An Analysis of Child Care Proceedings through the Lens of the Published District Court Judgments

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Subject: Family law. Other related subjects: Administration of justice. Human rights

Keywords: Care proceedings; Courts; Human rights; Ireland; Judicial decision-making; Written judgments;

Where parents fail in their duty towards their child, the State has an obligation under the Constitution of Ireland and international human rights law to intervene in family life to safeguard the child from abuse or neglect. Such intervention may lead to a child being placed in State care: there are currently 6,258 children in care in Ireland.\textsuperscript{1} The majority of these children are in care subject to a court order granted by the District Court, \textsuperscript{2} with the remainder being subject to a voluntary arrangement \textsuperscript{3} between the child’s parents and the Child and Family Agency (CFA). \textsuperscript{4} In these voluntary arrangements there is no judicial oversight.

Each day judges in the District Court—a court of local and limited jurisdiction organised on a regional basis \textsuperscript{5}— make immensely significant decisions affecting the lives of children and their families. To protect the privacy rights of the parties, child care proceedings are heard in camera. \textsuperscript{6} Since 2008, 119 written judgments of District Court proceedings involving children have been published by the Court Service of Ireland. \textsuperscript{7} The publication of these decisions, along with the work of the Child Care Law Reporting Project, \textsuperscript{8} provides a unique window into decision-making in the District Court. These judgments form a unique body of work: there is no equivalent publication of decisions in any other area of the District Court’s work. \textsuperscript{9} Although judgments of the District Court do not have legal precedence, these publications contribute to greater transparency and contain valuable information for legal professionals and statutory bodies, in particular, the Department of Children and Youth Affairs and the CFA.

Methodology

Through an analysis of key quantitative indicators, this paper presents for the first time an overview of the published District Court judgments, examining the nature of the cases and the factors influencing decision-making. The paper also explores the extent to which the judgments rely on international human rights law and in particular how they respond to the jurisprudence of the European Court of Human Rights (ECtHR) in relation to the principle of proportionality. Of the 119 judgments published on the Courts Service website, 114 concern child care proceedings. \textsuperscript{10} All of the 114 child care decisions are included in the research sample for this paper. However, this sample has three limitations. First, the 114 decisions do not represent the totality of decisions made during the relevant time period, \textsuperscript{11} as the majority of child care hearings do not result in a written judgment. The second limitation is that the sample is neither random nor representative. It is at the discretion of the individual judge whether or not to deliver a written judgment and whether or not to submit it to the Court Service of Ireland for publication. The published judgments span a nine-year period from 2008 to 2016. However, they are not evenly spread across this period, for example only two judgments were published from the year 2008 as compared to 27 judgments from the year 2012. \textsuperscript{12} Thus, it is a self-selected sample, selected by
individual judges. One impact of this selection bias is that the sample only contains cases where
the judge has had the time to develop, approve and submit a judgment for publication. Finally, a
third limitation in this study is that the sample is disproportionately weighted in favour of
Dublin-based cases decided by a small number of judges: the majority (76 per cent) were
delivered by three judges who at the time were sitting in the Dublin Metropolitan area. One
reason for this over-representation is that in Dublin the judges hear child care cases on a full-time
basis, while judges in other parts of the country must combine child care proceedings with the
hearing of other District Court cases.

The written judgments are not—nor could they be—a complete account of all aspects of the
proceedings. The information available is limited to one perspective of the proceedings—that of
the court. Given that partial view, this paper does not purport to be a comprehensive analysis of
these proceedings.

Nature of Cases Heard

A variety of applications are made within the 114 judgments. The majority (69 of the 114
decisions) relate to an application for a Care Order under s.18 of the Child Care Act 1991 (as
amended); four relate to an application for an Interim Care Order (ICO) or an extension of such
an order under s.17 and four relate to an application for a Supervision Order under s.19.

However, national research conducted by the Child Care Law Reporting Project over a two year
period found that Care Order applications represented 12 per cent of all cases heard whereas the
granting and extension of Interim Care Orders comprises nearly 40 per cent and Supervision
Order applications eight per cent. In contrast, the ratio in the published decisions is just over 60
per cent for Care Orders, and less than four per cent for Interim Care Orders and less than four
per cent for Supervision Orders. Hence, the published decisions are disproportionately weighted
towards Care Orders. This may be explained by the fact that a Care Order application is the final
order made, usually after a series of other orders, and it is often contentious and lengthy. It is the
order under which the State exercises its power to separate a child from his or her family until the
child reaches adulthood. The smaller number of written decisions on Interim Care Orders and
Supervision Orders may be due to the fact that they are often relatively short, and also that
Interim Care Orders may be renewed on a number of occasions over a period of months so
there is no clear cut-off point. It should also be noted that the decision in relation to a Care Order
often includes details on the circumstances surrounding the child's initial entry into the care
system and the granting of Interim Care Orders.

Other significant groupings in the written decisions are 12 cases relating to applications for costs
and nine cases relating to evidential issues of either the admission of hearsay evidence or lifting
the in camera rule to share material. The remaining 16 cases focus on a range of issues
including applications to discharge a Care Order, aftercare, access to a child in care, the role of
the guardian ad litem (GAL), making a child party to proceedings, removing a child from the
jurisdiction and psychological assessments.

Profile of Parents

Where recorded in the judgments, the profile of parents subject to proceedings indicates that the
majority of parents face significant personal difficulties. Of the 114 cases, 79 explore the ability of
the parents to care for their child. In the overwhelming majority, 85 per cent (67 of the 79 cases),
a concern was raised in relation to parental alcohol and drug addiction, mental health difficulties,
domestic violence or homelessness and often a combination or one of more of these factors. Of
the remaining 12 cases, five relate to physical abuse or non-accidental injury, three relate to
parenting capacity and in four cases the concern was either unclear or not accepted by the judge.

Factors Influencing Decision-making

The published judgments provide insight into the factors that influence decision-making in child
care proceedings. As with all cases, the judgments refer extensively to the evidence of witnesses
called and documentation submitted to the court, in many cases this includes the views of the
child. As is to be expected, the judgments refer to the relevant statutory provisions for the
application sought. In addition, several of the decisions explicitly mention that they are guided by
s.24 of the Child Care Act 1991 which places a duty on the court to regard the welfare of the child as paramount and to give consideration to the wishes of the child.

Many of the judgments refer to the duty on the court to uphold constitutional rights; notably under Arts 40.3, 41 and 42 of the Constitution of Ireland. It is interesting to note that of judgments decided after the passage into law in 2015 of Art.42A, which strengthens children's rights, only five make an explicit reference to the new provision. 20 The lack of focus on the new provision may be partly explained by the fact that as of yet there is no significant legal authority on Art.42A from the superior courts and some of the provisions under Art.42A remain inadequately provided for in legislation.

The doctrine of precedent, under which the case law of the superior courts can have an immediate and binding influence on District Court decisions, is evident within the judgments. 21 For example, the impact of HSE v O.A. and Child and Family Agency v O.A. (as both a High Court and then a Supreme Court decision), can clearly be seen in judgments concerning the allocation of costs. 22 Furthermore, despite the lack of precedent, some judgments cite and follow other District Court judgments. 23

The jurisprudence of the English courts, which has persuasive authority in Ireland, 24 also appears to have a significant influence on the decisions. 25 The judgments draw on the jurisprudence of the European courts and on international human rights law (this is discussed in more detail later in this paper).

An interesting feature which may not be applicable in other proceedings is the high rate of success on behalf of the applicant. Over 92 per cent (70 of 76) of the applications sought by CFA/HSE were granted by the court 26 —this figure includes Care Orders, Interim Care Orders and Supervision Orders. 27 In the majority of cases where the court has appointed a GAL, and the position of the GAL is made known, the GAL supported the State's application. However, four of these successful Care Order applications were granted for a shorter period of time than that sought by the State, 28 and in six cases the order sought was refused entirely. 29 It is interesting to note that of the 114 applications, only two were applications by parents to discharge a Care Order; both of these were denied by the court. 29

On occasion, regardless of whether or not the application was granted, the court has expressed its dissatisfaction with elements of the work of the statutory bodies which it believes had or is having a negative impact on the child and his or her family. For example, the court provides critical feedback in relation to poor practice, 30 lack of placement planning, 30 delay 31 and a lack of protocols in relation to holiday travel. 31

**International Human Rights Obligations**

Under international human rights law, Ireland has an obligation to respect, protect and fulfil the rights of children and their parents who are subject to child care proceedings. These obligations flow from four international treaties signed by Ireland:

* the UN Convention on the Rights of the Child (UNCRC) which Ireland ratified in 1992; 32
* the Council of Europe's European Convention on Human Rights (ECHR) which was incorporated into domestic law in 2003 and the European Social Charter (Revised) which came into force in Ireland in 2001; and
* the Charter of Fundamental Rights of the European Union which became legally binding on the European Union in 2009.

The rights afforded to children and their parents include that the State has a duty to take measures to protect children from abuse, neglect and exploitation to promote their right to survival, development, health and education, and to provide appropriate assistance to parents with their child-rearing responsibilities. Children and their parents have a right to
respect for private and family life, a right to access an effective remedy to a breach of their rights and to have a fair hearing within a reasonable time. In child care proceedings, all interested parties must be given an opportunity to participate and make their views known. Decisions relating to children must be made with the child's best interests as a primary consideration. In addition, a child—who is capable of forming his or her own views—has the right to be heard, for their views to be given due weight in accordance with age and maturity and to be taken into account when determining best interests.

The State must respect the child's right not to be separated from his or her parents unless it is necessary for the child's best interests. If a child is separated from his or her family, the State must respect the right of the child to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. The State is obliged to provide alternative care to children who have no family or in whose own best interests cannot live with their family. Article 42A.4 of the Constitution states that provision shall be made in law for the best interests of the child to be the paramount consideration and for the views of the child to be “ascertained and given due weight” in child care proceedings. However, in relation to child care proceedings, these rights are still not adequately provided for by statute.

The court must achieve a delicate balancing act of respecting sometimes conflicting rights, by limiting rights that are not absolute. The court must balance the child's right to be protected from harm, the child's right to be reared in his or her family and the rights of the parents, and also ensure that any decision made is in the child's best interest. In one of the District Court cases, the judge described the need to “balance the issue of the Child's need for placement security, the issue of the Child's contact or access with the mother/father, and the issue of reunification (which at all times must remain a possibility).”

A number of the 114 judgments make reference to these international human rights obligations. It is accepted that the lack of an express reference does not mean that judicial decisions are not informed by or compliant with international human rights law. Indeed, many of the cases cite relevant constitutional provisions or case law which are consistent with the principles and provisions of international human rights law. Additionally, a reference in a judgment to international human rights does not, by itself, ensure that the judgment is human rights compliant.

Nine decisions refer to the Charter of Fundamental Rights of the European Union or the jurisprudence of the Court of Justice of the European Union, where a remedy for a breach of the Charter can be sought. The limited references to the Court of Justice is not unsurprising given that it has yet to develop jurisprudence of relevance to child care proceedings. However, now that the Charter is legally binding and the European Commission has begun to adopt a more prominent child's rights agenda, it is likely that children's rights will feature more regularly on the Court of Justice's listings.

European Convention on Human Rights

Over a third of the published 114 District Court judgments (39 judgments) include references to the ECHR—making it the most cited human rights instrument among the District Court judgments. These vary from a once-off reference to lengthy citation of ECtHR case law. The references to the ECHR in the published judgments concern a range of issues, including the threshold for granting a Care Order, the appropriate duration of the Care Order and issues of parental access. Although the ECHR does not contain a specific provision on children it has developed extensive jurisprudence in the area of child care proceedings, under the right to respect for private and family life (art.8) and the right to a fair hearing within a reasonable time (art.6). Any interference with art.8 by a public authority must be in accordance with the law and proportionate to a legitimate aim pursued, taking into account the margin of appreciation afforded to the State in question. Since 2015, Art.42A.2.1° of the Constitution of Ireland explicitly requires that State intervention to safeguard a child must be “by proportionate means as provided by law”. In one of the published judgments, Health Service Executive v SB (Care Order-Homelessness & Addictions), the judge summarises the combination of factors influencing decision-making in the District Court:

“The Child Care Acts, the Constitution, the European Convention of Human Rights, and the Charter of Fundamental Freedoms all require courts to carefully examine and be satisfied as
to whether a Care Order is a reasonable and proportionate interference justifying the removal of a child from a parent in order to protect the best interests of the child. Courts must examine whether the reasons a child is taken into care are both relevant and sufficient.\(^{66}\)

The first case to comprehensively set out the ECtHR jurisprudence in relation to child care proceedings was the 2011 decision of LL, MK & GM.\(^{67}\) This case and the detailed consideration of proportionality in CG & JB \(^{68}\) are drawn on and added to in subsequent judgments when addressing compliance with art.8.\(^{69}\)

The key ECtHR cases cited include Olssen v Sweden,\(^{70}\) Johansen v Norway \(^{71}\) and K & T v Finland.\(^{72}\) Taken together \(^{13}\) these cases emphasise that the removal of a child from his or her parents must not be done in such a way as to destroy the natural bond and that there should not be a presumption in favour of permanent separation. These cases place a duty on the State to work towards reunification with parents if possible while at the same time protecting the best interests of the child.\(^{73}\) The parties must be afforded an opportunity to take part in decision-making. In addition, three of the judgments \(^{74}\) cite a passage from YC v the United Kingdom which found that:

“family ties may only be severed in very exceptional circumstances and … [e]verything must be done to preserve personal relations and, where appropriate to ‘rebuild’ the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing.”\(^{75}\)

In a number of judgments, the court recognises that in addition to its obligations under statute it also has obligations under European human rights law. For example, in ES & AJ, the judge sets out the steps necessary to determine if the threshold for granting an Interim Care Order has been met.\(^{76}\) The test begins with two steps (already provided for statute): that the court is satisfied that there are reasonable grounds for believing that circumstances as set out in s.18(1) exist or have existed; and that being immediately placed in care is necessary for the protection of the child's health or welfare.\(^{77}\) The judge adds a third element: that the court is satisfied that the removal is a necessary proportionate interference with the child's and other relevant persons' rights under Art.42A and rights to private and family life as contained in art.8 ECHR.\(^{78}\) In another case, YC & HA, the judge sets out a test to determine whether or not the decision against reunification falls within the doctrine of proportionality.\(^{79}\)

Under s.18 of the 1991 Act, where it has been established that intervention is necessary and requires the making of a Care Order, the court's role is to consider the duration of the order to be made. The Act allows the court discretion to either make an order until the child attains majority or “for such shorter period as the court may determine”.\(^{80}\) From a review of the published cases there appears to be three different approaches taken to determining the length of a Care Order to ensure that it is proportionate and thus ECHR compliant.

The first approach, adopted in 55 of 69 decisions, is to grant a Care Order until the child reaches the age of majority. Under this approach the possibility of family reunification can be pursued in two ways. A parent may make an application to vary or discharge the order if their circumstances change.\(^{81}\) Alternatively, child in care reviews examine any change in the circumstances of the parents and whether it would be in the best interests of the child to be given into the custody of his or her parents.\(^{82}\) These non-judicial reviews are held periodically under statute in respect of a child in care: \(^{83}\) they are the CFA’s internal review of the child’s care plan with input from family members and other relevant professionals.

The second approach is to make a judicial direction, at the time of granting the order, to review the order after a specified period of time. Eight of the 69 Care Order applications adopt this approach.\(^{84}\) For example, in ON & OE, the judge granted a Care Order until each child reaches 18 years “to ensure permanency planning” for the children. However, the judge also commented that “reunification is not ruled out” and set a date to review the case in six months' time to assess the progress made by the HSE and parents.\(^{85}\)

A third approach is to grant a Care Order for a specific duration, shorter than that of the child's majority. Six of the 69 Care Order applications adopt this approach.\(^{86}\) For example, in CG & JB,
the court granted a Care Order for two years. This was contrary to the CFA’s application which sought an order up until the children reached 18 years.  

Prior to the end of the short order, the judge committed to consider the circumstances of the parents and children again and may, of its own motion, either extend the order until each child is 18 years or consider granting a Supervision Order.

Interim Care Orders and judicial reviews of Care Orders provide an opportunity for the judiciary to provide oversight and guidance on case management and to seek an update on directions made or commitments given. When granting a Care Order, the judge often makes directions pursuant to s.47 in respect of matters affecting the welfare of the child. These directions may include provisions on access between the child and his or her parents, siblings and extended family, and the child’s right to know his or her identity. They may also provide that the case can be re-entered in the event that a long-term placement is not matched; there is a planned or unplanned change of the care placement; the case becomes unallocated to a social worker/fostering link worker; or there is a failure to adhere to the statutory Care Planning regulations (including child in care reviews and social work visits). Provision may be made for the GAL to be discharged or re-appointed and for costs to be discharged. In addition, directions may be made that the child or his or her parent/s receive appropriate therapeutic interventions or other support services. Finally, directions may include the appointment of an aftercare worker or the listing of the case for an aftercare review. An application under s.37 and s.47 of the 1991 Act can allow the parties to revisit these judicial directions and/or re-enter the case on foot of a significant change in circumstances.

Conclusions

From the review undertaken, it appears that to date international human rights law has had a degree of influence on District Court decision-making with the European Convention on Human Rights (ECHR) having the most significant impact. The level of detail in some of the cases points to a real engagement with Ireland's international human rights obligations and provides valuable material for future consideration. However, a key unknown is the extent to which international human law is being followed in other non-documented decisions.

Several aspects of the way in which child care proceedings are managed may be at risk of breaching human rights in particular under the ECHR. First, the lack of clarity surrounding Interim Orders could provide grounds for a challenge. The Interim Care Order is framed as a temporary measure while awaiting the holding and conclusion of a Care Order hearing. Given its temporary nature, the threshold for granting an Interim Care Order is lower than that needed for a Care Order. An order can be granted for a period not exceeding 28 days, or for a longer period as may be agreed by the parents and the CFA and approved by the court. The order may be extended, however, and the legislation does not specify the maximum number of extensions permitted. A number of factors may delay the holding and conclusion of a Care Order hearing including the commissioning and finalisation of assessments. Such delays can result in a child being in care under an ICO for a significant period of time—in some cases for up to two years and in one case for over four years from the time of the child's birth.

Consideration should be given as to how to guard against the practice of extending Interim Care Orders from being found to be a violation of the right of access to a hearing within a reasonable time under ECHR art.6 and the right to respect for family life under ECHR art.8.

Secondly, it is also arguable that, if challenged, the State could be vulnerable to a breach of art.8 and art.6 of the ECHR in regard to how it undertakes its positive obligation to work towards family reunification. The judgments indicate that, depending on the circumstances of the case, different approaches are adopted in relation to an oversight mechanism to review possible family reunification. One of these mechanisms is that it is open to a parent to make an application to the court, under s.22 of the 1991 Act, to vary or discharge a Care Order or a Supervision Order. While this is an important provision, it places a heavy burden on parents who may face considerable difficulties in initiating and progressing such an application. These difficulties include realising and understanding that they have a right to make such an application, and the fact that no clear support on how to make such an application, including potentially facing barriers to access legal advice, is provided. It is not surprising that a successful application under s.22 is a rare occurrence.
Another mechanism is for a periodic child in care review to keep the issue of family reunification under review. It is arguable that such a review, if it is the sole mechanism, could be found to be inadequate to meet the State’s obligation in relation to family reunification. Child in care reviews are social work led—there is no judicial oversight—and their primary focus is on care planning, the child’s placement and the needs of the child. The necessity of a coherent approach to family reunification will be even more important if the Adoption (Amendment) Bill 2016, currently before the Oireachtas, is passed into law. Under s.23 of the Bill, in line with Art.42A2, the High Court will be permitted to dispense with parental consent in circumstances where a child is in care for a specific period of time, and where it is satisfied that the child has been failed by his or her parents and there is “no reasonable prospect” of family reunification.

The area of non-consensual adoptions has been the subject of European Court of Human Rights (ECtHR) jurisprudence, so there is clear case law to support Ireland to put in place adequate safeguards for children in care under court orders and those in care under a voluntary arrangement. Stringent safeguards must be adhered to given the finality involved in the granting of an adoption order.

Thirdly, from a review of the published judgments it is clear that different approaches to the mechanisms for family reunification are adopted depending on the circumstances of the case. While this may be appropriate and in line with the judicial discretion afforded under the legislation, it must be seen in light of the research findings that practice varies across the country in terms of the type and nature of the order sought and granted. For example, in some parts of Munster there is a tendency to use more short term Care Orders than in other parts of the country. This raises the question of whether the outcome for children and their parents is dependent on the part of the country in which the case is heard and the judge hearing the case. If this is the case then this variation potentially breaches the principle of equal treatment before the law—that the law is applied equally to all people without discrimination.

On reviewing the judgments, it is noted that a number of the judges have developed and utilised innovative tests to ensure compliance with international human rights law, often adding an additional layer to the existing statutory provision. The planned review of the 1991 Act will be the first review of this key statute since the enactment of the European Convention on Human Rights Act 2003. It is an opportune time to protect Ireland from vulnerability to a challenge in the ECtHR by ensuring that the amended legislation is ECHR-compliant. It is submitted that key messages from the judgments should be considered as part of this review.

The publication of District Court judgments constitutes a valuable educational tool, a method of providing greater transparency and a vehicle for judicial comment. Having said that, its value could be enhanced. Given that the granting of Interim Care Orders is often life-changing for the child in question and his or her family, the child enters care (often for the first time) and may remain in care for up to two years until a Care Order hearing is held, it would be beneficial to see the publication of more decisions on these orders. This would also ensure that the publications are more reflective of the work of the court. In addition, value would be added to the body of work through providing a more representative sample of judgments with a balanced geographical spread.

In Norway the principle exists that 20 per cent of all child care cases decided should be anonymised and made public. The introduction of a similar policy, on an incremental basis, could be explored here.
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2. Child Care Act 1991 Pt IV.


4. The latest available figures for legal status show that, of the children in care, 58 per cent were under a court order and 42 per cent were under a voluntary arrangement. See Carol Coulter with Lisa Coffer, Kevin Healy & Meg MacMahon, Child Care Law Reporting Project Final Report (Child Care Law Reporting Project 2015) p.3.

5. The District Court consists of a President and 63 judges and comprises 23 district areas, as well as the Dublin Metropolitan District. For further information, see http://www.courts.ie/Courts.ie/Library3.nsf/pageCurrent/131DAE1B7E9059E580257FBC004D1137?opendocument&l=en [Last accessed 30 January 2017].

6. The court is not open to members of the public and media reporting is subject to restrictions under s.8 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 which amends s.29 of Child Care Act 1991.

7. The judgments can be accessed on the website of the Court Service of Ireland, see http://courts.ie/Judgments.nsf/FrmJudgmentsByCourtAll?OpenForm&Start=1&Count=35&Expand=6&Seq=1 [Last accessed 27 March 2017].

8. The Child Care Law Reporting Project, established in 2012, is a time-limited project which provides information to the public on the operation of the child care system and promotes transparency and accountability. For further information, see http://www.childlawproject.ie/[Last accessed 5 March 2017].

9. The District Court also hears private family law, criminal and civil law cases and licensing matters and other miscellaneous actions.

10. Of the remaining cases, four relate to decisions in the area of youth justice and one relates to a private family law matter.

11. Other possible sources to explore child care proceedings include the reports of the Child Care Law Reporting Project and judicial reviews of District Court decisions. These sources were not included in this study.


13. One judge delivered 49 judgments, another 20 judgments and a third 18 judgments.

14. The remaining judgments were delivered by seven judges and in two decisions the name of the judge was not recorded.


16. The Child Care Law Reporting Project collected and analysed data on 1,194 District Court cases, estimated to be approximately 30 per cent of all the cases heard between December 2012 and July 2015. See Carol Coulter with Lisa Coffer, Kevin Healy and Meg MacMahon, Child Care Law Reporting Project Final Report (Child Care Law Reporting Project 2015) 2 and 77.

17. Carol Coulter with Lisa Coffer, Kevin Healy & Meg MacMahon, Child Care Law Reporting Project Final Report (Child Care Law Reporting Project 2015) 60. I have not included the categories of “extension of care order” and “reviews Care Order” which together comprised just over 28 per cent.

18. The remaining 35 cases concern an application for costs, procedural matters, issues related to a child in care or are predominantly focused on the child such as child abandonment.

19. See for example, Health Service Executive v AM (Care Order—Mental Illness) [2013] IEDC 10 at 43; and Health Service Executive v AR (Inadequate Care Plan—Temporary Care Order) [2013] IEDC 11 at 14.
20. Child and Family Agency v RT
[2015] IEDC 5; Child and Family Agency v M
[2015] IEDC 03; and Child and Family Agency v E.S. & A.J. (Interim Care Order—Refused)
[2015] IEDC 08; Child and Family Agency v AB
[2016] IEDC 17; and Child and Family Agency v VR

21. Cases cited include G and An Bord Uchtála [1980] 3 I.R. 32 (SC); Re Article 26 and the Adoption (No.2) Bill 1987
[1989] I.R. 656 (SC); North Western Health Board v W(H)
[2001] IESC 90; W v HSE
[2014] IESC 8; Health Service Executive v McAnaspie (Deceased)
[2011] IEHC 477; HSE v DK
[2007] IEHC 488; N v Health Service Executive
[2006] IESC 60; McD v PL
[2007] IESC 28; N v N [Hearing a Child]
[2008] IEHC 382.

22. HSE v O.A.
[2013] IEHC 172 and Child and Family Agency v O.A.
[2015] IESC 52. This case set down a test for how the court must exercise its discretion in deciding applications for cost.

23. See for example, Child and Family Agency and KC (Care Order — Proportionality) [2014] IEDC 12 at 27 and 28; and Child and Family Agency and CD (Care Order) [2014] IEDC 15 at 17.

24. Irish Shell Ltd v Elm Motors Ltd

25. References made include to Re H and R (Minors) (Sexual Abuse: Standard of Proof)
[1996] 1 A.C. 563; Lancashire County Council and Another v Barlow
[2000] 1 F.L.R. 583, Re O (Minors)(Care: Preliminary Hearing)
[2004] 1 A.C. 523, Re H (Sexual Abuse: Standard of Proof)
[2006] 1 A.C. 576; Re S-B
[2010] 1 A.C. 678; Re B. (Children) (Care proceedings: Standard of Proof)
[2008] UKHL 35.

26. Prior to the establishment of the Child and Family Agency in January 2014, child care proceedings were initiated by the Health Service Executive.

27. The figure of 76 cases does not include one application made in the case of Health Service Executive v EF (Supervision Order)
[2012] IEDC 4. The reason for its omission is because it is an application made under s.47 by the GAL, supported by the child’s mother, for the court to direct the HSE to issue an application for a Supervision Order, as opposed to an application initiated by the CFA.

28. Health Service Executive v NC (Interim Care Order—Substance Abuse)
[2013] IEDC 18; Child and Family Agency v CG (Care Order-Proportionality)

29. Health Service Executive v BM (NAI Standard of Proof)
[2009] IEDC 2; Health Service Executive v YB (Supervision Order)
[2012] IEDC 21; Health Service Executive v SO (Care Order—Supervision Order)
30. CC v Health Service Executive (Application to Discharge Care Order) [2011] IEDC 4; and MF v Child and Family Agency (Application to Discharge a Care Order) [2014] IEDC 07.

31. Health Service Executive v SM & anor (Change of Placement and Wishes of Child) [2010] IEDC 1 at [7].

32. Health Service Executive v YC (Physical and Substance Abuse) [2012] IEDC 19 at [19].


34. Child and Family Agency v M [2015] IEDC 03 at [31].


37. European Convention on Human Rights Act 2003. Under s.3(1) of the 2003 Act “organs of the state” (which includes the Child and Family Agency but excludes the courts) have a duty to perform their functions in a manner compatible with the ECHR subject to any contrary statutory provision or rule of law.


40. Article 24(1) of the Charter of Fundamental Rights of the European Union, Art.19(1) and Art.34 of the UNCRC and Art.7(10) of European Social Charter (Revised). In addition, children have a right not to be subjected to torture or inhuman or degrading treatment or punishment under Art.4 of the Charter of Fundamental Rights of the European Union and Art.3 of the ECHR.

41. Article 6(2) of the UNCRC.

42. Article 24 of the UNCRC.

43. Article 28 of the UNCRC.

44. Article 18(2) of the UNCRC and art.16 of European Social Charter (Revised).

45. Article 8 of the ECHR; and art.7 of the Charter of Fundamental Rights of the European Union.

46. Article 13 of the ECHR; and art.47 of the Charter of Fundamental Rights of the European Union.

47. Article 6 of the ECHR; and art.47 of the Charter of Fundamental Rights of the European Union.

48. Article 9(2) of the UNCRC.
50. Article 24(2) Charter of Fundamental Rights of the European Union; and art.3 UNCRC. See also UNCRC, (2013) General Comment No. 14: The right of the child to have his or her best interest taken as a primary consideration, (2013), CRC/C/GC/14, art.3, para.1.

51. UN Committee on the Rights of the Child (2009) General Comment No. 12: The right of the child to be heard CRC/C/GC/12, para 53.

52. Article 9(1) of the UNCRC.

53. Article 24(3) Charter of Fundamental Rights of the European Union and art.9(3) of the UNCRC.

54. Article 20 of the UNCRC; and art.12 UNCRC.


56. Health Service Executive v SB (Care Order—Homelessness and Addictions) [2013] IEDC 6 at [29].


58. An action can be brought before the European Court of Justice based in Luxembourg in circumstances where an EU institution has infringed fundamental rights or a national authority violates the EU Charter of Fundamental Rights Charter when implementing EU law. See https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en [Last accessed 30 January 2017].

59. To date, the court has largely focused on interpreting the Brussels II bis regulation (Regulation 2201/2003) concerning private family law matters which fall outside the scope of this study.


63. Article 8 provides: 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 wellbeing 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.

64. Article 6(1) provides: In the determination of his civil rights and obligations […], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […].


66. [2013] IEDC 6 at 27.

68. Child and Family Agency v CG & Anor (Care Order—Proportionality) [2014] IEDC 06.

69. For example, it is followed in Health Service Executive v CB & Anor (Care Order—Neglect and Abuse) [2012] IEDC 5; Child and Family Agency and KC & Anor (Care Order—Proportionality) [2014] IEDC 12 at 27; Child and Family Agency and JO & Anor (Care Order—Proportionality) [2014] IEDC 11 at 33; and Child and Family Agency and CD & Anor (Care Order) [2014] IEDC 15 at 17.


73. Johansen v Norway (at 78) and Olsson v Sweden (at 259) has been cited by the High Court case of SS v HSE [2007] IEHC 189 at 94.

74. Child and Family Agency v CG & Anor (Care Order—Proportionality) [2014] IEDC 06 at 48. The case is also cited in Child and Family Agency and KC & Anor (Care Order—Proportionality) [2014] IEDC 12 at 27; and Child and Family Agency and NC & Anor (Care Order—Proportionality) [2014] IEDC 18 at 15.


77. [2015] IEDC 08 at 34-40.

78. [2015] IEDC 08 at 38.


80. Child Care Act 1991 s.18(2).

81. Child Care Act 1991 s.22.

82. See Health Service Executive v YC & Anor (Physical and Substance Abuse) [2012] IEDC 19 at 19.

83. Child Care Act 1991 s.42. Under national regulations a child in care *10 review should take place two months after a child initially enters care, and every six months for the first two years of their care placement. After this period, a review should take annually (S.I. No. 259 of 1995—Child Care (Placement of Children in Residential Care) Regulations 1995 reg.25, and S.I. No. 260 of 1995—Child Care (Placement of Children in Foster Care) Regulations 1995 reg.18).

84. For example, see Health Service Executive v AC &Anor(Care Order—Neglect and Chaotic Lifestyle) [2010] IEDC 6 at 19; Health Service Executive v LL & ors (Full Care Order—NAI) [2011] IEDC 6 at 120; Health Service Executive v ON & Anor (Care Order—Corporal Punishment) [2011] IEDC 8 at 29; and Health Service Executive v CB & Anor (Care Order—Neglect and Abuse) [2012] IEDC 5 at 67(5); Health Service Executive v AM & Anor (Care Order—Neo Natal Abstinence and ALTE) [2012] IEDC 9 at 30; Health Service Executive v SC (Care Order—Parenting Capacity)
It is interesting to note that in one case, the judge directed that the case be inserted for mention six months before the two year Court Review date for the purpose of the Respondent mother filing an application under s.22 if she is then in a position to request family reunification (Child and Family Agency v RT [2015] IEDC 5 at 20).

85. Health Service Executive v ON & Anor (Care Order—Corporal Punishment) [2011] IEDC 8 at 29.

86. For example, see Tusla: Child and Family Agency and COS & Anor [2014] IEDC 16 at 24.

87. Child and Family Agency v CG & Anor (Care Order—Proportionality) [2014] IEDC 06 at 48.

88. [2014] IEDC 06 at 50.

89. [2014] IEDC 06 at 49.

90. Other issues where vulnerabilities exist, not covered in this paper, include hearing the views of the child, State failure to act to prevent child abuse and a lack of legal safeguards for children and their parents in circumstances where children are in care under a voluntary arrangement.

91. Section 17(1)(a) of the Child Care Act 1991.

92. Under s.18 of the Child Care Act 1991, the threshold for the granting of a Care Order is that the court must be “satisfied” that the circumstances under s.18(1) exist or have existed and that the child requires care or protection which he or she is unlikely to receive, unless such an order is granted. Under s.17(1) the threshold for an Interim Care Order is lower in that the court must only be satisfied that there is “reasonable cause to believe” that any of circumstances specified under s.18(1) exists or has existed and “that it is necessary for the protection of the child's health or welfare”.


94. An extension can be granted by the judge under s.17(2) or with the consent of the Child and Family Agency and the child's parent(s).

95. See for example, Child and Family Agency (CFA) v H (Care Order-Psychological Assessment) [2014] IEDC 01 at 4; and MF & Anor v Child and Family Agency (Application to Discharge a Care Order) [2014] IEDC 07 at 30.

96. For example, in Child and Family Agency v ND & Anor [2015] IEDC 2, the child was under an Interim Care Order for two years.


99. Although s.22 does not apply to an Interim Care Order, a parent can contest the order on the first or subsequent hearing or apply to court for a direction or the variation or discharge of any such direction under s.17(4).

100. Section 28 of the Civil Legal Aid Act 1995 sets out the criteria for obtaining legal aid.

101. Only two of the 114 published judgments concern an application under s.22 and both of these applications were refused: CC & Anor v Health Service Executive & Anor (Application to Discharge Care Order) [2011] IEDC 4; and MF & Anor v Child and Family Agency (Application to Discharge a Care Order)

103. Adoption (Amendment) Bill 2016, ss.23(1)(b) which will amend s.54 of the Adoption Act 2010, available at https://www.oireachtas.ie/documents/bills28/bills/2016/2316/b2316d.pdf [Last accessed 30 January 2017].


107. This right is be found under Art.40.1 of the Constitution of Ireland, Protocol 12 of the ECHR; art.26 of the International Covenant on Civil and Political Rights; art.20 of the Charter of Fundamental Rights of the European Union.
