

LEGAL PROTECTIONS FOR SIBLING RELATIONSHIPS OF CHILDREN IN CARE

1. Introduction

1.1 The Oireachtas has not specifically addressed its mind in legislation to the issue of maintaining the sibling relationship when children are taken into care. The statement in Section 3(2)(c) of the *Child Care Act, 1991* to the effect that in the performance of its function, the HSE shall “*have regard to the principle that it is generally in the best interests of a child to be brought up in his own family*” is, in my experience, applied in Court in a manner which imposes obligations solely upon the HSE in terms of maintaining the parent-child relationship in their own home; it may or may not be stretching its meaning a little too far to say that it applies to the obligations upon the HSE to maintain and promote sibling relationships after children have been taken out of their parents’ care? The argument that it to be interpreted to mean that the principle does in fact apply to the sibling relationship is bolstered by the obligations imposed upon the HSE by the Constitution and the European Convention on Human Rights, discussed below.

2. Legislative provisions in the U.K.

2.1 In England and Wales, Section 23(7) of the *Children Act, 1989* states that:

“Where a local authority provides accommodation for a child whom they are looking after, they shall, subject to the provisions of this Part and so far as is reasonably practicable and consistent with his welfare, secure that—

(b) where the authority are also providing accommodation for a sibling of his, they are accommodated together”

2.2 As the applicable Principles of Good Child Care Practice No. 13¹ make clear;

“Siblings should not be separated while in care and when looked after in voluntary arrangements unless there are part of a well- thought out plan based on each child’s needs. When large families require care away from home, every effort should be made to provide accommodation where they can remain together”. (underline inserted)

2.3 In Scotland, the *Children (Scotland) Act 1995* and the supporting regulations envisage that siblings in care should be placed together:

“except where this would not be in one or more of the children’s best interests”.²

2.4 In Northern Ireland, the *Children (Northern Ireland) Order 1995*³ provides that:

“Where a Trust provides accommodation for a child they are looking after, they shall, so far as is reasonably practical and consistent with his welfare, secure that –
(a) the accommodation is near his home; and
(b) where the authority is also providing accommodation for a sibling of his, they are accommodated together” (Article 27[8]).

¹ Department of Health, 2010

² p. 5, para 19.

³ At Part 4

3. Constitutional and ECHR Standards

3.1 While it would be preferable to have the clarity and definition that legislation and regulations can bring to this area, it is clearly not the case that there are no lawful bases at present in this jurisdiction upon which persons seeking to argue that siblings in care ought to be placed together can rely. I feel that the neatest and best tool to use for this purpose is Article 8 ECHR which guarantees a right to respect for private and family life, qualified in certain specific and defined instances. Nonetheless, it is appropriate to consider very briefly the impact of the constitution first of all in relation to the protection of the sibling relationship of children in care.

- One of the main reasons for my submission that Article 8 ECHR is the neatest way to proceed as that it offers protection to families across the board regardless of whether the family is a marital or non-marital one, thus avoiding the limitations of Article 41 Bunreacht na hÉireann. Even if the child who has been put in care does come from a marital family – is he and his siblings a “*unit*” for the purposes of Article 41 once his or her parents have been taken out of the equation⁴? while this has not been answered in any case law, it would appear likely that the Courts would adopt the view that it is and as such the family unit comprising the siblings possesses rights to be protected from undue interference.
- Furthermore, while the un-enumerated rights doctrine based in Article 40.3 of the Constitution by which the State guarantees to protect and vindicate the rights of citizens might at first glance appear to offer another option for invoking the constitution to protect the rights of the individual children in a soon-to-be separated family, it is hard to see in fact which of the un-enumerated rights recognised to date cover the type of issue under consideration herein⁵.

⁴ See obiter comments of *Walsh J in G v An Bord Uchtala [1980] IR 32 at 70* to the effect that “orphaned children who are members of a family whose parents have died continue to be a family for the purpose of the Constitution.....The family is recognised as the fundamental unit group of society founded on marriage and the fact that the married parents of the children have died does not alter the character of the unit.”

⁵ The right to privacy to date has been invoked as a means of excluding state interference from an individual’s life and not used to embrace the broader notion of protection of the individual’s private life. Perhaps the right to self-determination, as invoked in the right to die case and in the first *Foy* case, might be of assistance, although it may be hard to imagine a Court recognising such a right on the part of, in particular, a very small child. While arguments

- It could be argued simply from the point of view of the best interests of the individual children: in that regard, it may be useful to keep an eye upon the emerging Article 15 *Brussels II Bis* jurisprudence in which the High Court has recognised that one of the “very significant considerations” to which regard must be had in determining whether or not it is in the child’s best interests to be returned to a particular EU state, is the possibility of “him having contact in the future not just with his parents, *but with his half-siblings* and with members of his extended family.” [italics inserted]. Interestingly, since that judgment was handed down, HSE have placed considerable reliance upon that argument in a number of other Article 15 applications that have come before the High Court.

3.2 Article 8 ECHR provides;

“1. Everyone has the right to respect for his private and family life, his home and correspondence;

2. There shall be no interference by a public authority with the exercise of his right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the

could be made to develop unenumerated rights along lines which would protect the right of siblings in care to grow up together, it must be borne in mind that the Supreme Court in both the *Sinnott* and the *TD* cases has expressed a reluctance to develop further socio-economic rights under the unenumerated rights doctrine.

*prevention of disorder or crime for the protection of health or morals, or for the protection of the rights and freedoms of others*⁶.”

3.3 Article 8 thus provides for the right to respect for one’s family life and private life. It would appear that the right to grow up with one’s siblings is a right which is protected by the right to respect for *private life* and *family life* alike; as to the former, see the dictum of the European Court of Human Rights in *Niemetz v Germany*⁷ to the effect that:

*“...it would be too restrictive to limit the notion [of private life] to an ‘inner circle’ in which the individual may live his own personal life as he chooses to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings*⁸.”

⁶ Section 3(1) of the European Convention on Human Rights Act, 2003 provides that: “Subject to any statutory provision (other than this Act) or Rule of law, every organ of this State shall perform its functions in a manner compatible with the State obligations under the Convention provisions”. The Health Service Executive is clearly an organ of State. The Courts, however, are not. Section 2(1) of the Act of 2003 which provides that:- “In interpreting and applying any Statutory provision or Rule of law, a Court shall, insofar as is possible, subject to the Rules of law relating to such interpretation and application, do so in a manner compatible with the State obligation under the Convention provisions”. Also of interest re the ECHR and domestic courts is Section 4 of the Act of 2003 which provides that judicial notice shall be taken of the Convention provisions and of any declaration decisions of the European Court of Human Rights, decisions or opinions of the European Commission of Human Rights and any decision of the Committee of Ministers or any question in respect of which it has jurisdiction and it is thereafter provided that a Court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgements.

⁷ (1989) 16 EHRR 97

⁸ This *dictum* was endorsed by Finlay-Geoghegan J in *Bode v The Minister for Justice*, unreported, 14 November 2006

3.4 Much of the usefulness of Article 8 stems from the generous definition of “family life” which has emerged from the European Court of Human Rights (ECtHR) case law. In essence, the jurisprudence of the ECtHR and of the domestic courts applying Article 8 makes it clear that “family life” for the purposes of that Article arises where there is a *de facto* relationship amounting to close personal ties between the parties, a matter that is decided on a case by case basis; it is clearly to be expected that such a *de-facto* relationship will be found to exist between most minor siblings. It is also to be envisaged that the term can embrace step-sibling relationships or even, conceivably, foster siblings who have a sufficient relationship which, despite the absence of blood link, is otherwise indistinguishable from that enjoyed by the individual family⁹. The case of *Olson v Sweden* (1989) 11EHRR 259 is often cited in academic commentaries as supporting the proposition that Article 8 embraces and protects sibling relationships as a form of “family life”; indeed, in that case, the ECtHR did not expressly state that this was so - it simply proceeded upon the basis that the placement of the three children in separate homes on foot of care orders of the Swedish courts engaged the provisions of Article 8(1); thus, the separation of siblings was treated as a *prima facie* violation of Article 8(1) and it had to be considered whether or not that interference could be justified under the terms of Article 8(2). This case is vital from the point of view of the legal protections afforded to the sibling relationship (will consider it in greater detail below, for now just looking at it from the point of view of definition of family life embracing the relationships that I am concerned with, thus enabling us to invoke Article 8 in our attempts to protect those relationships once a child goes into the care of the State). Likewise, in a number of deportation cases, the European Court of Human Rights¹⁰ has addressed the issue of the separation of the proposed deportee from his siblings and other family members and found a *prima facie* violation of Article 8(1), which depending upon the other circumstances of the case may nonetheless be justified under Article 8(2). Surprisingly, given the amount

⁹ In that regard an analogy can be drawn with the approach taken by the European Courts of Human Rights in *X, Y and Z, Z v The UK* (1997) 24 EHRO 1 43C found that the relationship between a female – to-male transsexual and the child born to its female partner by artificial insemination by donor amounted to family life within the meaning of Article 8 because their relationship was otherwise indistinguishable from that enjoyed by a traditional family.

¹⁰ See, for example, *Boughanemi v France* (1996) 22 EHRR 228; *Moustaquim v France* 1991 [ECHR] 3

of judicial review challenges brought before the Irish courts in the last 15 or so years, and the frequency with which Article 8 is pleaded in those challenges, there does not appear to be any written judgment of the Irish courts addressing the issue of whether the separation of siblings, in the deportation context of otherwise, engages the provisions of Article 8 nor indeed of any of the relevant constitutional guarantees.

3.5 Once “family life” or “private life” is demonstrated, any interference with or restriction on that right must be justified under Article 8.2, in that it must be;

- “in accordance with the law”;
- for one or more of the specified aims in Article 8(2);
- “necessary in a democratic society” in order to secure the necessary aim. Thus the interference with or restriction on the right must be in response to a pressing social need and be no greater than is required in order to address that need, i.e., it must meet the requirements of the *proportionality* test.

3.6 *In accordance with law*: The separation of siblings is a by-product of the main concern of the HSE and of the Court; removal from the care of the children’s parent or parents. But prior to granting an ICO or an FCO, the District Court must oversee and endorse the alternative regime of care that is to be provided by the HSE when they act *in loco parentis* if such an order is granted. Thus, if a child is put in a different placement to his or her siblings by the HSE when the child is placed in its care that placement will have been given the go-ahead by the Court when granting an Order pursuant to Section 17 or 18 of the Act of 1991 and so that separation will be “in accordance with law.”

3.7 *For one or more of the purposes specified in Article 8(2)*: An action which interferes with an Article 8(1) right must be designed to achieve one or more of the legitimate aims set out in Article 8(2) and “the protection of health and morals” is most commonly invoked in the ECtHR case law in the context of care order applications.

3.8 Necessary in a democratic society: It is likely that, when challenging a decision to separate siblings in care or attempting to stop that happening in the first place, that the greatest emphasis will be on the third strand of Article 8(2) – that which involves showing that the decision to place them apart from their siblings is “necessary in a democratic society” or as more generally referred to, that it is a proportionate measure. There is a considerable body of ECtHR case law regarding whether or not decisions taken by the relevant state authority to take the child into care and also whether the steps taken in implementation of those measures, are proportionate to the rights of the child and of its parents pursuant to Article 8; it is clear from that case law that the authorities must offer “relevant and sufficient” reasons for the interference. There are, however, few cases in which the proportionality of the interference with the sibling relationship is addressed specifically – one of the few cases is *Olsson v Sweden* .

3.9 In *Olsson v Sweden*, the applicants mounted, inter alia, an Article 8 challenge to the implementation of the care plan by the Swedish authorities which resulted in their three children in care being placed separately and far part from each other, resulting in limited contact between the three. It is interesting to note that in contesting this claim, the Swedish government argued that the measures relating to the placement of the children had been taken in good faith, were not unreasonable and were justified by the special circumstances which arose. They relied upon keeping the need to avoid keeping the children in institutions for too long as one basis for placing them in separate and far-apart foster homes, referred to the limited supply of suitable foster homes, to the fear that the female child had an inclination to take too great a responsibility for her brother, and to the fact that, given the special needs of these children, that it would not have been realistic or psychologically appropriate to place them in the same foster home. At paragraph 81 of its decision, the Court noted that:-

“As for the remaining aspects of the implementation of the care decision, the Court would first observe that there appears to have been no question of the’ children being adopted. The care decision should therefore have been regarded as a temporary measure, to be discontinued as soon as circumstances permitted and any measures of implementation should have been consistent with the ultimate aim of

re-uniting the Olsson family. In point of fact, the steps taken by the Swedish authorities ran counter to such an aim. The ties between members of a family and the prospects of their successful re-unification will perforce be weakened if impediments are placed in the way of their having easy and regular access to each other. Yet the very placement of Helena and Thomas at so great a distance from their parents and from their third sibling must have had adversely affected the possibility of contacts between them.....There is nothing to suggest that the Swedish authorities did not act in good faith in implementing the care decision. However, this does not suffice to render a measure “necessary” in Convention” terms. Examination of the Government’s arguments suggests that it was partly administrative difficulties that prompted the authorities’ decisions; yet, in so fundamental an area as respect for family life, such considerations cannot be allowed to play more than a secondary role”. In conclusion, in the respects indicated above and despite the applicants’ unco-operative attitude, the measures taken in implementation in the care decision were not supported by “sufficient” reasons justifying them as proportionate to the legitimate aim pursued. They were therefore, notwithstanding the domestic authorities’ “margin of appreciation, not “necessary” in a democratic society. (underline inserted)

4. Vindicating sibling rights in the District Court?

4.1 It would seem fair to say that the practices of many social work departments do not at present conform with the requirements of Bunreacht na hEireann nor with Article 8 ECHR *vis-à-vis* vindicating the rights of siblings in care. What then, as legal practitioners representing parents, can or should we do?

4.2 Ideally, the principle would be established in a High Court decision, which could recognise the existence of the right of siblings and the requirement that if siblings are to be separated, then there must be relevant and sufficient justifying same. The Court could grant declaratory reliefs along those lines but, as the High Court will not entertain proceedings in which declaratory relief is the sole remedy sought (unless there is a declaration of unconstitutionality or a Section 5 ECHR Act 2004 sought), and given the judicial reluctance to

grant mandatory orders (eg., a mandatory injunction compelling the HSE to place the children together), it would appear that the best remedy to seek would be a prohibitory injunction preventing the HSE from placing the children in separate placements. It would be hoped that such a High Court judgment could serve to bring about changes and improvements in social work practices at a quicker pace than would be the case if the issue were raised on a case-by-case basis in the context of child care proceedings in the District Court.

4.3 Until such a case is brought to the High Court, if indeed it ever is, what can be done in the District Court? In the course of an ECO or ICO hearing, what can a District Judge do if he or she is faced with a situation in which the children ought to be removed from the care of their parents at that point in time yet there is no proper best interests-based justification for the proposed placement of the children in separate foster homes? It would appear that the most that can be directed by the Court is that a proper assessment is conducted as soon as possible with a view to placing the children together again if there is still no child-centred justification for their being kept apart. Section 47 CCA 1991 could be used to similar effect by legal representatives for parents and guardians ad litem to secure the conduct of such an assessment (although strictly-speaking that ought not be necessary as the Court should of its own initiative demand such information in order to ensure that the care regime that it is endorsing when it makes a care order is a "proportionate response) Of course, Section 47 can only be invoked in relation to the welfare of a child *already in the care of the HSE* and, likewise, a District Court direction to the HSE at an initial ICO hearing requiring them to conduct an assessment cannot ensure that the children are properly placed together *from the outset of their care experience*; thus, a change of social work practice across the board is required in order to ensure that this issue is considered at the outset.

4.4 Once the right of siblings to be together is recognised in the Courts, how is that right vindicated? In essence, as per Brian Lavery's presentation, what is required is a comprehensive assessment of the sibling relationship prior to the child going into care for the purpose of determining whether the children should live together or whether there are "relevant and sufficient" reasons based upon their best interests which justify them being placed apart. If, for some reason such as an emergency, there is no opportunity to conduct that

assessment prior to the placement of the children in care, then it should be conducted as soon as possible thereafter and reviewed throughout the duration of the children being in care. Guardians ad Litem must also refer to the wishes of the children vis-à-vis placement with their siblings and to their best interests in regard thereto.

4.5 The quality of the HSE's assessments on this issue are, of course, key. At present, it would appear, from the explanations that are often are akin to those offered by the Swedish authorities in the Olsson case. Many of the reasons are administrative resource-led issues and point to a structural problem or problems within the HSE.

4.6 It is vital to emphasise that, even if the proper assessment and review processes become the norm, there will be no one outcome in relation to the placement of siblings within the care system. Each case will turn on its own comprehensively and fairly-assessed facts; but the truth is that in this jurisdiction reaching the stage where an assessment of that nature is conducted would be huge progress. If, having conducted that assessment, there are positive reasons why they ought to be separated than that ought to be done, with as much sibling access taking place between them as is consistent with their best interests. In the absence of such an assessment however, sibling contact cannot be seen as an acceptable substitute for placement together.

4.7 For too long, the focus on parent-child relationships has been at the expense of considering the significance of sibling relationships – a glaring omission when you consider the needs of children in care where the sibling ties represent a huge and comforting part of the child's identity. Siblings should have the right to grow up together unless that is *shown to be* contrary to their best interests.