

CHAPTER 5:

Welfare and Material Deprivation

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This chapter examines the issues of welfare and material deprivation and considers how the best interests and the voice of children are treated in housing and social welfare law.

Two things became very apparent in preparing this chapter. The first was the sheer number of issues that could be included in a chapter looking at the effect material deprivation has on children. The second is that while this is, primarily, a legal text, any study on the rights and interests of children will also include elements of sociology, public policy and child development.

At the outset of the chapter, I propose to list the most relevant provisions of the United Nations Conventions on the Rights of the Child as well as the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights. I will give an overview of the main social welfare payments that relate to children and the data relating to child poverty. I will examine the jurisprudence regarding the Domiciliary Care Allowance.

In respect of housing law, I will examine the issues of homelessness, standards of rented houses and the assessment of eligibility for social housing of European Economic Area (EEA) families. I will look at the issues of window safety and social housing supports to accommodate children whose parents live apart. Lastly, the chapter considers the right of children to play, specifically in multi-unit developments.

What this chapter does not do is to address the question of what constitutes an adequate level of income support. Although this question is one of great importance, it goes beyond the scope of this chapter and its recommendations.

5.1 INTERNATIONAL LEGAL OBLIGATIONS AND STANDARDS

Article 27 of the United Nations Convention on the Rights of the Child (CRC) provides for the rights of the child with regard to standard of living. The Article provides:

1. State Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. State Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. State Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial

responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

In Article 27, State Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. There is a specific reference in the Article to providing material assistance and support programmes for nutrition, clothing and housing.

Also relevant are CRC articles Article 26 (the right of the child to social security) and Article 31 (the right to play).

Also of relevance is the European Convention on Human Rights, in particular Articles 2, 3, 8 and 14. Article 2 relates to the right to life; Article 3 to the prohibition of torture, including inhuman or degrading treatment. Article 8 refers to the right to respect of private and family life, including the home. Article 14 provides for the prohibition of discrimination.

The EU Charter of Fundamental Rights includes provisions relevant to the welfare and voice of children. Article 14 provides for the right to education. Article 19 relates to the rights of migrant workers and includes a reference to the rights of children of migrant workers to be facilitated in learning their mother tongue.

Article 24 of the EU Charter contains detailed provisions regarding the rights of the child. The article provides:

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Also contained in the EU Charter is recognition of entitlements to social security, including the right to social and housing assistance in order to provide a decent existence for all those who lack sufficient resources.

5.2 ISSUES ARISING IN IRELAND

In a seminal review on behalf of the Office of the Ombudsman for Children, Kilkelly¹ pointed to the invisibility of children in policymaking, including with regard to their welfare and measures taken to tackle material deprivation. The author referred to particular groups of very marginalised or vulnerable children, and the multiple barriers that they face. Such groups include Traveller children, the children of immigrants and asylum-seekers and children living in poverty.

As a party to the CRC, Ireland is obliged to report to the UN Committee on the Rights of the Children in relation to the implementation of the CRC. The most recent report of the Irish Government is the consolidated third and fourth reports submitted in July 2013.² This chapter will consider the adequacy of the responses given by Ireland to those points and suggest recommendations. It will also assess how well the best interests and voice of the child are respected in housing and social welfare law.

The main points arising from the Government's response are that there are 1,148,687 children in Ireland, some 25% of the total population. It notes that as a result of the economic downturn, child poverty has become more prevalent, with both an increase in the number of children 'at risk of poverty' and in 'material deprivation'.

In its report, the UN Committee made recommendations regarding the standard of living of children. It called for a supplement to the universal Child Benefit payment to assist families with a high level of poverty. It called for additional investment in social and affordable housing. In response, the Government pointed to the priority afforded to child poverty in the *National Action Plan for Social Inclusion 2006 – 2014* and the commitments made in the *Programme for Government 2011 – 2016*. It pointed to initiatives taken, mainly related to childcare in disadvantaged areas, which counter-balance the reductions in the universal Child Benefit payment. As regards to housing, the Government response simply states the number of children living in households assessed as having a housing need.

The 2015 Report Card published by the Children's Rights Alliance gave a 'D' grade for the measures under Right to an Adequate Standard of Living.³ It noted that the 2013 EU SILC results show 11.7% of children living in consistent poverty, while a further 17.9% were at risk of poverty.⁴ The report notes that the cuts in the Back to School Clothing and

1 Ursula Kilkelly, *Barriers to the Realisation of Children's Rights in Ireland* (Office of the Ombudsman for Children 2007).

2 Department of Children and Youth Affairs, *Third and Fourth Consolidated Report to the UN Committee on the Rights of the Child* (2013).

3 Children's Rights Alliance (2015) Report Card 2015

4 Central Statistics Office, *Ireland: At risk of poverty and consistent poverty rates by age group*, 2013 <<http://www.cso.ie/en/releasesandpublications/ep/p-mip/measuringirelandsprogress2013/society/society-socialcohesion/#.VUpn0fVhBc> accessed 6 May 2015.

Footwear Allowance have not been reversed and that Maternity Benefit payments were reduced. Budget 2014 did not make further reductions in Child Benefit payments, while Budget 2015 introduced a €5 per month increase in the payment. The new rate was payable from the 1 January 2015.

5.3 HAS THE CONVENTION BEEN JUDICIABLE IN HOUSING AND SOCIAL WELFARE LAW?

In Irish courts, plaintiffs have raised the CRC in cases involving deportation of children⁵ and in cases involving the surrender of a person subject to a European arrest warrant.⁶ The parallel Convention on the Rights of Persons with Disabilities 2006 has been subject to judicial consideration in cases involving wrongful arrest⁷ and detention under the Mental Health Act.⁸ In *DF v the Garda Commissioner*, Hogan J. held:

[A]s this case is accordingly governed entirely by Irish law, the 2006 Convention could only be justiciable in the event that there was a domestic law which gave effect to its provisions. Since the Oireachtas has not enacted such legislation, it follows, therefore, that the claim based on the 2006 Convention is doomed to fail and must be struck out pursuant to the inherent jurisdiction of the Court.⁹

The CRC and the Convention on the Rights of Persons with Disabilities (CPRD) have been invoked in a number of decisions regarding housing benefit in the UK superior courts. In *Burnip v Secretary of State for Work and Pensions*,¹⁰ the Court of Appeal held that it was appropriate for courts to have regard to these unincorporated international Conventions. In his judgment, Lord Justice Maurice Kay held, at paragraph 22, that:

If the correct legal analysis of the meaning of Article 14 discrimination in the circumstances of these appeals had been elusive or uncertain (and I have held that it is not), I would have resorted to the CRDP and it would have resolved the uncertainty in favour of the appellants. It seems to me that it has the potential to illuminate our approach to both discrimination and justification.¹¹

In *MA v Secretary of State for Work and Pensions*,¹² Lord Justice Laws issued a notice of caution about using either Convention as a source of domestic rights, stating:

5 *Olaniran v Minister for Justice, Equality and Law Reform* [2010] IEHC 83.
6 *Minister for Justice and Equality v RPG* [2013] IEHC 54.
7 *DF v the Garda Commissioner and others* [2014] IEHC 213.
8 *MX v HSE and others* [2012] IEHC 491.
9 *DF v the Garda* (n 7).
10 *Burnip v Secretary of State for Work and Pensions* [2012] EWCA Civ 629.
11 *ibid.*
12 *MA v Secretary of State for Work and Pensions* [2013] EWHC 2213.

I certainly accept that under our law an unincorporated treaty may be deployed as an aid to construction of an ambiguous statute to whose subject-matter it is relevant ... but care is needed to ensure that such a treaty is not seen as a source of substantive domestic legal rights.¹³

In *Nzolameso v City of Westminster*,¹⁴ the UK Supreme Court reiterated that where ECHR rights are engaged, they should be interpreted in line with international human rights standards, but the Court left over the question of whether a statutory provision could be construed in line with the Convention, where ECHR rights are not engaged.

The ECHR and Housing

The European Convention on Human Rights (ECHR) has been raised in Irish housing cases on many occasions since the enactment of the European Convention on Human Rights Act 2003. It led, for example, the Supreme Court to issue a declaration of incompatibility of section 62 of the Housing Act, 1966 regarding the recovery of local authority dwellings (see *Donegan v Dublin City Council*).¹⁵

The Courts have also been willing to hold that a plaintiff's Convention rights have been breached without finding that there has been any breach of a statutory duty. In *O'Donnell v South Dublin County Council*,¹⁶ Laffoy J. held that a plaintiff's Article 8 rights had been breached by the failure to provide adequate accommodation for the plaintiff, given their 'disability, hardship and deprivation'.

Children and Social Welfare Law

In Budget 2015, the Minister for Social Protection announced an allocation of €1.97 billion in Child Benefit payments, increasing the monthly payment by €5 per child. This payment is a universal payment that is not subject to a means test or included in assessment of income tax.

A child's parent may be in receipt of One Parent Family Payment; although new claims will come to an end when the parent's youngest child reaches the age of seven. Support for children is also made through the Qualified Child payment; a small supplement made to recipients of other social welfare payments such as Jobseeker's Allowance or Disability Allowance. Children at school whose parents receive social welfare could also benefit from the Back to School Clothing and Footwear Allowance. Family Income Supplement supplements the income of low income families.

The reductions made in recent years to the Back to School Clothing and Footwear Allowance has not been reversed. The Qualified Child payment was maintained at

13 *ibid.*
14 *Nzolameso v City of Westminster* [2015] UKSC 22.
15 *Donegan v Dublin City Council* [2012] IESC 18.
16 *O'Donnell v South Dublin County Council* [2007] IEHC 204.

€29.80 per week. It is notable that the eggs are very much in the Child Benefit basket and I would suggest that this spreads increased resources thinly, without focusing them on the most disadvantaged children.

It is also notable that many of the recent cases involving challenges in the High Court to decisions of the Department of Social Protection involve benefits paid on behalf of children. In *Jama v Department of Social Protection*,¹⁷ the High Court considered the Department's obligation to maintain, and allow access to, a database of decisions regarding entitlement to Child Benefit. The High Court ruled that there was no obligation on the Department to maintain such a database. In *Solovastru v Minister for Social Protection*,¹⁸ the High Court refused the applicants' claim for Child Benefit and other payments in circumstances where they were formerly self-employed Romanian nationals and did not have a right to reside in Ireland.

Habitual Residence Condition and Family Benefits

In social welfare law, the Habitual Residence Condition (HRC) is a statutory provision that requires claimants of certain social welfare payments to establish their right of residence and habitual residence in Ireland, in order to qualify for payment. In short, a claimant is required to show that their main centre of interest is Ireland. It is the subject of controversy as many claimants have been wrongly refused a claim on HRC grounds.

The Social Welfare Appeals Office Annual Report 2013 refers to a pilot project initiated by it and the Department regarding quality assurance in HRC-related cases, noting that issues arose around the level of investigation carried out to establish relevant facts; the weight being given to family resident abroad; the weight given to employment history and the understanding of Deciding Officers of the right to reside.

Two issues arise around Child Benefit and family payments. The first is ordinary residence and the second is habitual residence.

Child Benefit is payable in respect of children ordinarily resident in the State. The Appeals Office 2013 highlights cases where Child Benefit was wrongly ended where children were temporarily outside of the State, for example to visit family abroad. The Appeals Office drew attention to confusion amongst Deciding Officers as to the difference between 'ordinarily resident' and a child being absent from the State, stating that temporary absences do not affect ordinary residence.

Child Benefit, One Parent Family Payment and other child-related payments are defined as family benefits under EU law (Regulation 883/2004). An EEA migrant who is employed or self-employed does not have to demonstrate habitual residence in order

to qualify for a family benefit. Non-EEA migrants who have previously worked in another EEA state may also qualify, without being subject to a HRC test, subject to their being employed in the State and their dependents being resident in the EEA. Migrants moving to Ireland from outside the EEA do not benefit from the Regulation and are therefore subject to a Habitual Residence Test.

A review of the case studies by the Social Welfare Appeals highlighted cases where the HRC test is not being administered in a fair or proportional manner by Department officers. There is insufficient weighing up of all the facts and factors of a case. Decisions concentrate on the factors counting against habitual residence, without a fair or proportionate account being taken of the positive factors. The existence of difficulties around the interpretation of HRC is evident from the ongoing focus on such cases by the Social Welfare Appeals Office. All the case studies in the 2011 Annual Report are devoted to HRC.

As a supplementary point, it is unclear what the logic is for excluding Carer's Allowance from the definition of 'family benefit' contained in the EU Regulation. This excludes a person who returns to Ireland to care for a person who is eligible on care needs grounds to the payment. From media reports and the work of the Carer's Association, this provision has affected UK residents of Irish descent who move to Ireland to care for ailing relatives. They cannot show that their centre of interest will be Ireland as they retain substantial links to the UK and are likely to return there. They cannot show habitual residence in their own right, but it is unclear why such a connection is necessary when they must also be able to demonstrate their full-time caring responsibilities to a person.

As a further supplementary point, Family Income Supplement (FIS) is not subject to habitual residence. This payment provides extra financial support to people on low wages, who have at least one dependent child residing with them. This means that all low-income workers will qualify for FIS, even if they have been deemed not to be HRC compliant in other circumstances.

Domiciliary Care Allowance – A Case Study

Domiciliary Care Allowance is a payment made in respect of children who have a severe disability requiring, for a period of at least 12 months, continuous care and attention substantially in excess of the care and attention normally required by a child of the same age. It is paid in respect of some 25,966 children¹⁹ and how the Department assesses such applications remains a matter of public controversy.²⁰ Many applications are refused on the basis that the disability is not sufficiently severe or that the level of care

17 *Jama v Department of Social Protection* [2011] IEHC 379.

18 *Solovastru v Minister for Social Protection* [2011] IEHC 532..

19 DCA Review Group, *Domiciliary Care Allowance Review* (Department of Social Protection 2012).

20 Noel Baker, 'More families head to court to secure DCA payments from Department' *The Irish Examiner* (Cork, 10 February 2014).

and attention required is not substantially in excess of that required of other children of the same age.

This chapter will consider Department case studies and the case law around the assessment of entitlement to this payment. It assesses the extent the best interests of the child have been taken into account by the Department of Social Protection and the Appeals Office. It does so because it provides insight into how the Department assesses the best interests of the child and the voice of the child.

The 2013 Annual Report of the Social Welfare Appeals Office addresses the ongoing controversy in dealing with Domiciliary Care Allowance applications. The report states:

[I]n Domiciliary Care Allowance cases, experience shows that many appellants concentrate on detailing and emphasising the cost to them of accessing services for their child. However, the relevant issue relates to the requirement for continual or continuous care substantially in excess of a peer child.²¹

It commented on the work of the Department in providing information to assist Deciding Officers and noted that these efforts have been hindered by the lack of face-to-face contact between Deciding Officers and families.

Demonstrating the public importance of entitlement to Domiciliary Care Allowance, all the case studies featured in the 2013 annual report related to this matter. The 24 case studies cover a wide range of ages and medical diagnoses. They provide significant assistance in preparing social welfare appeals. It is also significant that Deciding Officers are now required to explain the basis for any refusal.

The 2013 Annual Report is a significant improvement on how the issue was dealt with in the 2012 Annual Report. In the 2012 case studies, it is striking how much emphasis was given to the genuineness and credibility of the parent, as opposed to the needs of the children concerned. It is submitted that the Department should place greater emphasis on the care needs of children. As a parallel, and commenting on the assessment of children's rights in the Swedish social welfare appeals system, Fernqvist outlined:

[S]ince the legislation that these cases emanate from is not oriented towards child welfare but the adults' rights to benefits, children's needs become secondary. Consequently, children's well-being and access to resources is often neglected by the court, even though children are directly affected by the outcome of the appeals.²²

The High Court has considered this issue on a number of occasions. In *AM v Minister for Social Protection*,²³ Hanna J. held that there was no duty for the Department to physically assess the child where there is no conflict as to the medical diagnosis of the disability (in this case, autism), even where there is a conflict as to the consequent care and support required by the child in question. The Court held that the Department was entitled to rely on a desk assessment of the resulting care and support needs.

It is submitted that the decision in *AM* does not give sufficient weight to the rights and interests of the child, in particular in the light of the Convention. What is at stake is the child's right to social security and an adequate standard of living, given his or her physical and mental development. Given the importance of such supports, it is submitted that a duty to do more than a desk assessment where the Department is inclined to refuse the application.

It should also be noted that the Department has a longstanding entitlement to require claimants of any disability-based payment to be medically assessed. 267,760 such assessments took place between 2008 and 2012.²⁴ It appears, however, that the Department's capacity to carry out such assessments has declined, with 60,412 taking place in 2008 compared to 37,396 in 2012.

In another Domiciliary Care Allowance case before the High Court, *CP v Chief Appeals Officer, Social Welfare Appeals Office*,²⁵ the High Court (Hogan J.) quashed a decision of the Chief Appeals Officer to close the applicant's appeal and require the applicant to submit a new application for the payment. The case revolved around the interpretation of section 317 of the Social Welfare (Consolidation) Act 2005 regarding unsuccessful, 'closed' claims. Section 4 of the Social Welfare and Pensions (No. 2) Act 2013 was enacted to allow the closing of unsuccessful new claims.

In *B v Minister for Social Protection*,²⁶ Barrett J. held that the decision-making process around a Domiciliary Care Allowance application to be flawed as the Department's Deciding Officers generally deferred to the opinion of the Department's medical assessors. The Court held that this represented an abdication of statutory duty in the case before it, resulting in a contravention of section 300 of the Social Welfare Consolidation Act 2005, which provides for the role of Deciding Officers.

Given that eligibility to Domiciliary Care Allowance is a comparative, based on the care needs of the child being substantially in excess of those of a child of the same age and without the disability, it is important that a child's eligibility be reconsidered over time and applications, where necessary, left open. For example, it will be easier to determine

21 Social Welfare Appeals Office, *Annual Report 2013* (Social Welfare Appeals Office 2014).

22 Stina Fernqvist, 'Redefining Participation? On the positioning of children in Swedish welfare benefit appeals' (2011) 18(2) *Childhood* 227.

23 *AM v Minister for Social Protection* [2013] IEHC 524.

24 Dáil Deb, 5 November 2013, reply to Parliamentary Question 46174-2013.

25 *CP v Chief Appeals Officer, Social Welfare Appeals Office* [2013] IEHC 512.

26 [2014] IEHC 186.

that the care needs of a ten-year old are substantially in excess of the norm than those of a five-year old. It should also be possible for the Department, in marginal cases, to fix a date in the future for an applicant child's eligibility to be reviewed, rather than having them re-submit an application.

5.4 CHILDREN AND HOUSING

Children are almost completely invisible in how the State allocates housing and housing. It is submitted that the housing in which children live has a determining effect on the realisation of their rights and on their development.

The CRC makes a particular reference in Article 27 to the need to provide support for housing available to children. In commenting on the scope of this right, MacDonald, 2011²⁷ refers to the report of the UN General Assembly special session on children which concluded that:

[a]dequate housing fosters family integration, contributes to social equity and strengthens the feeling of belonging, security and human solidarity, which are essential for the well-being of children. Accordingly, we will attach a high priority to overcoming the housing shortage and other infrastructure needs, particularly for children in marginalised peri-urban and remote rural areas²⁸

In 2006, the UN Committee on the Rights of the Child²⁹ had raised two general points relating to housing in Ireland: they were to 'implement fully existing policies and strategies and increase budgetary allocations for and subsidisation of services, including childcare, healthcare and housing, for families with children who are particularly vulnerable; and increase investments in social and affordable housing for low-income families.'

The Government's response in July 2013 was a statement of fact about the number of households with children seeking social housing and a statement that the bi-annual assessment of housing need would occur (and did occur) in 2013. It states:

[i]n 2011, there were 43,578 households with children identified as being in need of social housing. The next assessment of housing needs is due to be carried out by local authorities in April 2013. Information on particular housing needs, household size and composition (including number and ages of children) will be gathered as part

of the assessment. This information will be used by authorities when drawing up their social housing programmes.³⁰

'Growing Up in Ireland'³¹ is a significant and complex longitudinal study undertaken on behalf of the Department of Children and Youth Affairs regarding the lives of children and their parents or guardians. For the purposes of this chapter, it is interesting to note that there is little assessment of the housing in which the children surveyed live.

The report on nine-year olds provided findings in relation to the neighbourhoods in which children live. The survey asked the children's mothers to give their perceptions of the condition of the neighbourhood, including whether homes and gardens were in poor condition. For the record, 17% of mothers classified as 'semi-skilled or unskilled manual' said that there were 'fairly common' or 'very common' issues with the poor condition of houses and gardens in their area. 10% of mothers classified as 'other non-manual/skilled manual' and 5% of mothers classified as 'professional/managerial' gave this response.

The survey thus far does not appear to have sought to elicit information on the quality of housing occupied by the cohort of children being followed. There does not appear to have been any analysis of the quality of the immediate living environment in which children live, for example facilities for children to play, or privacy in respect of sharing rooms with siblings or others. We know from the 2011 Census that 34.7% of all pre-school age children live in rented accommodation. We know that, in all, 347,846 children live in the rented sector. We also know that 53,936 children live in apartments or flats.

This chapter will examine five issues related to children and housing. It will look at children living in homelessness and increasing rent costs. It will examine the allocation of housing supports to accommodate children whose parents live apart and the eligibility for social housing of EEA migrants. It will look at the need to ensure that children are safe in high-rise homes. The last issue considered is the opportunity children have for structured and unstructured play in multi-unit developments.

Homelessness and Children

Housing charities have warned of the great number of households with children becoming homeless.³² The loss of their home has an obvious effect on children and cuts their ties to friends, community and services such as schools. It is submitted that part of the cause of the increased number of children being made homeless is how the rent supplement scheme is framed.

27 Alistair MacDonald, *The Rights of the Child Law and Practice* (Jordan Family Law 2011).

28 UN General Assembly, 'Report of the Ad Hoc Committee of the Whole of the Twenty-seventh Special session of the General Assembly' A/S-27/19/Rev.1.

29 UN Committee on the Rights of the Child, 'Concluding Observations of the UN Committee on the Rights of the Child: Ireland' (29 September 2006) CRC/C/IRL/CO/2.

30 Department of Children and Youth Affairs, *Ireland's Consolidated Third and Fourth Reports to the UN Committee on the Rights of the Child* (DCYA 2013).

31 See www.growingup.ie.

32 Kitty Holland, 'Dublin's homeless children' *The Irish Times* (Dublin, 15 November 2014) and 'Rise in Dublin families becoming homeless, says Focus Ireland' *The Irish Times* (Dublin, 8 December 2013).

Rent Supplement requires the landlord's ongoing consent for the payment to be made on the behalf of the tenant and demands that the rent cannot be set above a maximum rent cap. The Department has reduced the maximum rents on a number of occasions, causing great difficulties in urban areas for households to secure accommodation below or at the maximum rent. A landlord is entitled, once every 12 months, to increase the rent to market rent, thereby causing tenants to end tenancies because the new rent is above the maximum rent cap.

The development by the Private Residential Tenancies Board of a localized rent index is an important step in assessing what market rent is for a particular dwelling. A landlord, however, is entitled to increase the rent by whatever amount, so long as the new rent is within market rent. This poses particular challenges to households with children in urban areas, as they have relatively little mobility and may not be able to afford the new rent.

On the 26 November 2014, the Government launched the Social Housing Strategy 2020 in response to this crisis. It undertakes to dramatically increase the number of social housing units. A significant reform in the plan is the development of cost rental housing, whereby housing provided to social housing applicants via housing associations or institutional investors would be let on a cost rental basis, rather than on a market rent. This seeks to counteract the current problem of private landlords deserting Rent Supplement as market rents rise.

In the interim, many families with children will be accommodated in temporary homeless accommodation. This chapter recommends that there should be a specific statutory duty to place the interests of such children at the centre of decision-making regarding such placements.

Becoming homeless will have significant detrimental effects on children. They lose the place they have called home. They are moved to alternative, temporary accommodation. They will often live in cramped accommodation and share a room with siblings and parents. They will live in close proximity with other families in a similar situation. There is no guarantee that such accommodation will be close to where they lived previously; they might lose contact with friends and family and have to move schools. They have no security; they could be moved at anytime to alternative homeless accommodation. Temporary homeless accommodation raises obvious child protection issues.

This report recommends that we apply a gold standard in realizing the best interests of children facing homelessness. It recommends that a statutory duty to the best interests of the child be the primary consideration in accommodating homeless children, reflecting Article 3 of the CRC. This is a higher standard than that of 'having regard', and places a positive obligation on the State to adequately accommodate children living in the precarious situation of homelessness. The effect of this duty is that statutory bodies will have to show how they have met the best interests of children while they reside in accommodation for homeless families.

Social housing supports to accommodate children whose parents live apart

(i) Social housing and the accommodation of children who have two homes

Adequate housing fosters family integration and assists children to develop, as well as form bonds with their parents or guardians. The parents of many children live separately, and where the parents are dependent on social housing or housing supports, the question that arises is their entitlement to avail of accommodation of sufficient size for their children.

As a preliminary point, the Housing (Miscellaneous Provisions) Act 2009 provides the framework for the assessment of housing need and following which, housing is allocated to persons and households deemed in need of housing support. Under the Act, each housing authority is obliged to carry out a housing needs assessment every two years, establishing the number and categories of households seeking social housing. The Social Housing Strategy 2020 outlines that such assessments will take place on a yearly basis from 2016.

The Social Housing Assessment Regulations 2011, as amended, provide detailed guidance to housing authorities on how to assess housing need. They determine how social housing assessments shall be carried out and provide for standard application forms. Being assessed as in need of housing is an obvious first step to being allocated a dwelling by the housing authority. It is also necessary to avail of other housing supports such as Rent Supplement or the Rental Accommodation Scheme. The 2013 Housing Needs Assessment establishes that 89,872 households are in need of social housing. The Service Indicators in Local Authorities 2013 suggest that some 6,462 new tenancies were created in the year.

The Act of 2009 imposes an obligation on each housing authority to publish a scheme of letting priorities. The scheme outlines how it will allocate dwellings to applicants and what types of accommodation they will be considered for. The question that arises here is what allowance is made in schemes of letting priorities for children who stay on a regular, overnight basis with parents who live apart. It is submitted that the social housing system should allow for the accommodation of children who have regular, overnight access to parents who live apart. They should not lose out on living with one parent because the child's accommodation needs are not included on the assessment of a parent's housing need.

It appears from the schemes of letting priorities operated by most housing authorities that they will only allow a child or children be counted on the assessment of housing need of one parent. This means that the housing needs assessment of the other parent will not include accommodation for the children, thereby preventing regular, overnight access of the child with this parent. A number of housing authorities, however, recognise this need, for example Dublin City, South Dublin, Galway City and Kildare. They may, for example, allow for a person to be entitled to a second bedroom to accommodate their child or children.

It is submitted that Schemes of Letting Priorities should provide for additional bedroom accommodation to allow parents facilitate overnight access of their children, where parents do not live together. This will allow both parents to accommodate children and provide for better relationships between parent and child. A child and parent who cannot facilitate court-ordered or privately-arranged overnight access or even to have a child visit their dwelling (say in the case of a small flat or bedsit) will likely have a weaker attachment. Housing authorities should also be consistent in their approach to this situation.

(ii) Rent supplement and the accommodation of children who have two homes

Rent Supplement is paid by the Department of Social Protection to assist social welfare recipients meet the cost of rent. The amount of support is determined by the location of the rented dwelling and the household size of the applicant. The question that arises is how to assess the household size of an applicant who has regular, overnight access to a child or children.

This question was considered in late 2014 by the High Court. In *McCormack v the Minister for Social Protection*,³³ the applicant challenged the Department's refusal of his application for Rent Supplement for him and his four children. The Department sanctioned payment of the supplement on the basis of his own accommodation needs only. He had agreed, overnight access to his children, who resided with their mother, some distance away. Baker J. held that:

I am satisfied that the decision making process was flawed as a matter of law in that the decision body took an erroneous view of the test it had to apply, and looked only to test the accommodation needs of the applicant himself without having any regard to the complexity of his family relationships, the needs of the children and their intrinsic interconnectedness with those of their father, the fact that the accommodation needs of the children when they are visiting their father in Dublin are an element in the test of whether they are qualified within the meaning of the legislation, and that if they have needs which are required to be satisfied by their father, his needs are to be accessed as including theirs. Further, the deciding body failed to have any regard to the fact that the accommodation and maintenance needs and claims of the children were met by a capitalized payment in the separation agreement.³⁴

It is submitted that this is a welcome decision, as it recognises the accommodation needs of children whose parents live apart. Overnight access, even where ordered by a court, is not a realistic prospect where the parent's accommodation is too small or otherwise unsuitable. It would also be regrettable if reform in this regard became a zero-sum game between the competing claims of parents. Instead, it is the needs of the child

that should determine the level of social housing support. The need for an additional bedroom is not exceptional, but a necessary step to ensure that the children can bond with both parents by living with them.³⁵

The decision in *McCormack* mirrors similar developments in the United Kingdom. In a case before the UK Social Welfare Tribunals, a First-Tier Tribunal in Liverpool held that the Housing Benefit Regulations were to be read subject to Article 1, Protocol 1, Article 8 and Article 14 of the ECHR.³⁶ The Tribunal determined that a parent who had regular, overnight access to a child required the second bedroom; consequently, the parent's housing benefit could not be reduced on the grounds that the second-bedroom represented over-accommodation.

It also mirrors the decision of the Irish Equality Tribunal *A v Community Welfare Service, Department of Social Protection*.³⁷ The Equality Tribunal held that the Department directly and indirectly discriminated against the applicant in refusing to include his two children in assessing the size of the household. The Tribunal held that the exceptional circumstances of this case meant that the respondent should have considered the claimant's parenting obligations as to whether the accommodation was suited to his 'residential or other needs.' The Tribunal made the maximum award of damages to the claimant and ordered the respondent to ensure compliance with the Equal Status Acts regarding the entitlement to rent supplement of separated parents.

On the 10 December 2014, the Minister of State at the Department of Social Protection, Kevin Humphreys, indicated that the decisions in *McCormack* and *A* are being considered as part of a Departmental review of the Rent Supplement scheme. It is submitted that the needs of children whose parents live apart should be facilitated in the Rent Supplement scheme.

Social housing and EEA citizens

An applicant for social housing support will be assessed pursuant to the Housing (Miscellaneous Provisions) Act, 2009 and the Social Housing Assessment Regulations, 2011 (as amended). Applicants who live in Ireland and who are from an EEA state other than the UK face an additional hurdle. This is provided in the Department of Environment Circular 41/2012, which deals specifically with eligibility for social housing of non-Irish households.

It is submitted that this Circular unduly restricts the ability of EEA citizens living here to apply for social housing in Ireland. It does so because it relies on an incomplete reproduction of the Statutory Instrument transposing an EU Directive regulating free

33 [2014] IEHC 489.

34 *ibid* para 52.

35 Social Welfare (Consolidated Supplementary Welfare Allowance) (Amendment) (No. 5) (Rent Supplement) Regulations 2014, SI 2014/604 was enacted after *McCormack* to clarify the definition of 'qualified child' in the Rent Supplement Regulations.

36 Decision of Judge McMahon, 13th February 2014, SC068/13/12334.

37 *A v Community Welfare Service, Department of Social Protection* DEC-S2013-010.

movement. This issue has been raised by Focus Ireland, Crosscare and the Mercy Law Centre.

In order to be eligible for social housing, Circular 41/2012 requires that a non-UK EEA national be in employment or self-employment or they be temporarily out of work, having worked for a year and now be registered as a jobseeker. The text contained in the Circular is a partial reproduction of Regulation 6 of Statutory Instrument (S.I. 656/2006), which governs the residence of EEA citizens.

It is submitted that Circular 41/2012 wrongly excludes categories of EEA citizens living in Ireland. It does so as it does not have regard for EEA citizens who have acquired the right of permanent residence in Ireland under Regulation 12 of S.I. 656/2006.

It also excludes families whose children have acquired a right of residence in Ireland while being in education. This right arises following judgments of the Court of Justice of the European Union, for example in *Teixeira v Lambeth Borough Council*.³⁸ In *Teixeira*, the Court held that children who were in education in a member state after a parent or carer had exercised free movement rights acquired a right of residence in the member state that was not dependent on the child or their carer having sufficient resources to avoid being a burden on the State. As a result, the applicant in *Teixeira* was able to avail of social housing supports, as her daughter had a right of residence in the United Kingdom.

It is recommended that Circular 41/2012 be amended to cater for situations where the EEA citizen has acquired permanent residence in Ireland or where a right of residence has arisen pursuant to the CJEU jurisprudence.

Children can't fly

'Children can't fly' was a programme developed by New York City's Department of Health in the early 1970s, to counter the high rates of death and injury among children following falls from windows.

According to Census 2011, 53,936 children live in apartments or flats in Ireland. Of this group, 25,647 were aged under four years. As a matter of note, 330 children of this age lived in bed-sits, i.e. the entire area to live, sleep and eat was one single room.

The significant number of children living in apartments or flats in Ireland raises the issue of their safety, in particular when living in dwellings above ground level. Working at heights has led to extensive legislative intervention to ensure the safety of employees and contractors in the workplace; this can be contrasted to the lack of intervention to protect children living in dwellings above ground level.

38 *Teixeira v. Lambeth Borough Council* [2010] C-480/08 ECJ 216–17.

In 2014, the Children's University Hospital, Temple Street, published a study on the number of children killed or injured following falls from apartments.³⁹ The survey showed that the hospital had treated 45 high-fall cases between January 2010 and September 2012. 80% were aged between one and five, and 33 of the 45 cases involved boys.

Tragically, children have died as a result of such falls. The Irish Examiner reports six such deaths in six years.⁴⁰ The Dublin Coroner, Brian Farrell has made representations to statutory bodies and the matter lies there. The Census illustrates that apartments and flats are the long-term home of many young children. The evidence published by Temple Street and the proceedings before Coroner's Courts demonstrate that children's safety is placed at risk by falls from high windows.

Where the dwelling is rented, the Standards of Rented Houses Regulations apply. The improved definition of 'proper state of structural repair', introduced on the 1 December 2009, provides that all windows and fittings should be in good condition and repair. There is no obligation to provide any specific window safety devices, for example in high windows.

The dangers arising from children falling from residential buildings have recently been extensively considered in Sydney. In 2011, the leading Sydney children's hospital published an 80-page report on window and balcony safety, including the corresponding need to ensure safe exit from a dwelling in the case of fire.⁴¹ Among the report's recommendations are that landlords should be obliged to provide window safety devices in windows above ground floor. It also recommends a similar obligation for owner management companies in the windows of common areas in apartment blocks.

Analysing the reasons why children living in apartments are vulnerable (and writing about Sydney), Sherry outlined the following considerations:⁴²

First and most obviously, the apartment buildings from which children fall are high. While most freestanding homes only have a second or, at most, a third storey from which a child could fall, high-rise buildings may have more than 50 floors. The further the fall, the greater the likelihood of serious or fatal injury. Second, when a child falls from an apartment building, they are unlikely to fall on anything other than concrete in the form of paths or driveways. Children who fall from freestanding homes may fall

39 B Freyne and others, 'Epidemiology of High Falls from Windows in Children' (2014) 107(2) *Ir Med J.* 57–59.

40 'Landlords face fines in window safety review' *Irish Examiner* (Cork, 6 January 2014).

41 The Children's Hospital at Westmead, 'Working Party for the Prevention of Children falling from residential buildings: outcomes report' (February 2011) <http://kidshealth.schn.health.nsw.gov.au/sites/kidshealth.chw.edu.au/files/attachments/758/outcomes_report_-_executive_summary.pdf> accessed 15 July 2015.

42 Cathy Sherry, 'Kids can't fly: The legal issues in children's falls from high-rise buildings' (2012) 2 *Prop L Rev* 22, 22.

into garden beds or onto grass, which greatly reduces the severity of injuries. Third, owing to the lack of play space around apartment blocks, in particular those dating from the 1960s and 1970s, as well as parents' inability to supervise children when several storeys up, children are more likely to be confined to bedrooms to play. Fourth, children living in apartments overwhelmingly live in those with two or less bedrooms. Limited floor space means that furniture is often placed under windows allowing children to climb up to sill level and fall.⁴³

Sherry further considers the rights parents have to install safety measures, such as locking mechanisms or nets affixed to the walls of buildings and the potential conflict this poses with apartment house rules and the prohibition on occupants to fix devices onto the external walls of a building. Such conflicts arise in Irish law and must be considered in ensuring that children are safe within apartment buildings and within their homes.

It is recommended that the Standards for Rented Houses Regulations be amended to include a specific landlord obligation to provide window safety devices. The Multi-Unit Development Act should be amended to impose an obligation on owner management companies to affix such window safety devices on windows in common areas. Section 23 of the Act should be amended to prevent apartment house rules from prohibiting window safety devices, such as nets or additional guards on or above balcony balustrades.

5.5 THE RIGHT TO PLAY

Article 31 of the CRC enshrines the right to play. It provides that '[S]tate Parties recognise the right of the child to rest and leisure, to engage and play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts'.⁴⁴ The predecessor of the Department of Children and Youth Affairs published a National Children's Play Policy in 2004, to be implemented by Government and local authorities.

I will consider a child's right to both structured and unstructured play in the public open spaces of multi-unit developments. This arises because the dwellings in many multi-unit developments do not have sufficient private open space to allow children to play.

This issue was anticipated by the Department of Environment when it published guidelines 'Sustainable Urban Housing: Design Standard for New Apartments' in 2007. This provides that the recreational needs of children need to be planned for from the

outset and states '[e]xperience from Ireland and elsewhere has shown that children will play everywhere; therefore, as far as possible, their safety needs to be taken into consideration and protected throughout the entire site, particularly in terms of safe access to larger communal or public open spaces.'

Some 53,000 children reside in apartments or flats. In many cases, children will not have access to private open space, such as a garden, or the private open space may be extremely restrictive, for example a small balcony. Some larger and more recently built apartment developments will have playgrounds built within the confines of the development. The Multi-Units Development Act, 2011 seeks to regulate apartments or estates under the ownership of an owners' management company. A multi-unit development is defined as a building that is comprised of units where it is intended that amenities, facilities and services are to be shared.

Section 23 of the 2011 Act provides that an owners' management company may make house rules in relation to the effective operation and maintenance of the development, with the objective of enhancing the quiet and peaceful occupation of units in the development. The section further provides that such house rules and any covenant or conditions in the title documents are terms of the letting of any unit in the development.

The section further provides that any house rules shall be made in a manner consistent with the objective of advancing the quiet and peaceful enjoyment of the property by the unit owners and the occupiers, and the objective of the fair and equitable balancing of the rights and obligations of the occupiers and the unit owners. The Minister may also make Regulations relating to the contents of house rules.

The issue of children playing in multi-unit developments is the subject of controversy, for example in one estate in Clane, Co. Kildare.⁴⁵ There are many examples of apartment house rules that seek to prohibit children's play, using a phrase like 'The Unit owner/ Tenant shall not permit children to play in or obstruct the use of the entrance halls, staircases and landings leading to the Units.'

It is submitted that unstructured children's play is an important part of their development and having regard to Article 27 of the CRC, one that should not be subject to undue restriction in house rules or to financial penalties. House rules should recognise a child's right to play, including where this involves unstructured play in public open space within multi-unit developments. It is submitted that the Minister issue Regulations to limit the extent house rules can prohibit or restrict play.

43 *ibid.*
44 Ciara Davey and Laura Lundy, 'Towards a Greater Recognition of the Right to Play: An Analysis of Article 31 of the UNCRC' (2011) 25(1) *Children & Society* 3.

45 Conor McHugh, 'Children banned from playing in gated Clane apartment complex' *Leinster Leader* (Kildare, 18 December 2012) and 'Meeting planned of Abbeylands, Clane residents' *Leinster Leader* (Kildare, 25 September 2012).

Recommendations

The chapter recommends the following legislative, administrative or procedural amendments:

Policy area	To whom addressed	Nature of recommendation	Purpose of recommendation
The Convention on the Rights of the Child	Government	Act of the Oireachtas to incorporate the Convention on the Rights of the Child into Irish law	To allow the CRC be judiciable in Irish courts
Social welfare payments related to children	Department of Social Protection	Targeted increases in the Qualified Child payment and Back to School Clothing and Footwear Allowance	To target increases in social welfare payments to the vulnerable children
Child Benefit 'ordinary residence'	Department of Social Protection	Clear guidance issue to Department of Social Protection officials regarding definition of 'ordinary residence'	To prevent recipients of Child Benefit unfairly losing entitlement to the payment for visits overseas that do not break ordinary residence
Habitual residence	Department of Social Protection	Ongoing information campaign to Department of Social Protection officials regarding fair and thorough examinations of a claimant's habitual residence	To improve the quality of Department decision making on habitual residence to ensure a full and fair examination of the facts
Carer's Allowance	Department of Social Protection	Carer's Allowance should be listed as a 'family benefit'	To allow carers care for relatives while they need full time care and attention

Policy area	To whom addressed	Nature of recommendation	Purpose of recommendation
Domiciliary Care Allowance (1)	Department of Social Protection	Provide for medical assessments of applicants in cases where the Department is inclined to reject the application	Desk reviews of an applicant's diagnosis and care needs do not respect the voice of the child
Domiciliary Care Allowance (2)	Department of Social Protection	Training of Department officials to allow them assess DCA applications without excessive reliance on Department medical assessors	To allow Deciding Officer to fully exercise their statutory powers in considering applications
Domiciliary Care Allowance (3)	Department of Social Protection	To set review dates on borderline applications	To allow for automatic review of applications as the child grows up, to assess their developing care needs
'Growing Up in Ireland'	Department of Children and Youth Affairs	The survey should assess children's housing situation, i.e. the quality and security of their home	To allow for a deeper insight into the effect housing has on the development of children
Children living in homelessness	Department of Environment, Community and Local Government	Statutory duty regarding the best interests of the child in providing accommodation to families in homelessness	To ensure that statutory authorities ensure that children in homelessness are adequately accommodated

Policy area	To whom addressed	Nature of recommendation	Purpose of recommendation
Social housing and housing supports	Department of Environment, Community and Local Government	To provide social housing and social housing supports as an alternative to rent supplement	To respond quickly to the many children who are homeless or in danger of homelessness
Social housing and children whose parents live apart	Department of Environment, Community and Local Government	Amendment to the Social Housing Assessment Regulations	To provide that Schemes of Letting Priorities should provide for additional bedroom accommodation to allow parents facilitate overnight access of their children, where parents do not live together
Rent supplement and children whose parents live apart	Department of Justice and Equality	Amendment to the Rent Supplement Regulations	To allow for parents with overnight access to children to have the children's accommodations needs considered for rent supplement
Social housing and EEA citizens resident in Ireland	Department of Justice and Equality	Amendment of Circular 41/2012	To ensure that the right of residence of EEA citizens is fairly and lawfully dealt with as part of their application for social housing support
Children can't fly (1)	Department of Environment, Community and Local Government	Amendments to the Standards for Rented Houses Regulations	To make the provision of window safety devices mandatory

Policy area	To whom addressed	Nature of recommendation	Purpose of recommendation
Children can't fly (2)	Department of Justice and Equality	Amendment to the Multi-Unit Developments Act and enacting Regulations	To provide for the installation of window safety devices and to allow for the installation of additional guards or nets around balconies
Right of children to play	Department of Justice and Equality	Statutory instrument pursuant to section 23 of the Multi-Unit Developments Act, 2011	To prevent house rules in multi-unit developments from excessively restricting children from structured and unstructured play

Spotlight on Direct Provision

Dr. Liam Thornton

The government hides it so well that people don't know. It's such a tragic form of a life. We don't get new toothbrushes or linen or soap. We want to stand on our own two feet. We want a better life, not a worse one. Ask the Minister to try live where we live and see if she survives for a week. It's not good enough. Would she like her family to be in that situation? Why don't we deserve the same as her children? The fear alone does not let you sleep. Ireland is not living up to its commitments - our rights and needs are not being met. They don't care about our needs. We are treated like animals. When we protested the staff at the centre treated us worse. We are not treated with any dignity or respect. They think we're a burden. After 14 years, you've nothing left where you came from. Everyday a bit of our past is being rubbed out. We're not cats. We don't have 9 lives and we cannot keep adjusting to changes. All I want is the protection of the country. I want to help the world be a better world. Happiness is what you want for everyone. No matter how much of an optimist you are, there is no good from Direct Provision.

Children living in the direct provision system in Athlone, Westmeath, 12 February 2015.¹

Introduction to the System of Direct Provision

'Direct provision' is the phrase used to describe the system Ireland utilises to provide minimum supports to those claiming refugee,² subsidiary protection³ and/or leave to remain.⁴ Within direct provision, asylum seekers⁵ are provided with bed and board, along with a weekly allowance. Accommodation is provided by the Reception and Integration Agency, a sub-unit of the Department of Justice and Equality. The weekly allowance, known as direct provision allowance, is paid by the Department of Social Protection. Adult asylum seekers are entitled to a direct provision allowance rate of €19.10 per week, while the payment for dependent children is €9.60 per week. This rate of payment has not increased since 2000.⁶ In June 2015, the *Working Group Report on the Protection*

- 1 Children's Rights Alliance, Department of Children and Youth Affairs and UNICEF, *Picture Your Rights: A Report to UN Committee on the Rights of the Child from Children Living in Ireland* (2015) 89.
- 2 For definition of 'refugee', see Section 2 of the *Irish Refugee Act 1996*.
- 3 For definition of subsidiary protection, See European Communities (Eligibility for Protection) Regulations 2006, SI 2006/518, and European Union (Subsidiary Protection Regulations) 2013, SI 2013/423. See further, Liam Thornton, 'Subsidiary protection for asylum seekers within Ireland' (2008) 26(1) *ILT* 6-13.
- 4 An application for leave to remain is made under Section 3 of the *Immigration Act 1999*.
- 5 An asylum seeker is a person who seeks refugee status, subsidiary protection or leave to remain. The veracity of the individual's claim has yet to be tested through the status determination process or determined by the Minister for Justice and Equality.
- 6 A challenge to the lawfulness of direct provision allowance was unsuccessful in *C.A. & T.A. v Minister for Justice and Equality & others* [2014] IEHC 532. See in particular paras. 13.1-13.27.

System and Direct Provision (McMahon Report) recommended an increase in direct provision allowance for adults and children. It is recommended that the adult rate be increased to €38.74 and child rate to €29.80 per week (equivalent to the Qualifying Child Allowance rate under Supplementary Welfare Allowance).⁷

Asylum seekers, while having authorised presence in the State,⁸ are not entitled to any other social welfare payment (including the Child Benefit payment)⁹ and cannot seek or enter employment, on pain of criminal conviction.¹⁰ A number of other supports are provided to asylum seekers, including education up to Leaving Certificate level (if person is of an appropriate age) and entitlement to a Medical Card.¹¹ Since May 2009, asylum seekers have been definitively disentitled to any other social security/welfare payment, other than direct provision allowance, as asylum seekers are legally barred from gaining habitual residence in Ireland.¹²

At the end of January 2015, there were 1,482 children resident in direct provision accommodation as part of a family unit.¹³ While figures for length of time children remain in direct provision accommodation are not provided, given the fact that the average length of stay within accommodation centres is generally 48 months (four years), this significantly impacts on the rights of the child.¹⁴

Direct Provision and the Rights of the Child¹⁵

Article 22(1) CRC provides:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable

- 7 Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers, *Final Report June 2015* (2015), paras 51, 5.27 and 5.30 Bullet Point 1.
- 8 Refugee Act 1996 (as amended) s 8(1)(a).
- 9 Social Welfare (Consolidation) Act 2005 s 246, as amended by Social Welfare and Pensions (No. 2) Act 2009 s 15.
- 10 1996 Act (as amended) s 9(4)(b).
- 11 For a detailed discussion of the modalities of the direct provision system, see: Liam Thornton, 'Upon the Limits of Rights Regimes: Reception Conditions of Asylum Seekers in Ireland' (2007) 24(2) *Refuge: Canadian Periodical on Refugee Studies* 86; Liam Thornton 'Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion' (2013) 20(2) *Journal of Social Security Law* 66-88.
- 12 See of the Social Welfare and Pensions (No. 2) Act 2009 s 15. This was enacted due to the success of the Free Legal Advice Centres in arguing that the previous iteration of the habitual residence condition did not absolutely exclude asylum seekers, see: *Case A: Review of the Appeal Officer's Decision under Section 318 of the Social Welfare Consolidation Act 2005*.
- 13 Reception and Integration Agency, 'Monthly Statistics Report January 2015', <<http://www.ria.gov.ie/en/RIA/RIA%20Monthly%20Report%201-2015.pdf/Files/RIA%20Monthly%20Report%201-2015.pdf>> accessed 14 July 2015.
- 14 *ibid* 19.
- 15 For a more detailed analysis of some of the arguments introduced in this short contribution, see Liam Thornton, 'Direct Provision and the Rights of the Child in Ireland' (2014) 17(3) *IJFL* 68.

international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.¹⁶

The United Nations High Commission for Refugees (UNHCR) has stated categorically that the Convention on the Rights of the Child (CRC) applies to children seeking asylum or children accompanying family members seeking asylum.¹⁷ While Ireland may seek to objectively, legitimately and proportionately limit the socio-economic rights of asylum seekers under other international human rights treaties, they are absolutely prohibited from doing this for children in the system of direct provision.¹⁸ The socio-economic rights of children are outlined in a variety of the CRC's articles. All children have the right to health,¹⁹ the right to benefit from social security,²⁰ the right to an adequate standard of living,²¹ the right to education,²² the right to rest and leisure,²³ and protection from economic exploitation²⁴ including protection from sexual exploitation²⁵ and trafficking.²⁶

The UN Committee on the Rights of the Child have stated categorically that there are no grounds for adopting lesser rights protection for children seeking asylum.²⁷ Ireland has

very clear international legal obligations that asylum seeking children/children in a family who have a member claiming asylum, must be treated equally vis-à-vis citizen children. In Ireland to date, law and administration, has rejected such a rights based approach to children in direct provision. The 2015 *List of Issues of the Committee on the Rights of the Child* to Ireland had not been issued prior to the finalising of the *McMahon Report*. However, it remains instructive as to what the precise obligations of Ireland are towards children in the asylum system.

At para. 10, the UN Committee on the Rights of the Child requests that Ireland:

Please provide additional information on the criteria for the fulfilment of the so called 'Habitual Residence Condition' in order to access social services. In doing so, please provide information on measures, if any, taken to ensure that this condition does not result in children from asylum seeking, refugee, migrant, and Traveller and Roma ethnic minority backgrounds being excluded from primary care, child benefits and social protection.²⁸

Direct Provision: A Violation of the Rights of the Child

Ireland is to be commended for mainstreaming children seeking asylum into education and providing for their medical needs through the medical card system. However, the significant time that children have had to spend in direct provision is of deep concern.²⁹ The *McMahon Report* has proposed that all individuals in the protection, 'Leave to Remain' or deportation systems, for five years or more, should, in general, be granted either protection status or leave to remain within six months of the report's publication. The *McMahon Report* 'discounted the possibility of an amnesty'.³⁰ Instead, the *McMahon Report* recommends:

All persons awaiting decisions at the protection process and leave to remain stages who have been in the system for five years or more from the date of initial application should be granted leave to remain or protection status as soon as possible and within a maximum of six months from the implementation start date subject to the three conditions set out below for persons awaiting a leave to remain decision. It is

16 Convention on the Rights of the Child (adopted and opened for signature, ratification and accession on 20 November 1989) 1577 UNTS 3 (UNCRC) Art 3.

17 See, UN High Commissioner for Refugees (UNHCR), *UNHCR Global Trends 2013: War's Human Cost* (UNHCR, June 2014) and UNHCR, UN High Commissioner for Refugees (UNHCR), 'Refugee Children and Adolescents' (17 October 1997) A12 A/52/12/Add.1, para 1.

18 Article 2 CRC. In this regard, other international human rights treaties are not as categorical as regards the equal applicability of rights for asylum seekers vis-à-vis citizens. For discussion on this, see: Liam Thornton, 'Law, Dignity and Socio-Economic Rights: The Case of Asylum Seekers in Europe' (2014) FRAME Working Paper No. 6, January 2014 <<http://www.fp7-frame.eu>> accessed 08 July 2015 and Liam Thornton, 'The Rights of Others: Asylum Seekers and Direct Provision in Ireland' (2014) 3(2) Irish Community Development Law Journal 22.

19 Convention on the Rights of the Child (n 16) Art 24.

20 *ibid* Art 26.

21 *ibid* Art 27.

22 *ibid* Art 28/29.

23 *ibid* Art 31.

24 *ibid* Art 32.

25 *ibid* Art 34.

26 *ibid* Art 35.

27 In UN Committee on the Rights of the Child (CRC), 'Report of the UN Committee on the Rights of the Child: Twenty-eight Session' (28 November 2001) CRC/C/111/59, the Committee stated that all children within Qatar's jurisdiction must enjoy all the rights set out in the Convention without discrimination (para 296(a)). See this point reemphasised in: UN Committee on the Rights of the Child (CRC), 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration' (Art. 3, para. 1) (29 May 2013) CRC /C/GC/1 and UN Committee on the Rights of the Child (CRC), 'Report of the UN Committee on the Rights of the Child, Seventeenth Session (Geneva, 5-23 January 1998)' (17 February 1998) CRC/C/73/14 at para. 96 and UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Ireland (29 September 2006) CRC/C/IRL/CO/2 para. 56.

28 UN Committee on the Rights of the Child (CRC), 'List of issues in relation to the combined third and fourth periodic reports of Ireland' (22 June 2015) CRC/C/IRL/Q/3-4.

29 See in particular, Geoffrey Shannon 'Fifth Report of the Special Rapporteur for Children' <<http://www.dcy.gov.ie/documents/publications/5RapporteurRepChildProtection.pdf>> accessed 13 July 2015 18; Emily O'Reilly, 'Asylum Seekers in our Republic: Why Have we Gone Wrong?' 102 *Studies*, Summer 2013; Catherine McGuinness (Foreword) in , Irish Refugee Council, *State Sanctioned Child Poverty and Exclusion* (2012) and Carol Coulter, 'Interim Report: Child Care Law Reporting Project' (November 2013) <<http://www.childlawproject.ie/wp-content/uploads/2013/11/correctedinterimreport.pdf>> accessed 14 July 2015, 20, 24 and 27 and Working Group to Report to Government (n 7) para 3.1. and Appendix 6.

30 Working Group to Report to Government (n 7) para 3.4.

recommended that an implementation start and end date be set by the authorities as soon as possible.³¹

If this recommendation is implemented, it has the potential to impact upon an estimated 1,082 children who have been living in the direct provision system for over five years.³²

However, it must be recognised that time spent in direct provision is only one of the problematic aspects of direct provision. Fundamentally, Ireland must ensure that accompanied children seeking asylum (or with carers who are seeking asylum), must enjoy all socio-economic rights that are recognised in the UN Convention on the Rights of the Child. While the *McMahon Report* engaged in an analysis of potential *child protection* issues within the direct provision system,³³ it does not substantively engage in a *child rights* analysis of the direct provision system.³⁴ If the *McMahon Report* recommendations are implemented, children can still potentially spend up to five years in the direct provision system.³⁵

Northern Ireland has refused to return children to the Republic of Ireland, who, along with their mother, had unsuccessfully claimed asylum and had an application outstanding for subsidiary protection in Ireland.³⁶ Relying on Section 55 of the Borders, Immigration and Citizenship Act 2009,³⁷ Stephens J. held that the children would not be able to develop their sense of identity and belonging in direct provision centres, accepted that many asylum seekers spend several years in direct provision and this can impact on mental and physical health of children and would not be able to enjoy family life in the Republic of Ireland if returned to direct provision.³⁸ In the recent Irish High Court decision, *CA & TA*,³⁹ direct provision was not found to have violated any of the adult applicant's human rights, protected under the Constitution or the European

Convention on Human Rights. A decision as to whether the child applicant, T.A, had legal rights that the State had to protect by virtue of Ireland's legal obligations under the CRC, was adjourned.⁴⁰ The *Dos Santos* judgment, delivered a number of days after *C.A and T.A.*, stated that no individual rights can be relied upon in Irish courts by children deriving from Ireland's obligations under the UN CRC.⁴¹

Recommendations

- > **The system of direct provision violates the rights of children and the system as currently operating is not compliant with Ireland's obligations under the UN Convention on the Rights of the Child.**
- > **The length of time children must live in direct provision is of deep concern. However, this is only one problematic aspect of the direct provision system.**
- > **At a minimum, children seeking asylum should be entitled to the Child Benefit payment and should not be expected to reside in communal accommodation for the duration of their (or their carers) asylum claims.**
- > **Children seeking asylum should enjoy the same social, economic and cultural rights as Irish citizen children. To this end, the Habitual Residence Condition in Irish social security law, must be amended so that it no longer violates the socio-economic rights of children seeking asylum.**
- > **An explicit best interests of the child requirement should be introduced within Irish immigration and protection law, protecting the best interests of the child as regards their civil, political, economic, social and cultural rights in Ireland.**

31 *ibid* para 3.128.

32 *ibid* paras 3.11-3.13. This recommendation may also potentially benefit 649 children who are in the refugee/subsidiary protection system, or who are subject to a deportation order for a period of over 5 years.

33 *ibid* paras 4.61 to 4.75.

34 See further, Liam Thornton, 'A Preliminary Human Rights Analysis of the Working Group Report and Recommendations on Direct Provision' < https://www.academia.edu/13446243/A_Preliminary_Human_Rights_Analysis_of_the_Working_Group_Report_and_Recommendations_on_Direct_Provision > accessed 08 July 2015 20-26.

35 Working Group to Report to Government (n 7) para 3.165.

36 *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88.

37 Section 55 provides that any function of the UK Home Secretary within the field of immigration, asylum or nationality must be discharged so as to promote the welfare of children who are in the United Kingdom.

38 For a detailed discussion on this case, and its potential impact, see Liam Thornton, 'Ireland's Asylum & Direct Provision System under the Spotlight in Northern Ireland High Court' (*Human Rights in Ireland*, 14 August 2013) < <http://humanrights.ie/children-and-the-law/irelands-asylum-direct-provision-system-under-the-spotlight-in-northern-ireland-high-court/> > accessed 14 July 2015 and Ciara Smyth, 'Direct Provision at 14: Has Direct Provision Met its Nemesis' (*Human Rights in Ireland*, 10 April 2014) < <http://humanrights.ie/children-and-the-law/directprovision14-has-direct-provision-met-its-nemesis/> > accessed 14 July 2015.

39 *C.A. & T.A. v Minister for Justice and Equality & others* [2014] IEHC 532. For a summary of the decision, see Liam Thornton, 'C.A. and T.A.: The Direct Provision Case' (2014) 17(4) IJFL 116.

40 *C.A. & T.A. v Minister for Justice and Equality & others* [2014] IEHC 532 at para 2.10. This element of the decision was specifically adjourned due to the *Dos Santos* decision.

41 *Dos Santos & others v Minister for Justice and Equality & others* [2014] IEHC 550, paras 48-60.