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25 January 2021

COVID-19 Third-Wave School Closures – Human Rights Issues

On 6 January 2021, the Government decided that all schools – including special schools – were to be closed, in response to the third wave of the COVID-19 pandemic.¹ The consistent guidance from the NPHE, ² including immediately prior to the decision, was that schools themselves ‘*are safe environments, with very little evidence of transmission within schools*’.³ The advice immediately prior to the Government decision was that it was not the schools that posed a risk of further community transmission, but the levels of mobility and linked activity that reopening of schools would generate.⁴

The closure of schools, even with the provision of online learning for those in a position to access it, has significant implications for the right to education as guaranteed by the Constitution of Ireland, the ECHR and the UN Convention on the Rights of the Child (UNCRC).

Constitution

Art.42.4 of the Constitution of Ireland states that ‘*the state shall provide for free primary education.*’ The Supreme Court held in *Crowley v Ireland*⁵ that Art.42.4 does not guarantee free primary education for children, but a rather guarantees that the State will provide the infrastructure required for *third parties* to provide free primary education. If this duty is complied with, the State is not liable if actions of third parties (in that case an INTO strike) prevent children receiving a free primary education.⁶ The INTO were subsequently held liable in separate litigation.⁷

Where a child with special educational needs is not being provided with *any* primary educational infrastructure from the State, the Superior Courts have accepted that this constitutes a breach of the Art.42.4 right: in *O’Donoghue v Minister for Education*, the court

¹ Minister Foley confirms that schools will remain closed to students (Press Release) Department of Education, 7 January 2021 <https://www.gov.ie/en/press-release/11176-minister-foley-confirms-that-schools-will-remain-closed-to-students/> (accessed 25 January 2021)

² Letter from Chief Medical Officer to Minister for Health re: Covid (30 December 2020) <<https://www.gov.ie/en/collection/ba4aa0-letters-from-the-cmo-to-the-minister-for-health/#december-2020>> (accessed 25 January 2021).

³ Letter from Chief Medical Officer to Minister for Health re: Covid (5 January 2021) <https://www.gov.ie/en/collection/ba4aa0-letters-from-the-cmo-to-the-minister-for-health/#january-2021> (accessed 25 January 2021)

⁴ Letter from Chief Medical Officer to Minister for Health re: Covid (5 January 2021) <https://www.gov.ie/en/collection/ba4aa0-letters-from-the-cmo-to-the-minister-for-health/#january-2021> (accessed 22 January 2021)

⁵ [1980] IR 102. In *O’Keeffe v Hickey* [2009] 2 IR 302 Hardiman J observed (p.312) that *The distinction between "providing for" and "providing" lies at the heart of the distinction between a largely State funded but entirely clerically/administered system of education on the one hand and a State system of education on the other*

⁶ Per Kenny J, ‘*The State cannot compel teachers to teach when they do not wish to do so.*’ [1980] IR 102, 130 per Kenny J.

⁷*Crowley v Irish National Teachers’ Organisation* [1991] 2 IR 305.

declared that *'the infant applicant is entitled to free primary education in accordance with Article 42.4 of the Constitution and the State is under an obligation to provide for such education.*⁸ This is a recognition of a *positive obligation* on the State to provide education to children with special needs.⁹

In *O'Carolan v Minister for Education and Science*, the child's parents challenged the *quality* of special needs education. The High Court rejected their challenge, holding that, excepting the extreme situation where *no* educational provision is made an 'adequate' educational provision by the state will satisfy its obligations under Art.42.4.¹⁰ Similarly, in *Ó C v Minister for Education and Science*, the High Court held that, provided the Minister has not acted '*in some irrational way by making provision in a way that simply cannot be appropriate to meet the needs of children with [special] needs,*' the approach adopted by the Minister will be deemed constitutionally compliant.¹¹

In summary, the State is under a duty to provide *some* primary education, where education is understood to be '*such advice, instruction, and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental, and moral; however limited those capacities may be.*¹²

If *some* provision is made, provided that the provision is not irrational, it will likely pass the test in *Ó C*. However, it is apparent there are categories of children for whom *no educational provision is currently being made*. First, and most obviously, children with special needs for whom online learning is not practicable, are not receiving any educational provision at all. This appears to fall short of the State's obligations under Art.42.4. Secondly, online education for mainstream primary students as currently provided assumes that the IT facilities and adult supervision are available for the child to make use of the online educational provision. This may not be possible for many children. For example, there may not be enough electronic devices in the home for the child and any adults working from home to each have access to IT. Where the caregiver(s) is/are an essential worker(s) the necessary level of adult supervision for a child to engage with online learning may be absent. These factors suggest that there are also mainstream primary pupils who are currently receiving no educational provision.

ECHR

Art.2 of Protocol 1 to the ECHR guarantees that the right to education '*shall not be denied,*'. The ECHR appears to primarily place a passive duty on the State not to hinder access to

⁸ [1996] 2 IR 20, 72 [editor's note]. (emphasis added).

⁹ This duty on the State was later interpreted, in *Sinnott v Minister for Education* [2001] 2 IR 545, as only requiring provision of free primary education for children with special needs up to the age of eighteen.

¹⁰ *O'Carolan v Minister for Education and Science* [2005] IEHC 296.

¹¹ *Ó C v Minister for Education and Science* [2007] IEHC 170.

¹² *O'Donoghue v Minister for Education* [1996] 2 IR 20, 65 (emphasis added).

education,¹³ rather than a positive obligation to subsidise a particular type of education.¹⁴ However, the ECHR right also includes secondary and higher education.¹⁵

In *Catan v Moldova and Russia*,¹⁶ the ECtHR accepted that the right to education is not absolute and may be subject to limitations, but there must be no injury to the substance of the right, they must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim to be achieved.¹⁷

In *Memlika v Greece*, the ECtHR found a violation of the right to education for two primary school aged children who missed three months of school due to a mis-diagnosis of leprosy. The Court expressly assessed the intrusion on proportionality grounds and found that it was disproportionate.¹⁸

The ECtHR has found that the right to education can be violated in combination with the Art.14 right to non-discrimination in the context of a child with special educational needs.¹⁹ The Court noted that the discrimination on the basis of disability was all the more serious as it had taken place in the context of primary education, which formed the foundation of child education and social integration, giving children their first experience of living together in a community.

In summary the ECHR prohibits the disproportionate limitation of access to primary, secondary and third level education. As the Constitutional case law has primarily focused on positive obligations, it is not clear whether the Constitutional right carries a similar prohibition, but it is certainly possible. More importantly, taken in combination the positive and negative obligations from the two human rights instruments indicate that: (a) the Irish State is obliged to provide the practical infrastructure for the provision of primary education by independent entities; and (b) the Irish State may not disproportionately prevent children from accessing that education. Large numbers of children are currently excluded from receiving any educational provision in circumstances where the public health experts indicate that schools themselves are safe; this raises serious questions about the proportionality of the current open-ended total closure of all schools.

UNCRC

Article 28 of the UNCRC provides, *inter alia*: that the right to education is recognized by States Parties and will be progressively realized and includes the provision of compulsory free

¹³ Vermuelen and van Rossmalen, 'Right to Education' in Van Dijk, Van Hoof, Van Rijn and Zwaak (eds) *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018), 890.

¹⁴ *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgian' v Belgium* ECtHR 23 July 1968. The primary focus of the ECtHR's education rights case law has been on instances of discrimination against linguistic or ethnic minorities *DH v Czech Republic* ECtHR 13 November 2007; *Oršuš v Croatia* ECtHR 16 March 2010; *Catan v Moldova and Russia* ECtHR 19 October 2012.

¹⁵ *Şahin v Turkey* (2007) 44 ECHR 5, paras.134-142.

¹⁶ (2013) 57 EHRR 4 (Grand Chamber).

¹⁷ (2013) 57 EHRR 4, para.140.

¹⁸ *Memlika v Greece* (37991/12) Judgment of 6 October 2015 (ECHR) – English Language summary: Fenton-Glynn "Article 2, Protocol 1: exclusion from school after wrong diagnosis" [2016] *International Family Law* 74

¹⁹ *GL v Italy* [2020] ECHR 618, application No 59751/15, judgment of 10 September 2020. Judgment currently only available in French and Romanian; English language summary from a recent academic blog post was used: <https://strasbourgobservers.com/2020/10/01/substantive-equality-as-the-driving-force-behind-reasonable-accommodations-for-pupils-with-disabilities-the-case-of-g-l-v-italy/> (accessed 25 January 2021).

primary education. Article 29(1)(a) of the UNCRC provides that the education of the child shall be directed to *'the development of the child's personality, talents, and mental and physical abilities to their fullest potential.'* In General Comment No 1, the UN Committee on the Rights of the Child expanded upon Article 28 and 29, finding that Articles 28 and 29 are:

*linked directly to the realization of the child's human dignity and rights, taking into account the child's special developmental needs and diverse evolving capacities [in particular] the holistic development of the full potential of the child, including development of respect for human rights, an enhanced sense of identity and affiliation, and his or her socialisation and interaction with others and with the environment.*²⁰

By making meaningful primary education unavailable for children who are not able to be taught effectively through remote learning, Ireland potentially also acts in breach of its commitments under the UNCRC.

Legal basis for school closure decision

The government announcement of school closures on 6 January 2021 refers to a decision taken by Government. The publicly available statutory instruments from 2021 do not indicate any secondary legislation being used to give effect to the school closures.²¹

The executive power of the State is exercised by the Government pursuant to Art.28 of the Constitution. However, the Constitution also provides for fundamental rights including the right to education as set out above. The Education Acts 1878 to 2018 set out a detailed statutory code for the funding and regulation of the provision of education in the State.

In *Prendergast v Higher Education Authority*²² the High Court accepted, applying *TD v Minister for Education*²³ that the HEA was entitled to set a quota for non-EU medical students insofar as it, a statutory body, was implementing the executive power of the State. However, that case concerned a complex interplay of government policy and statutory powers. And it did not appear to engage any protected fundamental right.

What appears to have occurred, based on currently available information, is that the Government, exercising its Art.28 executive powers has prohibited third parties (schools) from providing education to children for an indefinite period. The absence of an express legal basis for this intrusion on fundamental rights raises questions as to the lawfulness of the decision in the first instance. It might be accepted that a public health emergency engages the Executive power of the State, but it has been channelled through statutory mechanisms in most other areas of COVID-19 Regulation and does not appear to have done so in this instance.

²⁰ Committee on the Rights of the Child, 'General Comment 1: The Aims of Education' (17 April 2001) CRC/GC/2001/1

²¹ As per www.irishstatutebook.ie and *Iris Oifigiúil* as of 22 January 2021.

²² [2010] 1 IR 490

²³ [2001] 4 IR 259.