return were made. The facts of the present case are very different; the respondent father is not the primary carer of the child who is aged 9, and he has never overstayed his visa periods in Australia. The authorities also emphasise that a degree of trust must be placed in the systems within the requesting State to consider and respect the best interests of the children.

[186] [2018] E.W.C.A. Civ 664.

In relation to the Article 20 defence, the Court was referred to *Nottinghamshire Co Council v. B (K) & B (K),*[187] a decision of the Irish Supreme Court. In that case, the applicants contended that Article 20 of the Convention and Article 41 and Article 42 of the Irish Constitution prohibited the return of the children to the United Kingdom, because the law in that country permitted the adoption of children of married couples in circumstances not permitted in Ireland. The Supreme Court held that a difference in the legal regimes, even a constitutional difference, did not suffice to trigger Article 20. The test was whether what was proposed or contemplated in the requesting state was something that departed so markedly from the scheme and order envisaged by the Constitution and was such a direct consequence of the court's order that return was not permitted by the Constitution. It was indicated that it was not sufficient to show that some aspect of the law of the requesting State was different from this jurisdiction, or even that some aspect of that law if enacted in this jurisdiction would be unconstitutional. It was necessary to go further and show that the manner in which children would be dealt with in the requesting jurisdiction would necessarily offend against the provisions of the Irish Constitution if administered in an Irish court.

The Court thus stated that the Supreme Court decision made it clear that the bar for successfully invoking Article 20 of the Convention is extremely high. It noted that on behalf of the mother, it had been submitted that it could not be said that Irish policy concerning matters of immigration and the granting of visas was so fundamentally different from Australian policy that the situation presenting in this case could be said to fall within the Article 20 exception. The Court also noted that Counsel on behalf of the father did not particularly press the Article 20 issue in argument and did not point to any particular differences between the legal regimes that would ground a submission under Article 20.

Considering the factual issue first, looking at his history of visa applications and the circumstances in which his most recent application (unsupported by the mother) was refused, the Court held that the father had not discharged the onus of establishing that it is "highly unlikely" that he will get a visa to enter Australia in the future. The Court also placed weight on the fact that there already exists a detailed Australian court order giving the father generous access to the child. The Court further noted that the existing order envisaged access

[187] [2013] 4 IR 662.

to the father to take place outside of Australia, therefore not even requiring his attendance in that State.

Notwithstanding this factual conclusion, the Court continued to consider the best interests of the child. It stated that it could not accept that returning the child to his primary carer and his home met the threshold of what is described in Article 13(b) as an intolerable situation. The Court further stated that the role of the High Court was not to decide the custody dispute itself, but simply to decide whether there had been an unlawful removal or retention and whether one of the limited defences had been made out.

The High Court thus concluded that having regard to the evidence as a whole, including the evidence regarding the visa issue, and that the child had always lived in Australia with his mother in what appeared to be entirely normal circumstances, that the defence of Article 13(b) had not been established, even taking into account the best interests of the child from the point of view of the close bond he had with his father. Ní Raifeartaigh J. ordered the return of the child. She further held that the situation in this case did not come near the threshold required by Article 20 of the Convention, finding that nothing had been put before the court to suggest that Article 20 applied in the present situation.

The father appealed this decision, arguing that the High Court erred in under-appreciating the practical impediments or obstacles to him in exercising any access with the child if he were returned to Australia. Emphasis was placed upon the absence of any entitlement of the father to be in Australia and the information put before the High Court by the Central Authority of Australia in response to a request made by the Irish Central Authority for information about future visa applications. It was submitted that there was no evidence that the immigration authorities in Australia were under any duty to take into the account the child's best interests when determining whether or not to grant a visa to the father and if so, the type of visa. The father sought to rely upon that fact in pursuing an appeal against the rejection by the High Court of a basis for consideration of Article 20 of the Convention.

The Court of Appeal held that the High Court was correct in its factual conclusion, namely that the evidence did not support the father's contention that it was "highly unlikely" he would get a visa to enter Australia to see his son. Having reconsidered the evidence before the High Court and, in particular, having considered carefully the letter from the Australian

Central Authority referred to by counsel for the father, it found the High Court's factual conclusion was correct. It thus rejected the argument advanced by the father that the return of the child to Australia would place him in an intolerable situation. In relation to Article 20 of the Convention, the Court of Appeal found the High Court judge to be correct in her analysis of the Supreme Court decision in *Nottinghamshire* and in the conclusion reached that there was no evidence before the Court which came 'anywhere near the threshold required by Article 20 of the Convention'. It concluded that there was simply no evidential basis which required a detailed consideration under that article.

The appeal was thus dismissed. The Court also held that the order for return should record and recite the undertaking given by the mother to support any future visa applications by the father connected with contact with his son and file any necessary documents for that purpose. It is clear from both the High Court and Court of Appeal decisions that the High Court made its decision having regard to the evidence that the child had always lived in Australia.

3.4.6 C.D.G. v. J.B.[188]

In *C.D.G. v. J.B.*, the Court of Appeal considered the appeal of a High Court order directing the summary return of a child to Sweden pursuant to Article 12 of the 1980 Hague Convention.

The parties in these proceedings were the married parents of a son, born in November 2012. His mother was Irish and his father was Swedish. The parties met in Ireland and the child was born in this jurisdiction. The parties moved to Sweden in June 2015. In November 2015, the mother left the family home with the child. She issued divorce proceedings and obtained a divorce in Sweden in October 2016.

The child was the subject of a number of assessments in Sweden and a child psychologist found his difficulties were consistent for functioning within the autism spectrum. The mother asserted that the father had sexually abused the child. In the Swedish courts, it was found that her fears in this regard stemmed from her own familial experience and that her fears predated even the birth of the child. The Swedish courts made a number of determinations

[188] [2018] IECA 323.

regarding custody and access of the child. In May 2016, the mother was granted custody on an interim basis and the father obtained supervised access. In October 2016, the supervision condition was lifted. Upon initially disclosing to the Swedish police her suspicion regarding abuse in November 2015, an investigation was carried out and a decision was made in March 2016 to take no further action. In January 2017, the mother made a fresh allegation claiming that the child had made a disclosure of sexual assault to her perpetrated by his father on 31 December 2016. A social work investigation took place thereafter and the report, concluded in May 2017, was inconclusive. As a result of inquiries into these fresh allegations, between January to August 2017 the child had no access with his father. The father was given supervised access in August 2017 and in November 2017, the court directed that unsupervised access resume. The mother did not facilitate such access and this led to a further court application. A hearing took place in February 2018 and at the conclusion of same, the Court granted custody of the child to the father, with access to the mother. The mother, in breach of the Swedish order and without the consent of the father, removed the child to Ireland. The father therefore issued Hague proceedings in April 2018. The mother did not appeal the Swedish order.

In the High Court,[189] the Court considered whether any defence was established pursuant to Article 13 of the Convention and whether Article 20 was engaged.

With regard to Article 13(b), the Court considered the jurisprudence on grave risk. It attached significant weight to the fact that there was a decision of a court of competent jurisdiction in the state of the child's habitual residence on the very issue that the mother sought to rely on as a defence – the alleged sexual abuse of the child. The Court noted that the Swedish decision was made immediately prior to the removal of the child and was satisfied that the Swedish court examined the same evidence as had been put before the Court as to whether there was a risk that the father had sexually abused the child. It was noted that the mother was seeking to re-litigate the same issues and the Court stated that it should not be lured into conducting some type of review or appeal from a decision of the court of habitual residence on this issue. The Court held that:

[189] [2018] IEHC 453.

> The whole basis of the scheme detailed in the Hague Convention and EU Council Regulation 2201/2003 is to leave substantive decisions on issues of custody and access, and related fact-finding, to the court of the place of the habitual residence of the child, while conferring on the court to which the child has been wrongfully removed a much more limited scope for examining the facts and refusing a return based on this examination.

The Court noted that in *P.L. v. E.C.*,[190] the Supreme Court considered the approach to be adopted where identical allegations were being advanced as an Article 13 defence to a summary return under the Hague Convention as were the subject of proceedings before the Australian Court concerning welfare of a child. In this decision, the Supreme Court made it clear that the Irish Courts should be reluctant to interfere with the fact-finding role of the court of habitual residence. This has even greater force where the Swedish Court has actually reached final conclusions based on the evidence before it. The High Court commented that the mother's defence of grave risk centred on alleged deficits with the investigation of the sexual abuse allegations in Sweden and her criticisms of the Swedish court's decision are more properly raised in an appeal within that domestic system. The trial judge concluded that there was no evidence to support the mother's claim that the Swedish courts were unwilling or incapable of protecting the child, being the test prescribed by the Supreme Court in *PL v. CL*. It held that the Swedish order was reached on the evidence - evidence with which the mother disagreed.

The High Court observed that it would only be in very exceptional circumstances that an Irish court would be entitled to take a differing view of the facts as already found by the court of habitual residence, particularly where the decision of the latter court was both proximate in time and directly related to the issues raised in the Irish court. It did not consider the present case to fall within any such exceptional category. The Court thus concluded that the defence of grave risk was not established.

The mother also sought to rely on the fact that summary return would result in the child residing in the sole custody of his father, which she contended would create a grave risk of an intolerable situation due to the significant disruption to his life this would entail, by reason of his unique psychological characteristics and his autism spectrum condition. She also pointed to the European Arrest Warrant that had been issued in Sweden for her arrest for child

[190] [2009] 1 IR 1.

abduction. The High Court noted that certain significant undertakings were made by the father to ensure that the child would not face an intolerable situation upon his return home to Sweden pending determination of any appeal or other application by the mother to the Swedish courts – including an agreement to waive his strict legal entitlement to have the child reside with him for the initial period following his return. The Court thus did not find that the situation upon the child's return would be intolerable.

The High Court then considered the Article 20 defence, namely that a summary return was not permissible having regard to the fundamental principles in this jurisdiction in relation to the protection of human rights and fundamental freedoms. The trial judge noted that the Supreme Court had considered this issue in *Nottinghamshire County Council v. K.B. & Ors.*[191] In this case, as previously stated earlier in this section, the Supreme Court held that a mere legal difference in regimes is not sufficient to trigger Article 20. The court noted that the appropriate test is whether what is proposed or contemplated in respect of the minor in the requesting state was something that departs so markedly from the scheme and order envisaged by the national constitution and was such a direct consequence of an order of the court that return to the requesting state was impermissible by virtue of the terms of the Irish Constitution. In this case, the High Court was satisfied that there was no particular difference between the legal regimes in Ireland and in Sweden with regard to the welfare of minors. Furthermore, there was no evidence, either by way of affidavits of laws or otherwise, suggesting any fundamental difference of importance as between the two legal systems. The Article 20 defence was not made out.

The trial judge thus concluded that there had been a wrongful removal of the child from Sweden within the meaning of Article 3 of the Hague Convention and ordered his return.

The mother appealed this decision to the Court of Appeal, raising nine grounds of appeal. Considering the Article 13(b) defence, the Court of Appeal stated that the trial judge correctly pointed out the test for what constitutes an intolerable situation was articulated by the UK Supreme Court in *Re E.*[192] where it was stated:

[191] [2013] 4 IR 662.
[192] [2011] UKSC 27.

> the risk to the child must be "grave" … 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.

The Court of Appeal thus stated that one had to conclude, as the trial judge effectively found, that whereas the mother had convinced herself that there was a grave risk that the child would be at risk of sexual abuse from his father there was no evidence that a court of competent jurisdiction in Stockholm, which heard and determined the welfare issues in relation to the child immediately prior his removal from the jurisdiction of Sweden, shared that view and indeed all the evidence was consistent with the court having rejected those allegations and having considered it necessary for welfare reasons to vest custody of the child with his father. It concluded that there was no legal basis upon which the trial judge could have gainsaid the determinations of the Swedish courts.

With regard to the Article 20 defence, the Court of Appeal noted that it was a narrow defence which offers a rarely exercised exception to the summary return of a child. It stated that Article 20 must be construed in light of Article 16, which prohibits the requested state from deciding on the merits of the rights of custody, unless the return is refused. The Court found that there was no evidence before the High Court of any fundamental defects in the justice system in Sweden concerning assessments of the welfare and best interests of children such as the child in this case. The Court was satisfied that the mother failed to make any stateable case pursuant to Article 20 nor had the very high standard been achieved that would engage Article 20 on the evidence. It thus determined that the trial judge was correct in concluding that the mother's arguments relating to Article 20 did not reach the threshold required.

The mother also appealed the failure of the trial judge to hear the voice of the child. The Court noted that the child in this case, aged five, was vulnerable, fragile and experiencing serious behavioural issues. It stated that the trial judge adopted a child-centred approach, mindful of the child's communication and other difficulties. Given his age and psychological fragility, the Court held there was a clear risk that drawing him into the process would be disproportionately stressful and potentially traumatic for this vulnerable boy. It also noted that there was no evidence that the child expressed a wish or opinion to his mother regarding his return to Sweden. The Court of Appeal held that the trial judge did not merely rely on the

chronological age of the child in finding that an assessment was inappropriate. It commented that there was evidence before the court that he did not have a maturity in excess of his nominal age and had significant developmental problems. It thus concluded that the approach of the trial judge accorded with the established jurisprudence and should not be disturbed.

The Court of Appeal thus upheld the High Court decision. It held that no evidence had been adduced to support the mother's contention that the Swedish Courts were unable or unwilling to protect the child the subject of the proceedings. It further held that the threshold for the Article 20 defence had not been met in this appeal.

Following the determination of the Court of Appeal, the mother subsequently sought leave to appeal this decision to the Supreme Court. In order for the Supreme Court to grant leave, it must be established that the decision sought to be appealed either involves a matter of general public importance or that it is otherwise in the interests of justice necessary that there be an appeal to this Court.

In the leave application, the mother identified as potential matters of general public importance in the decision of the Court of Appeal alleged violations of Article 42A of the Constitution, Article 12 CRC and Article 7(3) of the Convention on the Rights of Persons with Disabilities (CRPD). These all related to the refusal by the High Court judge of the application that the child be interviewed by a child psychologist and the refusal to appoint a guardian *ad litem*.

Considering the leave application, the Supreme Court noted that the Court of Appeal judgment did not refer to Article 42A of the Constitution or to Article 12 of the CRC or to the CRPD. It noted that the mother did not contend that the Court of Appeal in error failed to deal with any ground of appeal or submission made in reliance upon those provisions. In addition, it noted that the application did not set out in the proposed grounds of appeal, should leave be granted, any stateable basis upon which the decision of the Court of Appeal upholding the order that the child be returned to Sweden should be reversed by reason of any failure to have regard to these provisions. The Court thus did not consider that the mother identified any matter of general public importance in the decision of the Court of Appeal by reference to these provisions.

The mother also sought to identify as a matter of general public importance an alleged failure by the High Court and Court of Appeal to ensure that the child was psychologically assessed prior to any determination being made as to whether the child was at grave risk of psychological damage and/or being placed in an intolerable situation. The Court did not consider that the treatment of these facts or issues in the decision of the Court of Appeal involved a matter of general public importance. In the absence of the decision of the Court of Appeal involving a matter of general public importance, the Court held that the application for leave did not identify any basis upon which it may be considered necessary in the interests of justice that there be an appeal to the Supreme Court. It stated at para. 25 that:

> The new constitutional appellate architecture provides for a full appeal to the Court of Appeal in proceedings such as this and only in those limited cases where the decision of the Court of Appeal raises a matter of general public importance or it is necessary in the interests of justice is there a further appeal to this Court. The applicant has not satisfied the Court that the constitutional threshold has been met on this application.

3.5 HIGH COURT

3.5.1 M.J. v. S.O.[193]

In *M.J. v. S.O.*, the applicant, the father of two children, sought a declaration pursuant to Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 that the parties' children were wrongfully removed from Poland by the respondent, their mother, in February 2017. He also sought an order pursuant to Article 12 of the Convention for their return to Poland.

The parties, both Polish nationals, had two children. Their son, W., was born in Poland in November 2006. Shortly after his birth, the parties moved to Ireland with W. Their daughter, G., was born in July 2009 in Ireland. The parties never married, but the applicant was appointed a guardian of the children in October 2014 in the District Court. They lived in Ireland until July 2016 when the respondent took the children to Poland. W., therefore, lived in Ireland for the first ten years of his life, and G. resided in this jurisdiction for all of her life until the family moved to Poland in July 2016. The children spent 6 months in Poland before returning to Ireland in February 2017.

[193] [2018] IEHC 10.

The Court held that the habitual residence of the children was Ireland until July 2016. The question before the Court, therefore, was whether their habitual residence changed between July 2016 and February 2017 – the period in which they lived in Poland. The Court also considered the children's objections to returning to Poland.

The mother alleged that while the parties resided together in Ireland, the applicant was physically and emotionally abusive towards her, citing particular instances of physical assault. She stated that she moved into a refuge with the children in April 2014, before securing rented accommodation in June 2014. The respondent and the children lived separately from the applicant for a period of two years. The respondent said that she removed the children to Poland in July 2016. She stated that she had suffered injuries in a car accident in May 2016 and returned to Poland with the children to recuperate on a temporary basis. She said that it was always her intention to return to Ireland, but when her recovery took longer than expected, she enrolled the children in a Polish school in September 2016. She said that the applicant moved back to Poland in August 2016 and that he had exercised access to the children every second weekend. Their main place of residence was with her in her mother's home.

The respondent stated that the children did not settle well in Poland and that she had informed the applicant from an early stage that she intended to return to Ireland. He was unhappy with this and stole their passports from her mother's home. She alleged that on 30 January 2017, the applicant assaulted their son during an access visit and this precipitated her return to Ireland. A medical report was exhibited in the affidavit, evidencing two scratches on W.'s right check and a bruise on his right leg. She returned to Ireland on 5 February 2017, travelling on European identity cards. She secured accommodation and permanent school places for the children. The respondent alleged that on 19 March 2017, the applicant and his brother came to her home and attempted to abduct the children. A Garda document exhibited demonstrated that the applicant's brother was being prosecuted for assault and public order offences, but that no prosecution could be taken against the applicant as he resided outside the jurisdiction.

The applicant, in his affidavit, gave the impression that the parties had been living together until they returned to Poland in July 2016. He denied all allegations of abuse and disputed the respondent's assertion that her injuries from the car accident were the reason for the

return to Poland. He claimed it was the family's intention to reside permanently in Poland upon their return and that the children had lived primarily with him at his parent's home while they were in Poland. The applicant stated that the respondent had indicated her desire to return to Ireland and he had obtained a Polish court order to restrain her from so doing, exhibiting an order dated 18 November 2016 directing her to remain in Poland. He denied that he had assaulted his son and maintained that the scratches on his face were caused by the family cat. He made no mention of the bruise. He also denied the incident that had occurred in March 2017, saying he simply visited the respondent to enquire after the children. The applicant referred to W.'s Irish school report, dated 28 June 2016, in which the report stated the child "was" a great member of the class and it "was" a pleasure to work with him. He claimed this wording corroborated his account that there was already a plan that the children would leave the Irish school at that stage, contradicting the mother's suggestion that the plan to enrol them in a Polish school developed only later.

The Court considered whether the children's habitual residence had changed from Ireland to Poland between July 2016 and February 2017. It noted that both the leading Irish authorities and those from the CJEU have confirmed that the question of a child's habitual residence is highly fact-specific.

As this case involves an EU country, the Court stated that Council Regulation (EC) No 2201/2003 applied and that it was necessary for the applicant to establish that the children's habitual residence was Poland at the time of their removal. The Court had to be satisfied on the balance of probabilities that the evidence demonstrated a change in habitual residence. As the children spent most of their lives in Ireland and only six months in Poland, a change in their habitual residence had to be shown by reason of the circumstances in which they came to be in Poland and/or events while there.

While the Court accepted that the evidence to support the mother's contention that she moved to Poland to recuperate at her mother's home from injuries sustained in a car accident was thin, the Court found that the applicant's version of events was unreliable. He had glossed over the details of their living arrangements in Ireland and various allegations made against him. It also found his response to the alleged assault of his son to be implausible. Accordingly, the Court found it difficult to place much weight on the applicant's version of events insofar as he said that he and the respondent decided together to travel to Poland in the

summer of 2016 and that there was a joint decision to live there on a long-term basis. The judge therefore was not satisfied the applicant had met the burden of proof upon him to establish a change of habitual residence. The Court concluded that there was no wrongful removal within the meaning of Article 3 of the Convention.

Notwithstanding that the Court determined there was no wrongful removal, it still considered the matter of the children's objections to returning to Poland. The Court considered the guidance provided by previous Irish authorities such as *C.A. v. C.A.*[194] and *A.U. v. T.N.U.*,[195] as to how this issue should be addressed. First, the court had to examine whether the objections had been "made out"; second it had to consider the age and maturity of the child expressing the views; and finally, it had to determine whether in all the circumstances it was appropriate to exercise the discretion in favour of return or non-return, having regard to such matters as the policy considerations underlying the Convention, the strength of the child's objections, the extent to which the objections were the child's own, and the long-term best interests of the child.

In this case, the children did in fact object to returning to Poland – they preferred their life in Ireland and school in this jurisdiction. They were interviewed by a child psychologist who determined that both children had the maturity to declare and present their preferences but that, as with children of their ages, they did not have the maturity to fully understand the long-term implications of their present wishes. The expert also noted that their opinions would inevitably have been affected by their mother, but that their fear of the applicant was clear.

The Court determined that the views of the children in this case should be given considerable weight, particularly those of W., who was aged 11. It considered that while living with their mother may have had some influence on the children's wishes, the fact that they were afraid of their father seemed more likely to have been caused by their direct experience of him than the mother's influence. The Court also placed weight on their preference for their school in Ireland. The Court concluded that the children's wishes pointed in the same direction as their best interests. In these circumstances, the judge exercised her discretion not to return the

[194] [2010] 2 IR 162.
[195] [2011] 3 IR 683.

children to Poland, even if (contrary to the first conclusion), there had been a wrongful removal.

3.5.2 B.B. v. Z.B.[196]

In *B.B. v. Z.B.*, the High Court considered an application under the 1980 Hague Convention for the return of a child to Hungary. An allegation of parental alienation was made in this case arising due to the removal of the child from Hungary to Ireland.

Both parents in this case were Hungarian nationals. They were never married, but cohabited until their separation in 2013. Their child, S., was born in 2008 in Hungary. After their separation, the mother remained the primary carer, with liberal access to the father. In 2016, the father moved to Ireland. He had regular Skype and holiday access with the child. In July 2017, the mother consented to a holiday in Ireland from 10-31 July. Prior to the return date, the father informed the mother that he would not be returning the child to Hungary and he failed to return her. The mother thus issued the within proceedings in August 2017.

It was accepted that the child was habitually resident in Hungary in July 2017 and that the father was exercising formal rights of custody under the laws of Hungary at the material time. It was also accepted by the father that the retention of the child was wrongful. He argued, however, that there was a grave risk that the return of the child would expose her to physical or psychological harm or otherwise place her in an intolerable situation. He further argued that having regard to the child's wishes, the Court should exercise its discretion and refuse to return the child. Specifically, the father claimed it was not safe for his daughter to live with the mother and her new partner, alleging that the partner had been aggressive and abusive to his daughter.

Concerning the child's wishes, the Court noted that the child was almost nine years old and was interviewed by a court-appointed assessor almost five months after she arrived in Ireland. The child reported that she did not wish to return to Hungary, that she was unhappy there and had nothing positive to say about her mother or her mother's partner. She said she did not

[196] [2018] IEHC 15.

wish to see her mother. The assessor found that the child was settled in her new environment and clearly expressed the wish to remain living in Ireland.

The Court considered the report against the background history in the case, where the mother had always been the child's primary carer. It had considerable concerns about the assessor's findings, especially in the absence of any objective evidence of any difficulty in the relationship between mother and child prior to July 2017. The Court stated that there was no plausible explanation for the child's current views where she appears to have been previously content in Hungary, where there were no welfare concerns in relation to her care there and where there was no mention in the report of being isolated in Ireland – a place where she does not speak the language and is cut off from all extended family and friends in Hungary. With reference to the report, the Court stated at paragraph 25;

> Indeed there appears to have been very little probing during the course of the assessment to establish how it is that the child has come to the position whereby she now has 'nothing positive' to say about the applicant. The evidence simply does not stack up. Whilst it is clear that the child is of an age and degree of maturity that the court must take account of her views, the court has very considerable concerns about whether these views are authentically the child's own.

The Court held that the assessor's findings appeared to be inconsistent with the background of the child.

The Court also noted with grave concern the position of the father, who was supportive of a position whereby the child was effectively alienated from her mother, in stark contrast with the attitude the mother had in ensuring that the child had regular contact with her father. The Court found that the retention of the child in this jurisdiction had resulted in considerable parental alienation for the applicant, a position it stated could not be endorsed by an Irish Court and indeed was not consistent with the overall policy objectives of the Convention as a whole.

With regard to the defence of grave risk, the Court noted that the allegations made by the father were unsupported by any objective evidence. In the circumstances, it concluded that same were self-serving. Even if the allegations made by the respondent were taken at their height, it held that there was no evidence whatsoever that the court in Hungary would be

incapable or unwilling to give the child adequate protection. The Court thus held that the threshold for grave risk was not met in the case.

Ultimately, therefore, the Court concluded that it was not satisfied that this was an appropriate case where the court should exercise its discretion to refuse the return of the child despite the objections of the child to returning to Hungary. It therefore ordered that the child be returned to Hungary. In making the order for return, the court was satisfied that same was in keeping with the overriding policy considerations of the Convention and in the best interests of the child.

3.5.3 D.H. v. L.H.[197]

In *D.H. v. L.H.*, the High Court considered an application made by the father for the return of his two children to the Czech Republic pursuant to the Hague Convention.

The parties were unmarried and had resided together for almost ten years in the Czech Republic. They had two children, born in February 2010 and June 2013. They separated in August 2017 when the father moved out of the parties' rented accommodation. At all material times, the parties and their children resided in the Czech Republic until 22 November 2017, when the children were brought to Ireland by the mother. It was not in dispute that the children were habitually resident in the Czech Republic prior to their removal to Ireland and it was accepted that the father had not consented to their removal.

Two main issues arose in this case. First, a dispute arose as to whether or not the applicant father was exercising custody rights within the meaning of Article 3 of the Convention at the time of the children's removal. The Court noted that under Czech law, the unmarried parents of a child have rights of parental responsibility, which includes the right to determine the place of residence of their children. The existence of this right to custody was not thus disputed, but the crux of the matter was whether the father was exercising his custody rights at the time of the children's removal. On behalf of the mother, it was argued that because the father had failed to properly provide for the children in financial and other respects, he had failed to exercise his parental responsibility in the best interests of the children within the

[197] [2018] IEHC 317.

meaning of the Czech Civil Code, and therefore he could not be considered to be exercising his right of parental responsibility at the time of their removal.

In considering this matter, the Court stated that a generous interpretation was to be given to the phrase "exercising custody rights" under the Convention according to the authorities on this issue. It held that as the father had lived in the same household as the children for almost all of their lives and was seeing them fortnightly in the short period after the parties had separated before their removal to Ireland between August and November 2017, he had been exercising his custody rights at the time of their removal. Based on this conclusion, therefore, the Court held that the mother had wrongfully removed the children to Ireland.

The second issue was the defence raised by the mother to the return of the children. The mother relied on the objections of the older child to returning to the Czech Republic, which were conveyed in the report of the court-appointed assessor. While the Court considered the older child's preference to remain in Ireland and wish not to see his father, it payed heed to the reservations of the assessor about placing undue weight on his views as he, at aged eight, was considered to be "at the threshold" of being capable of expressing a view, in terms of age and maturity. The Court therefore did not accept that the child's views as a standalone ground would be a reason to refuse to order the return of the children.

Pursuant to Article 13(b), the mother further raised the defence of grave risk that the return of the children to the Czech Republic would create an intolerable situation. The Court considered the mother's defence of grave risk. Despite the high threshold for establishing "grave risk" within the meaning of Article 13 of the Convention, the Court found that there was a grave risk that if the mother was forced to return to the Czech Republic with the children, they would be facing a situation without accommodation, with no guarantee of any source of income, whereas in Ireland their mother had a job, accommodation and the children appeared to be well settled and happy at school. This, the Court determined, gave rise to a grave risk of an intolerable situation for the children if they were returned. The Court therefore exercised its discretion pursuant to Article 13 to refuse to return the children to the Czech Republic.

3.5.4 A.M. v. S.McG.[198]

In *A.M. v. S.McG.*, the applicant father sought the return of the child, C., to Illinois pursuant to the Hague Convention. The child was born in March 2015 in Illinois in the United States of America. C.'s parents were unmarried. They lived together in the U.S. and were engaged to be married until their separation in April 2016. In May 2016, they signed a Parenting Plan, which was notarised, but not the subject of court proceedings or a court order. On 18 June 2016, the respondent mother, an Irish national, took C. to Ireland and shortly afterwards, she communicated to the applicant father that she would not be returning to the U.S.

On 28 June 2016, the applicant instituted proceedings concerning the child in Illinois and he obtained, *inter alia*, an order that the respondent return the child to Illinois. The respondent failed to comply and ultimately in her absence in September 2016, the applicant was granted an order giving him sole decision-making authority over the child. On 22 December 2016, the applicant applied through the Central Authority in Illinois to the Irish Central Authority for the return of the child pursuant to the Hague Convention.

Ni Raifeartaigh J. stated that this case raised two questions; (1) whether the father had "custody rights" for the purposes of Article 3 of the Hague Convention at the time of the child's removal to Ireland and (2) if not, whether he had acquired "custody rights" by virtue of an application made to an Illinois court on a date after the mother had come to Ireland with the child.

Considering whether the father had custody rights at time of removal, the Court noted that the parties were unmarried. The day after their child was born, a Voluntary Acknowledgment of Paternity ("VAP") was executed, as a result of which the father's name was placed on the child's birth certificate. A factual dispute arose as to whether the mother signed this document. She claimed she had not and that her signature was forged by the applicant. The father said that the form was signed in the hospital and it was possible that he had signed it on her behalf, but that she had been in the room at the time and he had not used any subterfuge. On the balance of probabilities, the Court reached the factual conclusion that the father probably signed the form in the hospital room in the presence of the mother, but this had not

[198] [2017] IEHC 843.

been fraudulent in the sense of intending to deceive her to her detriment. The Court placed weight on the fact that at that time, the parties were still planning to get married and the mother stated that she never had any difficulty with the applicant being acknowledged as father of the child.

The Court noted that this factual conclusion led to a legal question as to the validity of the VAP, given that the Illinois provisions appeared to place considerable emphasis on the mother signing the form personally. It, however, held that this legal question did not need to be clarified by referring the question to the Illinois courts as the case could be disposed of without this matter being resolved. Assuming the VAP was valid, the Court went on to consider whether the applicant had "custody rights" within the meaning of Article 3 at the time of the child's removal.

The father relied on the VAP, the Parenting Plan and the claim that as his permission was required for the child to obtain a passport, this was tantamount to a *ne exeat* power. Affidavits of laws were filed by attorneys on behalf of both parties. Neither disputed that the Parenting Plan did not have any legal effect on the custody rights of the father, because it had not been made the subject of a court order. The pivotal question therefore was whether the VAP, which had been filed with a State Department, conferred custody rights on the father. The affidavits of laws conflicted on this issue. The Court took the view that the affidavit of laws offered by the respondent represented the correct interpretation of Illinois law – namely that the applicant possessed an adjudication of parentage, but not an adjudication of custody and that the VAP does not, nor can it, attribute rights of custody to an unwed father. The Court determined that the very petition made by the applicant to the Illinois courts for "allocation of parental responsibility", which was not granted until 27 September 2016, was entirely inconsistent with the notion that the VAP in and of itself automatically conferred custody rights on him. Thus, the Court concluded that the applicant did not have custody rights at the time of the child's removal from the U.S. There was, therefore, no wrongful removal in this case.

The Court then went on to consider whether the father had acquired custody rights. The applicant argued that even if there was no wrongful removal, there was unlawful retention of the child after the date of his *ex parte* petition to the Illinois courts, dated 28 June 2016. He argued that the child's habitual residence had not changed by this date and any retention of

the child in Ireland beyond that date was unlawful. In determining the issue of wrongful retention, the court stated that three questions arose;

(a) In principle, can custody rights ever be acquired by a parent or court for the purpose of making an application under the Convention for the return of a child by virtue of an application to court, or a court order granted after a lawful removal has taken place (often referred to as "chasing orders")?

(b) If (a) is answered in the affirmative, were custody rights acquired by the applicant in this case after the child came to Ireland?

(c) Was the child's habitual residence in Illinois lost and if so, when did this occur and what impact does this have on (a) and (b)?

Assessing whether custody rights can be acquired after a lawful removal has taken place, the Court gave detailed consideration to three Irish decisions, *A.S. v. E.H.*,[199] *H.I. v. M.G.*[200] and *G.T. v. T.A.O.*[201]. It noted that on two occasions, in *A.S. v. E.H.* and *G.T. v. T.A.O.*, the Irish courts have ordered the return of children based upon a finding of unlawful retention in circumstances where the custody rights grounding the application were obtained through a court application made after the lawful removal of the child. On the contrary, the Supreme Court in *H.I. v. M.G.* expressed a strong view, although probably *obiter*, that the Hague Convention does not recognise custody rights acquired by the applicant parent after there has been a lawful removal. While the Court commented that it was difficult to reconcile these cases, it highlighted that in both decisions where the return was ordered, the habitual residence of the child had not changed. The Court thus concluded that under the Irish authorities, the view is not that "chasing orders" can never be recognised for Hague purposes, but that the outcome may depend upon the relationship between the chasing order and whether the habitual residence has remained unchanged or not at the time the chasing order is obtained. It, therefore, went on to consider whether the habitual residence of the child had changed in this case.

The applicant contended that it takes time to acquire a new habitual residence and for a child to integrate into the new environment. The Court considered the relevant authorities on the issue of habitual residence. It noted that as the child was very young, the question of his

[199] [1999] 4 IE 504.
[200] [2000] 1 IR 110.
[201] [2008] 3 IR 567.

habitual residence was heavily dependent on the intention of his mother. The Court noted the steps taken by the respondent in the immediate period before her departure on 18 June 2016 - namely giving notice to her employer in Illinois, shipping all her belongings to Ireland and collecting the child's vaccination records, as well as those following her arrival in Ireland. In July 2016, the mother informed her U.S. landlord that she would not be returning. In August, the child was allocated a PPS number and in September, he was enrolled in a local crèche. Having regard to the steps taken by the respondent before her departure, together with her pre-existing links to Ireland and her narrative of a complete breakdown of the relationship, the Court concluded that the mother had an intention to move permanently to Ireland by the time she left Illinois. It thus determined that this was one of the unusual cases where a child lost his old habitual residence quickly by reason of the particular circumstances in which he was brought to the jurisdiction. He had lost his habitual residence in Illinois by the time the Illinois court was first petitioned on 28 June 2016 and acquired an Irish habitual residence within a very short time of his arrival.

The Court therefore determined that there was no unlawful removal of the child from Illinois when the mother came to Ireland on 18 June 2016 because the applicant father, whose consent was not obtained for this removal, did not have custody rights in Illinois at that time and therefore no custody rights for the purpose of Articles 3 and 12 of the Hague Convention.

On this issue of a possible wrongful retention, it held that at the time of her departure from Illinois, the mother had decided to relocate permanently with the child to Ireland, therefore they had abandoned their former habitual residence of Illinois, if not immediately, within a few short days. Even if the Hague Convention may sometimes allow for an unmarried father to make an application for the return of a child based on custody rights vested in the courts by reason of a court application made after the mother has lawfully removed a child from the jurisdiction, this case was not such a case as the habitual residence of the child had changed by the time those rights were vested in the Illinois courts. The condition in Article 3 of the Convention, therefore, that the child be habitually resident in the requesting state immediately prior to the application was not fulfilled. The Court concluded that the child was neither wrongfully removed nor retained within the meaning of Article 3 of the Hague Convention.

3.5.5 Lincolnshire County Council v. J.MCA and Another[202]

In *Lincolnshire County Council v. J.MCA and Another*, the applicant, Lincolnshire County Council, applied to the High Court seeking the return of an infant child to the jurisdiction of England and Wales pursuant to the 1980 Hague Convention and Brussels II *bis.*

The child, E., was born in November 2017. Her parents, the respondents in this case, were British citizens and were not married. After the child's birth, a number of events occurred causing the English authorities to have concerns for the welfare of the child. The essence of these concerns was that the mother was repeatedly reporting medical symptoms in relation to the child which, in the opinion of the medical authorities, were not borne out upon investigation. As a result of these concerns, an application was made to the English Courts and an interim care order was made in January 2018. This interim care order placed the child in the care of Lincolnshire County Council and the Council in turn, placed the child with her grandmother. Under English law, once such an order is made, the local authority has the power to decide where the child shall live pending a final decision and to determine the extent to which the parents may meet their parental responsibility for the child. The interim order itself contained an explicit prohibition on the removal of the child from the jurisdiction and the Council organised supervised access three times per week between the child and her parents. These orders of the English courts were interim, pending a full fact-finding hearing which was to take place in September 2018.

On 20 April 2018, the day before the next court date, the parents covertly entered the grandmother's home and took the child. They then travelled to Ireland with the child. An emergency hearing was convened in England and orders were made that the child be returned forthwith. On 22 April, the parents presented themselves at a Garda station in Ireland, having realised that they may be in breach of court orders. On 23 April, following an application by the CFA to the District Court, an emergency care order was made placing the child in the care of the CFA. On 25 April, there was a further sitting of the English High Court. An order was again made providing that the habitual residence of the child had not changed and for the return of the child. A certificate was executed pursuant to the provisions of Annex II of Brussels II *bis* for the child's return. The parents attempted to appeal these orders, but leave

[202] [2018] IEHC 514.

to appeal was refused. In this jurisdiction, the Council obtained from the Master of the High Court an order dated 17 May 2018 declaring that the return order be recognised and enforceable in Ireland. The parents appealed this order, and the order was stayed pending determination in separate proceedings of a reference by the Court of Appeal to the CJEU. On 9 July 2018, a further interim care order was made by the District Court. The Council then issued the present proceedings and an order was made that the CFA continue to provide care for the child pending the determination of these proceedings.

Affidavits and legal submissions were prepared in advance of the hearing. The respondent parents were unrepresented. They averred that they wished to stay in Ireland; that the child was happily settled with her current foster family and that she was responding well to both parents during access visits; that the mother had been fully discharged from mental health services a year before her pregnancy; and that the allegations and conclusions made in the English proceedings were false and unsubstantiated.

The High Court, in considering the case, noted at the outset that the submissions of the parents were more in the nature of cries from the heart to be allowed to stay in Ireland, rather than legal arguments framed with reference to the Hague Convention. It noted that it was constrained to operate within the necessary legal parameters of the Convention and it was not conducting some kind of hearing "on the merits" as to what was best for the child. The key issue, it stated, was whether any particular set of circumstances arose to create an exception to the obligation to return.

It was considered by the Court as to whether the applicant Council had custody rights within the meaning of the Hague Convention. Examining the English court order placing the child in the care of the applicant council and the provisions of the Children Act 1989, which provides that the local authority designated by the care order shall have parental responsibility for the child, the Court concluded that there was no doubt that the applicant Council had and still had custody rights within the meaning of the Convention. The removal of the child was thus held to be wrongful.

The Court then considered whether any defence to the summary return of the child arose. It noted that the complaints of the respondents could be divided into two broad but separate legal submissions; (1) that the English courts "got it wrong" on the merits and should not

have come to the conclusions they did; and (2) that the English courts were/are unwilling to treat the respondents fairly.

Regarding the first submission, the Court re-emphasised that it was not its role to decide on the issue of custody or to review the English decision in any way. In relation to the second submission, the Court had regard to the decision of the Supreme Court in *PL v. EC*[203] and placed weight on the fact that the English proceedings had not yet been finalised. It stated that the parents had alleged that the English Courts were unwilling to protect their rights or those of the child without any supporting expert evidence or any affidavits from the lawyers who represented the respondents in the English courts. The Court thus rejected this submission, stating the following at paragraph 39:

> The respondents were afforded legal representation before the English court; appropriate hearings were conducted; a doctor gave evidence and was cross-examined; future hearings were being planned; this was all done in a similar fashion to how adversarial proceedings are carried out in Ireland. Further, the interim arrangement was in my view a humane one, involving the child being placed with her grandmother and the respondents being permitted three access visits per week. There is no evidence at all to suggest that the English courts are unwilling to protect the child's rights or those of the respondents. In reality all that is offered is the respondents' personal view that the doctors and the court were wrong in their diagnosis and that they were being treated unfairly by the courts.

The parents further argued that the return of the child to England would cause potential emotional damage to the child that would amount to a grave risk of an intolerable situation under Article 13(b) of the Hague Convention. They argued that not only would the child be uprooted from the family where she had been living for two months, but that she would also be deprived into the future of the company of her parents because they could not return to England for fear of being prosecuted for child abduction. Considering this, the Court found that in the first instance, any disruption caused to the child by returning her to England, after her having been taken from her grandmother, was the fruit of the respondents' own actions in bringing E. to Ireland in clear disregard of an English court order. However, ultimately, the Court was not convinced that the only possible outcome of the child's return to England would necessarily be the dramatic one that her parents would never be allowed by the English authorities to play a role in her life in the future. It stated that it must place trust in the English system to ensure that the child's best interests will be factored into any decisions

[203] [2009] 1 IR 1.

concerning whether the parents would be prosecuted if they returned to England or if convicted, what sentence might be handed down.

Finally, the parents sought to rely on Article 20 of the Convention which, as stated previously in this section, provides that the return of the child may be refused 'if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.' The Court, however, held that there was nothing in the present case to suggest that child care proceedings were so fundamentally different in England than in Ireland that this argument could be considered to have any substance.

The High Court thus held that the removal of the child in this case was unlawful and in breach of the rights of custody of Lincolnshire County Council. It found that none of the defences available under the 1980 Hague Convention had been established to enable the Court to exercise its discretion to refuse to order the child's return. The Court thus ordered the return of the child.

3.5.6 Swansea County Council v. M.O.[204]

In *Swansea County Council v. M.O.*, Abbott J considered an appeal of an order of the Master of the High Court. The respondent, M.O., appealed the Master's order, made on 3 June 2015, enforcing an interim care order and recovery order granted by Swansea Family Court on 20 May 2015. The applicant in this case was Swansea County Council, the statutory body having responsibility for the care of children in the Swansea area in the jurisdiction of England and Wales and in particular, having responsibility for the care and protection of three children, M., H., and A. The respondent was the mother of the children.

The respondent agreed to the children being placed in voluntary care in February 2015, pending the outcome of care proceedings which were commenced by the applicant in March 2015. On 16 May 2015, when she attended for supervised access with the children, the respondent withdrew her consent to the voluntary care arrangement and removed the children in a waiting car. The applicant sought an interim care order on 18 May 2015. This order was granted *ex parte* in light of the danger posed to the children and was returnable to 20 May

[204] [2017] IEHC 771.

2015. The respondent's solicitor was present in court on 18 May and took a photograph of the interim order, sending it via a private Facebook message to the respondent. The respondent did not attend court on 20 May as she had removed the children to Ireland by ferry on the evening of 16 May. On 20 May, Judge Sharpe in Swansea Family Court made an order declaring that the children remain in the care of the applicant pursuant to the interim care order. He directed that An Garda Síochána have liberty to search for and recover the children and signed a certificate referred to in Article 39 of Brussels II *bis* concerning judgments on parental responsibility. The applicant made contact with the CFA. It obtained an emergency care order in respect of the children, who were then located by An Garda Síochána.

Following the recovery of the children, an application was made to the Master of the High Court for an order pursuant to Order 42A, rule 4-8 of the Superior Court Rules and Chapter III of Council Regulation (EC) 2201/2003 for the enforcement of the interim care order of 18 May 2015 made in Swansea Family Court, namely "the judgment". The enforcement of the recovery orders of 20 May 2015 was also sought. Said orders were duly enforced by the Master. The respondent appealed the Master's order and a stay was placed on this order pending the hearing of the appeal.

The court considered Article 31 of Council Regulation 2201/2003, which provides that the court to which an application for a declaration of enforceability is made shall give its decision without delay. Neither the person against whom enforcement is sought, nor the child, are entitled to make any submissions at this stage of the application. It also provides that enforcement may only be refused for one of the reasons specified in Articles 22, 23 and 24 and that under no circumstances may a judgment be reviewed as to substance. Having regard to the prohibition on reviewing the jurisdiction of the court of origin contained in Article 24, Abbott J. considered each ground of non-recognition for judgments relating to parental responsibility, as provided in Article 23.

> *(a) If such recognition is manifestly contrary to public policy of the Member State in which recognition is sought taking into account the best interests of the child.*

The court took judicial notice of the fact that child protection measures in England and Wales serve the same objectives of public policy as in this jurisdiction. While in the past, it had

been suggested that the tendency of the child protection policies in England and Wales to free up children for adoption without the consent of their parents was inconsistent with Irish policy, this approach has ceased having regard to recent Supreme Court decisions. The court also noted that the respondent had not raised this issue in her defence. Thus, paragraph (a) was not accepted as a ground for non-recognition.

> *(b) If it is given, except in cases of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought.*

The respondent contended that her children had not been given an opportunity to be heard, especially her eldest child who was aged seven. Abbott J., however, was satisfied that the order had been made in circumstances of urgency, involving a reaction to the respondent's taking of the children out of care in Swansea – thus he held that the exception to the requirement for the voice of the child to be heard applied. Nevertheless, he noted that the affidavit of the applicant grounding its application before the Master exhibited a report of a contact worker which contained the views and wishes of the two eldest children. With regard to the voice of the child, the court noted generally that since the coming into force of Brussels II *bis*, the Children's Referendum and the Children and Family Relationships Act 2015, it is a fundamental principle of procedure in Ireland that children to whom an order relates should be given an opportunity to be heard.

> *(c) Where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with the equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally.*

Abbott J. was satisfied that the solicitor for the respondent was in a position to photograph the interim order, sending same to the respondent, and notifying her of the further hearing.

> *(d) On the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such persons having been given an opportunity to be heard.*

The court held that the person envisaged in this paragraph is a person other than the respondent who may be claiming parental responsibility. In this case, the court noted that while another person attended with the respondent from time to time before the Court, that

person never claimed parental responsibility and thus there was no ground for non-recognition under this paragraph.

(e) If it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought.

(f) If it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Abbott J. noted that there exists no such judgment as described in either paragraph.

Finally, the court considered Article 26 of Brussels II *bis* which provides that under no circumstances may a judgment be reviewed as to its substance. It stated that no such review had been undertaken in this case. The court only considered the facts and arguments made by the respondent as to the substance of the matter to the extent necessary to consider such objections she may have had for the purpose of examining any grounds of non-recognition of the judgment. Abbott J. therefore concluded that there were no grounds for non-recognition of the Swansea Family Court's judgment in this case. Accordingly, the appeal was dismissed and the order of the Master of the High Court was affirmed.

3.5.7 P. v. The Child and Family Agency[205]

In *P. v. The Child and Family Agency*, Barrett J. in the High Court considered issues surrounding the possible transfer of jurisdiction in a case to the courts of England and Wales. In this case, the applicant mother brought judicial review proceedings in respect of an Order of District Judge Toale made on 11 December 2011. He had ordered that the child care proceedings before the District Court be stayed and that the parties be invited to make an application to the courts of England and Wales for the transfer of jurisdiction in respect of the child, J.

In July 2014, Ms P., a UK national, gave birth to a baby boy in that jurisdiction. The boy, R., came to the attention of social services there in August 2014 when he attended hospital with

[205] [2018] IEHC 161.

serious injuries following an attack by an adult. The UK authorities obtained a care order in respect of R. and he was later adopted. In April 2015, Ms P. came to Ireland at which time she was pregnant. A social worker at her maternity hospital made a referral to the CFA. Having enquired of Ms P.'s past, the CFA decided that it would make an application for an emergency care order on the birth of Ms P.'s second child, J., on 11 July 2016. An emergency care order was made on 13 July 2016. On the expiry of the emergency care order, Ms P. signed a voluntary consent agreement with the CFA and J. was placed in foster-care. Ms P. had access three times per week. J. remained in voluntary care until August 2016, when an interim care order was made. J.'s foster parents indicated that they could not care for J. on a long-term basis, but that they would continue to do so until the resolution of the proceedings. If J. was not returned to his mother, therefore, the CFA would need to find a new foster care placement for him and the expert evidence before the District Court was that same had to be available on a long-term basis, as any temporary placement would be detrimental to J.'s welfare.

In relation to the involvement of the UK authorities, no social work department in the UK ever had any involvement with J. and at the time of the hearing of the within judicial review application, no child protection authority in the UK had any intention of taking responsibility in respect of J. in the event of a transfer of jurisdiction in respect of the child to England and Wales pursuant to Article 15 of Council Regulation (EC) No. 2201/2003. R.'s adoptive parents were not in a position to care for J. and all social work and medical teams involved in J.'s life were based in Ireland.

In December 2016, the District Court commenced an inquiry pursuant to Article 17 of Regulation 2201/2003 and concluded that the Irish courts had jurisdiction in respect of J. based on his presence in Ireland. In October 2017, District Judge Toale, of his own motion, commenced consideration of whether a transfer of jurisdiction under Article 15 was appropriate. The CFA indicated it would consent to such a transfer if it did not require the child to be transferred to the UK in the short term. Having heard the Article 15 inquiry, the District Court concluded that J. has a particular connection to England and Wales and that the courts there were better placed to hear the care order proceedings in respect of J. because of (1) the compellability of R.'s father (possibly also the father of J.) in any proceedings that may be commenced in England and Wales and (2) the greater availability of documentary evidence in England and Wales concerning the circumstances which gave rise to the previous

proceedings there concerning R. Toale J. did not agree with Ms P.'s arguments that it was not possible to transfer jurisdiction without transferring the child and that the risk of an interim placement could not be avoided if a transfer was made. On 11 December 2017, therefore, the District Court stayed the proceedings, inviting the parties to make an application to the courts of England and Wales for the transfer of jurisdiction in respect of J. Ms P. brought judicial review proceedings seeking to quash this decision.

In relation to the child's habitual residence, Ms P. contended that the District Judge erred in law in failing to consider whether J.'s habitual residence had changed by the time it was considering whether the courts of England and Wales were best placed to determine the proceedings. This submission was rejected by the High Court. It noted that the Article 15 inquiry could only be carried out by a court having jurisdiction and that in May 2017, the District Judge in this case concluded that he had jurisdiction to hear the case based on the presence of J. in Ireland. Article 15 allows a court that has jurisdiction to transfer it to a court of another Member State which is better placed to hear the case. Thus, there was no need for the District Judge to conduct a separate assessment as to whether a different basis of jurisdiction may or may not have been applicable when he made his decision to invite a transfer application, as he had already determined jurisdiction in May 2017.

Ms P. further argued that the District Court erred in finding that J. had a particular connection with England and Wales. She submitted that he had a particular connection to Ireland. Again, Barrett J. did not accept this contention. He stated that there was nothing to suggest that the concept of "particular connection" connotes a degree of exclusivity and that the trans-national aspect of many family relationships inevitably means that the children of such families may enjoy a particular connection with more than one Member State.

The Court determined that the two reasons underpinning the District Judge's determination that the courts of England and Wales were better placed to hear the care order proceedings were rational reasons to which the District Court was entitled to have regard. While it was argued that Ms P. would not be compellable at the hearing of the proceedings if she remained in Ireland and the courts of England and Wales had jurisdiction, the Court stated that this did not prejudice her as she could agree to give evidence voluntarily in England and Wales. Furthermore, this did not alter the other reason concerning the greater availability of documentation in England and Wales.

Ms P. argued that there could not be a transfer of jurisdiction without the transfer of the child in question. Barrett J., however, noted that Article 15 allows a transfer of jurisdiction with regard to specific parts of a case, as well as the entirety of proceedings. Thus, in those circumstances, it would be possible for a child care case to be heard in one jurisdiction without the child being present there. Logically, therefore, the situation should not be different in cases where there is a complete transfer of jurisdiction. Furthermore, the Court held that the wording of Article 15(3)(a) itself is indicative of the situation being precisely the same in the context of a complete transfer and he cited the case of *Re A.E.*[206] as an example of where this had occurred. As a general proposition, therefore, the Court held that jurisdiction and the presence of the child are severable.

Ms P. argued that the best interests of J. would not be served by a transfer of jurisdiction as a long-term placement could not be guaranteed for the child in any transfer. The Court noted that this argument was based on the perception that the transfer of jurisdiction necessitated the transfer of the child – which the Court already ruled it did not. Furthermore, the Court noted that the courts of England and Wales may or may not elect to accept jurisdiction and if they did, they would decide how best to proceed with J.'s case, in his best interests. Regardless of how the courts of England and Wales decided to proceed with J.'s case, the Court stated that this could not prevent the District Court from reaching its decision pursuant to Article 15.

Finally, Ms P. argued that the UK will cease to be an EU Member State on 29 March 2019 so any order transferring J. to the UK will mean that J. will spend the greater part of his minority in a non-EU Member State. Barrett J. took the view that there is nothing to suggest that if the UK courts did accept jurisdiction in the case, that the care decision to be made would be made on or after 29 March 2019 and any decision made before that time would be decided in accordance with the European Charter of Fundamental Rights and the ECHR. Thus, the Court determined that "Brexit" had no practical import regarding the determination of the care proceedings at that time. The Court concluded that there was no legal deficiency, flaw or unlawfulness in the decision of the District Court and the reliefs sought were therefore refused.

[206] [2017] EWHC 2298 (Fam).

3.5.8 J.F. and A.F. v. Health Service Executive; K.K. and F.C. v. Health Service Executive[207]

In *J.F. and A.F. v. Health Service Executive; K.K. and F.C. v. Health Service Executive*, the High Court considered the mandatory obligation to complete an assessment of need under the Disability Act 2005 in two similar cases.

An assessment of need is an assessment to determine the health and education needs of a person with a disability and the health or education services required to meet those needs. The assessment process is open to any child under aged five. In the present cases, it was suspected by the respective parent of each infant applicant, that their children had autism. The importance of early intervention where autism is diagnosed has been previously recognised. Specific timeframes are enacted by the Disability Act 2005 and S.I. No. 263 - Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007 ('the 2007 Regulations') with regard to assessments of need – namely that the assessment be commenced within 3 months of the date of receipt of the request and be completed within three months of commencement. A statutory complaints procedure is also enacted in the 2005 Act, which *inter alia,* deals with complaints where there has been a delay in the commencement or completion of an assessment of need.

In the High Court, the applicants brought judicial review proceedings seeking an order compelling the respondent HSE, to commence and/or complete an assessment of need in respect of the applicant children within thirty days or such other period considered reasonable by the Court. They also sought a declaration that the respondent failed to comply with its statutory obligations to the applicant children due to the delay in commencing and/or completing the assessment of need and a declaration that the statutory complaints process contained in the 2005 Act was not an adequate or appropriate remedy, insofar as it created further delay and due to the number of complaints being made, there was a delay in the complaints process itself.

In the first set of proceedings, J.F., the mother of A.F., suspected A.F. had autism. Her older child is autistic. The mother submitted an application for an assessment of need in respect of

[207] [2018] IEHC 294.

A.F. which was acknowledged as received by the HSE on 29 July 2016. It was not commenced, so in November 2016, the mother lodged a complaint concerning the delay. His assessment was subsequently commenced on 1 March 2017, but not completed within the required three months. On 22 June 2017, the mother withdrew her complaint in favour of judicial review – arguing that the statutory complaint process was not an appropriate remedy due to the delay in the complaints process itself.

In the second set of proceedings, K.K., the mother of F.C., made an application for an assessment of need, which was received by the HSE on 20 May 2016. It was commenced on 24 August 2016, but the mother was advised of a 15 month waiting list for a multidisciplinary team assessment concerning F.C. On 16 December, the mother complained regarding the delay to the complaint's officer. On 2 August 2017, the HSE wrote to the mother informing her that the delay regarding the completion of the assessment was now 18 months. On 13 October 2017, the mother withdrew her complaint in favour of judicial review.

As grounds for the mandatory and declaratory relief sought in respect of the respondent's failure to commence and/or complete the assessments of need in respect of the infant applicants in the within proceedings, reliance was placed on the provisions of section 9(5) of the 2005 Act, and Articles 6(1), 9 and 10 of the 2007 Regulations. The applicants contended that the said provisions provide a maximum six month timeline for the commencement and completion of an assessment of need; three months for commencement and three months for completion. Where an assessment is commenced and is not going to be completed within three months, the individual concerned must be informed within three months of the commencement of the reasons for the delay and the specified timeframe for completion.

Arguing the declaration that the statutory complaints process was not an adequate or appropriate remedy, the applicants submitted:

(i) An applicant may, pursuant to section 14 of the Disability Act, 2005, make a complaint to a complaints officer, three months after the initial application for an assessment of need (where it has not commenced) or, if it has commenced by the end of the three month period, three further months after the initial three months (i.e. six months in total after the initial application).

(ii) This six month period constitutes the total period of time in which the entire process should be commenced and completed. Yet, if that is not achieved and the statutory complaints process is invoked, an applicant engaging with the

complaints process must then await the determination of a complaints officer, which may take up to eight to nine months, as there is currently a waiting list and delays in the statutory complaints process due to the current large number of complaints. A complaints officer's report will normally stipulate a further three month period in which the assessment of need should be completed. It is also noted that the complaints officer does not appear to inform those making complaints of their right to seek enforcement of the complaints officer's recommendation before the Circuit Court.

(iii) An applicant may only file a motion in the Circuit Court, pursuant to section 22 of the Disability Act, 2005, seeking enforcement of the complaints officer's recommendation, three months after the date specified for the provision of a service in the complaints officer's report. Thus, if a three month period for completion of an assessment of need is stipulated in the complaints officer's report, a total period of six months will have passed before enforcement in the Circuit Court can be sought. This timeframe does not take account of any waiting time in the Circuit Court system. Even when an enforcement order is made by the Circuit Court, there will normally be a period of time given and/or necessary in which to complete the assessment of need.

(iv) Consequently, an applicant with a special needs child, urgently awaiting a diagnosis and access to services, using the complaints process, may have to wait up to in excess of twenty months to secure a statutory right (i.e. an assessment of need which at the outset should be fulfilled within a maximum of six months from the date the application is first made). This is not an adequate or appropriate remedy.

Concerning both cases, the HSE admitted its failure to complete the assessments of need in respect of the minor applicants within the statutory timeframe enacted by the 2005 Act. Notwithstanding that admission, the respondent contended that the applicants were not entitled to seek orders of mandamus in relation to the alleged failure by the respondent to comply with its statutory obligations under section 9 of the 2005 Act and/or the 2007 Regulations. It submitted that the grant of the relief sought by the applicants would give the minor applicants priority over other children who were also awaiting assessments of need, at the expense of those other children. It was further contented that the reliefs sought by the applicants would compel the respondent to conduct the assessments of need in breach of the statutorily prescribed order of processing such applications. The respondent also specifically denied that the statutory complaints process was not an adequate or appropriate remedy.

The High Court first considered whether 2005 Act imposed a legal obligation upon the respondent to carry out an assessment of need such as would entitle the applicants to an order of mandamus. It noted that an applicant seeking mandamus must, according to *State*

(Sheehan) v. Government of Ireland,[208] establish '*a statutorily imposed duty…where the duty has been clearly and unambiguously expressed in the statute.*' In this regard, the Court stated that the term 'shall' is expressly used in section 9(5) of the 2005 Act and the relevant provisions of the 2007 Regulations. It thus perceived the duties imposed upon the respondent under the Act and the Regulations as being entirely and unambiguously mandatory. The Court noted that applicants for *mandamus* must, in the normal course of events, call upon an administrative body to perform its duty. In this case, however, it found that the applicants proceedings had called upon the respondent to fulfil its duty, but it had failed to do so. Finally, the Court considered whether an alternative remedy to judicial review existed and whether it was permissible for the applicants to bypass the statutory complaints procedure. In particular, the Court had regard to the significant delays within the complaint's procedure.

Overall, the Court concluded that it was satisfied, given the factual situation of delays in the complaints process of nine months or more, to make an order directing the assessments of need in respect of the minor applicants be completed within a number of weeks. It was, however, not persuaded that a case has been made out for the declaratory relief sought by the applicants, stating;

> In the first instance, the Court must take cognisance of the fact that no challenge has been brought against the 2005 Act or the 2007 Regulations. The issue before the Court is the manner of the respondent's discharge of its statutory duties in relation to the completion of assessments of need and its management/implementation of the statutory complaints process. I find nothing inherently wrong with the remedy provided in the 2005 Act to address a failure on the part of the respondent either to commence or complete an assessment of need.

The Court thus directed that the respondent complete the assessments of need in respect of the minor applicants within a period of six weeks.

3.5.9 The Child and Family Agency v. L.B. and Another[209]

In *The Child and Family Agency v. L.B. and Another*, the High Court considered whether it was able to answer questions raised by the District Court judge in a consultative case stated.

[208] [1987] IR 550.
[209] [2018] IEHC 423.

In the District Court, the CFA made an application for a two-year care order in relation to the respondents' child, born in December 2016. This application was opposed by the respondent mother, who had a mild intellectual disability. She had resided with the child in a parent and infant unit between January 2017 until her discharge in April 2017. The discharge report recommended that the child be made the subject of a long-term care order as despite her efforts, the mother had not been able to demonstrate capacity to safely and consistently parent the child. At an early stage in the District Court proceedings, the District Judge requested that a report be prepared by a psychologist pursuant to section 27 of the Child Care Act 1991. It was prepared and the conclusions of the discharge report were accepted by the psychologist.

In December 2017, the District Court made an order that the child be placed in care for a six month period, pending the determination of certain matters of law upon which he had sought the opinion of the High Court by way of a consultative case stated pursuant to section 52 of the Courts (Supplemental Provisions) Act 1961. In the case stated, the District Judge made the following findings of fact:

(i) There is a presumption that the child's welfare is best provided for by being parented by a biological parent;
(ii) The first-named Respondent being the female parent in this case is a loving concerned conscientious mother who on such limited evidence as is before me cannot, due to a mild intellectual disability among or in combination with other significant factors, provide adequate care for the child in the absence of either appropriate family support or an unascertained level of non-family support;
(iii) The second-named Respondent being the male parent in this case takes no part in the care of the child or in these proceedings, although a party to and notified of them;
(iv) On such evidence as I have, appropriate family support is not available to the first-named Respondent;
(v) The evidence before me was to the effect that the content and level of the non-family support necessary for and appropriate to a parent in such circumstances are unique to that parent;
(vi) The cost of carrying out an assessment of the unique weaknesses and strengths of the parent or parents and the effect of their interaction on the parent's capacity in this case is uncertain but in any case is beyond the capacity of the parent in this case whose income is her Disability Allowance;
(vii) The effect of the basic care of the child being provided by professional services on the emotional and other development of the child has not been ascertained and is very significant having regard to the constitutional rights of the child to an opportunity for full personal development.

The District Judge stated that he was minded to make orders under section 47 of the Act of 1991 in the terms contained in the questions framed by him, as follows:-

> Am I entitled to make orders under S.47 of the Child Care Act 1991 as amended directing the Child and Family Agency to:
>
> 1. Ascertain the cost of carrying out an appropriate assessment as to what services, if any, would be required and suffice to enable the first-named Respondent to parent the child to the maximum of her ability, having regard to her limitations and strengths and her rights as provided for by legislation, Bunreacht na hÉireann, and the European Convention on Human Rights, including in so far as her rights under the Convention are extended or defined by the International Convention on Rights of Persons with Disabilities;
> 2. Carry out such an assessment;
> 3. Provide such services as may be indicated by such an assessment, in the event that such assessment indicates that such services will enhance her capacity for parenting sufficiently to justify the provision of such services and that such parenting is in the interests of the child.

Section 47 of the Child Care Act 1991 provides that where a child is in the care of the CFA, the District Court may, of its own motion or on the application of any person, give such directions and make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order.

The CFA argued that the answers to the questions in the case stated should be that the Court is unable to answer them, or alternatively, they be answered in the negative. It submitted that both the existence and the application of a power under section 47 of the Child Care Act 1991 require that the welfare of the child be directly engaged and no clear findings of fact in relation to the child's welfare had been made by the District Judge. Following from this, therefore, it argued that the High Court could not assess whether section 47 of the Act arose. On behalf of the CFA, it was submitted that despite the fact that Article 42A expressly provides that the interests of the child are served by being with the parents, it is still necessary for there to be a finding of fact in order for the High Court to answer the question in a consultative case stated. It is not sufficient for the District Judge simply to employ a constitutional presumption to justify the obtaining of a report – otherwise it might be deemed to so apply in every case. Rather, there must be some basis for believing that a report is necessary or would be beneficial to the functioning of the court or to the parties in the case before it.

The respondent mother argued that the questions be answered in the affirmative - that there was a fundamental presumption which arises under the Constitution that it was in the best interests of the child to be raised by his or her parents and that it was only in exceptional circumstances that the child should be removed from the family.

The Court agreed with the CFA that the case stated as so framed largely placed the focus, in express terms, on the child's mother, rather than the child. It noted that the best interests of this child were not referred to in the case stated, save in the context of the generally stated presumption. On its reading of the case stated, it concluded that the District Judge did not expressly refer to his having considered or found as a fact that the proposed course of action, being the ascertainment of the cost of carrying out an appropriate assessment, was in the best interests of this child.

MacGrath J. held that to imply from the constitutional and statutory presumptions that there had necessarily been a finding of fact, albeit unexpressed, on a particular issue regarding the best interests of the child, would go a step further than is permitted by the jurisdictional limitations placed on the High Court by the provisions of section 52 of the 1961 Act, as interpreted in both the High Court and the Supreme Court. The Court held that in the absence of a finding or findings of fact that it was in the best interests of the child, on the evidence considered, that the questions arose and should be answered, he was unable to answer the questions raised by the District Judge.

This case thus makes it clear that any case stated must contain sufficiently clear findings of fact to allow the High Court reach conclusions concerning the issues of law raised therein.

3.5.10 S.O'N. v. C.D.[210]

In *S.O'N. v. C.D.*, the High Court helpfully addressed the standards expected of lay litigants in court proceedings.

This case concerned divorce proceedings but may have implications in the child care/child protection area. The proceedings were heard by Judge Johnson on 7 and 9 March 2017. The

[210] [2018] IEHC 478.

applicant husband represented himself during the hearing, whereas the respondent wife was represented by a solicitor and junior counsel. The matter was heard over approximately three hours on 7 March. During the hearing, the court conducted a detailed and lengthy engagement on disputed issues between the parties. An agreed arrangement was reached in respect of custody; the court made orders in respect of the parties' three properties having considered all of the papers in the case and submissions made in relation thereto; and having considered the evidence adduced in respect of income and outgoings in the affidavits submitted, the court directed the husband to pay €60 per week maintenance for the dependent child. The matter was adjourned to 9 March to finalise the orders.

At the beginning of the hearing on 9 March, the husband made a statement to the court regarding the manner in which the learned judge conducted the hearing, complaining that he did not get an adequate opportunity to state his case and that he was 'railroaded' into agreeing to arrangements in respect of the child and the family home to which he did not agree. The applicant proposed that the court set aside its rulings and rehear the divorce proceedings without these perceived shortcomings. The court rejected the complaints of the applicant, stating that the applicant had been given every possible opportunity and assistance to put his case in the course of the hearing.

The judge declined to rehear the proceedings at which point the applicant chose to absent himself from the court. The order granting a decree of divorce and ancillary orders were thus made in his absence.

The applicant husband then applied to the High Court for judicial review, seeking an order quashing the Circuit Court order made on 9 March 2017. He advanced a number of grounds of review, arguing, *inter alia*, that the trial judge acted in breach of his constitutional and natural law rights to fair procedures by failing to observe his right to be heard.

The High Court refused the application. It held that there was no breach of the applicant's right to fair procedures. The Court noted that he had participated in and received a full and fair hearing in respect of the issues that fell to be determined by the court. The Court also had regard to the fact that the husband had sought to have the pension adjustment order made in January 2018. His conduct in so doing gave approval to the Circuit Court order which he

sought to challenge and thus, the Court held he had waived or abandoned his entitlement to relief.

The Court noted that the applicant consented to the custody and access terms which were ruled by the learned judge and became part of the order. This meant, therefore, that he was precluded by his conduct from challenging that part of the order by way of judicial review. The Court viewed his attempt to set aside the ruling on 9 March as unreasonable and an attempt to disrupt the smooth implementation of those agreed terms. The Court stated:

> Persons who represent themselves must also be held to a standard of reasonable behaviour with regard to the conduct of litigation and their dealings with the court and other litigants who are also entitled to a fair hearing and a just result. The resources of the courts are finite and in this case considerable care, time and effort was devoted by the judge to this issue. The applicant made a fully informed decision to agree to those terms and offered no credible reason to the learned judge or to this court as to his sudden abandonment of terms which had been accepted as forming the basis of an order made in the best interests of H. I am not satisfied to grant leave on this ground.

Ultimately, on numerous grounds therefore, the Court refused the husband's application for judicial review.

3.5.11 R v. The Child and Family Agency[211]

In *R v. Child and Family Agency*, the applicant mother sought leave to bring judicial review proceedings in respect of orders of the Circuit Court, essentially seeking to vacate all emergency and interim care orders made in respect of her three daughters and seeking their return to her care.

In the District Court in August 2017, emergency and thereafter interim care orders had been made in respect of the three children. The applicant appealed and on appeal, the Circuit Court affirmed the orders of the District judge in September 2017.

The applicant sought leave to apply for judicial review in relation to the Circuit Court orders made on appeal. She made numerous complaints against the respondent CFA, the DPP and both District and Circuit Court judges. She alleged, *inter alia*, that the Circuit Court orders

[211] [2018] IEHC 469.

were erroneous as no matter had been "adequately considered"; that she did not receive a fair hearing; and that the Circuit Court judge made orders after she had asked him to recuse himself in light of what she contends was an unfair Circuit Court hearing in respect of previous appeals. She also alleged that the course of justice was perverted by the judge's failure to "ensure attendance of ten witnesses". At the Circuit Court appeal hearing, the applicant had made an application for the Circuit Court judge to recuse himself. The Court declined and following this refusal, the applicant stated she wished to have the appeal deferred and left the court while the judge was speaking.

Regarding the allegation of bias, the Court applied the test in *Orange Ltd v. Director of Telecommunications (No.2)*,[212] that bias cannot be established from the nature of the decision made. It held that the fact that the Circuit Court judge made a certain adverse decision or decisions on a previous occasion was not, in and of itself, evidence of bias. The Court stated that as the essential element of the applicant's complaint was one of bias allegedly established by virtue of a previous decision of the judge, in its view such an allegation could not and did not establish or evidence bias sufficient to establish a prima facie arguable or stateable case.

Regarding the complaint that the judge failed to ensure the attendance of witnesses, namely that ten CFA witnesses did not appear to be in attendance at the Circuit Court hearing, the Court noted that the applicant had made no application to the court in respect of the subpoenas or the alleged failure on the part of the witnesses to answer them. She left court immediately after the Circuit Court judge failed to recuse himself. The Court concluded;

> Even though the matter of witnesses was addressed in a general manner before the court, given the actions of the applicant in leaving the court, and, as she has admitted, in not making any application to the judge in respect of the subpoenas and in depriving herself of the opportunity to do so, I do not believe that on the facts she has made out an arguable case for judicial review under this heading.

The High Court thus did not believe that on the facts of the case an arguable case for judicial review had been made by the applicant and refused leave to apply for judicial review.

[212] [2000] 4 IR 159.

3.5.12 L.S.M. (A Minor) v. The Child and Family Agency[213]

In *L.S.M. (A Minor) v. The Child and Family Agency*, an Article 40.4 application was made for the release of the applicant child, L.S.M., from the custody of the CFA.

In this case, the applicant child (L.S.M.) was born in June 2018. Her mother was aged 20 and had been in the care of the CFA during her teenage years. A number of concerns were held by the CFA regarding the mother, including substance misuse, mental health issues, emotional and behavioural difficulties, aggression, self-harm and offending behaviour. After the birth of the child, the mother had resided with the child in a mother and baby home. On 29 August 2018, however, an application was made by the CFA for an emergency care order, which was granted. Subsequently, the CFA made an application for an interim care order. Pursuant to the District Court rules, notice of such an application was required to be given two days in advance of the hearing date for the interim care order. The mother's solicitors, however, were only furnished with the CFA's reports the day before the hearing. On 5 September 2018, the application came before the District Court. Oral evidence was given by the unit manager of the mother and baby home, who was cross-examined by the mother. Evidence was then commenced by the Head and Clinical Lead of Family Treatment and Assessment Services at the home, but time did not permit his evidence to be completed. The District Court judge adjourned the hearing to the earliest possible date for completion, but issued an interim care order in the meantime, commenting that she had concerns, although she had only heard one part of the evidence. Counsel for the mother argued that the court had no jurisdiction to make an interim care order because the proceedings had not been completed, but the District judge held that the welfare of the child required same.

The child's mother then issued the proceedings pursuant to Article 40.4 of the Constitution on behalf of the child seeking the child's release from the care of the CFA. She advanced two arguments in support of her application. First, it was alleged that a fundamental denial of justice had taken place due to the late delivery of the materials - that the failure to furnish all reports two clear days in advance was a breach of the District Court Rules and was in breach of the applicant's right to fair procedures in terms of dealing with the application. Secondly,

[213] [2018] IEHC 500.

it was argued that a breach of fair procedures or want of jurisdiction had arisen from the District Court issuing an order without hearing the entirety of the evidence.

Regarding the alleged fundamental denial of justice, the Court noted that the mother's legal representative had not sought an adjournment in the District Court to deal with this material. The point made in the High Court – that the applicant was so severely prejudiced in defending the proceedings that it amounted to a denial of justice - was not made to the District Court. In these circumstances, Humphreys J. held that this objection was something of a legalistic one and did not meet the fairly high benchmark of a fundamental denial of justice as set out in *S. Mc.G. v. Child and Family Agency*.[214]

Considering the allegation of a breach of fair procedures or want of jurisdiction due to issuing an order without hearing all the evidence, the Court considered whether the court was entitled to make an order in circumstances where time had run out before all of the evidence had been completed. It noted that the order was not made on the basis of no evidence whatsoever, in that the court had both written evidence and had heard the first witness, who had been cross-examined. The High Court stated that the authority on this issue is the doctrine that arises from *The State (Lynch) v. Cooney*,[215] namely where there was '*no opportunity for debate or parley*' the requirements of fair procedures did not impose an obligation to hear from a party interested in the decision. From this, the Court stated that a broader principle can be established; "…*where circumstances are such that the full operation of conventional fair procedures is simply impractical, due in particular to the decision-maker running out of time, a practical and pragmatic solution whereby a curtailed or modified form of fair procedures is applied is not in itself a breach of the principle.*"[216]

The Court thus held that the District Judge's order, lasting only 12 days, was pragmatic and wise, having considered the doctrine that arises from *The State (Lynch) v. Cooney*. The Article 40 application was therefore dismissed.

[214] [2017] IESC 9.
[215] [1982] IR 337.
[216] *LSM (A Minor) v. The Child and Family Agency* [2018] IEHC 500, at para.9.

3.5.13 Emergency Care Order overturned – 27 November 2018

In a recent decision of the High Court, made on 27 November 2018 (unpublished at the time this report was completed), an emergency care order made in respect of a day-old baby was quashed as disproportionate.

In this case, the CFA obtained an emergency care order in respect of a day-old baby due to serious concerns of risk to his health and life if he was left with his mother. The mother, during her pregnancy, had missed several ante-natal appointments, but had 12 emergency room attendances. A few days before her due date, she insisted she wanted the baby out immediately, claiming that demons, spirits and angels were coming for her and that she had to save the baby from them. A pre-birth case conference was held, but both parents failed to attend. At this conference, it was concluded that an immediate and serious risk to the health and welfare of the baby would be triggered as soon as the parents learned of emergency care order proceedings. The CFA thus applied for and was granted an emergency care order *ex parte* on foot of evidence from social workers and a psychiatrist whose concerns included concern for what the mother might do if she thought the baby was possessed.

On foot of this order, the baby was removed from his mother at a maternity hospital. The CFA knew of the birth induction date in advance and of the potential risk to the child. Several other children of the parents were also in foster care for reasons including concerns by social workers about the mother's mental health, domestic violence and neglect, and those care orders had not been opposed by the parents. At the time of the removal of the child, the mother was initially calm but later became aggressive, insisting God had given her the child through immaculate conception and they could not take him. The mother had a Bible in one hand and the infant on her lap and there was concern he could fall to the ground. Eventually, the child was removed using minimal force. Interim care orders were subsequently granted in respect of the child.

The mother brought judicial review proceedings, challenging both the granting of the emergency care order and the subsequent interim care order.

Noonan J. in the High Court found that when seeking the emergency care order, the CFA had provided no evidence it had even considered any alternative to forcible removal, such as

detaining the baby in hospital for a few more days and permitting his mother supervised access. He stated there was "a world of difference" between that and the baby being forcibly taken from his mother and brought to an unknown location. The Court held that in seeking the emergency care order, this was a "nuclear option" sought by the CFA and the granting of same was not constitutionally proportionate or compliant with the European Convention on Human Rights (ECHR). Considering the jurisprudence of the European Court of Human Rights, the Court stated that it was clear that State authorities must consider all possible alternatives to the removal of the child from its family and the action taken must be proportionate. Furthermore, Article 42A of the Constitution requires that where the State endeavours to supply the place of the parents, it must act always with due regard for the natural and imprescriptible rights of the child.

While, therefore, the Court noted that there was more than ample evidence of potentially very serious risk to the baby if the mother was allowed leave hospital with him, the taking of a new born baby into public care at the moment of its birth was regarded by the Court as an extremely harsh measure, hugely traumatic for mother and baby. The Court thus quashed the emergency care order as disproportionate.

While quashing the emergency care order, the judge disagreed that the manner in which the interim care order was made two days later breached the rights to fair procedures of the parents. They had argued that their lawyers had insufficient time to prepare for the interim care order hearing and that the District Court should have adjourned the application. The Court however, noted that the requirement to take steps to protect children may sometimes take precedence over rights of parents to fully participate in such hearings, as previously held by the Supreme Court. It also placed weight on the fact that one of the reasons why the parents in this case had little time to prepare for the interim care order hearing had been their steadfast refusal over years to engage with the CFA or disclose their addresses. Noonan J. noted that the parents had not sworn affidavits disputing the CFA reports. The court thus upheld the interim care order under which the baby remained in foster care.

3.5.14 Obligation on the CFA to initiate proceedings – 13 December 2018

In a recent judgment (unreported at the time this report was completed) delivered on 13 December 2018, the High Court upheld a complaint made by the applicant grandmother concerning the failure of the CFA to take action in the circumstances of her case.

The applicant was the grandmother of three young children. In 2013, she assumed responsibility for their care following an emergency case conference with the CFA due to the "significant" and "imminent" risk posed to the children by their mother, her daughter. This involved the applicant leaving her home and job and moving to another part of the country. A child-protection plan was put in place, through which the applicant became the children's temporary carer and providing, if the mother was deemed able to parent them, that there would be a gradual transition to her care. No formal review of this plan had taken place since April 2014, despite issues arising concerning the children's safety and welfare since then. In particular, applications were made by the mother to the District Court in 2016 and 2017 seeking unsupervised overnight access. In the course of these proceedings, the mother alleged that she had not agreed to the current arrangement relating to the children. While ultimately the mother's application was dismissed on technical grounds, this could not prevent her from re-applying.

Judicial review proceedings were subsequently issued by the applicant in light of the failure of the CFA to apply for care orders on her behalf, despite several requests being made. The applicant feared that the mother would move to take the children back and without any formal legal right to retain the children, the applicant would not have been in a position to prevent the mother from taking custody of them. She thus argued that the children were at a very vulnerable stage in their lives and needed the protection of the CFA.

In opposing her action, the CFA argued that it had no legal obligation to intervene in this case. It submitted that the children were being cared for under a private care arrangement between the grandmother and the children's mother and, as far as it was concerned, the file on the case was closed as it had no current child protection or welfare concerns about the children.

The High Court granted the relief sought by the applicant to direct the CFA to apply for orders formally placing the children in her care. Meenan J. emphasised the State's constitutional duty to intervene to protect children when parents fail in their duties in that regard and, in particular, the duty of the CFA under the Child Care Act 1991 to protect children. He noted that the children's mother continued to suffer from addiction, mental-health problems and other difficulties, remained incapable of looking after the children and was also in a "dysfunctional and abusive" relationship with her partner. Moreover, Meenan J. stated that the District Court applications brought by the mother underlined the vulnerable legal situation of the applicant and could not be of benefit to the three children, who had significant childcare demands. Noting that letters from the grandmother's solicitor setting out her concerns were not replied to, the Court stated that it would have thought that a case review would have taken place at a minimum.

The Court accepted the children's position was as stated by the applicant, taking the view that as the CFA had failed to review the position in some four years, it could not validly dispute that. He found that the children require, within the meaning of section 16 of the Child Care Act 1991, "care or protection" that they were unlikely to receive unless a formal care or supervision order was made for them. In the circumstances, the grandmother was entitled to succeed, he ruled. The case was adjourned to consider the content of the formal orders to be made in these circumstances.

3.5.15 The Child and Family Agency v. K.B. and Another[217]

In *The Child and Family Agency v. K.B. and Another*, the High Court considered whether an application for a special care order must be heard "otherwise than in public" or whether it can be dealt with by way of reporting restrictions.

In this case, the CFA applied for an extension of the period for which a special care order had effect pursuant to section 23J(7) of the Child Care Act 1991. An issue arose therein as to whether such an application needs to be heard *in camera* or whether reporting restrictions would suffice. The Court noted that section 23NH of the 1991 Act provides that "Proceedings under this Part shall be heard otherwise than in public". The question was whether "otherwise

[217] [2018] IEHC 513.

than in public" means entirely otherwise than in public in line with the *in camera* rule, or whether it could encompass situations of something less than that.

The Court considered the authorities set out in Kelly's The Irish Constitution, 4th Ed. (Dublin, 2003) that some flexibility in the "otherwise than in public" rule applies in practice, particularly regarding the delivery of the judgment, and in such situations there is an element of discretion vested in the court. If there was no flexibility, such an interpretation could raise constitutional or ECHR issues.

The High Court considered that the importance of public justice as a constitutional principle is such that a court should be slow to read a statutory provision like the one at issue here in an absolute manner incapable of legitimately flexible and discretionary application, while remaining sensitive at all times to the confidential nature of the subject-matter of the proceedings. On that basis, the Court determined to read it as allowing a court to have discretion to impose reporting restrictions rather than requiring an *in camera* hearing.

Humphreys J. held that this approach involves reading "otherwise than in public" as meaning "otherwise than fully in public", so as to allow the possibility of the protection of the confidentiality of the proceedings to be secured in a particular case by means, such as reporting restrictions, rather than closing the doors of the court, even if the latter is the general approach in practice in any particular category of cases.

Applying this approach to the facts of this specific case and considering how such a discretion should be exercised in this case, the Court found that any legitimate concerns of the parties in the particular circumstances of this specific application could be dealt with by reporting restrictions to the effect that nothing should be published either identifying the non-professional parties or setting out the contents of the affidavits and pleadings other than in general terms, and by excluding persons not involved in the case other than legal professionals and representatives of the media. The Court proceeded to hear the application on that basis.

The Court, therefore, in this case held that the obligation to hear Special Care Order cases "otherwise than in public" could be satisfied by imposing reporting restrictions.

3.5.16 CFA v. A.A. (a minor) and C.[218]

The case of *CFA v. A.A. (a minor) and C.* considered the legal issue as to whether a doctor can disclose the HIV status of her patient, without the consent and against the will of that patient, to a person who the doctor believes is having unprotected sex with that patient and so is at risk of contracting HIV. Twomey J. in the High Court considered this issue as well as the broader question as to the circumstances in which a doctor can breach his or her duty of patient confidentiality due to a risk of harm to a third party.

The CFA was the plaintiff in this case as A., almost aged 18, had been in the statutory care of the CFA since March 2015. A. had exhibited significant behavioural problems in the past. He was, however, living with his family at this time. B. was not a party to these proceedings and was unaware of their existence. She was also aged 17 and was unaware that A. had HIV. The CFA accepted that while A. and B. were still children, the legal issue in this case arose regardless of whether they were children or adults. It brought these proceedings against A., and C., his mother, given his age.

The Court noted that the CFA, rather than a doctor, was the applicant seeking to breach the patient confidentiality that exists between medical professionals and a patient simply because the CFA was aware of the HIV status of A., as well as the relationship between him and B. Twomey J. held that nothing turned on the identity of the plaintiff, as in other cases it may be a doctor who had the relevant information, whereas here, it was the CFA.

Prior to considering the legal issues in the case, the Court noted that a factual dispute existed between the parties. The plaintiff contended that A. was having unprotected sex with B. It pointed to the fact that A. had admitted to having sex previously with others; that he had been ambivalent in his answers to social workers regarding whether he used condoms on those occasions; that there were photographs on social media of A. and B. together, exchanging a kiss on the lips with tags such as “love her”; that there was daily contact between them; that A. had refused the offer of condoms from the CFA; and that one morning in June 2017, when the Gardaí forced entry into A.’s bedroom, B. was present in A.’s bed wearing a t-shirt and

[218] [2018] IEHC 112.

bare-legged. The plaintiff argued that the cumulative effect of this evidence was such that a court could infer that A. was having sex with B.

While A. acknowledged that B. was his good friend, he denied that she was his girlfriend and denied that they have ever had sex. He indicated that the photographs were simply the way that young people who are close friends express themselves on social media; that he refused condoms as he had enough condoms; and that on the occasion of the Gardaí's entry, B. did not stay over, but she had called in that morning and he had asked her to get into bed and pretend to be asleep when the Gardaí were at the door as he left. He therefore argued that there was no basis for his HIV status to be disclosed to B. It was also argued that despite this circumstantial evidence, no evidence was produced from the staff of A.'s former residential home or from social workers that A. and B. were in an intimate relationship.

The plaintiff further argued that C. had suggested to them that B. be tested for HIV, rather than disclose A.'s HIV status. The Court noted that it was difficult to believe that C. would have suggested this course of action unless she believed A. and B. were having sex, however this was not direct evidence that A. was having sex with B., but rather a mother's belief that same might be occurring. It therefore was just another factor in determining the balance of probabilities. The Court also found it relevant that C. had told a social worker that B. was staying over in her home at a meeting in June 2018, although C. said she had told the social worker that a group of friends were staying overnight. The social worker was very worried that A. was having unprotected sex with B.

A. gave evidence in the within proceedings. The Court found A. to be a convincing and very honest witness, noting that he does not want his HIV status to be disclosed. His evidence was that he would be so devastated in the event of such disclosure that he would kill himself due to the social stigma of having HIV. Although honest, the Court stated it was not inconceivable that, because he felt so strongly about not disclosing his HIV status to anyone, he would lie about whether he was in a sexual relationship with B. in order to ensure that his HIV status was not disclosed.

In its application, the plaintiff relied on the medical opinion of a Consultant Paediatrician and Infectious Disease Specialist who averred in her affidavit that this was one of the rare situations where disclosure of patient information without his/her consent was justifiable to

prevent harm to another identifiable person who is potentially at risk. The medical evidence was that HIV was a chronic lifelong condition that people manage, particularly through taking antiretroviral medication on a daily basis. This then means that HIV is for all intents and purposes not communicable by sexual activity and that risk is even further lessened if condoms are used. If, however, such medication is not taken consistently, then a person having unprotected sex with A. would be exposed to the risk of contracting the HIV virus. There was evidence before the Court that for considerable parts of 2017, A. was not taking his antiretroviral drugs on a daily basis and the Court concluded that A. could have lost virological control, albeit briefly, at some stage between May and July 2017.

The Court considered existing caselaw concerning the breach of patient confidentiality from other jurisdictions. It recognised that there may be circumstances in which professionals may be entitled to breach confidentiality to their patients. The Court cited the leading English case in the area of patient confidentiality, *W. v. Edgell*,[219] where the Court of Appeal held that only the most compelling circumstances could justify a doctor in acting in a way which would injure the immediate interests of his patient, as the patient perceived them, without obtaining his consent. In this case, the Court of Appeal found that the public interest in protecting third parties against possible death, resulting from a bomb planted by the patient, a known killer, justified the breach of patient confidentiality.

The Court noted that this was the first time that this issue was raised in the Irish Courts. It held that the appropriate test to apply to determine whether patient confidentially should be breached is whether, on the balance of probabilities, the failure to breach patient confidentiality creates a significant risk of death or very serious harm to an innocent third party. Applying this test, the Court concluded that the plaintiff failed to establish on the balance of probabilities that A. was having sex with B., let alone unprotected sex. It stated there was not enough evidence to support a finding that A. was having sexual intercourse with B. On this basis, the Court held that there was no risk to B. of her contracting HIV and therefore no basis for the breach of patient confidentiality.

The Court held that even if it was wrong on the factual dispute and A. and B. were having sex, HIV is no longer a terminal condition, but rather a chronic and lifelong condition that

[219] [1990] WLR 471.

can be managed. Accordingly, it is not a "very serious harm" to justify the breach of patient confidentiality, which should only be breached in exceptional circumstances such as were present in the case of *Edgell.* In addition, the Court held that there was not a "significant risk" of that harm as the risk of A. contracting HIV through sexual intercourse with B. was in the region of 0.04%, which can itself be dramatically reduced by the use of condoms. Further, if A. and B. were having sex, the Court stated that B. would not be an "innocent third party" in the legal sense since she would be undertaking in an activity which she knew, or should know, carries a risk of contracting sexually transmitted diseases, including HIV.

In all the circumstances, therefore, the Court concluded that there was no basis for breaching A.'s patient confidentiality, even if he was engaged in unprotected sex with B. It held that the public interest in ensuring that patients can have absolute confidence in revealing their most private medical and personal information to doctors, without fear of disclosure to third parties, supersedes the right of B. to be warned that if she engages in unprotected sexual intercourse with A., she risks contracting HIV. The Court emphasised that the high bar to disclosure was not because the Court did not believe there was merit or a public interest in seeking to protect B., but because there is a greater public interest in all patients and prospective patients knowing their personal medical information will not be disclosed, save in the most extreme of circumstances. In reaching its decision, the Court was also mindful of the consequences of the order sought on all medical practitioners. If the order was granted giving medical professionals the right to breach patient confidentiality in this manner, this would place on medical professionals a responsibility in the future to decide, in cases of sexually transmissible diseases, whether a sexual partner of his or her patient needed to be notified of the harm to which he or she was exposed. With this responsibility would come liability for medical practitioners who failed to breach patient confidentiality.

3.5.17 CFA v. A.A. (a minor) and C. (No. 2)[220]

In *CFA. v. A.A. (a minor) and C. (No. 2)*, the issue of legal costs of the abovementioned proceedings is addressed. The facts of this case and the determination reached on the substantive issue are set out in full above.

[220] [2018] IEHC 116.

With regard to the costs of the child, A.A., it was conceded by the CFA that costs should be awarded against the CFA in favour of the child. The CFA had referred the child to a solicitor when it became apparent that he did not wish to disclose his HIV status to B., as he claimed they were not having sex. A dispute arose, however, concerning the legal costs for A.'s mother, C. The CFA argued that there should be no order as to costs between the CFA and C.

Twomey J. noted that C. had received legal aid, thus the dispute arises between two State agencies, the Legal Aid Board and the CFA, as to who should be liable for C.'s legal costs. C. herself, therefore, could not suffer any prejudice or gain in any way by the order that the Court would make regarding legal costs.

The Court was guided by the Supreme Court case of *CFA v. O.A.*[221]. While that case involved child care orders and legal costs in the District Court (and on appeal in the Circuit Court), it stated that it could see no reason why the principles set down therein would not equally apply to the legal costs incurred in the High Court in a child welfare case, such as this one.

Applying these principles to the present case, the Court stated that the starting point as *per* MacMenamin J. is that that there should be no order as to costs in favour of C. in this case. Considering the exceptions to this general rule, it held that the CFA did not act capriciously, arbitrarily or unreasonably in commencing or maintaining the proceedings in this case, since it was motivated by a genuine desire to protect B. from harm, based on expert medical opinion. Secondly, the Court found that this was not a case where the outcome was clear and compelling, particularly as there was no precedent in this country and little if any precedent abroad on the legal points at issue. Thirdly, the Court noted that no injustice would be visited upon C. if her legal costs were discharged by the Legal Aid Board rather than by CFA. Further, the Court did not see any injustice being visited on the Legal Aid Board, if it, rather than the CFA discharged the costs.

The Court viewed a particular advantage in the costs rule set down by the Supreme Court in cases such as this where the child is represented – namely that the Board will have to give

[221] [2015] IESC 52.

very active consideration, whether, and to what extent, it is justified in expending further legal costs which will ultimately have to be paid for by the taxpayer on behalf of C., when C.'s primary role at the trial was as a witness as to fact in relation to her "adult" child, something which does not require legal representation.

SECTION 4: CRIMINAL DEVELOPMENTS

4.1 DETENTION OF YOUNG PERSONS

The age-appropriate treatment of children who commit criminal offences is widely prioritised in both international and domestic law. Article 37(b) of the United Nations Convention on the Rights of the Child provides that the arrest, detention or imprisonment of a child must be in conformity with the law and must only be used as a measure of last resort and for the shortest appropriate period of time. Ireland similarly recognises and promotes this principle that the detention of a child should take place as a last resort. Section 143 of the Children Act 2001, as amended by section 158 and Schedule 4 of the Criminal Justice Act 2006, is instructive in this regard. It provides that detention cannot be imposed on a child unless the court is satisfied that it is the only suitable manner of dealing with the child and a place in a children detention school is available.

While, therefore, there is generally an emphasis on avoiding ordering the detention of young persons, there are cases where no other option is available. At times, children are detained by the State – either on remand or as part of their sentence. Until 1 June 2016, there were three children detention schools located in Dublin, namely Trinity House School, Oberstown Boy's School and Oberstown Girl's school. These three schools were amalgamated into the Oberstown Children Detention Campus (in Lusk, Co. Dublin) under section 14 of the Children (Amendment) Act 2015.[222] Under the Children Act 2001, the main objective of the Oberstown Children Detention Campus is to provide care, education, training and other programmes, with a view to reintegrating the child into society.

Inspection of the Oberstown Children Detention Campus

In order to ensure that appropriate standards are met within detention schools, independent inspections take place regularly. These are carried out annually by the Health Information and Quality Authority (HIQA) with reference to the Standards and Criteria for Children Detention Schools. The overall purpose of such an inspection is to safeguard vulnerable children who reside therein, as well as provide assurance to the public that children are receiving a service

[222] Under S.I. No. 273 of 2016, this amalgamation came into effect on 1 June 2016.

that meets the requirements of quality standards. In March 2018, the most recent inspection of the Oberstown Children Detention Campus took place. This was an unannounced, full inspection which took place over a 5-day period. The report on this inspection was published by HIQA on its website on 9 October 2018.[223] The results contained in the report are to be welcomed as showing significant progress in the care of children and protection of children's rights within the Oberstown campus.

The report found that the campus is substantially compliant or compliant across five areas – Education; Health; Purpose and Function; Children's Rights; and Child Protection. It noted a number of positive developments. Children's health needs, including medication management, were noted to be met to a good standard with significant improvements evident from March 2017, at which time the health standard in Oberstown was recorded as a "major non-compliance". Over the course of a year, therefore, vast improvements were made in this area. The education needs of the children in Oberstown were found to be appropriately assessed and met. The establishment of a campus council, which emphasises and provides for increased participation and consultation with children, was regarded as a particularly positive move. The report also noted improvements in the management of challenging behaviour and a reduction in the need to use restrictive practices.

There were no findings of major non-compliance, however the report reached a finding of moderate non-compliance in five areas: Care of Children; Planning for Children; Premises Safety and Security; Dealing with Offending Behaviour; and Staffing and Management. In particular, the report noted that the campus was failing to meet National Standards in that children were not aware of their right to access their information and how to do so; that procedures to support the implementation of the campus complaints policy were not in place; and that not all complaints were appropriately recorded to include action taken to address complaints, timeframes and level of satisfaction of the complainant. Furthermore, the report recognised that there was no procedure in place to ensure timely and consistent inter-agency communication between Tusla social work services and the designated liaison person for the campus in relation to child protection concerns.

[223] Report available at - https://www.hiqa.ie/system/files?file=inspectionreports/4225%2C%20Oberstown%20Children%20Detention%20Campus%2C%2007%20March%202018.pdf.

Overall, there was a reduction in the number of non-compliance findings compared to the report carried out in 2017. There was, however, found to be inadequate record-keeping on physical interventions used with children and concerning the use of handcuffs on children within a secure environment. The data provided to the inspectors, relating to the 12 months prior to the inspection in March 2018, showed handcuffs had been used on children in certain circumstances. On three occasions, this was cited as being required for the child's court attendance; on two occasions, handcuffs were used following incidents; and three children had been handcuffed following attempted escapes. The inspection found that the records regarding this use of handcuffs were lacking in detail – failing to contain information in relation to how long they were used for, when they were removed or authorisations for use. Records on the use of handcuffs were noted therefore as requiring further improvement in order to effectively monitor appropriate use.

The report indicated a reduction in the use of single separation. Single separation is a behaviour management technique where a child is placed in a separate protection room - a designated room on each unit, designed to minimise the risk of the young person harming himself or taking his own life. A campus policy has been in place in Oberstown since June 2017 which sets out that single separation must only be used after all interventions have failed and the use of this intervention must be safe, effective and proportionate. The report showed that when the designated protection room was used, it was usually used for a short period only. Furthermore, throughout 2017 there was a 56% reduction in the use of this type of intervention, when compared with 2016. Nonetheless, the report records 1,701 incidents of single separation during 2017 – the number of incidences therefore remaining very high – and records relating to the use of single separation were also lacking in sufficient detail and difficult to read.

Concern was raised in the report about CCTV-monitored searches. It was noted that during the admission or re-admission process, children would be searched to ensure they were not concealing any dangerous or prohibited items or substances. This process involved a child undressing and using a towel or dressing gown to cover himself. While every effort was made by staff completing this admissions process to respect the dignity and privacy of the children, the room in which this took place was covered by CCTV cameras. Consideration, therefore, was not given to the fact that these private images would be visible on monitors within communal staff offices. This meant they would be visible to care staff and other

professionals who may be in communal staff rooms at that time. A child's right to privacy, therefore, was not always maintained during the admission process.

Despite improvements since 2017 following the publication of the previous HIQA inspection report, it is clear that steps must be taken to further advance the standards in place within the juvenile detention facility at Oberstown. In this regard, the Irish Penal Reform Trust (IPRT) has called for certain developments to be introduced.[224] It recommends that Oberstown Campus management heighten its recording, analysis and oversight of restricted practices on the campus and seeks the regular publication of data on the use of physical interventions and handcuffs. It calls for urgent improvement in engagement by Tusla with management and children at Oberstown, including the completion of the inter-agency communication protocol between Tusla and the Campus, as well as the appointment of a Tusla representative to the Board of Oberstown. Finally, the IPRT recommends evaluation of the pilot Bail Supervision Scheme, with a view to extending the scheme so that children who are in care are not excluded.

In response to the report, in September 2018, Oberstown Children Detention Campus has developed an Action Plan to address the observations made within the report and this has been accepted by HIQA. The Action Plan details the actions that either have been taken already by the campus within 2018 or actions that it is planning to take following HIQA's assessment. Contained in the Action Plan is particular reference to the Oberstown Children Detention Campus Strategic Plan 2017 – 2020, which has an overall objective of providing the best possible care for young people. The Strategic Plan, *inter alia*, seeks to promote participation of young people in decision-making. In this regard, a Participation Strategy was approved in October 2017 – promoting engagement and consultation with young people and progress on the strategy is to be reported to the Board of Management twice yearly. An information booklet was developed early in 2018 for each young person on admission to provide him with information about life in Oberstown, his rights, schooling, and safety and security on campus, and the appointment of a Campus Advocacy Officer for young people was to be completed by the end of 2018.

[224] http://www.iprt.ie/contents/3341, accessed on 31 October 2018.

The Action Plan, *inter alia*, indicates that a process of reviewing single separation on a daily basis is now underway; report forms have been updated since 1 August 2018; and the Director is notified daily since June 2018 on the use of single separation for each young person. The Plan specifically addresses the failure to ensure effective inter-agency communication between Tusla and the designated liaison person for the campus by designing an inter-agency communication protocol between Tusla and the campus which was due to be finalised in the last quarter of 2018. Similarly, the Plan seeks to put in place a collaborative approach between the Probation Service and Oberstown in the identification of areas of risk and needs associated with offending behaviour of young people in Oberstown.

While many of the actions detailed within the Action Plan are already underway, it is recommended that the continued implementation of and adherence to the contents of the Plan takes place. This is essential to ensure that all of the concerns highlighted within the Inspection are addressed. Furthermore, these actions will serve to ensure that the Oberstown Campus meets the Standards and Criteria for Children Detention Schools, where currently it is not fully compliant with same.

Recommendations

It is recommended that all steps necessary be taken to address any non-compliance findings of the 2018 HIQA Inspection Report into the Oberstown Children Detention Campus forthwith.

It is recommended that the contents of the Action Plan prepared on 17 September 2018 in response to the Inspection Report be adhered to in order to ensure that the Oberstown Campus meets the National Standards and Criteria for Children Detention Schools.

Bail Supervision Scheme

In line with the general principle that young persons should not be detained prior to the hearing of their cases and in support of the age-appropriate treatment of children, in my Fourth Report, I recommended the introduction of a Bail Support Scheme in this

jurisdiction.[225] In my Eleventh Report, I welcomed the significant progress that has been made recently in this regard, noting that in June 2017, the Minister for Children and Youth Affairs, Dr Katherine Zappone T.D., launched Ireland's first Bail Supervision Scheme (BSS) for young offenders.

The pilot scheme is currently operational and is being managed by the Irish Youth Justice Service supported by Extern (the social justice charity) using the MultiSystemic Therapy (MST) intervention programme. The BSS offers to young persons a particular type of bail with intensive 24/7 supervision using multi-systemic therapy. It works through referrals from Oberstown Children Detention Campus on a second appearance in Court having been remanded to Oberstown or on any appearance in Court where the defence solicitor may refer to the scheme and where the young person is assessed for suitability while still in the community. Staff in Oberstown refer young persons to the Bail Supervision Scheme – to try to allow those on remand to address their behaviour through this community-based intervention, rather than being further detained pending the outcome of their case. As noted in my Eleventh Report, this pilot project is located only in Dublin and caters for just 25 young people annually.[226] The Research Evidence into Policy Programmes and Practice (REPPP)[227] project is currently reviewing and evaluating the progress of the scheme.

In my Eleventh Report, I raised concerns relating to the small pool of young persons to which the Scheme is open – applying to so few young people annually and only those who reside in the Dublin region. This prevents those who live elsewhere in the country from accessing the Scheme. I recommended, therefore, that consideration be given to implementing the Scheme in other locations across the country after the completion of its first year in the Dublin region. This would allow young offenders residing elsewhere in the country to access this crucial support – not just those based in the Dublin area. It would also prevent discrimination based on geographical location, which contradicts the State's obligation to protect children from discrimination as set out in Article 2 UNCRC, as well as expand the number of young people who could participate in the Scheme. I understand that implementing the Scheme in other locations and opening the Scheme to children in care are part of the evaluation framework

[225] See Dr. Geoffrey Shannon, *Fourth Report of the Special Rapporteur on Child Protection* (2010).
[226] See Dr. Geoffrey Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (2018).
[227] Research Evidence into Policy Programmes and Practice (REPPP) project, School of Law, University of Limerick.

which was developed to gather the empirical evidence necessary to extend/expand the Scheme.

Similarly, the Scheme should be open to children in care as recommended by the IPRT above. Under the present criteria for the Scheme, participants must have a primary caregiver willing to work with the BSS team. A child who has a significant adult/guardian, which includes foster parents, can avail of the BSS.[228] In some situations, however, the young person may not have an appropriate parent or guardian. This may be because a child is in the care of foster parents or because he/she lives within a residential programme, or due to addiction issues or mental health difficulties, his/her parent or guardian is not capable or willing to work with the multisystemic therapist. Children in these difficult positions, where their vulnerability is heightened due to their lack of familial support, should not be automatically excluded from accessing the BSS. Further thought is thus required on this eligibility issue to ensure that the Scheme is accessible to all young offenders, whatever the family situation or supports. As stated above, I understand that this issue is part of the evaluation framework which was developed to gather the empirical evidence necessary to extend/expand the Scheme.

Recommendations

The Bail Supervision Scheme, now in its third year of operation, should be expanded to operate in other locations across the country, preventing discrimination based on geographical location.

The scope of the Scheme should be extended forthwith to increase the numbers participating on the Scheme. The amount of young people permitted to access the BSS should at the very least be doubled.

[228] Care by a foster parent is not an exclusionary criterion under the present MST intervention criteria.

4.2 ONLINE WORLD AND CHILDREN

Child Sexual Abuse – Garda Inspectorate Review

On 27 February 2018, *Responding to Child Sexual Abuse – A follow up Review from the Garda Inspectorate* was published.[229] The Garda Síochána Inspectorate is an independent statutory body established under Part 5 of the Garda Síochána Act 2005 with the objective of ensuring that the resources available to the Garda Síochána are used to maintain and achieve the highest levels of effectiveness and efficiency in its operation. The Inspectorate previously published a report on the investigation of child sexual abuse, *Responding to Child Sexual Abuse*, in 2012; a comprehensive examination of Garda Síochána practices and procedures in this particular area of offending. The recommendations contained therein prompted the Minister for Justice and Equality to request a follow-up report, to look at progress since the previous report and consider new challenges facing the investigation of child sexual abuse. In this recent Review, completed in December 2017, the Inspectorate re-examined the area of child sexual abuse and assessed whether the recommendations made in the original report had been implemented. The Review also makes 24 new recommendations to address the findings made therein.

The Review acknowledges a number of positive developments that have taken place in recent years – emphasising progress in the area of cooperation between An Garda Síochána and Tusla under *Children First* and other initiatives. It welcomes the introduction of the Criminal Law (Sexual Offences) Act 2017 which enacts new offences and greater penalties to tackle child exploitation and abuse, and notes that 13 of the 29 recommendations originally made in the initial report have been implemented in full. The Review, however, highlights that steps need to be taken to fully implement recommendations that were originally made, but have only been implemented partially thus far. Furthermore, there are a significant number of new recommendations contained within the Review, many of which continue to seek to improve joint-working arrangements between An Garda Síochána and Tusla. The Review, *inter alia*, proposes the development of a National Strategy for Child Sexual Abuse, Child Sexual Exploitation and Online Risks to Child Safety; it recommends the development of a national

[229] A copy of *Responding to Child Sexual Abuse – A follow up Review from the Garda Inspectorate* report is available at http://www.gsinsp.ie.

protocol for the sharing of information; and advises on the implementation of a standard operating procedure for assessing, managing and investigating child abuse materials.

From a child-centred perspective, it is important to note that 66% of all reported sexual offences in Ireland involve a victim who is a child. From an online perspective, the increasing prevalence of information and communication technology as an aid to commit child sexual abuse offences is of profound concern and it is worrying that 28% of Irish children have made contact online with someone they did not know.[230] In this vein, the Review recognises the considerable increase in the risks posed by the internet and social media since the 2012 Report. It states that the volume of online child abuse material is growing exponentially, that there was insufficient online Garda presence at the time of the review and that there are long delays in the forensic examination of computers, despite an increase in resources. It views internet service providers as having an important role to play in preventing access to child abuse material. Clearly, therefore, in the area of online child sexual abuse, improvements are urgently needed.

Chapter 4 of the Review specifically concerns Online Child Sexual Abuse and Child Sexual Exploitation. It notes the potential dangers which are posed to children from the internet and that the growing number of indecent images and videos of children available online poses a major challenge for the Irish police service. It looks at how abusers use internet networks to share child abuse material; analyses the structure and approach of An Garda Síochána in dealing with online threats; considers how the Gardaí can respond more effectively to the use of the internet in circulating child abuse material; and reviews the practical steps that are taken when a referral is made involving a computer or other technical device which has accessed child abuse material.

The Review considers in detail the process of referrals of child abuse material to the Online Child Exploitation Unit (OnCE). Certain issues arise therein. In particular, the Review discusses the categorisation of child abuse material. Many countries visited by the Inspectorate are using the Child Abuse Image Database (CAID). This database holds worldwide child abuse material. Once child abuse material is categorised by three different

[230] As noted in my Seventh Report – see Dr. Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014).

police services to the same level, it is stored in CAID as a recognised and categorised image or video. The database ultimately increases the speed at which devices can be analysed and allows much quicker cataloguing and grading. The use of CAID saves time, can assist during on-site triage or an initial assessment to prioritise which of the suspects devices requires further analysis and allows cases to progress quicker. CAID is not yet being widely used in Ireland, meaning that investigators in the OnCE unit are regularly and unnecessarily viewing and categorising child abuse material previously accessed by its own unit or by another police agency. It is recommended that Ireland commence using this database as soon as practicable. The benefits of its use are clear from its operation in other jurisdictions, as evidenced by the Review.

The Review also highlights the benefits of carrying out risk assessments in cases of child sexual abuse and exploitation. It notes that managing the risk posed by online child sexual abusers in light of the growing volume of child abuse material is a challenge for all police services. In other jurisdictions, the Kent Internet Risk Assessment Tool (KIRAT) is used – giving criteria by which the risk posed by each individual offender can be assessed. Once this risk assessment is carried out, the police can use the information gleaned therefrom to prioritise its activities and intelligence. This ensures that those abusers who pose the greatest risk to children can be identified and targeted with priority. The Inspectorate recommends therefore that a risk-based approach, such as KIRAT, be utilised to prioritise intelligence and enhance decision-making.

Having regard to the referral process and a number of the findings made within the Review, including the concerns regarding lack of risk assessment and use of CAID, the Inspectorate has recommended the implementation of a standard operating procedure to assess, manage and investigate child abuse material referrals. This would ensure a more effective and efficient system, with less delay. It also makes a number of helpful recommendations in relation to searches of addresses and seizing of devices. It similarly recommends that a standard operating procedure be introduced for conducting searches of addresses in abuse cases, as well as the use of forensic examiners during such searches. This would ensure that suspect devices were correctly handled, and only necessary devices seized, thereby reducing the number of devices that would be required to be sent for examination and further reduce the backlog in examinations. The Review also recommends annual joint-strategic assessments be carried out concerning the threat posed by the internet to the safety of

children - in consultation with key partner agencies, such as Tusla and the Irish Society for the Prevention of Cruelty to Children.

Considering the legislation in place to tackle online child abuse, the Review found that the two key pieces of legislation in this area – the Child Trafficking and Pornography Act 1988 and the Criminal Law (Sexual Offences) Act 2017 – are lacking in one particular respect. Neither provides the Gardaí with a power to compel the lawful owner of a computer or other device to provide a password to facilitate access to such computer or device. The 1988 Act provides that on the sworn information of a Garda sergeant, a district court judge may issue a warrant for the search of a place, and any persons found therein, if an offence relating to child pornography is suspected. While the Act also states that a person at such an address must provide his/her name and address to a Garda member, it does not contain a power to request a password for a computer or other device. A similar power, however, currently exists under the Criminal Justice (Theft and Fraud Offences) Act 2001.[231] Clearly such a power is required also for the investigation of online child sex abuse, as well as theft and fraudulent offences. Password-protected devices and encryption codes are a major obstacle to effective investigation of all online crime.

The Inspectorate thus is of the view that such a power would be of great assistance in the investigation of these crimes and this lacuna in the criminal legislation should be addressed. It therefore recommends that a provision be introduced to provide the Gardaí with the power to compel any person who appears to have lawful access to a computer or other device to provide a password and any encryption key or code in order to operate that computer. Failure to comply with the request of the Gardaí in this regard should amount to an offence in and of itself. The Review invites consideration as to whether such powers should be provided to the Gardaí with or without the authority of a warrant and does not make a recommendation in this regard.

I believe that if the Review promotes such powers as necessary for the effective investigation of online child sex abuse, they should be provided for in criminal legislation forthwith. While arguably the requirement to provide the necessary password/encryption codes could amount to a breach of an individual's right to privacy, this could be justified in pursuit of

[231] Section 48, Criminal Justice (Theft and Fraud Offences) Act 2001.

legitimate aims, namely the apprehension of child sex abusers and curbing the use of the online world to enable child sexual exploitation. This therefore would amount to a necessary interference with privacy rights and arguably would not be in breach of the protections contained within the Constitution or the ECHR. Furthermore, I believe that a warrant should not be required in such cases, provided that the investigating Garda reasonably believes that the computer and/or device in question has been used in the commission of an offence under either the 1988 Act or 2017 Act *and* where the investigating member holds a reasonable belief that the person in respect of whom the request has been made has lawful access to the computer and/or device.

Following the publication of the Review, the government agreed to establish an independently chaired cross-sectoral Implementation Group in order to implement the recommendations. It reports every quarter to the Cabinet Committee on social policy. This Group comprises senior officials across a number of departments - the Department of Justice and Equality, the Department of Children and Youth Affairs, the Department of Communications, Climate Action and Environment and the Department of Public Expenditure and Reform - as well as An Garda Síochána, Tusla and other Government bodies as required. It also considers the views of the Policing Authority and other key stakeholders. This is a welcome step to ensure that the Inspectorate's recommendations are advanced promptly and reviewed at regular intervals.

Recommendations

The recommendations contained within "Responding to Child Sexual Abuse – A follow up Review from the Garda Inspectorate" should be followed in full and active steps taken to ensure the effective implementation of these recommendations as soon as possible, with the assistance of the Implementation Group.

The Child Abuse Image Database (CAID) should be employed in this jurisdiction to assist in the investigation of online child sex abuse cases. Its benefits are apparent from the content of the Review from the Garda Inspectorate. It is recommended that training in its use be provided forthwith and that it be operative as soon as practicable.

The criminal legislation should be amended to provide for a power to compel any person who appears to have lawful access to a computer/device to provide to a member of An Garda Síochána a password/encryption key/code in order to operate that computer/device. Failure to comply with the request made by An Garda Síochána should amount to a criminal offence.

This power to require passwords/codes should operate without the necessity for obtaining a warrant, where the investigating member holds a reasonable belief both in relation to the device and in relation to the person in respect of whom the request has been made.

Online Safety

Further developments have occurred during 2018 with regard to child protection and the online world. On an international level, on 4 July 2018, the Council of Europe's Committee of Ministers adopted a new Recommendation concerning online safety.[232] It deals with how to better respect, protect and fulfil the rights of the child in the digital world and it provides a significant number of detailed and comprehensive guidelines for the governments of its Member States on this issue.

The Recommendation is discussed more fully in Section 1 above, concerning international developments. Amongst its guidelines, the Recommendation advises governments to review their legislation, policies and practices to ensure that they all adequately address the full range of children's rights, taking into account the best interests of the child. While it promotes children's access to the online world, it advocates that sufficient measures must be in place for their protection. It advises that digital literacy education be included in the educational curriculum for children from a young age. The Recommendation highlights the necessity to have in place competent bodies who are responsible for implementing action in a timely and efficient manner and that these bodies be adequately resourced and funded. Furthermore, it recommends that governments require business enterprises to also meet their responsibility to respect children's rights in the digital environment and be held accountable for failures. States are advised to cooperate with the Council of Europe in the implementation

[232] Recommendation CM/Rec (2018) 7 of the Committee of Ministers to Member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment; Adopted by the Committee of Ministers on 4 July 2018 at the 1321st meeting of the Ministers' Deputies.

of the guidelines and in this regard, they are urged to closely monitor existing programmes or newly-created ones with the aim of protecting the rights of the child in the digital environment.

The guidelines contained within the Council of Europe's new Recommendation are non-binding, however they stem from obligations under the United Nations Convention on the Rights of the Child (CRC) and the European Convention on Human Rights (ECHR). They build on existing legal instruments and provide comprehensive direction for action by Member States. Detailed consideration should be given to the content of the Committee of Ministers' Recommendation on the rights of the child in the digital environment and steps should be taken in this jurisdiction to follow the guidelines contained in the Council of Europe's Recommendation.

On 11 July 2018, some progress in this area was made on a national scale – as discussed more fully in Section 1 above - when the Government launched its first Action Plan for Online Safety 2018-2019.[233] The primary objective of the Action Plan is to put in place actions that are achievable over an 18-month period and which will have the greatest impact on online safety for all persons living in Ireland. While not specifically directed towards children, it recognises children as a particularly vulnerable group with regard to the online world and the Action Plan will necessarily impact young people greatly, especially given that teenagers and young people demonstrate particularly high levels of internet usage.[234] For instance, 68% of 8-13 year olds own their own smartphone, while 70% of the same group are using social media.[235]

The Action Plan was drawn up following engagement with a number of stakeholders, including young persons through both the Open Policy Debate held in March 2018 and through the recent Report of the Joint Oireachtas Committee on Children and Youth Affairs

[233] Action Plan for Online Safety 2018-2019, available at http://www.internetsafety.ie/en/IS/7082532ONLINE%20SAFETY%20ACTION%20PLAN%2020182019.pdf/Files/7082532-ONLINE%20SAFETY%20ACTION%20PLAN%202018-2019.pdf.

[234] According to CSO estimates in 2017, 92% of young people between 16 - 29 accessed the internet every day in 2017. See https://www.cso.ie/en/releasesandpublications/er/isshh/informationsocietystatistics-households2017.

[235] CyberSafeIreland, Annual Report, 2017 at p.3.

concerning Cyber Security for Children and Young Adults.[236] The Plan demonstrates a "Whole of Government" approach, meaning that implementation of the Plan will take place across six government departments. This approach has been taken as the importance of online safety has a wide-ranging reach and involves a broad range of issues.

The Plan focuses on five goals – Online Safety for All; Better Supports; Stronger Protections; Influencing Policy and Building Our Understanding. Within these goals, 25 specific actions are sought to be progressed over the next 18 months. Key actions include;

- The establishment of a National Advisory Council for Online Safety. The role of the Council is to provide advices to the Government regarding Online Safety policy issues. It is tasked with identifying new emerging issues and reviewing all national and international research in this area;
- Actions aimed at educating – equipping teachers to embed digital awareness in their classes; working with the Teaching Council to integrate specific training into its existing frameworks for trainees; supporting enhanced curriculum development; and encouraging student participation in a new "Safe Internet Day" with associated activities and peer-to-peer initiatives;
- Actions aimed at communicating the key message of online safety – the development of a national campaign "Be Safe Online" to provide online safety messages targeted at each specific group (children, parents, teachers and so forth); the creation of a single online access point at - www.gov.ie/besafeonline - through which all available Online Safety resources can be accessed; and the publication of an annual Safer Internet report, published to coincide with Safer Internet Day;
- The provision of new resources – the development of a youth hub to represent the student voice in digital safety; the adaption of resources for parents; and the creation of digital learning centres for internet novices;
- Actions aimed at protection – using criminal legislation to create offences criminalising online stalking, harassment and revenge porn, and engaging with internet service providers to investigate the possibility of proactively searching for and removing child pornography.

A Sponsors' group has been created to implement the Action Plan across Government and all departments are involved, with the Minister for State responsible for linking all Government bodies together.

The Action Plan on Online Safety is a coherent plan setting out a variety of actions that are to be undertaken concurrently across Government Departments and agencies to promote safer

[236] Joint Oireachtas Committee on Children and Youth Affairs, Report on Cyber Security for Children and Young Adults; available at – https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_children_and_youth_affairs/reports/2018/2018-03-29_report-on-cyber-security-for-children-and-young-adults_en.pdf.

use of the internet and to protect all persons living in the State from online harm. Its publication in July 2018 is to be welcomed and steps must be taken to ensure the 25 actions described therein are implemented effectively. In this vein, it is positive to note that action has commenced on foot of the Plan and the first meeting of the National Advisory Council for Online Safety took place in October 2018. It has a membership of twenty from a range of stakeholder groups, including representatives of children's organisations and experts on online issues, ensuring that all those concerned about online safety issues play a role in addressing these matters and it is fortunate that its work is already underway. It is recommended that the national communications campaign "Be Safe Online" similarly be fully commenced and rolled-out as soon as possible. It is hoped that "Be Safe Online" will be as effective in highlighting online safety as a serious issue as previous road safety campaigns have been in changing society's attitude to road safety. In this regard, therefore, the national campaign and any advertising/communication strategies employed therein should be monitored closely to gauge their reach, impact and efficacy.

While the Action Plan is, on the whole, a positive development, some elements are lacking. Only brief reference is made to the Digital Safety Commissioner Bill 2017 therein. It does not give a timeline for when a Digital Safety Commissioner will be appointed and instead, seems to declare that progress in this area needs to be pursued internationally before developments can be made on a national level.

The recommendation to appoint a Digital Safety Commissioner in this jurisdiction was first made by the Law Reform Commission (LRC) in its 2016 Report on Harmful Communications and Digital Safety.[237] The Report recognised the inadequacy of the existing civil regime in this jurisdiction, particularly that relating to "take-down procedures" (i.e. the procedure to take down harmful communications/images/videos published online), noting:

> The potential cost, complexity and length of civil proceedings may deter victims of harmful digital communications and available processes and remedies may not be effective.[238]

[237] LRC 116-2016 Report on Harmful Communications and Digital Safety.
[238] LRC 116-2016 Report on Harmful Communications and Digital Safety at p.134.

The current non-statutory self-regulation by social media companies is not sufficient to tackle harmful cyber communications. Drawing from experiences in other jurisdictions, the LRC proposed the establishment of a new statutory oversight system with a dual role of promoting digital safety and ensuring an efficient take-down procedure for harmful digital communications. It proposed the creation of the Office of the Digital Safety Commissioner of Ireland. The Digital Safety Commissioner would oversee an "effective and efficient" take-down procedure in a timely manner, regulating for a system of take-down orders in respect of harmful cyber communications made in relation to both adults and children.

The recommendations of the LRC were widely welcomed as a practical and viable solution to the current lacuna in the law, whereby take downs are difficult to achieve and civil remedies are often too expensive and ineffective. In my Tenth Report, therefore, I recommended that consideration be given by the government to Chapter 3 of the Commission's Report forthwith, to enable progress to be made in this regard and to ensure that steps are taken to establish an Office of the Digital Safety Commissioner.[239] In November 2017, the Digital Safety Commissioner Bill 2017 was introduced to the Dáil. It provides for the establishment of the Office of the Digital Safety Commissioner with its functions to ensure the oversight and regulation of procedures for removal, by digital service undertakings, of harmful digital communications. This, however, is a Private Members Bill and progress appears slow. It was anticipated that the Action Plan for Online Safety would demonstrate a commitment to appoint a Digital Safety Commissioner and designate a specific timeframe for such an appointment. However, number 18 of its key actions merely states:

> We will work with the Joint Oireachtas Committee on Communications, Climate Action and the Environment to explore the issues arising in relation to the Digital Safety Commissioner Bill 2017.

In the body of the Action Plan, it states that the Private Members Bill raises jurisdictional and other legal issues which require greater examination and scrutiny. It points out that many of the objectives proposed for a Digital Safety Commissioner are being already addressed by the Action Plan and states that "it is only through international cooperation and agreement that a Digital Safety Commissioner could be effective in enforcing a system of 'notice and take

[239] Dr. Geoffrey Shannon, *Tenth Report of the Special Rapporteur on Child Protection* (2017).

down'." It concludes that progress in this area must be pursued on an EU or international level.[240]

I welcome the announcement by the Minister for Communications, Climate Action and Environment, Richard Bruton TD, on 4 March 2019 that the appointment of a new online safety commissioner is to be included in a proposed Online Safety Act, which will make provision for what constitutes "harmful content". Under the proposed Online Safety Act, a cyber safety commissioner will be able to fine, prosecute, and name and shame offending services.

A second manner in which the Action Plan is somewhat lacking is within its focus on education. In a recent article, this issue was explored by Alex Cooney, CEO of CyberSafeIreland, a not-for-profit organisation that works to empower children, parents and teachers to navigate the online world in a safe and responsible manner.[241] The concerns raised therein relate primarily to the Action Plan's educational proposals which centre on enhancing existing measures in place with regard to curriculum content and teacher training, rather than promoting new initiatives. From its research, CyberSafeIreland has found that many teachers are unaware of the resources and training opportunities that are already available. Furthermore, 51% of teachers do not feel equipped to deliver online safety education.[242] In light of these figures, it recommends ensuring that at least one teacher in every school becomes a "digital-safety champion", rather than expecting each teacher to become highly skilled in this area. While it supports growing the confidence of all teachers to engage in conversations about digital safety with children on an ongoing basis, it advocates proper investment and training of "digital safety champions" in schools so that expertise on online safety issues is available in-house, in every school across Ireland.[243]

The concept of one specially trained person in each school with a particular interest in this area would be of considerable practical assistance, especially where urgent advice is required

[240] Action Plan for Online Safety 2018 – 2019, at p.43-44.
[241] Alex Cooney, CEO CyberSafeIreland, "We've seen how Facebook behaves. Now it's time to protect our children", 18 July 2018, available at https://www.irishtimes.com/opinion/we-ve-seen-how-facebook-behaves-now-it-s-time-to-protect-our-children-1.3568955.
[242] CyberSafeIreland, Annual Report 2017. On a positive note, this figure has decreased from 2016, when 69% did not feel sufficiently resourced to effectively deliver educational messages relating to online safety in the classroom.
[243] CyberSafeIreland, Annual Report 2017.

or when problems arise. Similarities can be drawn with the appointment of a designated liaison person under the *Children First National Guidance for the Protection and Welfare of Children* (2017). The designated liaison person (DLP) under Children First is appointed in line with best practice in child safeguarding in both public and private organisations providing services to children and is trained for the role. This person is the resource person for any staff member or volunteer who has child protection concerns, liaises with outside agencies and must be knowledgeable about child protection. The "digital safety champion" is a similar concept, should be trained accordingly and available for colleagues and students alike to approach with regard to any online safety concern. Consideration should be given to the proposal made by CyberSafeIreland concerning the appointment of digital safety champions in schools across Ireland.

One particular aspect relating to children and the online world not considered within the Action Plan is the effect of "screentime" on the health and well-being of children and adolescents. This is an area that has led to widespread research in recent years. In a 2018 study, *Effects of screentime on the health and well-being of children and adolescents: a systematic review of reviews*,[244] considerable evidence was found that higher levels of screentime is associated with a variety of health harms for children and young people. This study undertook a systematic review of existing studies concerning the time spent by children and adolescents on screens – however most studies reviewed therein concerned the prevalence of television screentime, with data concerning mobile screen use being extremely limited at this time. In particular, the evidence most strongly suggested association between screentime and adiposity, unhealthy diet, depressive symptoms and quality of life. No consistent health benefits from screentime were found. The data considered in this study, therefore, broadly supports policy action aimed at reducing and limiting children's screentime due to the evidence of health harms across a broad range of domains of physical and mental health. It is recommended that efforts be made to consider policy actions that could be initiated to encourage placing limits on screentime for children and young people.

[244]See Stiglic N, Viner RM.; *Effects of screentime on the health and well-being of children and adolescents: a systematic review of reviews*. BMJ Open 2019;9:e023191. doi:10.1136/ bmjopen-2018-023191.

Recommendations

Detailed consideration should be given to the content of the Committee of Minister's Recommendation on the rights of the child in the digital environment and steps should be taken in this jurisdiction to follow the guidelines contained therein.

The publication of the National Action Plan for Online Safety for 2018–2019 is to be welcomed and it is recommended that steps should be taken to ensure the 25 actions described therein are implemented effectively.

The national communications campaign and any communication strategies supporting the campaign should be monitored closely to gauge their reach, impact and efficacy.

The proposed Online Safety Act should be progressed without delay.

Consideration should be given to the proposal made by CyberSafeIreland concerning the appointment of "digital safety champions" in schools across Ireland.

Efforts should be made to consider policy actions that could be initiated to encourage placing limits on screentime for children and young people.[245]

4.3 INTERNATIONAL INSTRUMENTS AND CYBERCRIME

Cybercrime is a serious threat to the fundamental rights of all individuals, especially children. No longer is a crime committed in a specific physical place, with the offender often present at the scene – cybercrime takes place without reference to borders or jurisdictions. Given its very nature and the broad reach of information and communication technology (ICT), cybercrime poses a profound challenge to the security of young persons, both as rights holders and as victims. Cybercrime encompasses a vast range of criminal behaviour – from cyber-harassment, online sexual exploitation and abuse of children, ICT-related threats of violence, hate crime and violations of privacy, to data and system interference, child

[245] I welcome the fact that this action has now been included in the First 5 Strategy.

pornography and computer-related fraud and forgery. The sheer scale of cybercrime therefore is far-reaching in its impact and the breadth of its scope is overwhelming, making this issue the modern child protection frontier.

At an international level, a variety of legal instruments regulate various aspects of cybercrime in the promotion of online safety for children. While examining each and every instrument is outside the scope of this Report, certain international developments set out below merit particular consideration.

Prior to reviewing these international developments and analysing Ireland's attitude thereto, certain preliminary considerations must be borne in mind. First, in assessing methods directed toward tackling cybercrime, it is important to have regard to the necessity to balance the public interest in the prevention of crime, investigation of offences and the administration of justice against fundamental human rights, for instance the right to privacy and the right to freedom of expression. Careful consideration must be given to competing interests in this regard. The particular fundamental freedoms protected by the European Convention on Human Rights (ECHR) that are engaged and are of significance are Article 6, namely the right to a fair trial, the presumption of innocence and the principle that there should be no punishment without law; privacy rights protected by Article 8; and Article 13 ECHR, which provides that any person whose rights have been violated has the right to an effective remedy.

Secondly, rule of law requirements must be adhered to where measures directed towards investigating cybercrime interfere with the rights of individuals. This demands that measures introduced to fight cybercrime should be prescribed by law and any such legislative measures must meet the requirements of precision, clarity, accessibility and foreseeability; they must pursue a legitimate aim; they must be necessary in a democratic society and thus be proportionate; they must allow for effective remedies; and they must be subject to guarantees against abuse.

Finally, care should be taken to prevent against over-criminalisation or under-criminalisation in the area of cybercrime. Over-criminalisation can occur where powers granted to law enforcement agencies are more general in their nature and become excessive. Broad, vaguely defined provisions are problematic, cause uncertainty and can lead to legitimate action being discredited. Under-criminalisation fails to go far enough to criminalise offending behaviour

effectively. It is recommended, therefore, that specificity is prioritised through the laws and powers created in this jurisdiction to combat cybercrime. This is preferable to prevent abuse.

International evidence suggests cybercrime is under-reported and under-prosecuted. The world-wide trend appears to be similarly reflective of the position in this jurisdiction. In January 2018, at the *Cyber Fraud in a Digital Age* conference, Detective Superintendent Michael Gubbins of the Garda Cyber Crime Bureau estimated that less than 5% of cyber-dependent crime is reported to An Garda Síochána in Ireland.[246] At the outset, it is recommended that increased reporting of such crimes be emphasised at a national level. By members of the public reporting crime, a true reflection of cybercrime in this jurisdiction will be gained. This in turn will justify increased resources and enable those resources to target the right areas – ultimately, assisting in the overall prevention of crime. A national campaign that both heightens awareness of cybercrime and promotes the reporting of such crime should therefore be established as soon as possible.

The Budapest Convention

The Budapest Convention, or the Convention on Cybercrime, is a criminal justice treaty drafted by the Council of Europe in 2001. It is the only binding multilateral treaty aimed at combatting cybercrime, focusing on crimes committed via the internet and other computer networks. It provides a framework to enable international cooperation between State Parties to the treaty – such cooperation being crucial given the transnational nature of cybercrime itself. It is further supplemented by an Additional Protocol to the Convention, adopted in 2003. In essence, the Budapest Convention seeks to address cybercrime with harmonised legislation and capacity building. Its main objective, set out in the preamble, is to pursue a common criminal policy aimed at the protection of society against cybercrime through adopting appropriate legislation and fostering international co-operation. The Convention is widely recognised as representing international best practice in this area and remains the most relevant international agreement on cybercrime and electronic evidence.

[246] https://www.irishtimes.com/news/crime-and-law/less-than-5-of-cyber-crime-reported-to-garda%C3%AD-1.3353433.

The Convention operates in three key ways in the promotion of common standards. It provides for the criminalisation of certain offences involving computers and information and communication technology (ICT); it puts in place procedural law tools to make the investigation of cybercrime and the securing of electronic evidence in relation to any crime more effective, but subject to rule of law safeguards; and it enhances international police and judicial cooperation on cybercrime and e-evidence. Crucially, the Convention does not dictate particular statutory language that must be utilised by parties or the specific method by which a party must implement its provisions. This allows for significant flexibility in its implementation.

The Budapest Convention sets out a range of offences that come within the umbrella term of cybercrime, including infringements of copyright law; illegal access, interference and interception of data and system networks; computer-related fraud; the production, distribution and transmission of child pornography; and violations of network security. Articles 2 to 11 of the Convention set out the specific differing substantive offences covered therein, and can be classified broadly into four categories;

(a) Offences against the confidentiality, integrity and availability of computer data and systems – for instance, stealing credit card information, intercepting emails or interference with a company's customer database;
(b) Computer-related offences – for instance computer-related forgery or fraud;
(c) Content-related offences – such as offences relating to child pornography;
(d) Criminal copyright infringement.

Each Party to the Convention is required to adopt such legislative and other measures as are necessary to establish these offences as criminal offences under its domestic law. Within the Additional Protocol, the act of using computer networks to publish xenophobic and racist propaganda is also listed as a punishable offence. Not all cybercrime, however, is covered by the Convention. For instance sexual grooming and exploitation of children using information and communication technology does not come within its remit, being covered by the Lanzarote Convention and the 2011 EU Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography.[247]

[247] Directive 2011/93/EU on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography.

Procedurally, the Convention introduces a number of provisions to assist the investigation and prosecution of crime. This gives law enforcement agencies the effective tools required to investigate cybercrime and collect electronic evidence. The Convention provides for the expedited preservation of stored computer data and the expedited preservation and partial disclosure of traffic data. Importantly, Article 18 of the Convention concerns production orders, requiring State Parties to empower their competent authorities to order that a person produce specified computer data in his or her possession or control; and to order service providers to submit subscriber information. The power to search, access and seize stored computer data, provided for in Article 19 and Article 20, enables the real-time collection of traffic data. Each Party is required to adopt legislative and other measures to establish all the powers and procedures set out in the Convention for the purpose of specific criminal investigations or proceedings.

With regard to enhanced international cooperation, the Convention promotes the mutual sharing of information between Parties to facilitate better law enforcement. Procedures are set out therein to govern the provision and receipt of such assistance. Article 23 describes the general principles applicable in relation to international co-operation, providing:

> The Parties shall co-operate with each other, in accordance with the provisions of this chapter, and through the application of relevant international instruments on international cooperation in criminal matters, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic laws, to the widest extent possible for the purposes of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence.

Parties are therefore expected to rely on pre-existing cooperative agreements in place between them to ensure mutual assistance. That said, mutual legal assistance (MLA) between parties where no such arrangement exists can be facilitated through the procedures set out in Article 27. Article 25 sets out the general principles applicable to mutual assistance, allowing *inter alia*, Parties to make requests for mutual assistance by fax or email in urgent circumstances. The sharing of information without request where it would assist another Party in its investigation is also permitted.[248] Article 24 concerns extradition for criminal offences under the Convention, providing that computer crimes are to be included in offences

[248] Article 26, Budapest Convention.

under existing extradition treaties and if a country does not extradite, it must generally be willing to prosecute these offences domestically. Pursuant to Article 32 of the Convention, trans-border access to stored computer data is provided for, where the data is available publicly or where the Party obtains the consent of the person who has authority to disclosure the date. This, therefore, allows police to access servers located in another country's jurisdiction without seeking sanction from authorities of that country – once permission from the system owner or service provider is obtained or where the data is publicly available.

The powers and procedures established in the Convention are subject to certain conditions and safeguards. Article 15 requires Parties to ensure that these powers and procedures are subject to conditions and safeguards in their domestic law, which must provide for the adequate protection of human rights and liberties, including those protected under the European Convention on Human Rights. This is to ensure that governments meet their positive obligations to protect citizens, particularly children, against cybercrime while concurrently respecting fundamental rights. An appropriate balance is required to be struck between crime prevention, investigation and prosecution in the public interest and the protection of the fundamental human rights of individuals, such as privacy and expression – and the Convention gives recognition to these competing rights.

Overall, the Budapest Convention seeks to ensure the harmonisation of national legislation, resulting in reciprocal international cooperation. Information and communication technologies continue to evolve, however, creating new challenges for criminal justice and the rule of law in cyberspace.[249] This is particularly so in relation to electronic evidence, which is increasingly being stored on servers in foreign, multiple, shifting or unknown jurisdictions (i.e. "in the cloud"), and law enforcement powers are limited by territorial boundaries. It is therefore not always clear in which jurisdiction the data sought is stored. The further question then arises as to which legal regime applies for lawful access to the data in question by criminal authorities. If data cannot be obtained, evidence cannot be gathered and if evidence cannot be gathered, no prosecution can be brought and justice will not be done. Technical challenges posed by cybercrime also arise, such as anonymisers, encryption and VPNs (Virtual Private Networks).

[249] See "Enhanced international cooperation on cybercrime and electronic evidence: Towards a Protocol to the Budapest Convention", Version 19 March 2018, Council of Europe, available at https://rm.coe.int/t-cy-pd-pubsummary-v6/1680795713.

To resolve these difficulties, currently the 2nd Additional Protocol to the Budapest Convention is being prepared. This is to focus on enhanced international cooperation and access to evidence in the cloud - providing a clearer basis for cooperation with service providers, while at the same time ensuring sufficient procedural safeguards and protection for human rights. In 2017, the Terms of Reference for the preparation of the 2nd Additional Protocol were agreed, with possible provisions for more effective mutual legal assistance to include:

- A simplified regime for mutual legal assistance requests for subscriber information;
- International production orders;
- Direct cooperation between judicial authorities in mutual assistance requests;
- Joint investigations and joint investigation teams.

It is anticipated, therefore, that the 2nd Additional Protocol, when finalised, will make provision for mandatory production orders directed at service providers, no longer dependent on their consent and willingness to cooperate or volunteer the data sought. In my Eleventh Report, I recommended the introduction of such powers in this jurisdiction – the absence of same notably preventing effective investigation of certain cybercrimes at present.[250] I highlighted that the powers of An Garda Síochána may need to be extended to compel co-operation from non-Irish companies that hold offices in this country concerning data they hold. For instance, where An Garda Síochána is investigating child pornography cases involving the use of information and communication technology, data may be required from a service provider, but this data may be stored outside this jurisdiction and outside of the reach of our police force. If An Garda Síochána is afforded the power to obtain production orders against such companies, akin to an order under section 15 of the Criminal Justice Act 2011 which operates in relation to fraud and banking offences, those service providers registered in Ireland would be obliged to produce the requisite electronic evidence notwithstanding the location of the data. This could include photographs, chat history, account information and IP addresses which may be critical to assist Gardaí in its investigation of online offences, particularly child pornography and grooming offences. Consultation and negotiation on the preparation of the Protocol is ongoing at present. It is likely that the 2nd Additional Protocol will be approved in mid-2020.

[250] Dr. Geoffrey Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (2018).

K.U. v. Finland[251]

In *K.U. v. Finland*, the European Court of Human Rights considered the criminal law protection that Contracting States to the ECHR should give to the right to private life. It held that there is a positive obligation upon States to protect children against cybercrime.

In this case, a young boy, aged 12, was the target of an indecent advertisement. His image, name, year of birth and a description of his physical characteristics were posted in an advertisement on an internet dating site seeking an intimate relationship with a boy of his age or older "to show him the way". The child only became aware of the existence of this advertisement when he was contacted by a man via email offering to meet him. His father requested that the police identify the person who placed the advertisement in order to bring criminal charges. The service provider, however, refused to divulge the identity of the holder of the dynamic IP address in question, claiming it was bound by the confidentiality of telecommunications. Legislation in place in Finland at that time prohibited internet service providers from disclosing user identity to protect freedom of expression and anonymous expression. The police requested that the District Court order the provision of the IP address, but this information was refused in the absence of an explicit legal provision authorising the court to order a service provider to disclose such telecommunications data. The court determined that legislation only gave police the right to obtain telecommunications data in respect of certain defined offences and the placing of an advertisement (as in this case) was not in the list of such offences. On appeal, this decision was upheld.

Following this decision, the child lodged an application to the European Court of Human Rights (ECtHR) against Finland, alleging the State had failed to protect the right to respect for his private life under Article 8 of the ECHR and further alleging that it had failed to provide him with an effective remedy as required by Article 13 ECHR. The State argued that the existence of a criminal offence in respect of this type of act – the making of untrue comments intended to damage reputation – was sufficient protection.

The ECtHR stated that "both the public interest and the protection of the interests of victims of crimes committed against their physical or psychological well-being require the

[251] No. 2872/02 ECHR (2008).

availability of a remedy enabling the actual offender to be identified and brought to justice." It viewed the lack of a criminal sanction available in this case as a serious problem, noting that the act involved was criminal, involved a minor and made him a target for approaches by paedophiles. While the act itself was criminalised, it found that this meant little if there was no means available to identify the actual offender and bring him to justice.

The Court thus held that the failure to compel a service provider to disclose the identity of a person wanted for placing an indecent advertisement about a minor on an internet dating site was a violation of the child's Article 8 right to privacy. While Article 8 protects against government interference in citizens' private lives, it similarly imposes obligations on States to secure respect for the private lives of individuals. The positive obligations to secure respect for private life extend to the horizontal relations between individuals and are not only applicable in the vertical relations between individuals and public authorities. It found, therefore, that there existed a positive obligation on Contracting States to ensure the protection of private life. This entailed an obligation to provide law enforcement agencies with the ability to obtain access to dynamic IP addresses and communication data in order to identify a private person who has violated another's individual right to private life. Freedom of expression and privacy of communications, although important considerations, are not absolute and must yield to the prevention of crime or the protection of the rights and freedoms of others.

The position in Ireland

As mentioned above, the Budapest Convention has been open for accession by any State since 2001. Currently, 62 States have become Parties. This includes European countries, but also States outside Europe including Australia, Canada and the USA. While a signatory, Ireland has failed to ratify the Budapest Convention. Almost twenty years later, it is one of a small number of countries that has failed to ratify this important international instrument.

In May 2018, the Minister for Justice and Equality, Charles Flanagan TD, recognised the prevalence of cybercrime as increasingly problematic and challenging across Europe and the world. In an address to the 46th Interpol European Regional Conference, held in Dublin, he considered the challenges presented in tackling this new form of crime, including *"...mobility of data, underreporting of cybercrime, the ever-increasing advancements in internet-based*

economies, and the challenge of multi-jurisdictional offences and enforcement together with the multiplicity of actors involved in tackling cybercrime." While the Minister stated that the vast majority of provisions in the Budapest Convention have been placed on the Irish Statute Book, he recognised that more work has to be done and further legislation is required by Ireland to enable formal ratification of the Convention.

In light of the wide-ranging benefits of the Budapest Convention and the anticipated expansion of the powers provided to State Parties within the 2nd Additional Protocol, it is recommended that Ireland take all steps necessary to ratify the Convention forthwith. Ireland signed this important international instrument but has yet failed to ratify it. This needs to be rectified as soon as possible to ensure Irish children are better protected and online crime committed against them is effectively investigated. Furthermore, the ruling in *K.U. v. Finland* makes it clear that the Irish State has an obligation to protect its children which is positive in nature. Ireland is therefore obliged to put in place a framework to combat cybercrime and protect the public interest in the administration of justice, having regard to the principles of proportionality and necessity and concurrently respecting the particular fundamental rights engaged in this area under the ECHR. No further delay should take place and it is imperative that the Convention be ratified at the earliest opportunity without reservation.

Some positive developments have, however, recently taken place in this area of law in Ireland. In June 2017, the Criminal Justice (Offences Relating to Information Systems) Act 2017 came into operation. This is Ireland's first piece of dedicated cybercrime legislation. It seeks to protect information systems and infrastructures, and their important data, from cyber-attacks that may take place from within and outside the State. Under the Act, it is an offence to engage in cybercrime activity and strong penalties are put in place for those found guilty of such activity. The Act serves to implement some of the key legal provisions in the Budapest Convention and gives effect to Directive 2013/40/EU on attacks against information systems.

While not directed towards the area of child protection, the 2017 Act creates five new dedicated cybercrime offences;

- Accessing an information system without lawful authority;

- Interfering with an information system without lawful authority so as to intentionally hinder or interrupt its functioning;
- Interfering with data without lawful authority;
- Intercepting the transmission of data without lawful authority; and
- Use of a computer, password, code or data for the purpose of the commission of any of the above offences.

It also gives certain powers to An Garda Síochána to be utilised in the investigation of the abovementioned offences. Against a backdrop of large scale hacking and cybercrime activities that have afflicted the world at large in recent times, the introduction of the 2017 Act is to be welcomed. While from a child protection perspective its implications are limited, its enactment represents progress, demonstrating the government's commitment to take positive action in the area of cybercrime in general.

The Lanzarote Convention

The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, known as the Lanzarote Convention, was adopted by the Council of Europe in 2007. Concerning children exclusively, the Lanzarote Convention provides a comprehensive set of obligations for Member States in respect of sexual exploitation and abuse. While the Budapest Convention focuses on wider areas of cybercrime and with regard to child pornography, covers individual actions of production, possession, distribution and solicitation of child abuse images, the Lanzarote Convention has a broader focus on abuse and exploitation, dealing with the issue of grooming or soliciting children to engage in sexual activity – offences in and of themselves, but also behaviour that could facilitate the production of pornographic material. The Lanzarote Convention therefore deals with child abuse or actions leading to that abuse, whereas the Budapest Convention focuses on material produced from child abuse.

Within the Lanzarote Convention, Party States are required to introduce a variety of preventative measures, such as vetting and information sharing, consciousness raising and participation measures, intervention programmes for offenders, child-friendly investigation procedures and international co-operation measures. Crucially however, the Convention, in Articles 18 to 24, provides for a number of substantive criminal law offences which Member States are obliged to enact concerning sexual abuse of children, child prostitution, child pornography and corruption of children. Unlike the Budapest Convention, the offences

concerning child pornography are not limited to offences involving computer systems. The harmonisation of national laws required by the Lanzarote Convention aims to facilitate their enforcement, preventing perpetrators from selecting jurisdictions in which to operate with more lenient penal codes.

There are also specific clauses in the Convention relating to children's use of information and communication technology and the need to engage with the ICT sector. Article 6 highlights the importance of educating children as a strategy for helping to prevent sexual exploitation and abuse. This is to take place within a more generalised context of information on sexuality; however, special attention is to be afforded to "situations of risk, especially those involving the use of new information and communication technologies". Further, Article 9 states that the private sector, and the ICT sector in particular, is to be encouraged to participate in the elaboration and implementation of policies designed to prevent exploitation and to implement internal norms through self-regulation or co-regulation.

The provisions of the Lanzarote Convention are augmented within the European Union by the Directive Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography.[252] This Directive similarly obliges Member States to criminalise certain kinds of conduct concerning the sexual abuse and exploitation of children, including offences related to the use of information and communication technologies, and requires the establishment of minimum penalties for such conduct.[253] The Lanzarote Convention was open for signature on 25 October 2007. The transposition date for the Directive was 18 December 2013 – by which point Irish law was to have been brought into line with the Directive.

In response to both international instruments, the Criminal Law (Sexual Offences) Act 2017 (considered at length in my previous reports[254]) was introduced. Years in its development, the provisions of this Act commenced in March 2017, bringing into operation a wide range of

[252] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combatting the sexual abuse and sexual exploitation of children and child pornography OJ L 335/1, 17 December 2011.
[253] For a full discussion on both the Lanzarote Convention and Directive 2011/93/EU see the *Sixth Report of the Special Rapporteur on Child Protection* (2013) at pp.77-82 and Section 3 of the *Seventh Report of the Special Rapporteur on Child Protection* (2014).
[254] See Dr. Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014) and Dr. Geoffrey Shannon, *Eighth Report of the Special Rapporteur on Child Protection* (2015).

new criminal offences targeting the sexual exploitation and grooming of children; new offences to counter the demand for sexual services through prostitution; and a statutory definition of "consent" in Irish law. The commencement of the 2017 Act puts in place a more effective response to sexual offending perpetrated against children in Ireland, especially through the use of the internet, social media and communication technology. It also finally brings Irish law in line with the 2011 EU Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography – albeit almost four years after the expiration of the transposition date. In light of the significant progress in this area, it is critical to restate the importance of the Lanzarote Convention. While Ireland signed the Convention upon its opening for signature in 2007, it has yet to ratify it. It is recommended therefore that the Lanzarote Convention be ratified forthwith to complement the Criminal Law (Sexual Offences) Act 2017.

E-Evidence Regulation

Alongside the development by the Council of Europe with regard to the preparation of a 2nd Additional Protocol to the Budapest Convention, developments at EU level are also taking place. A proposal has been made for the introduction of European Protection and Prevention Orders. The European Commission's E-Evidence proposals have been made in light of the borderless nature of the internet and the increasing prevalence of a cross-border element in criminal investigations. In a growing number of criminal cases, Member State authorities need access to data that might serve as evidence, however that data is stored outside their country and/or by service providers in other Member States or third countries. Such access also needs to be timely. While mechanisms for cooperation between countries have been developed over time, these cooperation measures are under increasing pressure, with Member States and third countries resorting to expanding their national tools. This has generated legal uncertainty, conflicting obligations and raises concerns about safeguards for the protection of fundamental rights. The proposed new measures therefore are hoped to ensure easier and quicker access for law enforcement authorities to e-evidence that they require, and they seek to adapt cooperation mechanisms to the digital age.[255]

[255] See Explanatory Memorandum to the European Commission's Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1524129181403&uri=COM:2018:225:FIN.

The European Commission's E-Evidence proposals were made on 17 April 2018 and the pending EU Electronic Evidence Regulation is proposed to implement new rules to assist Member States in securing and gathering electronic evidence for criminal proceedings stored or held by service providers in another jurisdiction. It suggests the creation of the following two orders:

- *European Production Order* – this allows a judicial authority in one Member State to request e-evidence directly from a service provider or its legal representative in another Member State. The service provider will be obliged to respond to a request within 10 days, or within 6 hours in cases of emergency.

- *European Preservation Order* – this allows a judicial authority in one Member State to request that a service provider, or its legal representative, preserve particular data in view of a subsequent request to produce the data via mutual legal assistance, a European Investigation Order or a European Production Order.

Both European Production and Preservation Orders are to be issued or validated by a judicial authority of a Member State and may only be issued if a similar measure is available for the same criminal offence in a comparable domestic situation in the issuing State. These Orders can be served on the service providers themselves (i.e. the providers of electronic communication services, social networks, online marketplaces and providers of internet infrastructures such as IP addresses and domain name registries), or on their legal representative where same exists. They are binding and the timeframes to respond to requests for production are considerably faster than those already in existence, which may be up to 120 days for existing European Investigation Orders or 10 months for a Mutual Legal Assistance procedure. The Orders can be used only in criminal proceedings, from the initial pre-trial investigative phase until the closure of the proceedings by judgment or other decision. The proposals require service providers to designate a legal representative in the EU. This ensures that all providers who offer services in the EU are subject to the same obligations. Even if their headquarters are in a third country, therefore, they are required to designate a legal representative within the EU for the receipt of, compliance with and enforcement of decisions and orders. Applying the same rules for access to all service providers will improve legal certainty and clarity.[256]

[256] See "E-evidence – cross-border access to electronic evidence, *Improving cross-border access to electronic evidence"* available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/e-evidence-cross-border-access-electronic-evidence_en.

Given that these measures may be intrusive, the proposals contain a number of conditions and safeguards to guarantee strong protection of fundamental rights, including safeguards for the right to protection of personal data. As mentioned above, a judicial authority has to validate the orders, these measures are limited to what is necessary and proportionate for the purposes of the relevant criminal proceedings and service providers can seek clarifications from issuing authorities where necessary. Service providers may use the same reasons to oppose enforcement of European Production and Preservation Orders by its own authorities. Personal data covered by this proposal is protected and may only be processed in accordance with the General Data Protection Regulation (GDPR) and the Data Protection Directive for Police and Criminal Justice Authorities (the Law Enforcement Data Protection Directive).

The E-Evidence proposals thus require service providers to disclose data they hold on individuals, regardless of nationality, residence, or location, to an investigating authority in any EU Member State. This is a mandatory obligation which applies to any provider regardless of the country in which its main establishment is located, as well as to providers with no establishment in the EU, if the provider's services can be used in the EU, and if the services are to some extent targeted to an EU Member State. The E-Evidence proposals of the Commission thus expand dramatically the reach of law enforcement authorities, enabling access to information concerning persons across the world to assist in criminal investigations. This is to take place in a timely manner, preventing protracted investigations which can adversely impact on the rights of child victims. While the proposed new measures have yet to be introduced, it is recommended that our government keep abreast of all developments and commence the necessary preparations for their introduction. This will ensure that Ireland is ready to comply with its obligations under EU law, and is proactive, rather than reactive in seeking to apprehend those who use the internet to the detriment of children. The pending European developments in the area of e-evidence further highlight the importance of Ireland ratifying key international instruments, particularly the Budapest Convention.

E-Privacy Regulation

The E-Privacy Regulation is due to replace the 2002 ePrivacy Directive and is anticipated to come into force at some stage in 2019. As a Regulation, it will directly apply in Ireland. Its overarching aim is to guarantee the right to privacy in the electronic communications sector. It will provide stronger privacy rules for all electronic communication, seeking to harmonise

the rules around electronic communication to align with GDPR rules. While the pre-existing Directive was more limited in its application, applying only to traditional telecom providers, the Regulation is to apply to all "electronic communication providers" – being any business that provides any form of online communication service. This necessarily includes, for instance, Facebook, Skype, Gmail and WhatsApp.

Currently the E-Privacy Regulation remains in its draft stage. It contains a number of provisions to ensure the confidentiality of electronic communications and sets out the limited permitted purposes and conditions for the processing of such communications data. Chapter III concerns the rights of end-users to control the sending and reception of electronic communications to protect their privacy. Article 15 thereof regulates the conditions under which end-users may be included in publicly available directories. In its current form, it states:

1. The providers of publicly available directories must obtain the consent of end-users who are natural persons to include their personal data in the directory and, consequently, must obtain consent from these end-users for inclusion of data per category of personal data, to the extent that such data is relevant for the purpose of the directory as determined by the provider of the directory. Providers must give end-users who are natural persons the means to verify, correct and delete such data.

2. The providers of a publicly available directory must inform end-users who are natural persons whose personal data is in the directory of the available search functions of the directory and obtain end-users' consent before enabling such search functions related to their own data.

3. The providers of publicly available directories must provide end-users that are legal persons with the possibility to object to data related to them being included in the directory. Providers must give such end-users that are legal persons the means to verify, correct and delete such data.

4. The possibility for end-users not to be included in a publicly available directory, or to verify, correct and delete any data related to them must be provided free of charge.

This arguably may prevent the sharing of information in certain child sexual abuse investigations through the use of technology known as "Photo DNA". This is an innovative form of technology, developed by Microsoft, which in such investigations is used to compile a digital signature of images which can be matched against a database of known child-pornography images. This significantly reduces the time spent by law enforcement officers

viewing these images, enabling them to determine more easily and more quickly whether the child victims shown therein have already been identified or whether they are currently at-risk. The technology is used to sift through hundreds of thousands of images, allowing police to categorise the victims and enabling teams to focus on new victims.

Under Article 15 thereof, Photo DNA sharing will be prohibited unless customers are asked for some form of "consent" before certain types of information can be accessed by service providers. This is obviously unworkable in the area of unlawful child sexual abuse imagery and it is likely to have profound negative implications from a child protection perspective. While privacy and data protection are core values of the EU, they cannot be protected to the detriment of prosecuting those predators who prey on vulnerable children. It is recommended that Ireland should make submissions to the Commission concerning the current form of the proposed E-Privacy Regulation, requesting that the wording be amended to ensure that specialist software which tracks child sexual abuse imagery still be permitted to operate. A specific exemption so that this type of technology can continue to legally operate may suffice. Otherwise, Ireland may have to consider derogation from the new e-privacy rules.

Recommendations

It is recommended that increased reporting of cybercrime be emphasised at a national level. This will provide a true reflection of cybercrime in this jurisdiction which in turn will justify increased resources and enable those resources to target the right areas – ultimately assisting in the overall prevention of crime. A national campaign that both heightens awareness of cybercrime and promotes the reporting of such crime should therefore be established as soon as possible.

Having signed both the Convention against Cybercrime (the Budapest Convention) and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention), it is imperative that Ireland ratify both Conventions forthwith without reservation.

The ratification of the Budapest and Lanzarote Conventions ought to be carried out in such a manner so as to ensure that the greatest level of protection to be afforded to children under

these instruments is provided for in our domestic legislation, having regard to the positive obligation on States to protect children from cybercrime, as held in K.U. v. Finland.

Close regard should be had to the progress of the Electronic Evidence Regulation and any necessary preparations for its introduction should be commenced.

Any further legislation introduced in this jurisdiction at a national level to combat cybercrime must balance the public interest in tackling crime with competing considerations of fundamental rights and ensure the application of the rule of law requirements. Over-criminalisation should be avoided and a preference for specific powers demonstrated.

It is recommended that Ireland make submissions to the European Commission concerning the current form of the proposed E-Privacy Regulation, requesting that the wording be amended to ensure that specialist software which tracks child sexual abuse imagery still be permitted to operate. A specific exemption so that this type of technology can continue to legally operate may suffice.

4.4 CRIMINAL JUSTICE (VICTIMS OF CRIME) ACT 2017

On 5 November 2017, the Criminal Justice (Victims of Crime) Act 2017 was enacted. The vast majority of its provisions were commenced on 27 November 2017. Strengthening the rights of victims of crime and their families, the Victims of Crime Act put the rights of victims of crime on a statutory footing and explicitly recognises the place of victims in the criminal justice system – whereas previously victims' rights in Ireland were governed by the Victims Charter, a document which was not legally binding, providing no legal entitlements or rights to victims. The commencement of the 2017 Act is a welcome development demonstrating the State's commitment towards greater acknowledgement of the victim within the criminal justice process, including child victims. It also endorses the EU developments in this regard and specifically, the Act transposes into Irish law Directive 2012/29/EU (Victims' Directive) of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime.

The Criminal Justice (Victims of Crime) Act 2017 does not make express provision for legal representation for child victims during the criminal trial. Irish legislation only provides for

separate legal representation for victims of a serious sexual offence, where there is an application by the accused to cross-examine the complainant concerning his/her prior sexual history.[257] Such representation for victims in these circumstances is provided and funded by the Legal Aid Board. While representation in these situations is undeniably necessitated, consideration needs to be given to expanding the provision of separate legal representation in criminal proceedings – so as to allow child victims to be legally represented throughout the criminal trial. By virtue of their age and maturity, children require additional protection to ensure their interests are safeguarded. Importantly, Directive 2012/29/EU requires that victims have the right to legal aid, but only where they are parties to the relevant criminal proceedings. In Ireland, however, it is the DPP that initiates criminal proceedings against the defendant and the victim is not a party to the proceedings at all. Under the Directive, therefore, Ireland is not obliged to ensure that victims are entitled to legal aid. While such legal representation is not mandated by the Directive in this jurisdiction, this does not prevent Ireland from giving additional rights to children as a distinct group of victims and going further than is strictly demanded by the Directive. It is recommended, therefore, that consideration be given to widening the right to separate legal representation during criminal proceedings for child victims as a group specifically, while ensuring that the due process rights of the accused are not impacted by such a development.

Recommendations

It is recommended that child victims of any crime have free access to State-funded legal advice during the pre-trial process.

Careful consideration should be given to the possibility of expanding the provision of legal representation during criminal proceedings to child victims as a distinct category requiring additional protection, while ensuring that the rights of the accused are not impacted.

[257] Section 34 of the Sex Offenders Act 2001 inserted section 4A into the Criminal Law (Rape) Act 1981.

4.5 SEXUAL EXPLOITATION AND CHILDREN

The sexual exploitation of children, such as the sale of children, child prostitution, child sex tourism and child pornography, whether operated commercially or otherwise, is widespread and occurs all over the world. According to UNICEF, an estimated one million children enter the multi-billion dollar commercial sex trade every year, suffering degradation and life-threatening risk.[258] Concerns surrounding the sexual exploitation of children have been discussed at length in my previous reports. In particular, the content of the Criminal Law (Sexual Offences) Act 2017, years in its development, has been analysed in detail previously.[259] This Act has been widely welcomed and the Parts relevant to the sexual exploitation and grooming of children came into operation in March 2017. The Act criminalises a range of new offences to target such sexual exploitation, including through the use of information and communication technology. While great strides have thus taken place in recent times and Irish law has finally been brought into line with the 2011 EU Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, there remains, however, further work to be done in this jurisdiction to both prevent and respond to sexual violence against children.

Of particular note is the fact that Ireland continues to be the only EU Member State that has not ratified the Second Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. This Optional Protocol became legally binding on 18 January 2002 and it has been signed and ratified by in excess of 100 countries. The CRC requires its contracting states to protect children from all forms of sexual exploitation and abuse, necessitating that all measures possible be taken to ensure that children are not abducted, trafficked or sold.[260] The Convention's Second Optional Protocol is more specific, giving detailed requirements to States to counter the sexual exploitation of children, as well as protect young persons from being sold for other purposes, including forced labour, illegal adoption and organ donation. It mandates that its member States criminalise and punish all activities related to these offences, for all persons involved –

[258] https://www.unicef.org/crc/index_30204.html.
[259] See Dr. Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014), Dr. Geoffrey Shannon, *Eighth Report of the Special Rapporteur on Child Protection* (2015) and Dr. Geoffrey Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (2018).
[260] See Articles 34 and 35 CRC.

whether offering, delivering or accepting children for the purposes of sexual exploitation, for profit or forced labour or for the transfer of organs. It also serves to emphasise the importance of international cooperation in tackling the exploitation of children, particularly given the cross-border nature of these activities.

On 7 September 2000, Ireland signed the Second Optional Protocol. While much progress has been made in recent years to ensure that Ireland meets all legal requirements of the Second Optional Protocol, particularly within the provisions of the Child Trafficking and Pornography Act 1998, the Criminal Law (Human Trafficking) Act 2008 and the recent Criminal Law (Sexual Offences) Act 2017, ratification has not yet formally taken place. Almost two decades later, however, ratification appears imminent in early 2019. In a press release, published on 2 January 2019, Minister for Children and Youth Affairs, Dr Katherine Zappone TD, announced her decision to recommend ratification of the Second Optional Protocol to the Irish Government. She stated; "*Across the globe human traffickers, people smugglers and pimps have put children in the frontline – Ireland now meets the best international standards to combat this and I will be recommending to the Attorney General and the Government that Ratification takes place in the New Year.*" [261]

The Department of Children and Youth Affairs has therefore prepared a document for the attention of the Attorney General to demonstrate that Ireland is in compliance with the provisions of the Convention and that no further measures are required to be put in place in this regard. This is scheduled to be submitted early in 2019 and once approved by the Attorney General, the Minister will seek a Government decision on the ratification of the Second Optional Protocol. This is a development that is to be widely welcomed, demonstrating Ireland's commitment to the Protocol and ensuring Ireland does not fall behind the expected international standards. It is recommended, therefore, that ratification occur early in 2019.

In May 2018, the UN Special Rapporteur on the sale and sexual exploitation of children, Ms Maud de Boer-Buquicchio, visited Ireland to analyse the systems in place in this jurisdiction to protect against child exploitation. This Special Rapporteur is an independent expert, tasked

[261] See https://merrionstreet.ie/en/NewsRoom/Releases/Ireland_joining_international_stand_against_sale_of_children_child_pornography%C2%A0and_child_prostitution.html.

with investigating the exploitation of children in member states and making recommendations necessary to improve protections against child exploitation. While the findings and key recommendations of the Special Rapporteur's visit will be presented in a report to the UN Human Rights Council in March 2019, certain issues were raised in a press statement by Ms de Boer-Boquicchio delivered on 21 May 2018.[262]

In particular, she emphasised that the government needs to strengthen care services throughout the country, increase co-ordination between agencies engaged in child protection, and ensure child victims and those at risk receive specialised and continuous care. She thus called for a national strategy to prevent and respond to sexual violence against children; *"A national strategy on this issue would include training for all professionals who handle child abuse cases, data collection and redoubled efforts to ensure no child can fall through the cracks…As it stands, a lack of appropriate statistics on incidents of child sexual abuse and exploitation leaves policymakers with little guidance on where best to direct resources."* The lack of resources was emphasised as problematic, putting pressure on the child protection system – namely the low number of judges, shortage of social workers and limited mental health services. She further emphasised the absence of a public, national counselling service dedicated to the needs of child victims of sexual abuse, preventing children from receiving long-term counselling after such traumatic events occur in their lives, as well as the existence of only one sexual assault treatment centre for children in the jurisdiction, meaning some victims have to travel considerable distances to be examined.

It is recommended that in the short-term, while the delivery of her report to the UN Human Rights Council in March 2019 is awaited, consideration be given to the statement made by the Special Rapporteur following her visit to this jurisdiction and efforts commenced to respond to the succinct recommendations highlighted therein. In the longer-term, steps need

[262] See https://ec.europa.eu/ireland/news/ireland-un-human-rights-expert-calls-for-national-strategy-to-protect-children-from-sexual-violence_en - for the full press statement by the UN Special Rapporteur.

to be taken to deal adequately with the issues raised in her report once it is received by the government.

Recommendations

It is recommended that ratification of the Second Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography occurs in early 2019, as anticipated.

It is recommended that in the short-term, consideration be given to the statement made by the Special Rapporteur following her visit to this jurisdiction and efforts commenced to respond to the succinct recommendations highlighted therein.

In the longer-term, steps need to be taken to deal adequately with the issues raised in her report once it is received by the government.

SECTION 5: TUAM REPORT

5.1 INTRODUCTION

It is worth noting at the outset that in international law, there are no unified mass-grave protection guidelines in place for States to follow when they are faced with the discovery of sites, such as the burial site at the former Mother and Baby Home in Tuam, despite the existence of guidelines to deal with situations of armed conflict and investigations of missing persons.[263] Calls have been made to work toward a more comprehensive set of legal guidelines for the protection of such graves at an international level. This would assist in achieving a number of desired aims, including ensuring that family members are informed of the fate of their relatives, allowing survivor populations be aware about what happened at the site in question and enabling proper investigations to take place - answering questions and finding those responsible where possible.[264] While the site at Tuam cannot be considered to be a mass grave in terms of what is typically associated with violence or conflict, physical investigation of the site has necessitated use of the skillset designed to forensically investigate mass graves and similar legal issues are thus raised.

5.2 EUROPEAN CONVENTION ON HUMAN RIGHTS

The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR) came into force in 1953. It was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and make them binding. Its contracting states are obliged to secure to everyone within their jurisdiction the rights and freedoms set out in section 1 of the ECHR. The ECtHR is tasked with enforcing the provisions of the ECHR and its judgments, in some cases, have broadened the interpretation of the Convention. In Ireland, the European

[263] For instance, the Geneva Conventions and their Additional Protocols form the core of international humanitarian law, regulating the conduct of armed conflict and seeking to limit its effects. With regard to missing persons, the International Committee of the Red Cross (ICRC), "Guiding Principles/Model Law on the Missing" (2009) and the International Convention for the Protection of All Persons from Enforced Disappearance are of assistance.

[264] See Melanie Klinkner, "Towards mass-grave protection guidelines" *Human Remains and Violence,* Volume 3, No.1 (2017) 52-70. This article, however, concerns primarily the protection of mass-graves in post-conflict situations.

Convention of Human Rights Act 2003 was introduced to give further effect to the ECHR in Irish law. The Act did not incorporate the Convention into Irish law, but rather requires Irish courts to interpret legislation in line with the Convention insofar as it is possible to do so. It also requires that certain public bodies perform their functions in a manner compatible with the Convention, unless precluded by law.

Section 1 of the ECHR contains the rights and freedoms that the Convention is designed to protect. Article 8 ECHR is of crucial importance for present purposes, however it is necessary to set out in full the following provisions:

> Article 2: **Right to life**
> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.
>
> Article 3: **Prohibition of torture**
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> Article 8: **Right to respect for private and family life**
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

5.2.1 Article 8 ECHR

Article 8 is crucial in considering the options available with respect to the Tuam Mother and Baby Home as it is most likely that the right to family life and privacy contained therein is particularly engaged in these circumstances, bearing in mind both the rights of the deceased and their family members. While Article 8 is therefore the primary provision of consideration, it is worth noting that the protections contained within Article 8 can operate at

the same time as those contained in other articles. For instance, in cases of detention, the Court may find a violation of both Article 8 and Article 3 where the conditions are particularly poor and privacy concerns are raised. With regard to Article 8, while it specifically guarantees the right to respect for an individual's private and family life, home and correspondence, its scope has been interpreted in a broad manner by the ECtHR, with rights being inferred from its provisions even where same are not expressly enumerated therein.

In determining complaints as to whether Article 8 has been breached, the ECtHR will first consider whether the applicant's claim falls within the scope of Article 8 and the interests it is designed to protect. The Court will then examine whether there has been an interference with that right or whether the State's positive obligations to protect that right have been engaged. This will involve a consideration of the circumstances within which the State may curtail the enjoyment of a particular right as set out in Article 8(2) namely, where the interference is in accordance with law and necessary in a democratic society in the interests of national security, public safety, economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It is worth noting at the outset that while Article 8 is couched in negative terms, giving individuals protection against arbitrary interferences with their private and family life and mandating that the State refrain from such interference, the ECtHR has held that there may also be positive obligations placed upon the State to secure respect for private life. This may oblige the State to adopt measures designed to safeguard this right. This principle was first set out in the decision of *Marckx v. Belgium.*[265] In this case, the parents of a child born out of wedlock challenged the provisions of the Belgian Civil Code which detailed the process of establishing the maternal affiliation of an "illegitimate" child. Essentially, under Belgian law at that time, no legal bond between an unmarried mother and her child resulted from the mere fact of birth. Instead, the maternal affiliation of an "illegitimate" child was established by means of either a voluntary recognition by the mother or of legal proceedings taken for this purpose. Furthermore, in order to increase the rights of the child, for example for inheritance

[265] (1979) 2 EHRR 330.

purposes, the parents were required to adopt their own "illegitimate" child. The parents therefore complained that their rights pursuant to Article 8 were infringed.

The ECtHR duly held that the Belgian system infringed the right to private and family life by reducing inheritance rights for "illegitimate" children, finding that this Article made no distinction between the legitimate or "illegitimate" family. While the Court commented that the purpose of Article 8 is to protect the individual against arbitrary interference by the public authorities, it went on to state that Article 8 "…does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life." In this case, the indictment was against Belgian law which was found to be wanting in respect of the family life of the applicants. This positive obligation means that the State, in its domestic legal system, determines the provisions applicable to certain family ties, including to those between an unmarried mother and her child and the State must act in a manner to enable those concerned to lead a normal family life. Article 8 demands the existence in domestic law of legal safeguards that enable a child to integrate with his or her family from the moment of birth. A law of the State that fails to satisfy this requirement violates Article 8(1), without the necessity to examine the provisions of Article 8(2).

In cases where a positive obligation is claimed, the Court will consider whether the importance of the interest at issue requires the imposition of a positive obligation as sought by the applicant. The ECtHR in *Hämäläinen v. Finland*[266] considered certain factors as relevant in assessing the content of positive obligations on the State. Specifically, the Court stated that the importance of the interest at stake and whether 'fundamental values' or 'essential aspects' of private life are in issue are relevant, as well as the impact on an applicant of a discordance between the social reality and the law and the impact of the alleged positive obligation on the State concerned. In implementing their positive obligations, States enjoy a margin of appreciation, however that margin will be narrower where a particularly important facet of individuals' existence or identity is at stake.

In relation to the site at Tuam and the juvenile remains interred therein, the positive obligation inferred from Article 8 ECHR may be of relevance. Given the rights at issue,

[266] [GC], no. 37359/09, ECHR 2014.

discussed in full below, the question arises as to whether the State has a duty to take particular action at Tuam – to investigate and where possible, to return the remains to family members and provide relatives with information on the fate of their loved ones.

An exhaustive examination of Article 8 is not possible herein. For present purposes, therefore, specific regard will be had to issues concerning the death and burial of family members and judgments given by the ECtHR interpreting Article 8 and addressing this subject. The question examined is whether there exists a right of family members to have the remains of their loved ones returned to them under the Convention. The existence of any such right should be considered in informing the State's response to the Tuam site. In the relevant ECtHR decisions, it is clear that the rights of the family of the deceased are engaged and not those of the deceased themselves. These cases have involved challenges brought by individuals against a State who they claim failed to grant access to the remains of their family members or where excessive delays have occurred in the restitution of a body after an autopsy or following completion of a criminal investigation. Essentially, in its line of authorities, the ECtHR has inferred a right to bury family members into Article 8's protection for private and family life. There also exists a right of family members to be informed and provided with information surrounding the circumstances of their relative's death, an additional entitlement that requires particular attention in assessing what course of action is best with regard to the Tuam site. Furthermore, decisions of the ECtHR regarding the treatment of the body of the deceased are considered, with a particular focus on the requirement for the consent of the deceased's next of kin.

The applications considered below have been brought in a variety of contexts and understandably, no case on its facts can be said to mirror the particular set of circumstances at issue in relation to the discovery of human remains at the site of the former Mother and Baby Home in Tuam. Nevertheless, comparisons can be drawn and it is necessary to examine each case below to fully consider the applicable rights under ECHR law. It must be remembered that the rights recognised and vindicated therein are not absolute and a failure to return a dead body to the relatives for burial, or disclose where it was buried for instance, may only constitute a violation of Article 8 if the interference with these rights cannot be justified by the State in question. A key question is whether sufficient justification is given and whether the necessity and proportionality of the interference are considered.

5.2.2 Returning body to family member – delay between death and burial

In a number of cases that have come before the ECtHR, complaints have been made concerning the return of a deceased's body to his or her family members. Specifically, the length of time between death and the burial of the deceased is a pertinent issue. This warrants consideration bearing in mind that those interred in the Tuam site have not as of yet been returned to their family members for a respectful and appropriate burial. The proximity of family relationships is also likely to be relevant. The cases set out below all seem to concern immediate family members. I understand that may apply in some cases in Tuam but not necessarily in all cases. It is possible to envisage the Irish courts drawing a line between the rights of immediate family members and the interests of more distant relatives.

5.2.2.1 Pannullo and Forte v. France[267]

In June 1996, the daughter of Italian parents had died following a postoperative check-up in France at age four. Investigations were carried out by French authorities into the cause of her death and an examination took place into her diagnosis and treatment. These investigations caused a delay in the return of her body to her parents. An autopsy had been carried out in July 1996, but the body was not returned to her parents until February 1997. Medical evidence demonstrated that there was no necessity to keep the body for investigative purposes after the autopsy had been completed. Furthermore, the forensic scientist carrying out an expert report had indicated to the investigating judge following the autopsy that the necessary samples had been taken and the body could be repatriated. Despite this notification, the body was still not released. It was therefore claimed by her parents that the delay constituted an unjustified interference with their right to respect for their private and family life pursuant to Article 8 ECHR. On behalf of France, the delay was not disputed and it was accepted that it constituted an interference with the parent's Article 8 rights, but it was argued that the various formalities carried out in the release of the body had pursued a legitimate aim of preventing crime and therefore Article 8 was not breached.

[267] Number 37794/97, ECHR 2001-X.

The Court noted:

> …[W]hile the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation.[268]

It found that the interference with the applicants' rights was in accordance with law and pursued the legitimate aim of preventing crime. The question here therefore was whether the interference was necessary in a democratic society. In this regard, the Court took account of the fact that more than seven months passed between the child's death and the issuance of the burial certificate. While it determined that the deceased's body was required for the autopsy, it was clear that her body should have been returned to her parents immediately after same. Having regard to the circumstances of the case and the tragedy for the parents of losing their child, the Court concluded that the French authorities failed to strike a fair balance between the applicant's right to respect for private and family life and the legitimate aim pursued. The Court thus held that there was a violation of Article 8 ECHR.

This case makes it clear that the unjustified delay in the restitution of a body after an autopsy may constitute an interference with both the private life and family life of surviving family members.

5.2.2.2 Girard v. France[269]

In this case, the applicants were two French nationals whose daughter had disappeared in November 1997. More than a year and a half later, she was found murdered. In an action against French authorities, relying on Article 2 of the Convention, the right to life, they argued that there had been a failure to properly investigate their daughter's disappearance. They further argued that the delay in returning samples taken from the deceased's body constituted an interference with their Article 8 rights.

[268] Ibid., at para. 35.
[269] Number 22590/04, 30 June 2011.

The Court found that an extended delay in returning samples taken from the applicant's daughter's body by police, which prevented the applicants from burying her in a timely manner, violated Article 8. It placed weight on the delay of over four months that elapsed between the decision of the authorities to return the samples to the applicants and the actual return of said samples, similar to the unnecessary delay at issue in *Pannullo and Forte* demonstrated above. Furthermore, the Court held that there had been a violation of Article 2 ECHR due to the lack of an effective investigation into the deceased's disappearance. This case essentially recognises that under Article 8 – there exists a right to bury one's relatives – and demonstrates the link that may occur between Articles 2 and 8 in certain situations.

Distinct from a State's obligations under the ECHR, there is also an obligation on States under international humanitarian law, to 'facilitate the return of the remains of the deceased and of personal effects to the home country'. This obligation is included in Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, discussed in greater detail below.[270] While the Geneva Convention applies in circumstances of armed conflict, it is worthwhile noting that the aim even in these circumstances is to ensure the return of the deceased's body to his/her home county, to the family. Similarly, in the UN's Inter Agency Standing Committee's Operational Guidelines on Human Rights and Natural Disasters, it is recommended that appropriate measures should be taken "to facilitate the return of remains to the next of kin…Measures should allow for the possibility of recovery of human remains for future identification and reburial if required". On an international level, whether during times of armed conflict or natural disasters, there therefore also exists an obligation upon States to seek to secure the return of the deceased to their loved ones. As stated above, the international humanitarian law obligations are examined later in this chapter.

5.2.3 Right to know the fate of a family member – information surrounding circumstances of death

Following the death of a loved one, it is understandable that his/her relatives will seek information concerning the circumstances of his/her passing. Where a family member is missing, his/her relatives will usually seek to obtain the truth of his/her fate. There are

[270] Additional Protocol I, Art. 34(2).

various reasons for seeking and ascertaining these details. It may assist in securing the return of remains for burial and commemoration purposes and enable a death certificate to be obtained. Information and investigations surrounding the death or disappearance of a relative may explain what happened, restoring the human dignity of the deceased, or ultimately leading to answers, accountability and criminal justice proceedings. On a larger scale, the provision of such information to the public itself may promote transparency and prevent similar situations from arising again. The right to know the fate of a family member has been at issue in certain ECtHR decisions, as set out below.

5.2.3.1 Hadri-Vionnet v. Switzerland[271]

The case concerned the conditions under which the municipal authorities conducted the burial of the applicant's stillborn child without consulting her on the matter. In this case, the applicant gave birth to a stillborn baby while she was residing in a centre for asylum seekers in Switzerland. She and the child's father decided that they did not wish to see the child's body. An autopsy was then performed on the body and the baby was buried in a communal grave for stillborn babies. This burial took place without the parents being present and without a ceremony. The applicant mother challenged the manner in which this burial occurred, arguing that the burial took place without her knowledge in a communal grave and that she had not been entitled to attend. She contended that this was an infringement of her Article 8 rights under the Convention.

First, the ECtHR found that Article 8 was applicable in these circumstances. It thus found that the State's failure to inform the mother about the location and time of the burial of her still-born son was not authorised by law and violated her rights under Article 8. This arguably demonstrates that knowledge is crucial – namely, that a family member of a deceased has the right to know where the deceased is buried and the failure to provide information regarding a burial may be in breach of Article 8 ECHR.

[271] Number 55525/00, 14 February 2008.

5.2.3.2 Marić v. Croatia[272]

In *Marić v. Croatia*, the ECtHR found again that the disposal of the body in a manner which left the parents with no information as to the whereabouts of the remains breached the parents Article 8 rights. The Court relied on its previous decisions as clearly establishing that Article 8 was engaged by the applicant's complaint that he was prevented from knowing where the child was buried. However, it might also be noted that the Court described the case as one where:

> it is not a question of whether the applicant had the right to a particular type of ceremony or to choose the exact location of the child's place of rest, as could be understood from the Government's arguments, but whether there has been an interference with the applicant's rights under Article 8 by the body of his stillborn child being disposed of as clinical waste.

It is clear that the Court in this case was responding to the Croatian government's arguments rather than making a positive decision on the scope of the Article 8 obligation. It does, however, draw attention to the fact that the Court's Article 8 case law has been concerned so far with negative interferences on the part of the State with the right of family members to the return or disposal of bodies, or to information about their disposal. The Court does not yet appear to have considered whether Article 8 imposes a more extensive positive obligation on the part of State authorities to ensure that a burial takes place in the particular manner desired by the family.

5.2.3.3 Zorica Jovanović v. Serbia[273]

A similar concern regarding being informed of the circumstances of a family member's death arose in the case of *Zorica Jovanović v. Serbia.* In this case, in October 1983, the applicant gave birth to a healthy child in the Cuprija Medical Centre (CMC), a State-run hospital. A few days after his birth, the applicant's son was taken to a separate room for new-born babies as was standard procedure. The following day, the applicant was informed by a doctor that he had died. She was told that an autopsy would be performed on his body in Belgrade, thus

[272] Application no. 50132/12.
[273] Number 21794/08, ECHR 2013.

his body could not be released to his parents at that stage. His body was never returned to the applicant.

From 2001 onwards, the Serbian media began reporting extensively on numerous cases similar to that of the applicant's where new-born babies had "gone missing" following their alleged deaths in hospital wards. The applicant requested information regarding her son's death – seeking all relevant documentation from the CMC, requesting information from the Municipality of Cuprija and lodging a criminal complaint against the medical staff of the CMC for her son's "abduction". She was informed by the CMC that her son's death had been from an unknown cause and that no other information was available because its archives had been flooded and many documents had been destroyed. The Municipality informed her that her son's birth was registered in their records, but his death was not. The criminal complaint was rejected as unsubstantiated as "there was evidence that the applicant's son had died on 31 October 1983". The body of the applicant's son was never released to her, nor was she ever provided with an autopsy report or informed as to when and where he was allegedly buried.

It is worth noting, that in light of the hundreds of similar cases to that of the applicant, an Investigating Committee was established in Serbia. The findings of the Committee concluded that there had been serious shortcomings in the legislation in place at the relevant times and in the procedures in place; that the situation justified the parents' concerns as to what really happened to their children; and that a concerted effort should be made on the part of all government bodies to provide parents with adequate redress. An Ombudsman report similarly found that there were no coherent procedures in place at the time; that the autopsy reports were usually incomplete, inconclusive and of highly dubious veracity; and that it could not rule out that the babies in question were indeed removed from their family unlawfully. In response, the Parliament adopted the findings of the Committee and new procedures were put in place in Serbia in 2003 regarding the burial of new-born babies who died in hospital, setting out a detailed procedure to prevent any unlawful removal of babies from hospital wards.

In its judgment, the Court noted that the applicant's son allegedly died or went missing on 31 October 1983, whilst the Convention came into force in Serbia in March 2004. Nevertheless, the Court emphasised that it was claimed that the respondent State continued to fail to

provide the applicant with any definitive and/or credible information as to the fate of her son. In these circumstances, the Court determined that the applicant's complaint related to a continuing situation and the Court was competent to examine the complaint in so far as it related to the respondent State's alleged failure to fulfil its procedural obligations under the ECHR as of March 2004. It could, however, consider the facts prior to ratification inasmuch as they could be considered to have created a continuous situation extending beyond that date.

With regard to "family life" the court stated that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8. It noted that the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, but that there may also be positive obligations inherent in this provision extending to the effectiveness of any investigating procedures relating to one's family life.

The Court determined that the failure of the hospital to provide information to the applicant regarding the death of her infant son and the subsequent disappearance of his body violated Article 8 and its respect for private and family life. Although the child had died in 1983, it found that there had been an ongoing failure of the State to provide the applicant with information surrounding what had occurred to her son. The Court noted that the amended legislation only improved the position for the future and effectively offered nothing to those parents who endured the ordeal in this case. It concluded that the applicant suffered a continuing violation of Article 8 of the Convention due to the respondent's continuing failure to provide her with credible information as to the fate of her son.

The two decisions (discussed above) of the ECtHR demonstrate that under the Convention, family members of a deceased have a right to information regarding the fate of their loved one – whether this means being informed of the burial time, autopsy results or the location of his or her last resting place. A State's failure to provide such information may violate Article 8 where it is in breach of the positive obligation upon it to have in place effective investigative procedures even where the death occurred prior to the coming into force of the ECHR in the State in question, as long as there was a continued failure post the coming into force of the ECHR to provide the relevant information. While there are differences between the situation in *Zorica Jovanovic* and Tuam, the decision in *Zorica Jovanović* may be of

potential relevance given that it is likely that the deaths of many of the juveniles interred in the Tuam site occurred prior to the coming into force of the ECHR in Ireland, but the discovery of unrecorded burials only took place in recent years.

However, it should be noted that the English courts have held that questions concerning the burial or exhumation of deceased persons do not necessarily engage the Article 8 rights of blood relatives. In *R (Rudewicz) v. Secretary of State for Justice*,[274] the Court of Appeal held that the claimant's Article 8 rights were not affected by a decision to exhume a deceased relative. Although she was the deceased's closest living relative, she had never met him or had a close family connection to him. While the exhumation might offend her religious feelings or beliefs, Lord Neuberger MR (as he then was) held that this was different from impacting on her family or private life.

At a further historical remove, the Article 8 rights of blood relatives were also briefly discussed in *R (Plantagent Alliance Ltd) v. Secretary of State for Justice*.[275] This was a challenge by a descendant of Richard III to decisions concerning his exhumation and proposed re-burial. Ultimately, the Article 8 arguments were not pursued at trial, an approach described by the Divisional Court as sensible given that they were "doomed to fail".

5.2.4 Treatment of body – samples and consent

In certain ECtHR cases, the treatment of a deceased's body is at issue – particularly in relation to the removal of bodily materials and samples from same for certain purposes. This also raises the issue of consent and whether permission must be sought from the deceased's family. Across all cultures, it is a common belief that the dead should be treated with respect. This is demonstrated in the criminal legislation of many States, which provide that mutilation of a corpse is an offence. In relation to the use of tissue or organs from a deceased person for donation or other purposes, the domestic law of most countries will specifically set out the circumstances in which this may take place. In Ireland, for example, at present there is an opt in/explicit consent position with regard to organ donation. If a person wishes to become an organ donor after his/her death, potential donors are advised to inform his/her next of kin of

[274] [2012] 3 WLR.
[275] [2014] EWHC 1662.

his/her intentions and to carry an organ donor card. Next of kin are always asked for consent in order for a donation to proceed and consent is never presumed, even if a donor card has been signed.[276]

5.2.4.1 Petrova v. Latvia[277]

In this case, the applicant's son sustained serious injuries in a car accident in May 2002. He died in hospital a few days later. Immediately following his death, a laparotomy was performed on the body, in the course of which the kidneys and the spleen were removed for organ transplantation purposes. The applicant had not visited the hospital, but claimed that she was in permanent contact with the doctors there during her son's stay. She said that she had not been informed that his condition was deteriorating, had not been asked whether her son had consented to being an organ donor and had not been asked whether she would consent to organ transplantation in the absence of any wishes expressed by her son. She claimed that the removal of her son's organs without her consent constituted an interference with her private and family life. The State claimed that the hospital did not have any information on record providing the contact details of any relative – thus there was no contact with the applicant whatsoever when her son was in hospital. It argued that the "presumed consent system" in place in Latvia permitted interference with an individual's right to private life under Article 8 ECHR and that in this case, the organ removal had been carried out in accordance with the domestic law.

At that time in Latvia, the relevant law provided that every person with legal capacity was entitled to consent or object in writing to the use of his or her body after death. A person was required to apply to the Office of Citizenship and Migration Affairs to exercise the right to consent or object. Only such refusal or consent as was recorded in the Population Register had legal effect. The procedure which the State institutions had to follow to request and receive the relevant information from the Population Register, however, had not been adopted at the time of the applicant's son's death. The law also provided that the organs and tissues of a deceased person could not be used against his or her wishes as expressed during his or

[276] In July 2017, the Government approved the preparation of the General Scheme and Heads of a Human Tissue Bill, providing for an opt-out system of consent for organ donation in Ireland.
[277] Number 4605/05, 24 June 2014.

her lifetime. In the absence of express wishes, the organs could be used if none of the closest relatives objected. It went on to state that the organs could be removed if he or she had not objected to such removal during his or her lifetime and if the closest relatives had not prohibited it. A stamp on a person's passport added before 31 December 2001 denoting objection or consent to the use of his or her body after death had legal effect until a new passport was issued or an application to the Office of Citizenship was submitted. The domestic law was later amended in 2004.

At a domestic level, the applicant made numerous complaints and in response, the Inspectorate of Quality Control for Medical Care and Working Capability (the MADEKKI), carried out an investigation. It concluded that the hospital complied with the relevant domestic law in taking the decision to remove organs and carrying out the surgery. The MADEKKI noted that there was no information at its disposal as to whether or not there had been a stamp on the deceased's passport signifying an objection to the use of his body tissues and organs. As the applicant had not been informed about the imminent removal of her son's organs, it determined that she neither consented nor refused. It was further concluded by a prosecutor considering the criminal complaint that the domestic law required consent from parents or guardians only in cases where organs were removed from a deceased child's body for transplantation purposes.

The ECtHR, in considering the case, determined that the removal by the hospital of the deceased's organs without informing his mother and without seeking her consent was not carried out in accordance with law and violated her rights to private life under Article 8 ECHR. It noted that Article 8's purpose is to protect the individual against arbitrary interference by public authorities. Interferences may be justified as necessary in a democratic society if proportionate and they pursue a legitimate aim. This requires the domestic law to be formulated with sufficient precision to afford adequate legal protection against arbitrariness and it must indicate with sufficient clarity the scope of discretion conferred on the appropriate authorities. In this case, the dispute between the parties was not with regard to the content of the Latvian law – which expressly provided the deceased's closest relatives with a right to express their wishes on organ removal following the death - but how this right was to be exercised. The applicant contended that the domestic authorities had not fulfilled their duty to provide conditions whereby her wishes could be expressed. The State, on the other hand, claimed the relatives involved were expected to take positive steps if they wished

to veto any organ removal. It was concluded by the Court that the law was not sufficiently clear as regards the implementation of this right. At no time when the applicant's son was still alive, was a procedure in place for the State institution to follow in order to establish that person's own views on organ transplantation, nor was there a legal duty on State institutions to inform the closes relatives about imminent organ removal. It stated that it was unclear how the claimed "presumed consent system" operated in practice in the circumstances in which the applicant found herself whereby she had certain rights, but was not informed as to how and when these rights might have to be exercised. The Court thus found that the applicable Latvian law was not formulated with sufficient precision or afforded adequate legal protection against arbitrariness. The interference with the applicant's Article 8 rights was not in accordance with law and a violation of Article 8 was held to have had occurred.

On the same reasoning, the Court also upheld the applicant's complaint that she had been subjected to inhuman and degrading treatment on account of the fact that the removal of her son's organs had been carried out without his prior consent or the consent of the applicant.

5.2.4.2 Elberte v. Latvia[278]

In 2001, the applicant's husband had died in hospital following a car accident. His body was transported from the hospital to the State Centre for Forensic Medical Examination in Riga. To establish the cause of death, an autopsy was carried out. Following the autopsy, tissue was removed from his body – the outer layer of the meninges - by a forensic expert who stated that he had verified that there was no stamp on the deceased's passport denoting his objection to the use of his body tissue. The applicant argued that the expert could not have verified that there was no stamp on her husband's passport as that passport had been in their home at the time.

The applicant only became aware that tissue had been removed from her husband's body two years later, when police informed her that a criminal inquiry had been opened into the illegal removal of organs and tissue for supply to a pharmaceutical company in Germany. There was in existence an agreement between the Forensic Centre and the German company to provide organs and tissue for scientific research. Under the agreement, experts carrying out

[278] Number 61243/08, ECHR 2015.

tissue removal were to comply with domestic law and were to verify whether the potential donor had objected to the removal of organs or tissues by checking his/her passport for the presence of the stamp. If relatives objected to the removal, their wishes were to be respected. Experts, however, did not attempt to contact relatives to establish their wishes. Ultimately, the criminal inquiry was discontinued. In this decision, it was held that the experts did not have any legal obligation to inform anyone about his/her right to consent to or refuse organ or tissue removal. While the domestic law provided for the right of the closest relatives to object to the removal of material from deceased persons, it did not place an obligation on experts to explain these rights to the relatives.

Reiterating the principle of clarity as set out in *Petrova*, the ECtHR held that Article 8 ECHR had been violated in this case. The domestic law was not formulated with sufficient precision to enable relatives to exercise their rights to object to the removal of bodily material from their family member. In this case, tissue was removed from the deceased without the knowledge and consent of his spouse. This occurred due to the lack of clarity in the domestic law and the absence of legal safeguards against arbitrariness. The ECtHR therefore held that Article 8 had been violated in this case.

5.2.4.3 Estate of Kresten Filtenborg Mortensen v. Denmark[279]

The case concerned the removal of DNA from the body of a deceased for the purposes of a paternity suit. It was claimed by two brothers that the deceased was their biological father. Following other testing, the City Court decided that his body was to be exhumed for the purpose of taking DNA samples – this being the only remaining option to establish paternity. The estate of the deceased, represented by his legitimate son, appealed against the decision and the case ultimately was considered by the Supreme Court of Denmark. The Supreme Court permitted the taking of biological material from the corpse despite the fact that the relevant domestic legislation did not contain any specific rules on forensic genetic testing of deceased persons.

[279] Number 1338/03, ECHR 2006-V.

In the challenge to the ECtHR, the deceased's estate complained that the exhumation of the corpse for the purposes of taking DNA samples constituted a breach of Article 8 ECHR as same was not "in accordance with law".

In considering this case, the Court emphasised that the applicant for the purposes of these proceedings was "the estate of KFM". It was complained that the Supreme Court's decision violated "the rights of the estate of KFM". While the concept of "private life" is a broad term, the Court stated that it would stretch the reasoning developed in case law too far to hold that the proposed testing on the deceased in this case constituted an interference with the Article 8 rights of the deceased's estate. In cases such as *Pannullo and Forte* (discussed earlier), the Convention was relied upon by individuals who were alive when they lodged their complaint with the Court who maintained that their right to respect for private or family life had been breached, as opposed to the deceased person's right to respect for private or family life. The ECtHR stated:

> In the present case the individual in question, namely KFM, was deceased when the alleged violation took place and hence when his estate, on his behalf, lodged the complaint with the Court alleging an interference with his right, or rather his corpse's right, to respect for private life. In such circumstances, the Court is not prepared to conclude that there was an interference with KFM's right to respect for private life within the meaning of Article 8.1 of the Convention.

While the representative for the estate, the legitimate son, did not make a claim in his own right as a family member of the deceased, submissions were made to the Court that the exhumation of the corpse also constituted an intrusion of that son's privacy rights. On the facts of this case, however, the Court rejected this assertion on the grounds that there was no evidence that the son complained at any point during the domestic proceedings that his rights had been violated. This submission was therefore inadmissible due to the non-exhaustion of domestic remedies.

These cases demonstrate that in terms of pursuing any claim for violation of Convention rights, it is the family members alone who are capable of asserting these rights. The deceased no longer possess human rights and they are not capable of asserting same. This approach is similarly demonstrated in the Council of Europe's Additional Protocol on Transplantation of

Organs and Tissues of Human Origin.[280] Pursuant to Article 18, "Respect for the human body", it is provided that during removal of organs and/or tissues, the human body must be treated with respect and all reasonable measures must be taken to restore the appearance of the corpse. The Explanatory Comment to Article 18 states; "A dead body is not legally regarded as a person, but nonetheless should be treated with respect."

5.2.5 Specific requests regarding burial

5.2.5.1 Elli Poluhas Dödsbo v. Sweden[281]

In this case, the ashes of the applicant's husband were buried in a family grave in Fagersta, Sweden, where the family had been living for some time. Years later, the applicant moved to be closer to her children. She thus requested that the cemetery authorities allow the transfer of her husband's urn to her family plot in Stockholm. She submitted that her children agreed to the removal, that she had no connection to Fagersta any longer and that she was sure her husband would not have objected to the transfer. Her request was refused by authorities in deference to the notion of a "peaceful rest" under the Funeral Act 1990 and her appeals were also refused. The relevant domestic law provided that when a person dies, his or her wishes concerning cremation and burial should, as far as possible, be followed. Where a dispute arises between survivors, it is for the county administrative board to decide. Once remains or ashes have been buried, moving them from one place to another is in principle not allowed unless permission is granted if special reasons exist. These provisions were based on respect for the sanctity of the grave. This requires that the provisions regarding the removal of remains and ashes be restrictive. A deceased's grave should be left in peace and may only be disturbed in special circumstances.

The applicant therefore complained that the refusal to allow her to transfer the urn containing her husband's ashes to her family burial plot in Stockholm was in breach of Article 8 ECHR. It was not disputed by the State that the refusal to grant permission to remove the urn from one burial place to another involved an interference with the applicant's private life, but it

[280] Adopted 24 January 2002, entered into force 1 May 2006; See Comment to Article 18, Additional Protocol on Transplantation of Organs and Tissues of Human Origin.
[281] Number 61564/00, ECHR 2006-I.

was argued that the interference was in accordance with law, that it served legitimate aims and was justified under Article 8.2.

As to the legitimate aims, the government emphasised that the principle of the sanctity of graves had a long-standing tradition and was founded on respect of the deceased. Thus, the strict approach taken by its law, and by the public authorities in applying the law, served to prevent disorder and to protect morals in society at large. It also submitted that the restrictive approach was necessary to prevent conflicts arising amongst relatives and that the living were entitled to be assured that, after death, their remains would be treated with respect. Regarding the issue of necessity, Sweden submitted that States should be afforded a wide margin of appreciation in cases of this kind, where the authorities had to balance the interests of the person requesting the removal with society's role in ensuring graves are not disturbed. In this case, there were no indications that the husband had not been buried in accordance with his wishes; he was buried in the region where he had lived and worked for twenty-five years; the burial site was a family grave, large enough for his entire family; and there was no obstacle to the applicant having her final resting place in the same cemetery as that of her husband.

The ECtHR acknowledged that the applicant's Article 8 right to private life was engaged. It stated that the concepts of "private and family life" are broad terms not susceptible to exhaustive definition and it noted the findings of the Commission that an applicant's wish to have his ashes spread over his own land fell within the sphere of private life in *X v. Germany.*[282] It found, however, that the State's refusal to transfer an urn from one burial plot to another did not violate Article 8. The Court held that the decision to refuse to transfer the remains was made with due consideration to the interests of the deceased's wife and fell within the margin of appreciation available in such cases, finding that in such an important and sensitive issue, States should be afforded a wide margin of appreciation.

5.2.6 Application of Article 8 principles

It is clear from the foregoing body of case law that Article 8 of the ECHR may be of relevance in relation to the particular set of circumstances arising from the discovery of

[282] Commission decision of 10 March 1981, no. 8741/79.

juvenile remains at Tuam. Article 8 has been broadly interpreted, providing family members of deceased persons with a substantial number of rights capable of assertion. While these rights are not absolute, and may be proportionately interfered with, their existence is of considerable importance and the State should be careful to ensure no illegitimate infringement of such rights. Family members may possess the right to have their loved one's body returned to them. Moreover, relatives may have a right to know the fate of their family members, including information surrounding the death and/or burial of their loved ones. A failure to provide relatives with definite and/or credible information may fall foul of the positive obligation under Article 8, even where the death occurred before the Convention came into force in the relevant county, where the failure to provide information continues following the coming into force of the ECHR. It is also of note, that where samples are sought to be taken from a corpse, the consent of the family member is a relevant concern and should be borne in mind in any approach taken in relation to the subject matter of this chapter of my report. Irish authorities are required to carry out their functions in a manner compatible with the ECHR and Article 8 rights in particular must be positively vindicated. Regard should be given to the distress and anguish of family members seeking information surrounding the death and/or burial of their loved ones. Nonetheless, it should also be borne in mind that there may be limits to the information which can or must be provided for the purposes of complying with Article 8. The decisions of the ECtHR confirm that Article 8 rights include information concerning the fate and place of burial of the deceased but it may not necessarily extend to additional matters (although these may be covered by Articles 2 and 3 ECHR).

Furthermore, any Article 8 ECHR right should be considered having regard to the extreme delicacy of any exhumation and further investigation at the Tuam site, as determined by the Expert Technical Group. The report of the ETG states that: "There are a number of factors that make this situation unique: The forensic requirement of the site; The 'significant' quantities of juvenile remains; The commingled or intermixed state of the remains; The position of the remains within subsurface chambers, with limited access." The report[283] concludes that the comingled state of the remains renders identification "particularly challenging". Moreover, the ETG states there is a "risk of destruction to human remains" that raises ethical issues.

[283] Report of the Expert Technical Group, December 2017, (i).

It is clear from the foregoing that it is the family members who assert their rights under the Convention. They are not asserting the rights of the deceased, but their own as relatives. It is even questionable whether the deceased possess any human rights, as realistically due to their death, they are not capable of asserting same. This issue was considered by Rosenblatt in relation to the investigation of mass graves in *International Forensic Investigations and the Human Rights of the Dead.*[284] He states:

> … [H]uman rights for the dead are philosophically unworkable and irreconcilable with the practical limitations of forensic work; therefore, we should not think of the dead as having human rights. However, this conclusion does not end discussion about what forensic investigators do for dead bodies. Rather, it makes room for a modest but rich sense of how exhumation can restore the identity, physical location, and care that have been denied to victims of atrocity.

5.2.7 Articles 2 and 3 ECHR

While much of the discussion above focuses on Article 8 ECHR rights and the right to respect private and family life, Articles 2 and 3 of the Convention also warrant consideration. Article 2 protects the right to life. The obligation of States to protect life is set out in the Convention, but is similarly recognised in other international human rights instruments, including the Universal Declaration of Human Rights (Article 3). As with Article 8, the ECtHR has interpreted Article 2 as placing a positive obligation on States. While, therefore, it requires States to refrain from the intentional and unlawful taking of life, they must positively take appropriate steps to safeguard the lives of those within their jurisdiction. Procedurally, there exists an obligation upon States to effectively investigate a killing or suspicious death within their territory. Article 3 prohibits torture, inhuman or degrading treatment or punishment. A similar obligation to investigate arises out of Article 3 ECHR. Where inhuman or degrading treatment is alleged, a State has a duty to investigate a complaint made.

[284] *Human Rights Quarterly*, Volume 32, Number 4, November 2010, pp. 921-950 (Article) published by The Johns Hopkins University Press.

5.2.8 Duty to investigate

The obligation to carry out an effective investigation was given explicit recognition by the European Court of Human Rights in the case of *McCann and Others v. United Kingdom*.[285] In *McCann,* three IRA suspects had been shot dead by Special Forces operatives in Gibraltar as a result of a conjoined anti-terrorist operation involving British, Gibraltarian, and Spanish authorities. The Court provided a lengthy and detailed judgment which examined the planning and control of the operation and it created an obligation to carry out an effective investigation inherent in Article 2:

> The obligation to protect the right to life under this provision (art 2) read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in the [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as result of the use of force by, inter alios, agents of the State.[286]

This principle has been applied in a number of subsequent cases since then, and its application has been extended to deaths which occur not just as a result of lethal force, but also in circumstances involving negligence within public health authorities.

5.2.8.1 Osman v. United Kingdom[287]

In this case, the applicants were the wife and son of the deceased, Mr Ali Osman. The deceased was killed by his son's former teacher and his son, Ahmet, was seriously wounded in the same incident. The teacher, during the course of the son's time as a pupil at a school in London, formed a disturbing attachment to him, giving him money, taking photographs of him and following him home. The school authorities investigated the matter and a police officer visited the school on several occasions, but no further action was taken. As the behaviour of the teacher escalated, he was suspended from teaching duties pending an investigation by the education authority into his unprofessional conduct towards Ahmet Osman. A number of attacks were then made on the Osmans' property: a brick was thrown through a window of their house; the tyres of Mr Osman's car were slashed and the

[285] Number 17/1994/464/545, 27 September 1995.
[286] Ibid., at p. 161.
[287] Number 87/1997/871/1083, 28 October 1998.

windscreen smashed; and paraffin and dog excrement were applied to their doorstep. Following each of those incidents, the Osman's complained to the police. A police officer interviewed the teacher on two occasions and he was later interviewed at his own request by officers from the education authority, to whom he stated he was thinking of doing a "Hungerford" (an indiscriminate mass killing carried out in the town of Hungerford).

The police were informed and in December 1987, the police went to the teacher's home to arrest him on suspicion of causing criminal damage to the Osmans' property. He was not at home and he later failed to attend for work. Between January and March 1988, he travelled around England, periodically returning to his home address, and on 7 March 1988, he went to the Osmans' home where he shot and killed Ali Osman and shot and injured Ahmet. He was later convicted. It was argued by the applicants that the police authorities had failed to protect the lives of the deceased and his son.

The Court noted that it was not disputed that Article 2 of the Convention might in well-defined circumstances imply a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. However, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, this obligation must be interpreted in a manner which does not impose an impossible or disproportionate burden on the authorities.

The Court considered that where there was an allegation that the authorities had violated its positive obligation to protect the right to life in the context of its duty to prevent and suppress offences against the person it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that it failed to take measures within the scope of its powers which, judged reasonably, might have been expected to avoid that risk. With regard to the particular circumstances at issue in this case, the Court found that there had not been a violation of Article 2 as the applicants had failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from the teacher.

5.2.8.2 Aslakhanova v. Russia[288]

This case concerned five joined applications by families who complained about the disappearance of their eight male relatives in two particular districts of Russia between 2002 to 2004. In all of the cases, the facts were similar in both the style of the abductions, which were conducted in a manner resembling a security operation, and in the resulting criminal investigations, which remained pending without having produced any tangible results. The Government did not dispute the principal facts of each case as presented by the applicants, but claimed that as the domestic investigations were pending, any conclusions about the exact circumstances of the crimes would be premature. It was also argued that it had not been established with sufficient certainty that the applicants' relatives had been detained by State agents or that they were dead.

In its decision, the ECtHR found that the evidence established that the family members of the applicants must be presumed dead following unacknowledged detention by State agents. It therefore held that there was a substantive violation of their right to life under Article 2 of the Convention. Importantly, the Court also found that a procedural violation of Article 2 had occurred due to the failure of the State to carry out effective investigations into the disappearances. Furthermore, there was found to be a violation of Article 3's prohibition on inhuman and degrading treatment as a result of the distress and anguish caused to the families by reason of the abduction of their relatives and due to the Russian authorities' response to their suffering.

5.2.8.3 El-Masri v. Former Yugoslav Republic of Macedonia[289]

In this case, the ECtHR stressed the importance of an effective investigation in establishing the truth. This was recognised as not only being of benefit to the relatives of victims, but also for other victims, as well as for the general public who have the right to know what transpired.

[288] Number 2944/06, 8300/07, 50184/07, 332/08, 42509/10, 18 December 2012.
[289] [GC] no. 39630/09, 13 December 2012.

In this case, the applicant was a German national of Lebanese origin. He had been a victim of a secret "rendition" operation in 2003 during which he was arrested, held in isolation, questioned and ill-treated in a hotel in Skopje hotel for 23 days regarding his alleged ties with terrorist organisations. He was then transferred to CIA agents who brought him to a secret detention facility in Afghanistan, where he was further ill-treated over four months. Amongst the legal action taken by the applicant, he lodged a criminal complaint against the former Yugoslav Republic of Macedonia and against unidentified law-enforcement officials due to his unlawful detention and abduction. This complaint was dismissed by the Skopje public prosecutor. The position of the Government of the former Yugoslav Republic of Macedonia was that the applicant had entered the country, had been interviewed by police on suspicion of travelling with false documents, had been allowed entry into the country and then had left the country, crossing into Kosovo. In the proceedings before the ECtHR, however, the Minister for the Interior of the former Yugoslav Republic of Macedonia confirmed that the Macedonia law-enforcement authorities, acting upon a valid international arrest warrant issued by US authorities, had detained the applicant and kept him in Skopje under the constant supervision of agents of the State Intelligence Service. He later had been handed over to the custody of the CIA rendition team.

The Court held that the applicant's allegations, in light of the evidence available, were sufficiently convincing and established beyond reasonable doubt. It therefore held that there had been a violation of Article 3 of the Convention in this case arising out of the inhuman and degrading treatment to which the applicant was subjected. The Court also held that there had been a violation of Article 3 due to the failure of the State to carry out an effective investigation into his allegations of ill-treatment. It observed that the applicant had brought his allegations of ill-treatment to the attention of the Macedonian public prosecutor, supported by evidence which had emerged from the international and other foreign investigations. The State, therefore, had been under an obligation to carry out an effective investigation. Apart from contacting the Ministry for the Interior for information, however, the prosecutor had not undertaken any investigative measure to examine those allegations before rejecting the complaint for lack of evidence. In particular, the applicant had not been interviewed, nor had the personnel working in the hotel at the time of his alleged captivity there. No steps were taken to establish why the aircraft suspected of having been used to transfer the applicant to Afghanistan had landed or to investigate the identity of the passenger who boarded it. The prosecutor had relied solely on the report of the Ministry, whose officials

were suspected of having been involved in the applicant's alleged ill-treatment, thus this fell short of what should have been expected from an independent authority.

It was emphasised by the Court that investigation of the case was important not only for the applicant, but also for the victims of similar crimes and for the general public, who had the right to know what had happened. The summary investigation that had been carried out was not an effective one capable of establishing the truth and leading to the identification and punishment of those responsible. The applicant's rights pursuant to Article 3 were thus violated with regard to the lack of an effective investigation into his allegations.

The ECtHR case law concerning Article 2 in particular demonstrates that the procedural obligation upon a State to investigate effectively arises where the death occurs in suspicious circumstances or where an individual has gone missing in life-threatening circumstances. The purpose of such investigations is to ensure that domestic law in place to protect the right to life is implemented. The Last Rights Project, in its article *The Dead, the Missing and the Bereaved at Europe's International Borders – Proposal for a Statement of the International Legal Obligations of States*,[290] sets out the criteria which the ECtHR has required to be met for an investigation to satisfy international human rights standards as follows:

- State initiative – the State authorities must take the initiative to investigate once the matter has come to their attention and may not leave it to the next of kin to bring proceedings;
- Independence – those carrying out the investigation must be independent from those implicated in their death;
- Effectiveness – the investigation must be capable of leading to a determination of whether the action taken by State officials was justified in the circumstances and to a determination of the culpability of those responsible for the death. Steps must be taken to secure all relevant evidence in relation to the death;
- Promptness – the investigation must take place promptly and must proceed with reasonable expedition;
- Transparency - the investigation must be open to public scrutiny to a degree sufficient to provide accountability in the circumstances of the case.[291]

[290] May 2017.
[291] The Last Rights Project - *The Dead, the Missing and the Bereaved at Europe's International Borders – Proposal for a Statement of the International Legal Obligations of States* (May 2017) at p.11.

5.2.9 Duty to investigate incidents which took place before the ECHR came into force

The Convention duty to investigate incidents may include incidents that happened some time ago. It is, however, a more limited duty in relation to historical incidents which occurred before the State in question signed the Convention. Nevertheless, relatives of the deceased should be involved in the investigation to a sufficient degree to safeguard their legitimate interests.[292]

5.2.9.1 Janowiec v. Russia[293]

The position with regard to atrocities and killings which took place before the Convention came into force was clarified by the Grand Chamber in *Janowiec v. Russia*.[294] In this decision, the applicants, who were family members of Polish officers and officials detained in Soviet camps or prisons following the Red Army's invasion of Poland in 1939, complained about the alleged failure of the State to adequately account for the fate of these prisoners, believed to have been executed by Soviet secret police at Katyń in 1940 and buried in mass graves. Investigations into the mass murders were started in 1990 but discontinued in 2004. The ECtHR upheld Russia's preliminary objection based on the fact that the deaths occurred 58 years before the Convention entered into force in the respondent State.

It stated that its temporal jurisdiction to review a State's compliance with its procedural obligation under Article 2 to carry out an effective investigation into alleged unlawful killings

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[292] *Edwards v. UK* [2002] ECHR 303.

[293] [2014] 58 EHRR 30.

[294] See also *Silih v. Slovenia* (2009) 49 EHRR 37 and *Mocanu v. Romania* (2015) 60 EHRR 19. The ECtHR in *Silih* established that breaches which have taken place before the coming into force of the Convention ('critical date') might also give rise to an obligation to investigate. It found that the Article 2 duty to investigate is free-standing, and did not require the triggering event to have taken place during the relevant State's period of formal obligation under the Convention.

The Grand Chamber in *Silih* set out four constraints on when a pre-ratification free-standing obligation to investigate suspicious death crystallises:

> (a) That only procedural acts and/or omissions occurring after the critical date fell within the court's temporal jurisdiction.
>
> (b) That there must exist a genuine connection between the death and the entry into force of the Convention in respect of the Respondent State for the procedural obligation to come into effect.
>
> (c) That a significant proportion of the procedural steps will have been or ought to have been carried out after the critical date.
>
> (d) However, in certain circumstances, the connection could be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.

by State agents was not open-ended where the deaths had occurred before the date the Convention entered into force in respect of that State. In such cases, the Court has jurisdiction only in respect of procedural acts or omissions in the period subsequent to the Convention's entry into force, provided there was a "genuine connection" between the death as the triggering event and the entry into force. For a "genuine connection" to be established, the period between the death and the entry into force had to have been reasonably short, no more than 10 years, and a major part of the investigation had or ought to have been carried out after the date of entry into force. The emergence of new, credible information about such past events, however, may trigger the duty to investigate.

On the evidence, the applicants' relatives were presumed to have been executed by the Soviet authorities in 1940. Russia did not ratify the Convention until May 1998. This period of time was much longer than the periods which had triggered the procedural obligation under Article 2 in previous cases and furthermore, the Court stated that it was too long in absolute terms for a genuine connection to be established between the deaths and the entry into force of the Convention in respect of Russia. The Court was unable to accept that a re-evaluation of the evidence, a departure from previous findings or a decision regarding the classification of the investigation materials could be said to have amounted to the "significant proportion of the procedural steps" required for establishing a "genuine connection" for the purposes of Article 2. It also noted that no relevant piece of evidence or substantive item of information had come to light in the period since the critical date. Accordingly, neither criterion for establishing the existence of a "genuine connection" had been fulfilled.

5.2.9.2 Keyu v. Secretary of State for Foreign and Commonwealth Affairs[295]

The UK Supreme Court in *Keyu v. Secretary of State for Foreign and Commonwealth Affairs* rejected an appeal against the decision of the UK's Foreign and Defence Secretaries to refuse to hold a public inquiry into the Batang Kali deaths. The Supreme Court held that as the alleged breach of Article 2 had come into effect prior to the 1998 Human Rights Act, there was no continuing breach beyond the creation of the Act.

[295] [2012] EWHC 2445 (Admin); [2015] UKSC 69.

In this case, the UK Supreme Court considered whether the respondents should be required to hold a public inquiry into the Batang Kali deaths – that is, a series of events in 1948 in which it is alleged that a Scots Guard patrol shot and killed 24 unarmed civilians in the village of Batang Kali, in Selangor. In 2008, a campaign group called 'The Action Committee Condemning the Batang Kali Massacre' presented a petition seeking a public inquiry from the British government. The respondents informed the appellants by letters on 29 November 2010 and 4 November 2011 of their decision to refuse to hold an inquiry into the killings.

The appellants sought to judicially review the refusal to hold a public inquiry, arguing that a public inquiry was required on three different grounds: (i) under Article 2 (right to life) of the ECHR; (ii) under the common law by virtue of its incorporation of principles of customary international law; and (iii) under the common law by judicial review of the respondents' exercise of their discretion under section 1 of the Inquiries Act 2005. Treacy J. in the High Court had held that as the alleged breach of Article 2 ECHR had occurred prior to the 1998 Human Rights Act, there was no continuing breach beyond the creation of the Act and a public inquiry was refused. The applicant appealed this decision.

The Supreme Court ultimately dismissed the appeal, finding that a requirement for a public or other inquiry could not be imposed in this case. It noted that where a death occurs prior to the date upon which the relevant Member State contracted to the ECHR, two criteria must be satisfied if the investigative duty under Article 2 is to arise – there must be (i) relevant 'acts or omissions' after the critical date, and (ii) a 'genuine connection' between the death and the critical date. As to the second criterion, in order for there to be a genuine connection, the lapse of time between the death triggering the investigative duty and the critical date must remain reasonably short, and should not exceed ten years. In this case, the alleged deaths took place prior to the Convention coming into force. No further incident or supervening event occurred to create any obligation upon the State after the ECHR came into effect.

There was a distinction made by the Court on the question of whether the critical date is the date of the coming into force of the ECHR or the date when the right of petition was recognised by the UK. The ECHR came into force for the UK on 3 September 1953, whereas the UK recognised the right of an individual to petition the European Court of Human Rights in January 1966. The majority held that it was the date when the right to petition was recognised that is the relevant critical date and on this basis, as the killings occurred more

than ten years before the critical date, there was no genuine connection. The Article 2 claim therefore failed. While Lady Hale similarly dismissed the Article 2 claim, she considered that the critical date was the date that the ECHR came into force. Nonetheless, she dismissed the Article 2 claim because the inquiry was sought for the purposes of establishing historical truth rather than legal liability and as a matter of principle, there was a difficulty in finding that there could be a "genuine connection" between killings which occurred before the coming into effect of the ECHR and obligations imposed by the ECHR.

The Court then considered the position of customary international law within the UK. It determined that same had not developed to impose a duty on the State to hold a public inquiry. However, even if that conclusion was incorrect, and it was a principle of customary international law that a State must investigate deaths such as the alleged incident in Batang Kali, the Court held that this principle could not be incorporated into common law. It noted:

> … Parliament has expressly provided for investigations into deaths (i) through the coroners' courts in the Coroners and Justices Act 2009, and its predecessors, and (ii) through inquiries in the 2005 Act, and its subject-specific predecessor statutes. It has also effectively legislated in relation to investigations into suspicious deaths through the incorporation of Article 2 in the 1998 Act. In those circumstances, it appears to be quite inappropriate for the courts to take it onto themselves, through the guise of developing the common law, to impose a further duty to hold an inquiry, particularly when it would be a duty which has such potentially wide and uncertain ramifications, given that it would appear to apply to deaths which had occurred many decades – even possibly centuries – ago.

5.2.9.3 Re McGuigan[296]

Re McGuigan concerned the interrogation of the "Hooded Men". During the period of internment in 1971 to 1972, twelve men in Northern Ireland suspected of being involved in terrorist activity were taken to an interrogation centre, now known to have been located at a British Army base. They there underwent "interrogation in depth" over the period from 11 to 17 August 1971. Two further men underwent similar interrogation in October 1971. The deep interrogation process involved "the five techniques" i.e. prolonged hooding, subjection to continuous loud noise, sleep deprivation, deprivation of food and water, and the

[296] [2017] NIQB 96.

maintenance of stress positions over long periods of time. Owing to the first of these techniques, these 14 men came to be known as the "Hooded Men".

In this case, the applicants challenged the decision of the Police Service of Northern Ireland not to take further steps to investigate the question of identifying and prosecuting those responsible for criminal acts during the interrogation of the "Hooded Men". They sought judicial review of the decision made by PSNI that there was no evidence to warrant an investigation, compliant with Articles 2 and 3 of the ECHR, into the allegation that the UK Government authorised the use of torture in Northern Ireland. They also challenged decisions of all three respondents as constituting a continuing failure to order and ensure a full, independent and effective investigation into torture at the hands of the United Kingdom Government and/or its agents in compliance with Articles 2 and 3 of the ECHR, common law, and customary international law. The application was brought by Francis McGuigan, one of the Hooded Men, and the daughter of another of the "Hooded Men".

McGuire J., in the High Court in Belfast, ultimately quashed the PSNI's decision, finding that the decision to end the inquiry was seriously flawed. Three legal issues were considered in this case.

First was the ECHR issue. The applicants argued that the respondents were guilty of failing to ensure an effective investigation was carried out relating to the performance by the UK of its procedural obligation under Articles 2 and 3; and that there was a duty enforceable in domestic law on the State to carry out an effective official investigation into the treatment of the "Hooded Men", capable of leading to the identification and punishment of those responsible for the methods used.

In determining whether there was a breach of Articles 2 and 3 of the ECHR on the facts of these cases upon which a domestic court could rule, the Court stated that two questions arose:

> … the first is whether it is likely that the ECtHR would find a breach and the second is whether it is open to this Court to hold that there is a breach.

In considering whether the ECtHR would find a breach, in line with the Grand Chamber's decision in *Janowiec*,[297] Maguire J. stated that the Strasbourg Court, in cases of this type where a temporal problem exists, would consider whether the 'genuine connection' test is met. The Court took the view that for present purposes the 'critical date' must be viewed not as the date when a State acceded to the Convention or agreed to the right of individual petition, but as the date when the Human Rights Act commenced, namely 2 October 2000. He noted that the triggering event in these cases occurred in the early 1970s whereas the equivalent of the 'critical date' is 2 October 2000. In the context of the time factor, he noted that the lapse of time between these dates should be 'reasonably short', by which is meant a period not exceeding ten years, though there may be, based on some Strasbourg authorities, some room for an element of flexibility on this point. He concluded, however, that on this aspect the distance in time was simply too long to establish the existence of a genuine connection, the gap of over 40 years exceeding significantly the norm of ten years.

Looking at the balance of the process of investigation as between the period prior to the critical date and the period after it, the Court noted that this involves the question of whether much of the investigation into the relevant event took place or ought to have taken place in the period following the critical date. If the balance favours the view that the majority of relevant actions have or should have taken place after the critical date, this aspect may be satisfied. On the other hand, if the balance is in the other direction, this aspect may not be satisfied. With regard to the present cases, Maguire J. found that this aspect of the genuine connection test was not satisfied as the majority of the activity in respect of the events in this case at issue occurred in the period 1971 to 1978. Thereafter there was a long period when the issues were dormant and he stated that he could not conclude that post 2014 there had been extensive investigative measures taking place. The court therefore held that the two aspects of the 'genuine connection' test, both of which would ordinarily have to be satisfied, had not been established.

This, however, was not the end of the inquiry as the court then examined the "Convention values test" – which deals with extraordinary cases which have failed the 'genuine connection' test. The court noted the "extremely high hurdle" to fulfil this test and that the

[297] [2014] 58 EHRR 30. See also section 5.2.9.1 above.

language in *Janowiec* describing the sort of circumstances which may meet the test is in very general terms:

> What may constitute the underlying values of the Convention or what sort of action or behaviour would amount to a negation of its very foundations invites the application of ideas which are difficult to define.

In considering this test, the court stated that it must bear in mind the circumstances in their totality which give rise to this issue, noting that this case involved the state and state authorities establishing a secret interrogation centre and a system for the deep interrogation of detainees which, when it reached the public domain, it produced such a reaction as to require the immediate establishment of the Compton Inquiry and that the events shortly became the subject of inter-State proceedings within the Convention system. In assessing whether this test was met, the court stated that the Convention is a living instrument and must be interpreted in the light of present day conditions. Maguire J. took the view that if the events herein were replicated today, the ECtHR would be likely to accept the description of torture in respect of these events as accurate. He therefore concluded that the sort of activity at issue in this case had a larger dimension than an ordinary criminal offence and thus would amount to "…the negation of the very foundations of the Convention." The "Convention values" test was found to be established.

The court then considered whether the *Brecknell*[298] test was met – whether new information has arisen since the event at issue, reviving the obligation under Article 2 to investigate. The new information in this case comprised materials which were exposed in an RTÉ broadcast of 2014. These materials tended to suggest that torture had been authorised at the time by a senior United Kingdom Minister and that the UK Government had withheld from the Strasbourg institutions evidence which undermined its case that the after effects of the use of the five techniques were not long-lasting or severe. The question was whether the new material could be said to come within the description of 'plausible or credible allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator'. The court was satisfied that this information fell within the broad description referred to in *Brecknell* and, accordingly, was sufficient to cause, given that the Convention Values test had been surpassed, a revival of the obligation

[298] *Brecknell v. United Kingdom* (2008) 46 EHRR 42 at paras. 66 to 72.

under Article 2 to carry out an effective official investigation. It concluded, therefore, that there was an obligation to take further investigative measures. The court held it was a matter for the authorities to take reasonable steps to comply with this obligation.

The Court, however, did not find in favour of the respondents on the Convention issue and held that, as a matter of domestic law Articles 2 and 3 were not engaged in this case because of the temporal restriction on the operation of the Human Rights Act. The Court stated that following the approach in *Keyu*[299] (in England and Wales) and *Finucane*[300] (in Northern Ireland), the decision in *McKerr*[301] remains the relevant governing authority. This meant that in the present cases no obligation under Article 2 or 3 could be held to operate under the Human Rights Act as a matter of domestic law as the events the court was dealing with long pre-dated 2 October 2000.

Maguire J. then determined the independence issue, namely the complaint regarding the independence of the investigator. He stated that as this argument derives from the jurisprudence of Articles 2 and 3, it must follow that if, as a matter of domestic law, Articles 2 and 3 are not engaged because of the temporal restriction on the operation of the Human Rights Act, this ground of challenge must also fail. On the common law issue, however, he found in favour of the applicants. The applicants claimed that quite apart from any issue of Convention law, there is an obligation of a broadly parallel nature at common law which requires an effective official investigation into a death or an event involving inhuman or degrading treatment or torture. The Court agreed that even if the ECHR as a matter of domestic law does not require the steps referred to above to be taken, such steps were required as a matter of common law - finding that this ground was made out, considering the Supreme Court judgment in *Re McKerr*. Furthermore, it upheld the applicants' claim that the PSNI's decision to end the inquiry of the matter was premature. It found that the decision was seriously flawed and was inconsistent with the broad approach which the Chief Constable had adopted. The Court therefore quashed the decision made on behalf of the PSNI not to take further steps to investigate the question of identifying and, if appropriate, prosecuting those responsible for criminal acts.

[299] [2015] UKSC 69.
[300] [2017] NICA 7.
[301] [2004] 1 WLR 807.

In *Ireland v. UK (request for revision of the judgment of 18 January 1978),*[302] the ECtHR dismissed the application by the Irish Government for a revision of the ruling in the 1978 *Ireland v. UK ("Hooded Men")* case. The 1978 judgment found that the UK violated the men's rights to be free from inhuman and degrading treatment, but that the treatment the men suffered did not amount to torture. I do not believe the 2018 judgment alters the above analysis regarding the temporality of the procedural obligations under Article 3 ECHR (including the Northern Ireland High Court's appraisal of its jurisdiction under the 1998 Human Rights Act), in that it only addressed the substantive question of whether the techniques would have been classified as torture in 1978 had the Court known what is now available in the public archives.

The case was decided on a narrow evidential ground – i.e. whether RTÉ's 2014 documentary based on newly released UK Government documents under the thirty-year rule constituted "new facts" for consideration. The Court rejected this submission. Moreover, the case also concerned a request for a revision of a previous decision under Rule 80 § 1 and therefore did not trigger any of the temporal issues explored above.

Summary

In relation to Ireland, while the European Convention on Human Rights Act was only introduced in 2003, the Convention was signed and ratified in this jurisdiction in 1953, entering into force on 3 September 1953. The deaths which occurred at the Tuam Mother and Baby Home are estimated to have occurred in the period between 1920 to 1960. While the majority of that period pre-dates the entry into force of the Convention in Ireland in 1953 and the adoption of the Convention itself in 1950, the remainder of that period post-dates Ireland's ratification of the Convention. Furthermore, the discovery of the remains interred therein only occurred in 2017. In light of the recent evidence of juvenile remains at the site of the former Mother and Baby Home in Tuam, therefore, a question arises as to whether the duty upon the State to investigate is triggered in the present circumstances. A further question to be considered is whether this is the kind of new information that would trigger an Article 2 obligation to investigate. In Keyu, one of the judges[303] *felt that the ECHR rule was*

[302] Number 5310/74 and ECHR 110 (2018), 20.03.2018.
[303] Para 103.

not a right to say that "any assertion or allegation can trigger a fresh investigative obligation under Article 2", but rather that "state authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further".

The unsettled position in the UK should be noted. In Re McKerr,[304] *the UK Supreme Court held that an obligation to initiate an investigation under Article 2 only applies to deaths occurring after the Human Rights Act 1988 came into force in 2000. A similar approach was followed by the UK Supreme Court in Keyu v. Secretary of State for Foreign and Commonwealth Affairs, discussed above. This approach, however, was called into question in other decisions and the current position is unclear.*[305]

5.2.10 The rights of relatives under Articles 2 and 3 ECHR

The duty to investigate inherent in Article 2 as recognised by the abovementioned ECtHR case law may operate together with the protections set out in Article 3 ECHR in some circumstances. Article 3 prohibits inhuman or degrading treatment. Any violations of Article 3 are significant because the right is absolute making it more difficult to assert resource constraints arguments and time limits for complainants. As demonstrated above in *Aslakhanova v. Russia*, relatives of deceased persons may be in great distress following the death of their family member in situations where the actions of or a failure by the State is involved. Accordingly, the Article 3 rights of these family members may be engaged where a State fails to investigate a suspicious death.

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[304] [2004] 1 WLR 807.

[305] See *In Re McCaughey* ([2011] UKSC 20) where Lord Phillips reflected on the *Silih* judgment [(2009) 49 EHHR 372] of the Grand Chamber:

> I believe that the most significant feature of the decision ... is that it makes it quite clear that the Article 2 procedural obligation is not an obligation that continues indefinitely ... [j]ust because there has been a historic failure to comply with the procedural obligation imposed by Article 2 it does not follow that there is an obligation to satisfy that obligation now. In so far as Article 2 imposes any obligation, this is a new free-standing obligation that arises by reason of current events. The relevant event in these appeals is the fact that the coroner is to hold an inquest into [the applicants'] deaths. *Silih* ... establishes that this event gives rise to a free standing obligation to ensure that the inquest satisfies the procedural requirements of Article 2.

However in that same judgment, Baroness Hale doubted whether the decision grounded any free-standing right to open a new investigation. See also *Re McGuigan* [2017] NIQB 96.

5.2.10.1 Cyprus v. Turkey[306]

This case concerned the aftermath of military operations conducted by Turkey in 1974 wherein it occupied part of Northern Cyprus. Cyprus brought an application alleging violations of the Convention arising from the conduct of the Turkish authorities, particularly with regard to their failure to investigate the fate of persons who were missing as a result of the conflict.

Having considered the circumstances of the case, the ECtHR concluded that there had been a continuing violation of Article 2 of the Convention due to the failure of the Turkish authorities to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances. It noted that States have a procedural obligation to effectively investigate, not only when individuals have been killed as a result of agents of the State, but also where individuals who were last seen in the custody of agents of the State, subsequently disappeared in a context which may be considered life-threatening. Such a situation was clearly demonstrated in this case. While Turkey had contributed to the investigatory work of the UN Committee on Missing Persons, the contribution thereto was not sufficient to meet the standards of an effective investigation under Article 2.

The Court specifically considered the impact upon the relatives of those missing persons, noting the moral pain and mental suffering of relatives. It found that the silence of the Turkish authorities in the face of the real concerns of the relatives reached a "level of severity" which was to be categorised as inhuman treatment and Article 3 was therefore infringed. This decision makes it clear that a violation of Article 3 will be found where the State's actions go beyond a "minimum level of severity", inflicting moral pain and mental suffering on relatives.

[306] [GC] no. 25781/94, 10 May 2001.

5.2.10.2 Çakici v. Turkey [307]

The applicant in this case alleged that her two sons and her grandson had disappeared in circumstances engaging the responsibility of the respondent State. She claimed they were taken into custody in 1994 by Turkish soldiers and never released. This was disputed by Turkey who did not acknowledge any such detention or disappearance. The European Commission of Human Rights conducted its own investigation with a view to establishing facts in light of the dispute surrounding the disappearance of the men in question. Reviewing the investigation, the ECtHR found that the applicant's sons must be presumed dead following an unacknowledged detention by security forces. Consequently, it held that the responsibility of the respondent State for their death was engaged. As the authorities did not provide any explanation of what occurred to the men after their apprehension and because they did not rely on any round to justify the use of lethal force by its agent, the Court held that there had been a violation of Article 2.

The Court then considered whether there had been an effective official investigation into the disappearance of the applicant's relatives. In this regard, the Court had regard to the length of time taken before an official investigation commenced and before witness statements were obtained. It also had regard to the manner in which relevant information was ignored by the investigating authorities. The Court concluded that the investigation carried out was inadequate and therefore in breach of the State's procedural obligations to protect the right to life and a violation of Article 2 took place on this account also.

Finally, the Court considered the applicability of Article 3 in this case – with regard to both the applicant's sons and the applicant herself. The applicant argued that the respondent State breached her sons' Article 3 rights. She emphasised the very fact that her sons' disappearance occurred in a context devoid of the most basic judicial safeguards, which she said must have exposed them to acute psychological torture. She referred to the ill-treatment that she had been told by witnesses that had occurred and she claimed that this must be considered even more compelling in view of the existence of a high level of torture of detainees in the respondent State. The Court found that there was no evidential basis upon which it could conclude that the applicant's sons endured ill-treatment contrary to Article 3, noting that it

[307] [GC] no. 23657/94, 8 July 1999.

requires a standard of proof "beyond reasonable doubt" that ill-treatment of a minimum level of severity occurred. With regard to the claim made by the applicant herself the Court reiterated that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The Court noted that the applicant received no news of her sons for almost six years and was living with the fear that they were dead. Moreover, she had requested the authorities to at least be given their bodies. It stated that the "uncertainty, doubt and apprehension suffered by the applicant over a prolonged and continuing period of time has undoubtedly caused her severe mental distress and anguish". Having regard to this and the authorities' complacency in the face of her distress, the Court found the State to be in breach of Article 3 in respect of the applicant.

5.2.10.3 Sabanchiyeva v. Russia[308]

In *Sabanchiyeva v. Russia*, the applicants were relatives of deceased persons who died during or soon after an attack on local law enforcement agencies. The authorities determined that this was a terrorist attack and decided not to return the bodies of the deceased to their families but to have them cremated. The applicants claimed a breach of their rights arising from this, including under Articles 3 and 8 of the ECHR.

The Article 3 claim related to the manner in which the bodies were stored during the process of having them identified. This means it bears some similarities to the issues that could be raised in the Tuam context. It was argued that this caused mental suffering to the applicants in breach of Article 3. The Court emphasised the importance of Article 3, as illustrated by the fact that it makes no provision for exceptions or derogations. However, the Court also reiterated the fact that ill-treatment must attain a minimum level of severity if is to fall within the scope of Article 3. In the context of mental suffering, the Court gave the example of the suffering "endured by applicants as a result of the acts of security forces who had burnt down their homes and possessions before their eyes". It also reiterated that allegations of ill-treatment must be proved beyond reasonable doubt.

[308] (2014) 58 EHRR 14.

Applying these principles, the Court accepted that the inadequate storage of the bodies meant relatives may have endured mental suffering. That was even more the case for those who witnessed the bodies in person.

However, the Court drew a distinction between these applicants and previous cases brought by relatives of victims who disappeared as a result of actions by the security forces. This may be an important point given that the situation in Tuam may be more similar to this case, than to the cases of persons 'disappeared' or killed by State security forces. The Court also held that the applicants did not suffer any prolonged uncertainty over the fate of their relatives; and that the manner of storage was due to logistical difficulties so that it could "hardly be said to have had as their purpose to subject the applicants to inhuman treatment, and in particular, to cause them psychological suffering". The Court therefore unanimously found that there was no violation of Article 3. While the applicants were likely to have experienced mental suffering, this was not of "a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to any family member of a deceased person in a comparable situation" so as to violate Article 3.

This decision underlines the high factual and legal threshold that is applied by the Court to allegations of a breach of Article 3. The fact that a deceased's body is treated in a manner that causes relatives mental suffering is not of itself a contravention of Article 3. The Court's discussion of its previous case law suggests that substantially greater legal or moral culpability – such as the intentional infliction of mental suffering on relatives; or the direct involvement of security forces in killing or disappearing the deceased – is required to ground an Article 3 claim.

On the Article 8 issue, the Court held that the ban on participation in the funeral and on disclosing the location of the grave permanently cut the link between the applicants and the deceased's remains in a manner that constituted a severe interference with their Article 8 rights. The Court accepted, however, that the authorities were entitled, in principle, to impose restrictions on the rights in this instance given the activities of the deceased and, in particular, the risk of disturbances or other unlawful actions during or after the burials. Nonetheless, the automatic nature of the measures was a disproportionate breach of Article 8 because it failed to give any consideration to individual situations or to the possibility of less intrusive alternative means.

In light of this decision, the question arises whether relatives of those interred in Tuam could contend that their rights pursuant to Article 3 ECHR have been violated. Whether any such claim would be successful would depend on the specific set of facts prevailing in each individual case as a minimum level of severity must be achieved.

5.2.11 Obligation to collect the bodies of the deceased

In light of the abovementioned discussion concerning the express and inherent rights pursuant to the Convention, the question arises as to whether there exists an obligation on States to collect the bodies of the deceased. The issue was considered by the Last Rights Project, in *The Dead, the Missing and the Bereaved at Europe's International Borders – Proposal for a Statement of the International Legal Obligations of States*.[309] While this work concerns refugees and migrants who die or go missing at international land and sea borders, the principles discussed therein may be relevant to the issue under review. The Last Rights Project notes that while there is a substantial body of legal principles and rules in both customary and treaty law that apply regarding the treatment of the dead in the context of armed conflict, the position is less clear in respect of the treatment of the dead in peacetime contexts. To address this lacuna, it recommends that the principles established in international humanitarian law in relation to armed conflict can serve as a guide with regard to the treatment of the dead in some peacetime situations.

With regard to the collection of the bodies of deceased persons, in cases of armed conflict, international humanitarian law contains an express obligation to collect the bodies of the deceased. This is set out in Article 15 of the Geneva Convention, which provides:

> At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.[310]

Similarly, Article 8 of the Additional Protocol II provides that "…whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without

[309] Lastrights.net.
[310] Article 15, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention 1), adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 85.

delay … to search for the dead, prevent their being despoiled, and decently dispose of them."[311]

While there does not appear to be a direct reference in the Universal Declaration of Human Rights (UDHR) or the ECHR stating that there is an express obligation on States to collect the bodies of the dead, it is arguable that the protection of the other human rights obligations discussed above – to investigate the cause of death, to return the remains to family members, to know the fate of one's relative – necessarily require such collection. In reality, the failure of a State to ensure the collection of bodies of the deceased may prevent it from complying with the positive obligations set out in Articles 2, 3 and 8 ECHR and may constitute an interference with the Convention rights of the family members concerned.

This positive duty to collect remains is not absolute, and the usual limitations apply. In this vein, akin to that set out in the Geneva Convention where States are required to take all possible measures to search for the dead, in collecting the dead in peacetime circumstances, States may be required to take all reasonable measures to discharge this duty. This would prevent a State from being at fault in circumstances where recovery is simply not possible – for instance, where bodies are lost at sea or where, such as is the case with regard to the remains at Tuam, it may simply be impossible to retrieve all of the remains due to the limitations of forensic excavation.[312]

Summary

In order to ensure the effective vindication of the abovementioned ECHR rights, there appears to be an inferred duty on the Irish State to collect, as far as reasonably possible, the remains of those interred at Tuam. The Tuam site, according to the Expert Technical Report, will test the boundaries of forensic investigation in every regard. The Expert Technical Group, due to the varied nature of the complexities at the site in Tuam, notes the limitations of the forensic possibilities involved in excavation and examination on the site. It states that given that the site holds a group of collectively interred individuals, "it may only ever be possible to provide collective answers", and the potential to identify individuals interred

[311] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 1125 UNTS 609, Article 8.
[312] See Expert Technical Group Report.

there poses many challenges. These limitations therefore must be borne in mind and where the State fails to collect remains for these reasons, it is unlikely to fall foul of its duty where it takes all reasonable steps to investigate the possibility of retrieval and, if proportionate and justified, undertakes reasonable measures to retrieve the bodies in question.

5.3 INTERNATIONAL HUMAN RIGHTS LAW: THE UN FRAMEWORKS

International human rights law also warrants consideration. The Universal Declaration of Human Rights (UDHR) is crucial in this regard. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations. It sets out the fundamental human rights that are to be universally protected. These are enforced through supervision and reporting by expert bodies, some of which may also deal with individual complaints. The state has an obligation to respect, protect and fulfil the rights guaranteed in these instruments pursuant to section 1 and as a member of the United Nations since 1955, Ireland is expected to uphold its principles, and to protect the rights set out in international treaties through its laws, policies and practices.

The right to life and the rights of the family are emphasised in the UDHR. Article 3 provides that everyone has the right to life, liberty and security of person. Article 8 states that; "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." The importance of the family unit is clear from Article 16 thereof, which recognises that the family is the natural and fundamental unit group of society and is entitled to protection by society and the State. The crucial rights capable of assertion and protection at European level therefore are also recognised within international law.

The Declaration contains a number of rights which are of relevance to the current review: Article 1 (equality and dignity); Article 2 (prohibition on sex discrimination); Article 4 (prohibition on slavery or servitude); Article 5 (prohibition on torture, or cruel, inhuman or degrading treatment or punishment); Article 6 (recognition as a person before the law); Article 7 (equality before the law); Article 9 (prohibition on arbitrary arrest, detention or exile); Article 10 (fair hearing); and Article 25 (minimum standard of living).

Within international human rights law, children are recognised as a specific group requiring particular special protection. In this regard, in 1989, the UN Convention on the Rights of the Child (CRC) was adopted by the UN General Assembly and in 1990, it entered into force. All State parties, including Ireland which ratified the CRC in 1992, have duties under the Convention to ensure that their laws, policies and procedures promote the full enjoyment of all the rights contained therein for all children. Article 4 CRC provides that States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. Article 6 protects the right to life of every child. Article 7 provides as follows:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8 protects the child's identity:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

The duty upon States to ensure the accurate identification of children demands the effective collection and preservation of essential data on children, and to collate all data. This necessarily would include the registration of the death of a child and collating the date of children who have died. As the site in Tuam contains a significant quantity of juvenile human remains, the provisions of the CRC may be of relevance.

International Covenant on Civil and Political Rights (ICCPR)

Ireland is a signatory, and since 1989 a State Party[313] to the ICCPR. As Ireland has ratified the Covenant, it can be held accountable for failures to realise the rights contained therein before international human rights fora and courts.

A number of Covenant Rights are relevant to this review: Article 3 (equal rights of men and women); Article 6 (right to life); Article 7 (prohibition on torture or cruel, inhuman or degrading treatment or punishment); Article 8 (prohibition on slavery); Article 9 (security and liberty); Article 10 (human dignity); Article 11 (prohibition on imprisonment "merely on the ground of inability to fulfil a contractual obligation"); Article 16 (recognition as a person before the law); Article 24 (child's rights including to registration at birth, and nationality); Article 26 (equality before the law).

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Ireland is a signatory, and since 1989 a State Party[314] to the ICESCR. As Ireland has ratified the Covenant, it can be held accountable for failures to realise the rights contained therein before international human rights fora and courts.

A number of Covenant Rights are relevant to this review: Article 7 (just and favourable conditions of work); Article 10 (rights of mothers during pregnancy and birth); Article 11 (adequate standard of living); Article 12 (right to health); Article 13 (right to education); and Article 15 (right to participate in cultural life).

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Ireland is a signatory, and since 1985 a State Party[315] to the CEDAW. As Ireland has ratified the Convention, it can be held accountable for failures to realise the rights contained therein before international human rights fora and courts.

[313] Having ratified the ICCPR.
[314] Having ratified the ICESCR.
[315] Having ratified the CEDAW.

A number of CEDAW rights are relevant to this review: Articles 1, 2, 7, 8, 9, 10, 11, 12 and 13. Other CEDAW rights of significance include: Article 16 (prohibition on discrimination against women); Article 3 (full advancement of women); Article 5 (elimination of prejudice; common responsibility of men and women in the upbringing and development of their children); Article 6 (prohibition on trafficking of women); and Article 14 (rights of rural women).

Enforced/Involuntary Disappearance

Laws prohibiting enforced/involuntary disappearance form part of both customary international humanitarian law,[316] and the UN framework of international human rights law.[317] When part of a widespread or systemic programme, enforced disappearance is a crime against humanity.[318]

Article 2 of the UN's 2006 International Convention for the Protection of All Persons from Enforced Disappearance states:

> For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[319]

Amnesty International states:

> [T]he human story is simple: People literally disappear, from their loved ones and their community, when state officials (or someone acting with state consent) grab them from the street or from their homes and then deny it, or refuse to say where they are. It is a crime under international law.[320]

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[316] See Rule 98 "Enforced Disappearance", in the *International Committee of the Red Cross, Customary International Humanitarian Law: Rules* (Cambridge 2005).
[317] The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) (2005) http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx.
[318] Rome Statute of the International Criminal Court (1998), Article 7(1)(i) http://legal.un.org/icc/statute/99_corr/cstatute.htm. It is to be noted that Ireland is a State Party to the Rome Statute, having ratified the instrument in 2002.
[319] http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx.
[320] https://www.amnesty.org/en/what-we-do/disappearances/.

The crime of systemic enforced disappearance has its roots in the Nazi regime in Germany during the 1940s, and re-emerged into the public consciousness during the era of dictatorships in South American States during the 1960 to 1980s,[321] in international and national wars, and in other repressive regimes throughout the latter half of the 20th century. Enforced disappearances were first codified as a crime in international human rights law in the Vienna Declaration and Programme of Action in 1993,[322] and then again in the Rome Statute in 1998.

Enforced disappearances, involving coercive detaining of individuals or groups, is a legally complex phenomena involving a possible multitude of distinct human rights violations, including the right to security and personal dignity; not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment; to humane conditions of detention; to legal representation; to a fair trial; to a family life; and even the right to life, when the abducted person is killed.[323] Enforced disappearances and the prohibition thereof are therefore an integral legal mechanism for preventing and holding to account breaches of a State's obligations under the ICCPR and the ICESCR. The UN's Human Rights Committee, the principal treaty body tasked with overseeing the implementation and adherence to the ICCPR, has noted that enforced disappearances can violate Article 6 (right to life), Article 7 (prohibition on "torture or other cruel, inhuman or degrading treatment or punishment"), Article 9 (liberty and security), and Article 10 (inherent human dignity) of the Convention.[324] The 2006 Convention, to which Ireland is a signatory, sets out detailed obligations on States to investigate alleged disappearances, and make appropriate accountability mechanisms (criminal and civil) a part of the domestic legal order.

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[321] Vitkauskaitė-Meurice and Žilinskas, "The Concept of Enforced Disappearances in International Law" (2010) 2 *Jurisprudence* 197, 198.

[322] Principle 62 states:

> The World Conference on Human Rights, welcoming the adoption by the General Assembly of the Declaration on the Protection of All Persons from Enforced Disappearance, calls upon all States to take effective legislative, administrative, judicial or other measures to prevent, terminate and punish acts of enforced disappearance. The World Conference on Human Rights reaffirms that it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed, to prosecute its perpetrators.

See http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx.

[323] Boot and Hall, "Crimes against Humanity", in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2nd ed, Bloomsbury 2008).

[324] See Communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003.

The UN's Human Rights Council (formerly the UN Commission on Human Rights) has, since 1980, established a Working Group on Enforced or Involuntary Disappearance, one of the primary tasks of which "is to assist families in determining the fate or whereabouts of their family members who are reportedly disappeared."[325] The Working Group also monitors State compliance with the UN's 1992 Declaration on the Protection of all Persons from Enforced Disappearances.

The Working Group's General Comment on the Right to the Truth in Relation to Enforced Disappearances states that the "right to truth" is now "an autonomous right at the international level, and through State practice at the national level",[326] having been previously recognised by the Working Group in its first report.[327]

The Working Group's General Comment also echoes Principle 2 of the *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*[328] in emphasising the preventive and educative function of the right to truth: by learning of and understanding past atrocities, States and societies can prepare to avoid their re-occurrence.[329]

In the same General Comment the Working Group stated, applying Article 13 of the 1992 Declaration, that the duty to continue an investigation is not time-limited, as the nature of enforced disappearance is also continuing. It emphasises:

> the right of the relatives to know the truth of the fate and whereabouts of the disappeared persons is an absolute right, not subject to any limitation or derogation … This absolute character also results from the fact that the enforced disappearance causes "anguish and sorrow" (5th preambular paragraph of the Declaration) to the family, a suffering that reaches the threshold of torture, as it also results from article

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[325] http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx.

[326] The Working Group further state:

> The existence of the right to the truth in international law is accepted by State practice consisting in both jurisprudential precedent and by the establishment of various truth seeking mechanisms in the period following serious human rights crises, dictatorships or armed conflicts.

See http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf. See also *Study on the right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights* (E/CN.4/2006/91), paragraph 21.

[327] E/CN.4/1435, 22 January 1981, § 187.

[328] "The inalienable right to truth" https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement E/CN.4/2005/102/Add.1.

[329] "General Comment on the Right to the Truth in Relation to Enforced Disappearances" http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf.

> 1§2 of the same Declaration that provides: 'Any act of enforced disappearance (...) constitutes a violation of the rules of international law guaranteeing, (...) the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.[330]

On paragraph 6 of the General Comment, the Working Group deals with the question of DNA testing within the obligations of the State under the UN Declaration:

> The remains of the person should be clearly and indisputably identified, including through DNA analysis. The State, or any other authority, should not undertake the process of identification of the remains, and should not dispose of those remains, without the full participation of the family and without fully informing the general public of such measures. States ought to take the necessary steps to use forensic expertise and scientific methods of identification to the maximum of its available resources, including through international assistance and cooperation.

Paragraph 7 of the General Comment states:

> The right to know the truth about the fate and the whereabouts also applies to the cases of children who were born during their mothers' enforced disappearances, and who were thereafter illegally adopted. Article 20 of the Declaration provides that such acts of abduction, as well as the act of altering or suppressing documents attesting to their true identity, shall constitute an extremely serious offence, which shall be punished as such.

While this relates to situations of enforced and/or involuntary disappearances, arguably the mothers and children interred at the site at Tuam could be regarded as the victims of enforced disappearances and the principles set out above may be applicable.

The Right to Know/Right to Truth

Originally part of international humanitarian law[331],[332] and later the international legal developments in the area of enforced/involuntary disappearance (emerging from the jurisprudence on the American Convention on Human Rights),[333] the right to know has

[330] Ibid., para. 4.
[331] Laws of war.
[332] *Study on the right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights* (E/CN.4/2006/91), paragraph 5.
[333] Ibid., at paragraph 8; Case 10.488, *Ignacio Ellacuría et al v. El Salvador* Report No 136/99 (1999).

evolved to include instances of "gross" or "systemic" human right abuses[334] outside of wartime,[335] culminating in formal codification in Article 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearance.[336] Various states and national courts have also recognised the right to truth, either as an implied component of their domestic law in the aftermath of gross or systemic human rights abuses, or as part of international human rights law.[337] For example, the Courts of Argentina have found that in cases of enforced disappearances the right to the truth is based on the right to mourning (*derecho al duelo*),[338] and also to add to the State's systemic capacity to prevent future re-occurrence.

The 2006 Convention on Enforced Disappearance grants each victim "the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party must take appropriate measures in this regard." "Victim" in this area of law, also covers the family of the victims, their representatives, and often includes the society or community at large.[339] The 2006 Convention codifies what is already implied in many international human rights instruments to which Ireland is a party.

The right of victims to know is also to be found in the 2006 Basic Principles,[340] with Principles 24 holding:

> [V]ictims and their representatives should be entitled to seek and obtain information on the causes leading to their victimisation and on the causes and conditions

[334] Both Article 5 of the International Convention for the Protection of All Persons from Enforced Disappearance, and the commentary on the Principle to combat impunity suggests that 'massive or systematic violations' is as defined in current international law (United Nations Commission on Human Rights, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, 18 February 2005, E/CN.4/2005/102, para 20).

[335] *Study on the right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights* (E/CN.4/2006/91), paragraph 8.

[336] Ireland has signed, but has yet to ratify the International Convention for the Protection of All Persons from Enforced Disappearance.

[337] *Study on the right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights* (E/CN.4/2006/91), paragraphs 21 and 23.

[338] See Agreement of 1 September 2003 of the National Chamber for Federal Criminal and Correctional Matters, Case *Suárez Mason*, Rol 450 and Case *Escuela Mecánica de la Armada*, Rol 761.

[339] Article 24(1) of the International Convention for the Protection of All Persons from Enforced Disappearance defines "victim" as "the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance."

[340] The Basic Principles - *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

> pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

Klinker states the position as follows:

> At its core … a positive action is required by the state to undertake continued and systematic efforts to investigate the abuses and to gather the evidence in an attempt to answer questions about what happened, why it happened, to identify those responsible, directly and indirectly, and understand the patterns of abuse.[341]

The UN's Commission on Human Rights' (since 2006 the UN Human Rights Council) *Report of the Independent Expert to Update the Set of Principles to Combat Impunity* sets out significant detail on the right to know: containing 17 distinct Principles.[342] These include: "the inalienable right to truth" (Principle 2); "the duty to preserve memory" (Principle 3); "the victim's right to know" (Principle 4). Similar to other literatures on the right to know in the context of abuses of international human rights,[343] these Principles emphasise the central role of commissions of investigation and truth commissions in achieving the right to know (Principles 6-13), along with detailed obligations on states to preserve evidence and archives (Principles 14-18). This approach to the right to truth highlights its value in avoiding future reoccurrence of the same human rights abuses, by holding perpetrators to account and challenging impunity in human rights violations.

The UN High Commissioner for Human Rights' 2006 wide-ranging *Study on the right to truth* found that the right is part of the State's broader duty to protect and guarantee human rights.[344]

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[341] Klinker, "Towards Mass Grave Protection Guidelines" (2017) 3(1) *Human Remains and Violence* 52, 57.
[342] Report of Diane Orentlicher, independent expert to update the set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity (February 2005) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement.
[343] *Study on the right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights* (E/CN.4/2006/91), paragraphs 13-15.
[344] *Study on the right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights* (E/CN.4/2006/91), paragraph 45.

Birth and Death Registration and International Human Rights

Birth Registrations

The UN High Commissioner for Human Rights, in a 2014 report to the UN Human Rights Council entitled *Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law*, emphasised the right to a birth registration is a fundamental human right.[345] The report notes how the right is recognised in Article 24 of the ICCPR, as well as Article 7 of the CRC. It argues that the right to birth registration is instrumentally beneficial/essential to the realisation of other fundamental human rights in the civil and socio-economic domains. The report states as follows:

> Birth registration is the continuous, permanent and universal recording within the civil registry of the occurrence and characteristics of birth, in accordance with the national legal requirements. It establishes the existence of a person under law, and lays the foundation for safeguarding civil, political, economic, social and cultural rights. As such, it is a fundamental means of protecting the human rights of the individual.[346]

There does not appear to be an express right to a birth certificate under the right to birth registration, though Gerber *et al*, writing on the experience of indigenous Australians, argue that such a right is implicit in the right to birth registration given its similarly central role in realising other civil, political and socio-economic rights.[347]

Death Registrations

There does not appear to be an equivalent right of families to death registration, though it may be implicit within the broader array of family rights under international humanitarian and human rights law discussed above. Drawing on numerous rights guaranteeing state recognition and registration of major life events[348] in conventions such as the ICCPR, Powell

[345] http://www.ohchr.org/EN/Issues/Children/BirthRegistration/Pages/ReportOnBirthRegistration.aspx.
[346] Ibid., at paragraph 4.
[347] Gerber, Gargett and Castan, "Does the Right to Birth Registration include the Right to a Birth Certificate?" (2011) 29(4) *Netherlands Quarterly of Human Rights* 434.
[348] See https://unstats.un.org/unsd/vitalstatkb/KnowledgebaseArticle50302.aspx.

notes the fundamental relationship between human rights and the registration of "vital events" in general – which would include death.[349] He states:

> [T]he existence of such a right [to death registration] is implied in Article 12(2)(a) of the International Covenant on Economic, Social and Cultural Rights wherein it is stated that, to achieve the full realization of the right to health, the States Parties to the Covenant must make 'provision for the reduction . . . of infant mortality.' … [T]he death register can provide the number of infant deaths (deaths under one year of age) – that is the basis for the measurement of infant mortality. Without this number, provided by a death register, and the number of live births from the register of births, it would not be feasible to compute the infant mortality rate over time and for various population groups. Hence, it would not be possible to monitor the trend of the rate and to plan for and assess its reduction.

5.4 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: TREATMENT OF THE DEAD AND THE RIGHT TO KNOW

Some of the strongest legal obligations on States with respect to treatment of human remains are based on customary international law, specifically the laws of war codified in the Geneva Conventions (1929 and 1949), of which Ireland is a signatory, and has ratified.

The main provisions, as set out in codified form in the International Committee of the Red Cross, are Rule 112 (Search for and collection of the dead); Rule 113 (Treatment of the Dead); Rule 115 (Disposal of the Dead); and Rule 116 (Accounting for the Dead).

The International Committee of the Red Cross (ICRC) has also concluded that the right to truth in relation to the treatment of war dead is a norm of customary international law applicable in both international and non-international armed conflict, according to which "each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any

[349] Nora Powell, *Human Rights and the Registration of Vital Events* (International Institute for Vital Registration and Statistics, March 1980) available at https://www.cdc.gov/nchs/data/isp/007_human_rights_and_registration_of_vital_events.pdf.

information it has on their fate".[350] The Secretary General of the UN has also recognised the right to truth as being a customary norm of international humanitarian law.[351]

Applying Article 130 of the Fourth Geneva Convention ("honourably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected, properly maintained, and marked in such a way that they can always be recognized") in 2002,[352] the Israeli High Court upheld "that burial of the deceased must be performed with respect, in a timely manner and according to religious custom, and if possible, the remains must be returned to the families of the deceased."[353]

Israeli courts have applied these customary international law norms on a number of occasions, emphasising the centrality of human dignity to such legal norms, even after death:

> Human dignity is not only a matter for the period of the life of the individual, but also relates to the time after the person passes away ... This fundamental value also includes respect for the dead, respect for the family of the deceased, and even respect for the public.[354]

Former President of the Supreme Court of Israel similarly found:

> Human dignity is not limited to the dignity of a living person. It also refers to dignity after death, and the dignity of his loved ones who preserve his memory in their hearts. This dignity is expressed, in part, by placing the gravestone, visiting the cemetery on memorial days and public ceremonies, and caring for the gravesite. This is the same relationship – at times rational and at times irrational – between the living and the dead, which develops the human being within us, and which gives expression to the yearnings of the soul. This is the 'hand' that the living extend to the dead. This is the external expression that reflects the internal relationship between the generations.[355]

In drawing on the foundational moral norm of human dignity, even in death, these international human rights law-based judgments echo core principles of the UDHR.

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[350] Rule 117 in ICRC, *Customary International Humanitarian Law, Volume I, Rules*, (Cambridge 2005), 421. See also, *Practice Relating to Rule 117. Accounting for Missing Persons*, Section D. Right of the families to know the fate of their relatives https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule117_section.

[351] Secretary General's bulletin, "Observance by United Nations Forces of international humanitarian law" (ST/SGB/1999/13).

[352] *Jenin (Mortal Remains) Case* [2002], Israel, High Court of Justice.

[353] "Special Focus: Holding the Bodies of Deceased Palestinians by Israel" http://www.alhaq.org/component/content/article/85-field-updates-201...pecial-focus-holding-the-bodies-of-deceased-palestinians-by-israel (visited 18 February 2018).

[354] Justice Menachem Alon, Civ App 506/88, *Yael Sheffer v. State of Israel, Piskei Din* 38(1) 87, 102, 103.

[355] Iv App 294/91, *Hevra Kadisha v. Kastenbaum, Piskei Din* 46(2) 464, 523.

Rosenblatt similarly finds human dignity, and its central status within the UDHR, as the core normative basis of his elucidation of the "human rights of the dead".[356]

Mass Graves

Within the broader literature around treatment of the dead, and the distinct legal sphere of Forced/Involuntary Disappeared Persons (see above), there is an increasing concern over the legal status of mass graves in international law. More specifically, there are calls for discrete protections for mass graves, in the form of State obligations to preserve and protect such sites, in order to both realise traditional customary international human rights obligations of States with respect to war dead, but also to preserve evidence for possible future prosecution of individuals under domestic or international criminal law.

While there is no legal definition of 'mass grave', Klinker and Kather describe such sites as "a site containing a multitude of human remains; a site of harrowing human loss, suffering and unimaginable acts of cruelty."[357] Those authors also suggest that legal protection for mass graves is essential for the "realisation of the right to truth, effective remedies and reparation for families of the deceased", as required under the UN's *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*[358] ('Basic Principles'), adding that such protections would "contribute to ensuring transparency, and ending impunity."

Genocide

It has been suggested that, given the scale of the Tuam site and the likelihood that there were common social and religious characteristics between the deceased, issues relating to the crime of genocide may arise. As a matter of law, however, it seems highly unlikely that criminal proceedings for genocide could be brought in respect of the Tuam site. Leaving

[356] Rosenblatt, "International Forensic Investigations and the Human Rights of the Dead" (2010) 32(4) Human Rights Quarterly 921.
[357] Klinker and Kather, "The Legal Protection of Mass Graves", *Blog of the European Journal of International Law* https://www.ejiltalk.org/the-legal-protection-of-mass-graves/ (visited 17 February 2018).
[358] Adopted and Proclaimed by General Assembly Resolution 60/147 of 16 December 2005 http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx.

aside the question of whether there may or may not be evidence which would establish a factual basis for a charge of genocide, there would be significant legal obstacles to such a charge.

Section 2(1) of the Genocide Act 1973 establishes the crime of genocide in Irish law. The definition of genocide is that provided by Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

The definition makes clear that there are a number of elements which must be established before genocide legally arises. In particular, it should be emphasised that the fact that there has been mass murder or abuse of a large group of persons does not constitute genocide.

First of all, one of the acts identified in subsection (a) to (e) must have occurred.

Secondly, that act must have been carried out with the intention of destroying a group. In other words, the purpose of the acts must have been to destroy a particular group. It should be noted that the intention need not be to destroy the whole group. It is sufficient if the intention is to destroy part of a group, although it has generally been accepted that it must be a substantial part of the protected group.[359]

Thirdly, the group against whom the acts are directed must fall within one of the four categories identified by the Convention: a national, ethnic, racial or religious group. Membership of a social or economic group does not come within the definition.

[359] International Law Commission: "[T]he crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group". See also the ICTY Chamber decision in *Prosecutor v. Jelisic* (Case no IT-95–10-T) (Trial Chamber judgment, 14 December 1999) that "Given the goal of the Convention to deal with mass crimes, it is widely acknowledged that the intention to destroy must target at least a substantial part of the group".

It is also important to note that these requirements are rigorously applied. The International Criminal Tribunal for the former Yugoslavia reiterated that:

> The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements—the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part—guard against a danger that convictions for this crime will be imposed lightly.[360]

Given this strict approach, there is a significant doubt that a court would regard the acts in Tuam (if proven) as coming within the remainder of the definition. The ICJ observed in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* that:

> [G]enocide requires a positive identification of the group. The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics.[361]

Whether a particular group comes within one of the aforementioned four categories is to be assessed on a case-by-case basis.[362] Both the objective characteristics of the group and the subjective view of the alleged perpetrators and group members are relevant. However, while it is likely the deceased at the former Mother and Baby Home in Tuam may have some of the protected characteristics in common (such as religion), this would not be sufficient to demonstrate that they were seen as a targeted religious group by either group members or alleged perpetrators, or that this characteristic (i.e., that the deceased were Catholic) was the purpose for the targeting of the deceased. This would also mean that the necessary intention to target and destroy the protected group was lacking.

Furthermore, while it might be argued that these criteria could be given a different and more expansive interpretation in the modern era, any application of those criteria to the events at Tuam would likely constitute retrospective penal conduct. This is prohibited by Article 15.5.1° of the Constitution and by Article 7 of the ECHR. There is an exception to the

[360] *Prosecutor v. Krstic*, (Case no IT-98–33-A) (ICTY Appeals Chamber judgment, 19 April 2004).
[361] [2007] ICJ Rep 43.
[362] *Prosecutor v. Rutaganda* (Case no ICTR-96–3-T) (Trial Chamber of the International Tribunal for Rwanda, 6 December 1999).

principle under Article 7 for conduct which was recognised as criminal under the general principles of the law. However, an attempt to prosecute persons under a more expansive definition of genocide for acts committed in 1953 was found by a majority of the Grand Chamber to violate Article 7 ECHR in *Vasiliauskas v. Lithuania*.[363]

Status of International Obligations

It is important to bear in mind that the obligations imposed on the State by international agreements occur and are enforceable, if at all, under international law only. Article 29.6 of the Constitution provides that:

> No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.

The Supreme Court explained in *McD v. L*[364] that this means that:

> The obligations undertaken by a government which has ratified the Convention arise under international law and not national law. Accordingly those obligations reside at international level and in principle the state is not answerable before the national courts for a breach of an obligation under the Convention unless express provision is duly made in national legislation for such liability.[365]

This means that even if it could be factually established that a breach of obligations under these international agreements has occurred in Tuam, this would not provide a right of action under Irish law or before an Irish court in respect of that breach.

Summary

The international human rights norms may not be directly relevant to this review, as Ireland has been quite slow to ratify the relevant instruments. The older humanitarian law is also not directly legally applicable, as they are legal norms that are active only when death occurred in, and as a result of, wartime atrocities, although the jurisprudence on dignity and State custom and practice may shed light on the requirement of the Irish constitution in this regard discussed later in this report.

[363] Application no. 35343/05 (October 20, 2015).
[364] [2010] 2 IR 199.
[365] At p. 247.

Much of the material included in these last two sections of this chapter is either human rights in times of war (customary international humanitarian rights), or instances of 'gross' or 'systemic' violations of human rights (under the various human rights frameworks of the United Nations). It is therefore subject to a number of qualifications.

Firstly, the UDHR is generally regarded as not legally binding.

The two International Covenants (the ICCPR and lCESCR) were not in existence until 1966, and Ireland did not ratify both until 1989. Ratification is key to legal effect in a particular jurisdiction. It is not clear therefore that there were any legally recognisable breaches of human rights in the 1920 to 1960 period. Moreover, it is not clear whether the right to know – which seems to be the legally strongest right – can be based on breaches of human rights before the state ratified the relevant instruments (as it cannot be stated at the time they were breaches).

In summary, if it was not a breach at the time, it is difficult to legally determine it so retrospectively. Therefore, there may be very limited grounds for the right to know which is parasitic upon the basic rights in the UN Charter (the conceptual instrument combining the UN Declaration and both Covenants together).

If inhuman or degrading treatment and violations of privacy can be characterised as continuing, it may constitute a violation of the United Nations Convention against Torture (UNCAT), ICCPR or CEDAW.

The most relevant jurisprudence on this matter relates to Enforced Disappearance. This is the most fruitful area of international human rights law to review, as it has an express right to truth/right of victims and their families to know. It is also closely tied to the ICCPR which, as stated above, Ireland ratified in 1989. It seems there may not be a requirement that the ICCPR was ratified by the member state when the 'disappearances' took place. There are interesting parallels between the experience in South America, where much of this law emerged, and the experience of the institutional abuse of women and children in settings such as the mother and baby homes. It should be noted, however, that Ireland has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance,

although it codifies what is already implied in many international human rights instruments to which Ireland is a party.

5.5 THE IRISH CONSTITUTION

In addressing the issues to be considered in this chapter of my report, regard must be had to the rights and obligations arising under the Constitution of Ireland as well as the European Convention on Human Rights. While the Constitution is the superior legal instrument in domestic law, the Convention and case law of the European Court of Human Rights form part of Irish law at a sub-constitutional level in the European Convention on Human Rights Act 2003. Both the Constitution and Convention are therefore relevant to this report.

As can be seen throughout the jurisprudence of the ECtHR (discussed in section 5.2 of this report), the rights that have been held to exist concerning the circumstances of a relative's death and burial stem from Article 8 of the European Convention on Human Rights (ECHR) concerning privacy and the family. The duty upon States to investigate deaths arises so as to vindicate the right to life protected in Article 2 ECHR. In addition, the provision of information to relatives of the 'disappeared' is a matter engaging Article 3 of the ECHR. Irish authorities are required to carry out their functions in a manner compatible with the Convention. The State is also obliged to ensure that it does not violate any Constitutional provisions or rights of its citizens in performing its duties.

The Constitution of Ireland, within Articles 40 to 44, contains the list of fundamental rights to which all citizens of Ireland are entitled. The right to life, the family and children's rights are all protected explicitly therein. In addition to those rights which are expressly protected, the Courts have recognised that certain other rights are protected by the Constitution, and these are known as unenumerated rights.[366] Furthermore, the right to privacy has been inferred by the Supreme Court as also deserving of protection under the Constitution. Article 40.3 provides:

> The state guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

[366] *Ryan v. AG* [1965] IR 294.

> The state shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

Pursuant to Article 41.1.1°, the state recognises the family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. The Supreme Court reiterated in *HAH v. SAA and ors*[367] and *M (Immigration-Rights of Unborn) v. Minister for Justice and Equality & ors*[368] in the last 12 months that the family remains the married family for Article 41 purposes. While there is some indication in *M* that the Supreme Court might revisit this issue, I do not believe that Article 41 would apply to the issues engaged by this chapter of my report.

Article 42A.1 recognises and affirms the natural and imprescriptible rights of all children. This requires that the State shall, as far as practicable, by its laws protect and vindicate those rights. A question arises as to whether this provision applies retrospectively and whether the deceased the subject of this chapter of my report constitute children within the meaning of Article 42A. The above recent Supreme Court judgment in *M* does not appear to support Article 42A applying retrospectively in the present context.

A centrally important concept in the Irish Constitution is the dignity of the individual. The Irish Constitution is the oldest subsisting constitution to specifically refer to dignity. It provides in its preamble:

> We, the people of Éire … seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured … [d]o hereby adopt, enact and give to ourselves this Constitution.

This makes it clear that one of the primary goals towards which the enactment of the Irish Constitution is directed is "… the assurance of the dignity of the individual." The Irish courts, in their interpretation of the various provisions of the Constitution, are obliged to interpret this concept harmoniously with the content of the Preamble and in particular, the aim of assuring the dignity of all individuals. The concept of dignity, however, has not yet been fully developed in Irish Constitutional case law. It is important to consider the role of

[367] [2017] IESC 40.
[368] [2018] IESC 14.

dignity in any consideration of the constitutional rights that may be raised within the decision to be taken at Tuam. Undeniably, an argument can be made that those interred in Tuam did not have their right to dignity upheld in the circumstances of their burial.

For present purposes the case of *Fleming v. Ireland and ors*[369] is of particular relevance as it is the most significant recent Supreme Court ruling where the claim was based on the right to dignity as well as the rights to autonomy and self-determination. The Supreme Court acknowledged that dignity was a core constitutional value, and that its application in particular circumstances would depend on a concrete analysis of the particular facts in question. The Court observed:

> It is undoubted that the Constitution recognises and respects th[e] general values [of autonomy, self-determination and dignity] in the rights protected by it. It does not follow, and it is not claimed, however, that every law which impinges on the life of individuals is even *prima facie* inconsistent with the Constitution. Whether therefore values of autonomy, self-determination and dignity, as they find expression in the rights guaranteed by the Constitution, provide constitutional protection for the performance of specific acts depends on a concrete analysis of the impact of any law which is impugned in a particular case on the life of the individual, and a careful consideration of the provisions of the Constitution and the values it protects in the rights it guarantees.[370]

Ultimately, the Court concluded in *Fleming* that dignity did not provide support for the existence of a constitutional right to be assisted in suicide, noting:

> Thus, insofar as the Constitution, in the rights it guarantees, embodies the values of autonomy and dignity and more importantly the rights in which they find expression, it does not extend to a right of assisted suicide. Accordingly the court concludes that there is no constitutional right which the State, including the courts, must protect and vindicate, either to commit suicide, or to arrange for the termination of one's life at a time of one's choosing.[371]

It is clear, therefore, that dignity, whether framed as a constitutional right or as a constitutional value, does not provide support for a right to have death accelerated. That said, it is clear that dignity is highly relevant to the experience of death and dying.

[369] [2013] IESC 19.
[370] [2013] IESC 19 at para. 110.
[371] [2013] IESC 19 at para. 114.

In the earlier case of *Re a Ward of Court*[372] the Supreme Court considered the withdrawal of treatment from a woman who had been in an almost persistent vegetative state for 20 years. In finding that it was lawful for treatment to be withdrawn the Supreme Court found that the woman had a right to die a natural death, and for a majority of the Court this right was founded, in part, on the right to dignity. Denham J. found that dignity was a right protected by the Constitution, and that the woman had a right to dignity in life and death. This right supported the Court in making an order allowing treatment be withdrawn. Therefore, the woman was allowed to die naturally in the care of her family. The right to dignity in life and in death is potentially of significance in the context of the Tuam Mother and Baby Home. While the circumstances of the deaths are unknown, the conditions of burial suggest that there may have been an absence of dignity in the manner that the bodies were treated after death.

Subsequent case law has confirmed that as well as protecting the rights of living family members of the deceased, the Constitution may protect certain rights of deceased persons, and in particular the right to dignity. A relevant and instructive case is *PP v. HSE.*[373] This case concerned a pregnant woman who had been diagnosed as clinically dead, while the foetus still had a heartbeat. The question before the court was whether life support could be withdrawn in such circumstances. It was suggested that the woman's rights were not engaged due to her having passed away. The High Court rejected this suggestion and commented:

> This does not mean that the Court discounts or disregards the mother's right to retain in death her dignity with proper respect for her autonomy with due regard to the grief and sorrow of her loved ones and their wishes. Such an approach has been the hallmark of civilised societies from the dawn of time. It is a deeply ingrained part of our humanity and may be seen as necessary both for those who have died and also for the sake of those who remain living and who must go on. The Court therefore is unimpressed with any suggestion that considerations of the dignity of the mother are not engaged once she has passed away.[374]

This passage confirms the importance of dignity under the Constitution and, in particular, the importance attached to the circumstances associated with a person's death. Clearly, this is of

[372] [1996] 2 IR 79.
[373] [2014] IEHC 622.
[374] What the decision records is "her right to retain her dignity in death" was outweighed by the interests of the unborn. The case focused on allowing her to die with dignity (which makes it very similar to the *Ward of Court* case).

potential significance in the Tuam context. It raises the question as to whether there was a failure to take account of considerations of the dignity of the deceased children in the circumstances of their burial; and whether, if so, this would give rise to a breach of the Constitution? Applying the reasoning of the cited passage in *PP v. HSE*, there is an argument that constitutional considerations of dignity may have continued to be engaged after the deceased children had passed away. If that is the case, the questions then raised include how, to what acts and for what period of time, those considerations continued to apply. As the decision in *Fleming* indicates, there may also be a distinct question as to whether – assuming considerations of dignity did apply to the burial and may continue to apply thereafter – the circumstances give rise to an enforceable constitutional right or claim, whether on the part of the deceased or of other persons.

On this last question, Irish law recognises a cause of action for breach of constitutional rights, insofar as the right breached is not vindicated by other legal mechanisms.[375] Importantly, where a person is incapable of asserting a right on his/her own behalf, the Irish courts have recognised that the right can be asserted by another appropriate person.[376] As such, if this is a breach of constitutional rights and is not addressed by the law of torts (discussed below), a question arises as to whether there could potentially be an action in respect of a breach of constitutional rights, which would be actionable at the suit of the families of the deceased, or appropriate other parties, on behalf of the deceased.

While the decision of the Supreme Court in *Fleming* confirms that the values of autonomy and dignity are not absolute, the analysis in *Ward of Court* indicates that the right to life and the related constitutional commitment to dignity extend to the manner and process of dying. Moreover, the High Court decision in *PP v. HSE* suggests that considerations of dignity may be capable of applying after the point of death.

The capacity of rights to be asserted on the part of the deceased could be a challenge in an Irish context. The recent Article 40.3.3° Supreme Court decision in *M* places considerable emphasis on the inability of the unborn to invoke constitutional rights because it has not been

[375] *Meskell v. Córas Iompair Éireann* [1973] IR 121, *Hanrahan v. Merck Sharpe and Dohme (Ireland) Ltd.* [1988] ILRM 629.
[376] *SPUC v. Coogan (No.1)* [1989] 1 IR 734. The Society for the Protection of Unborn Life was entitled to litigate to protect the right to life of the unborn.

born and is therefore not a rights-holder. The corollary of the concept of rights-holder that emerges in that judgment (and that is consistent with some judicial decisions in recent cases about whether non-citizens are necessarily rights-holders) might be that the deceased are not rights-holders for constitutional purposes. This would probably place the deceased in a position of being entitled to respect, but not to have specific rights under the Constitution invoked on their behalf.

The rights that could be invoked to challenge any prosecutions brought include the right to a trial within a reasonable time. The courts may be reluctant to require the State to take steps if those steps are unlikely to produce any practical benefit.

The report of the Expert Technical Group also raises significant practical concerns about the results that would be obtained from any exhumation or retrieval. The obligations imposed on the State by the Constitution are to defend and vindicate the personal rights of the citizen "as far as practicable". The decision in *PP v. HSE* highlights the important point in this context that the Constitution does not require the taking of steps to promote or vindicate a constitutional value (in that case the right to life of the unborn) if those steps will not produce any practical benefit. This suggests that the views expressed in the expert report should be given weight in considering the steps to be taken in this matter.

It should be stated that there may be a countervailing dignity interest in disturbing the burial site. That could also be a factor that a court would weigh in assessing the practical benefits of exhumation. If there are countervailing constitutional considerations which may incline against exhumation, the fact that exhumation may not produce any practical benefits may weaken any claim that it is constitutionally required.

Finally, there is a general judicial reluctance to litigate matters after several decades, even though attitudes may have changed to the practices in question. On a practical level, a major problem for a claimant in any litigation could be the apparent indication that these deaths were registered. This makes it much more difficult to argue that there was a lack of knowledge or concealment. There might be a separate issue about the circumstances of the burials although this might run into factual problems if the indication was that it was known in the local area about the burials.

5.6 STATUTE LAW

The law governing death and dead bodies is primarily a matter of common law rather than statute. However, the requirements concerning the registration of deaths have long been regulated by statute. At the relevant time this was governed by the Births and Deaths Registration Acts (Ireland) 1863–1994 and relevant regulations.[377] These provisions imposed a general duty to report deaths to the registrar. The legislation specified an order of priority of persons on whom that duty was imposed. It fell, in the first instance, on the relatives of the deceased and then on persons present at the death, and then the occupier of the house in which the death took place.[378] House was expressly defined under the Act to include a public institution such as a hospital, and occupier to include the governor, keeper, master, matron, superintendent or other chief resident officer of every public institution.[379]

The following would appear to be the situation in respect of the registration of the deaths at the former Mother and Baby Home in Tuam:

- The 796 juvenile human remains were identified by local historian Catherine Corless by accessing the records of the General Register Office (GRO). They are all registered deaths but there are no records of the burial location of these deceased children.

- The inter-departmental group report, published in 2014, includes some of the data provided to the group by the GRO. This contains a complete list of the 796 names, ages, dates of death, and cause of death provided by the GRO.

It may be the case therefore that all deaths which took place at the Tuam Mother and Baby Home were duly notified to the registrar. There is no doubt, in any event, that a clear statutory duty existed in respect of such notification. Auditing the obligation to register a death should be considered in the context of Tuam. This might be undertaken by matching the death certificates to the number of juvenile human remains.

[377] Registration of Births and Deaths (Ireland) Act 1863 (26 Vict., c.11); Births and Deaths Registration Act (Ireland) 1880 (43 & 44 Vict., c.13); Regulations for Registrars of Births and Deaths 1880; Regulations for Superintendent Registrars 1981; Vital Statistics and Births, Deaths and Marriages Registration Act 1952; Births, Deaths and Marriages Act 1972; Births, Deaths and Marriages Act 1987; The Stillbirths Registration Act, 1994. Registration of deaths is now governed by the Civil Registration Act 2004.
[378] Sections 10 to 15 of the Births and Deaths Registration Act (Ireland) 1880.
[379] Sections 38 of the Births and Deaths Registration Act (Ireland) 1880.

5.7 COMMON LAW

At common law, the body of law derived from judicial decisions rather than statute or constitutions, there has long since been recognition of the right to a decent burial, and of a range of rights and duties concerning dead bodies. The common law of England and Ireland was a unified body of law until 1922. After that, Irish common law diverged in various ways, although in certain respects the common law in each jurisdiction remained the same. Because of the nature of this topic, many of the key common law precedents date from before 1922, and thus the English cases can be taken as a strong indication of the common law in both England and Ireland. Precedents from other common law jurisdictions such as Australia, Canada and the United States, are also of assistance in stating what, precisely, the common law of Ireland is in this area, and what it was in the relevant period.

Burial of Bodies and the Wishes of the Deceased

The leading English case, upon which the common law in Australia, Canada and New Zealand is also based, is *Williams v. Williams*.[380] In this decision, the deceased had instructed the executors of his will to give his body to his friend so that she could dispose of him in accordance with a private letter he had given her, and to reimburse her for the costs of his disposal. In the letter, he had asked that his body be cremated, however his wife instead buried him. The friend later exhumed his body and had it cremated. She sought reimbursement for her expenses but the executors refused. In rejecting her claim, the Court held that; "It is quite clearly the law of this country that there can be no property in the dead body of a human being". It necessarily follows from this that a person cannot leave binding instructions regarding the disposal of his or her body. Executors therefore do not own the body of the deceased which they are obliged to dispose of. They do, however, have a right to possess the body until it is properly buried.

On the issue of a person's funeral and burial instructions, different approaches can be discerned in the different common law jurisdictions.[381] Courts in the United States have established a common law right for a person to be disposed of in accordance with his/her

[380] (1882) 20 Ch D 659, 665.
[381] See Victoria Law Reform Commission, *Funeral and Burial Instructions: Consultation Paper*, 9 November 2015, Chapter 3: Funeral and burial instructions in the common law.

wishes. The deceased's funeral and burial instructions must be carried out unless there is a compelling reason not to do so. On the other hand, in England, Australia and Canada, a person with the right to dispose of a body may do so as he/she wishes, regardless of the deceased person's instructions.[382] New Zealand exhibits a more mixed approach, requiring the person with the right to dispose of the body to make an appropriate decision about the method and place of disposal after taking into account the deceased's wishes, the views of family members and the deceased's cultural or religious background.

The Entitlement to Possess a Body for the Purpose of Burial

It is generally accepted that a property right, in the usual sense, does not exist in a corpse. However, the common law does recognise a right of possession over the body for the purposes of burial,[383] an entitlement that is akin to a 'right to bury'. For the purpose of burial, persons such as the executors of the deceased's will, the surviving spouse or next of kin have the right to possess the corpse for the purposes of proper burial alone.

The Common Law Duty to Bury

Alongside the right to possess a body for the purposes of burial, the common law imposes duties in respect of burial. It appears that this duty to bury is a public duty, which attaches to various persons, depending on where the death occurs. In the case of *R v. Stewart*,[384] the High Court of England and Wales considered the nature of the public duty to bury. The case concerned the body of a pauper who had died in a hospital in a parish. The hospital sought an order of mandamus[385] seeking to compel the overseers of the parish to remove the dead body and cause it to be buried. Lord Denman CJ commented:

> Every person dying in this country, and not within certain exclusions laid down by the ecclesiastical law, has a right to a Christian burial; and that implies the right to be carried from the place where his body lies to the parish cemetery.[386]

Importantly, the court went on to explore the nature of that burial, commenting:

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[382] *In re JS* [2016] EWHC 2859.
[383] *Sharp v. Lush* (1879) 10 CH D 468.
[384] (1840) 113 ER 1007.
[385] This is a public law remedy whereby the court makes an order against a state body to take a particular action.
[386] (1840) 113 ER 1007 at 1009.

> That bodies should be carried in a state of naked exposure to the grave, would be a real offence to the living, as well as an apparent indignity to the dead."[387] We have no doubt, therefore, that the common law casts on someone the duty of carrying to the grave, decently covered, the dead body of any person dying in such a state of indigence as to leave no funds for that purpose.[388]

It is clear from this passage that the common law imposed a public duty to bury, and crucially, that duty was not simply a duty to put the body in a grave of some description. Rather, it incorporated an obligation to afford to the dead body decency and dignity in that burial. The Court went on to consider on whom that common law duty fell, and concluded that it fell on the individual "under whose roof a poor person dies." This person was under a common law duty to carry the body decently covered to the place of burial, and could not keep the body unburied or do anything which prevented burial.[389]

This foundational case illustrates that the duty to bury is a public duty, which arises from the circumstances of a particular death. It is different, to some extent, from the criminal law rules discussed below, because it could be enforced through public law proceedings to enforce the duty, as were in issue in the case of *R v. Stewart.* It appears, however, that a failure to bury – i.e. a breach of the duty to bury - is also a misdemeanour at common law.[390] In essence, the duty is a single common law duty which can be enforced through a range of types of public law proceedings.

Based on these precedents, it seems that the operators of the Mother and Baby Home at Tuam may have been under a common law duty to bury those who died under their roof. This duty to bury incorporates a duty to bury decently and with dignity, in a Christian burial.[391]

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[387] These words were quoted from an earlier judgment: Lord Stowell in *Gilbert* v *Buzzard* (2 Hagg. Consist. Rep. 333 to 344).
[388] (1840) 113 ER 1007 at 1009.
[389] On the facts, the court decided that the duty to bury lay on the hospital, not the parish.
[390] *R v. Vann* (1851) 169 ER 523.
[391] It is probably the case that the modern duty to bury is not solely one of Christian burial but rather about burial reasonably appropriate to the deceased person's known values and religious practices. At the relevant time, it seems that Christian burial would have been the appropriate entitlement.

The Special Duty of Parents to Bury a Child

The operators of the Mother and Baby Home at Tuam were likely under a further duty to bury arising from the fact that they were in *loco parentis* in respect of the children living in their care. In addition to the public duty to bury at common law there is a specific duty to bury imposed upon those who have a special relationship to the deceased. Spouses were one such category.[392] The common law also imposed a duty on parents to bury their children. The leading case on this point is *R v. Vann,*[393] which concerned the question of whether a man who had not the means to bury his child was liable for a misdemeanour for leaving it unburied and allowing it to cause a public nuisance. The court found that there was a general duty on a parent to bury his/her child, but that the parent was not liable for a misdemeanour if he lacked the funds for the burial. Of special relevance to the Tuam circumstances are the Court's comments that while the parent lacking funds could not be indicted for mere non-burial the parent "cannot sell the body, put it into a hole, or throw it into the river."[394] The implication is that such actions would themselves constitute breaches of the duty to bury, and thus would be misdemeanours.

Similar to the general duty to bury, the specific duty to bury has been described by the courts as being "in the nature of a public duty."[395] The special duty of the parent to bury has been confirmed on a number of occasions by the courts,[396] and while the common law duty of a husband to bury his wife is now qualified by the fact that a married woman now has full, independent legal status,[397] children remain in a dependent position as regards their parents or guardians.

It would seem that in addition to the general common law duty to bury, the operators of the Tuam Mother and Baby Home would have been under a special duty arising from the nature of the protective relationship between the operators and the residents of the home. Where a child was concerned, this was in the nature of being *in loco parentis.* As such, both the rights

[392] *Rees v. Hughes* [1946] All ER 2. This duty has now been altered by legislation, changing and enhancing the legal status of married women. Where a married woman dies leaving an estate sufficient to pay for her funeral expenses her husband is no longer liable to pay those expenses.
[393] (1851) 169 ER 523.
[394] (1851) 169 ER 523 at 526.
[395] *Rees v. Hughes* [1946] All ER 2.
[396] *Clark v. London General Omnibus Company* [1906] 2 KB 648.
[397] *Rees v. Hughes* [1946] All ER 2.

and responsibilities of parenthood would have been enjoyed by the operators. As in the general case law on the duty to bury, this special category of duty clearly imports a concept of decency or dignity. The father in *R v. Vann* was not entitled to put his child's body in a hole. Even if he as the parent considered that to be appropriate, the common law imposed a duty on him to provide the child with a decent burial, appropriate to the standards expected by society more generally.

Criminal Law – Prevention of a Lawful and Decent Burial

It is, therefore, widely accepted that at common law there is a right to a decent burial. As well as this being reflected in duties in respect of burial, the criminal law recognises the right to a decent burial through the common law offence of prevention of a lawful and decent burial. This offence, found in its modern incarnation in the law of England and Wales since 1974, has been used in recent prosecutions, is triable by indictment only and is punishable by a maximum sentence of life imprisonment, an unlimited fine, or both. In the decision of the Court of Appeal in *Hunter*,[398] the Court noted that the very existence of this offence requires that burials be decent. It stated:

> …[I]f it is a crime for the person responsible for burial to prevent it, there is no reason for regarding the act of a stranger in preventing burial as any less reprehensible. We think that in this connection burial means lawful and decent burial.

In the 2008 case of *R v. Skidmore*,[399] the notion of a lawful and decent burial was similarly at issue.[400] This case concerned the body of a child. The defendant was an undertaker, who accidentally failed to put the child's body into the correct coffin. Panicking, he placed the child's body in the coffin wherein lay the body of an old lady who was due to be cremated later that day. She and the child, unbeknownst to everyone other than the defendant, were subsequently cremated. Years later, what had transpired was discovered and the defendant was charged with conspiracy to prevent a lawful and decent burial of a corpse. It was claimed that the defendant had prevented the decent burial of the child's body by dealing with it in the manner in which he did and he had not acted in accordance with the wishes of the child's parents. He was convicted and on appeal, his conviction was upheld. The court

[398] [1974] QB 95 CA (Crim Div).
[399] [2008] EWCA Crim 1464 (CA (Crim Div)).
[400] See also *R v. Parry and McLean* (1986) 8 Cr App R (S) 470.

rejected the defendant's argument that his lack of dishonest motive meant that the offence had not been committed.

This offence has been used recently in prosecutions in England.[401] Applying this offence to the Tuam context, a question that arises in the present review is whether the original actions of the operators of the Tuam Mother and Baby Home could have constituted prevention of a lawful and decent burial. Moreover, were the relevant authorities to refuse to exhume, sort and bury the remains, could this constitute a continuing offence of prevention of a lawful and decent burial? In contrast to the tortious claim considered below, this crime does not require there to be any identifiable family member who is affected by the failure to bury.

Tortious Actions in Respect of Dead Bodies

In certain jurisdictions, the common law recognises a tortious right in respect of interference with a dead body, which is actionable at the suit of the family of the deceased person. The law of most US states recognises a tort in respect of mistreatment of a dead body.[402] The American Law Institute's *Restatement of the Law, Second, Torts* expresses these various torts as a single cause of action, providing:

> [O]ne who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or who prevents its proper interment or cremation is subject to liability to a member of the family who is entitled to disposition of the body.[403]

Similarly, the law of certain Canadian provinces recognises a right of action on the part of family members of the deceased where the body is interfered with if that interference causes emotional or physical harm to the surviving relations.[404] Tortious actions in such circumstances have met with less success in England. However, there is a basis in Scottish

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[401] *R v. Rausing*. Sentencing Remarks; available at https://www.judiciary.gov.uk/judgments/rausing-sentencing-remarks-01082012/ accessed 23 February 2018. 'Amanda Hutton jailed for Hamzah Khan killing' BBC News 4 October 2013; available at http://www.bbc.co.uk/news/uk-england-24401112 accessed 23 February 2018.
[402] See e.g. *Scarpaci v. Milwaukee County* 292 NW 2d 816 (Wisc SC 1980).
[403] American Law Institute, *Restatement of the Law, Second, Torts* (Washington, American Law Institute 1965) § 868. As the US jurisdictions are all separate, there is no one common law of the US. The Restatement attempts to formulate general propositions of law that are applied across the States, but it does not, itself, have any legal status.
[404] See e.g. *Mason v. Westside Cemeteries* (1996) 135 DLR (4th) 361, *Edmonds v. Armstrong Funeral Home* [1931] 1 DLR 676 (SC).

law for recognising unauthorised interference with a dead body as a legal wrong in respect of which the family may claim damages.[405]

In view of the emphasis that Irish culture and tradition places on the dead body in the grieving process, there may be good reasons for saying that the common law of Ireland does recognise a tort of wrongful interference with a dead body. The wake remains central to Irish funeral practice, a feature which strongly distinguishes it from funeral practices in England. Because of this significant cultural difference, it may be that this is one instance in which Irish common law may be said to have diverged from English law, and that therefore the more persuasive precedents are those from Canada and the Unites States.

Applying these principles to the case of the Tuam Mother and Baby Home, it is possible that the actions and inactions in respect of the interment of the dead bodies were tortious wrongs at the time when they occurred. These wrongs would have been actionable at the suit of the family of the deceased. A question arises as to whether this could potentially also be framed as a present-day tortious duty on the part of the State in respect of the bodies. The Restatement refers to the *withholding* of a body and the *preventing* of its proper interment.

Other Procedural Options

One option which may merit further consideration is whether there is an inherent jurisdiction on the part of the High Court to determine whether and how the remains should be dealt with. There is some (although limited) support from other jurisdictions for the proposition that the courts retain a common law power to determine disputes concerning the duty to dispose of the body of the deceased. In the New Zealand Supreme Court decision of *Takamore v. Clarke*,[406] Elias CJ suggested that "where there is a dispute as to burial, either party (meaning personal representatives) has standing to bring the dispute to the High Court for resolution". The High Court of England and Wales reached a similar conclusion in *Oldham MBC v. Makin*[407] where a dispute arose as to the manner and timing of the disposal of the remains of the Moors Murderer, Ian Stewart-Brady. While the Court decided the matter on other grounds, it observed that:

[405] *Stevens v. Yorkhill NHS Trust* [2006] SLT 889. The payment is described as a 'solatium'.
[406] [2012] NZSC 116.
[407] [2017] EWHC 2543.

> In my judgment, the court does have an inherent jurisdiction to direct how the body of a deceased person should be disposed of. The court will normally, as I have said, be deciding between the competing wishes of different sets of relatives, and will only need to decide who should be responsible for disposal rather than what method of disposal should be employed. I cannot see, however, why the court's inherent jurisdiction over estates is not sufficiently extensive to allow it, in a proper case, to give directions as to the method by which a deceased's body should be disposed of.

Perhaps most relevantly, the High Court of England and Wales held in *In re K* that it had an inherent jurisdiction to authorise arrangements to be made for the disposal of a child's body where the parents had neglected to make any arrangements.[408]

It should be emphasised that this does not necessarily mean that the Irish courts have such an inherent power, or that it would be engaged in the case of the Tuam deceased. Aside from the fact that these cases provide limited persuasive authority for the existence of such a power, the courts in those cases are dealing with situations where there is a dispute between personal representatives of an estate; and where the body remains to be dealt with. The legal context of any application here might be quite different. There is also the obvious factual difference that the question at Tuam would be one not of burial but of possible exhumation and re-burial. Nonetheless, the reasoning of the courts in these cases is based in part on the existence of a common law duty to dispose of remains. As discussed elsewhere in this chapter it is arguable that duty is engaged and/or may have been breached in the situation in Tuam.

5.8 LIMITATION PERIODS

As regards the tortious actions and actions for breach of constitutional rights, the limitation period which would apply to legal proceedings arising out of events which occurred at the Tuam Mother and Baby Home is the standard limitation period of 6 years.[409] In respect of the original wrongs, this period has elapsed.[410] It is important to note that under the Statute of Limitations Act 1957, limitation periods do not apply in circumstances where (a) the action is based on the fraud of the defendant or (b) the right of action is concealed by the

[408] [2017] 4 WLR 112.
[409] Section 11 of the Statute of Limitations Act 1957 as amended. On constitutional rights, see *McDonnell v. Ireland* [1998] 1 IR 141.
[410] See, however, the judgment of Geoghegan J. in *Murphy v. Grealish* [2009] 3 IR 366.

fraud of the defendant.[411] The fraud must either consist of *conduct* which is concealed from the plaintiff or of the failure to disclose the existence of facts known only to the defendant which, if disclosed, would found a cause of action. The fact that persons did not realise the illegality of the conduct in question or that no one in authority took steps to ensure that affected persons were made aware of their legal entitlements will not constitute fraud.[412]

As regards the criminal law, the position is a rather complex one. The question of time limits centres around the distinction between offences which are triable summarily and offences which are triable on indictment only. Generally there is no time limit for indictable offences, whereas in respect of an offence which is triable summarily, a complaint must be made within a period of six months.[413] The crimes identified in relation to failure to bury were misdemeanours, meaning they were relatively minor offences. The distinction between felonies and misdemeanours was abolished by section 3 of the Criminal Law Act 1997. Because there are no reported Irish cases on these common law crimes, it is unclear whether they would have been triable summarily or on indictment. It is important to note, however, that the crime of prevention of a lawful and decent burial is an indictable misdemeanour as a matter of English law.[414] That said, section 3(2) of the 1997 Act provides that "on all matters on which a distinction has previously been made between felony and misdemeanour, including mode of trial, the law and practice in relation to all offences shall be the law and practice applicable at the commencement of this Act in relation to a misdemeanour".[415]

Regard must also be had to the right under Article 38.1 of the Constitution to a trial within a reasonable period of time.[416] This right is not absolute and must be balanced against the community's interest in prosecution. One of the key issues in considering this balancing exercise is whether any delay has impacted on the ability of an accused to defend himself/herself so that there is a real and substantial risk of an unfair trial. That is a fact-based assessment which will depend on the circumstances of the case.[417] As a general principle, the risk of unfairness increases as time passes, especially in matters where the

[411] Section 71(1)(b) of the Statute of Limitations Act 1957, as amended.
[412] *O'Dwyer v. Daughters of Charity of St Vincent de Paul* [2015] IECA 226.
[413] Petty Sessions (Ireland) Act 1851, section 10.
[414] *Re v. Hunter* [1974] QB 95 CA (Crim Div) relying on JWC Turner Russell on Crime (London: Sweet and Maxwell, 12th edn, 1964).
[415] See also section 15 of the Act.
[416] See, for example, *PP v. Director of Public Prosecutions* [2000] 1 IR 403; *PM v. Malone* [2002] 2 IR 560.
[417] *Donoghue v. DPP* [2014] IESC 56.

recollection of witnesses may be relevant to the issues to be tried. This could have some bearing on whether criminal prosecutions are constitutionally permissible after this period of time.

Historical abuse cases cover several potential civil causes of action - actions in tort such as negligence, assault or trespass to the person or false imprisonment and actions for breach of constitutional rights - both of which are treated as an action in tort for limitation period purposes. Gallen argues that it may not be fair, however, for these limitation periods to operate where victims of historical abuse may not have pursued litigation under these causes of action on the belief that the conduct under which they were abused was legal and endorsed by the State.[418] He also argues that it may be possible to claim that the lack of social and legal recognition of the wrongdoing in such contexts would render it unconstitutional for a state defendant to rely on the Statute, as expecting victims to have pursued legal action contemporaneously to their abuse ignores the traumatic impact of the abuse. This, he states, "…creates an artificially receptive historical context". Nonetheless, it should be noted that as a matter of Irish law, a number of actions brought by persons in respect of their historic mistreatment in mother and baby homes[419] or hospitals[420] have been found to be statute barred.

In contrast with the approach taken in other common law jurisdictions, the Irish limitation period regime is different. While the law in relation to limitation periods in Ireland and the UK is broadly similar, under the UK Limitation Act 1980, section 33, courts have an equitable discretion to allow an action to proceed, having regard to the degree to which the limitation periods for personal injuries prejudice the plaintiff or defendant. In exercising this jurisdiction, the court is required to have regard to a number of factors, including: the length of, and reasons for the delay on the part of the plaintiff in bringing his/her claim, the extent to which his/her evidence is likely to be less cogent than if the action was brought within the allowed time; and whether the plaintiff acted promptly once he/she knew the act or omission of the defendant might be capable of giving rising to an action for damages. Case law in the UK indicates that situations of both physical and sexual abuse can engage a court's discretion under section 33 of the Act – the key factor is to assess whether a fair trial is no longer

[418] *Statute Law Review*, 2016, Vol.00, No.00, 1-15.
[419] *O'Dwyer v. Daughters of Charity of St Vincent de Paul* [2015] IECA 226.
[420] *Farrell v. Ryan* [2016] IECA 281.

possible even where a claimant had an ostensible strong case on the facts. The English approach highlights the restrictive position in Ireland, with no judicial discretion.

Regarding any pre-ratification violations: the Inter-American Court of Human Rights (IACtHR), the UN Human Rights Committee and ECtHR have each recognised that a failure to investigate pre-ratification substantive violations of the relevant Convention may, in certain circumstances, amount to ill-treatment in itself (which exists post-ratification) and carries a right to a remedy.

Apart from the Committee against Torture (CAT), none of the treaty bodies appear to have stated that there is an indefinite right to redress for torture or ill-treatment. The ECtHR, Inter-American Commission on Human Rights (IACmHR) and Human Rights Committee (HRC) all apply time limits. Nonetheless, in some cases the IACmHR and ECtHR have extended the time limit for complaints regarding torture or ill-treatment on the basis of the violation's effects on the victim.[421]

[421] See *Mocanu v. Romania* (2015) 60 EHRR 19, *Garcia Lucero v. Chile*, judgment of 28 August 2013 (Preliminary Objection, Merits and Reparations) Series C No. 267, *Rio Negro Massacres v. Guatemala*, judgment of 4 September 2012 (Preliminary Objection, Merits and Reparations) Series C No. 250 and the CAT's General Comment No. 3.