

A CHILDREN'S RIGHTS ANALYSIS OF INVESTIGATIONS

by Dr Ursula Kilkelly, Senior Lecturer,
Faculty of Law, University College Cork

Commissioned by the
Ombudsman for Children

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Foreword by Ombudsman for Children, Emily Logan



The Ombudsman for Children Act 2002 provides for the examination and investigation of administrative actions by public bodies affecting children under eighteen years. These legislative provisions set out standard maladministration grounds for the review of complaints. Given that the effect of an action on a child must be the subject of any investigation conducted by the Ombudsman for Children and that children themselves can bring complaints to the Office, the Act sets out a range of specific legislative provisions which take particular account of the vulnerability of children. These include my obligation to have regard to the best interests of the child and to give due consideration to the child's wishes.

The Act does not oblige me to investigate the extent to which such action or inaction meets or has met international children's rights standards.

This analysis has considered a variety of investigation statements undertaken by my Office from a children's rights perspective. The purpose of this review is to audit our approach to the investigations function in monitoring children's rights and to determine in the context of a need for public sector reform, the areas that particularly affect children and require attention.

While this review represents 10 cases, it is fair to say that we have chosen some pivotal cases that we believe accurately represent the breadth of our experience with civil and public administration – from attempts by professionals to advocate for children up to and including occasions when our work has been deliberately obstructed.

It is a dominant feature of these Investigations that with few exceptions they highlight a lack of awareness about the impact of public administrative decision-making on the lives and rights of children and their families.

Decision-making that affected children directly and sometimes indirectly was not informed by its impact on the children concerned; nor was it informed by children's rights principles. In particular, the parameters of the child's best interests and the child's right to be heard were not used to guide administrative actions or decision-making to any great extent if at all. The procedures, and in some cases those applying them, were not aware of or sensitive to the needs or rights of children or their families.

Other considerations appeared to dominate over ensuring that the rights and interests of individual children are met. In this respect, the individual children appeared to be largely invisible in the decision-making process. There are examples of an excessively bureaucratic approach to public decision-making, and often a disconnect between administrative decision-makers and those affected by those decisions.

At least some, if not all of the cases indicated a lack of awareness about the needs and rights of individual children as recognised by international instruments to which Ireland is a party.

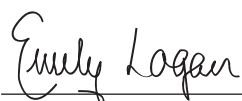
A further particularly worrying common theme is the failure to ensure the implementation of national law and policy. The failure to rigorously apply the best interests principle and to ensure children's voices are heard as the Child Care Act 1991 requires is of serious concern as is the failure to ensure adherence of the Children First National Guidelines.

The absence from the decision-making process of an awareness of how quickly harm can be done to children (by depriving them of education, separating them from parents, providing for their care etc) is very stark as is the apparent failure to appreciate the relationship between timely decision-making and good administration.

There is consistency in the apparent absence from decision-making structures of any child impact analyses to review policy to ensure that it continues to meet the needs of the public, generally, and children in particular.

It is important in these strained economic times to remember the principles upon which this Office was established. Accessibility to an independent mechanism of redress for people who cannot avail of redress in the courts is fundamental to a well functioning democracy. It is my view that without the intervention of my Office that it is unlikely that any review of the area of decision-making complained of would have been initiated. The investigation of these cases averted litigation against the state by offering parents and children an alternative mechanism of resolution. The manner in which the cases are investigated is non-adversarial, generally speedier than the courts, and less costly.

Earlier this year we heard how three civil service administrative Ministries – health, justice and education - all expressed concern about the proposed wording published by the Oireachtas Committee on the Amendment to the Constitution. It appears there was concern expressed across the three civil service departments about 'unintended consequences', one of which was about the inclusion of the best interests of children. It is encouraging that the new Minister for Children has been given executive powers, an issue raised with the Irish state by the UN Committee at its hearing in 2006. Six years on, it is clear to me as Ombudsman for Children that the inclusion of the principles of the United Nations Convention on the Rights of the Child is a human rights imperative and that any attempt to diminish children's best interests should be resisted by government when amending the Constitution.



Emily Logan
Ombudsman for Children

Introduction, Aims and Objectives

Section 8 of the Ombudsman for Children Act 2002 authorises the Ombudsman for Children to undertake an investigation into any action by or on behalf of a public body where, upon having carried out a preliminary examination of the matter, it appears to the Ombudsman for Children that the action has or may have adversely affected a child and the action was or may have been:

- i taken without proper authority,
- ii taken on irrelevant grounds,
- iii the result of negligence or carelessness,
- iv based on erroneous or incomplete information,
- v improperly discriminatory,
- vi based on an undesirable administrative practice, or
- vii otherwise contrary to fair or sound administration.

A similar power exists under s 10 of the 2002 Act where the Office may undertake such an investigation on its own volition. The power to undertake investigations is both broadly framed and child-focused insofar as it allows the Office to examine any action taken by a public body which either has or may have adversely affected a child. However, although the Ombudsman for Children can examine administrative actions affecting children on a long list of grounds, neither section 8 nor section 10 makes express provision for the Office to investigate the extent to which such action (or inaction) meets or has met international children's rights standards *per se*. In other words, the failure to act in compliance with international children's rights obligations is not a ground on which the Ombudsman for Children can find fault with the actions of administrative bodies.¹ However, the Ombudsman for Children has a more general duty to promote the rights and welfare of children and under ss 7(1) of the Ombudsman for Children Act. In particular, under ss 7(1)(a), the Ombudsman for Children shall advise any Minister of the Government on the development and co-ordination of policy relating to children and under ss 7(1)(b) shall 'encourage public bodies, schools and voluntary hospitals to develop policies, practices and procedures designed to promote the rights and welfare of children'. Against this backdrop, this analysis of the investigations undertaken by the Ombudsman for Children aims to bring a greater children's rights perspective, so common to other areas of OCO work, to the investigations area.

¹ Discussion of the Ombudsman for Children's remit in this area is beyond the scope of this research. However, see Committee on the Rights of the Child, General Comment No 2, The role of independent national human rights institutions in the promotion and protection of the rights of the child, CRC/GC/2002/2, available at www.ohchr.org (25 January 2011), especially paras 13-14.

Auditing law, policy and practice from a children's rights perspective is an essential way to achieve greater compliance with Ireland's international obligations.² It helps to measure progress in the implementation of instruments like the Convention on the Rights of the Child and reveals gaps and barriers frustrating greater progress in this area. It also helps to identify problems in ensuring compliance by public bodies with their domestic legal obligations, including under the European Convention on Human Rights Act 2003. As well identifying shortcomings, benchmarking can help to produce recommendations for law and policy reform and as a result, it is an important way to ensure coherence and consistency between international law and national law and policy. Assessing administrative decision-making from a children's rights perspective can be difficult however. Even though public administration arguably has a greater impact on children's daily lives than law and policy, the fact that this process can take place under the radar, sometimes without transparency, makes it hard to undertake general assessments about its impact on children's rights. It is important to recognise, however, that like auditing law and policy, viewing administrative decision-making through a children's rights lens can be very revealing in terms of outcome and process. Benchmarking of this kind is not just a valuable research and monitoring endeavour, therefore, it also has great potential to bring about reform in the way children are treated in practice.

The aim of this research was to examine a select number of Investigation Statements with a view to assessing whether and to what extent the actions of the public bodies in question met children's rights standards. The 10 investigation statements, chosen by the Office of the Ombudsman for Children for consideration are as follows:

1. Failure to provide appropriate housing in the case of a child with a disability;
2. Provision of school transport for 23 children;
3. The refusal by a County Council to grant tenancy of a local authority dwelling;
4. The delay in a suitable placement being made available to a young person by the HSE;
5. Eligibility for Concessionary School Transport of a Child with Special Needs;
6. Inability by a child with autism to avail of home tuition under the July provision scheme for 2003-2005;
7. The Administrative Actions of the Department of Education and Science with respect to an application for a home tuition grant made by a child with Autism;
8. Investigation into HSE provision for a mother and her baby, both in the care of the State;
9. Appropriate care for a young person who died in HSE care; and
10. Provision of supports and therapeutic services and care for a child with special needs in foster care.

² See Kilkelly and Lundy, 'Children's Rights in Action: using the Convention on the Rights of the Child as an auditing Tool' (2006) 18(3) CFLQ 331-350.

Children's Rights Standards

There is now an extensive body of international law setting out the rights of children and outlining obligations on states and national authorities as to how these standards can and should be implemented in practice. Principal among these instruments is the United Nations Convention on the Rights of the Child (CRC) adopted in 1990 and ratified by Ireland in 1992, which makes specific and comprehensive provision for the rights of children in all areas of their lives, including in their family, education and healthcare. The Convention contains four provisions identified as general principles, namely the right to enjoy CRC rights without discrimination (art 2); the duty to ensure the best interest of the child are a primary consideration in all matters concerning the child (art 3); the right to life, survival and development (art 6) and the child's right to express his/her views in all matters affecting him and have them given due weight in accordance with age and maturity.³ In addition to general principles, the CRC also makes specific provision for the rights of children with special needs such as children at risk of abuse and ill-treatment (art 19), children without parental care (art 20) and children with disabilities (art 23). The Committee on the Rights of the Child, the body established under the Convention to monitor its implementation, has published several 'General Comments', which consider issues affecting the implementation of specific Convention provisions (eg General Comment No 1 on Article 29, Aims of Education, General Comment No 12 on Article 12 and General Comment No 13 on Article 19, the Child's Right to Protection from All Forms of Violence) while also setting out how Convention provisions apply in specific areas or contexts (eg General Comment No 4 on Adolescent Health; General Comment No 9 on Children with Disabilities and General Comment No 10 on Juvenile Justice). The Committee has also published guidance on what states need to do to further implement the Convention (eg General Comment No 5 on General Measures of Implementation) and with each state party report it publishes country-specific recommendations in this regard.⁴ The publication of this 'jurisprudence' from the Committee on the Rights of the Child means that there is now substantial guidance available on the application and interpretation of the Convention in practice.⁵ Although not binding, it is important to take this into account in any activity concerned with furthering the implementation of the Convention. It is particularly important and useful in assessing whether and to what extent the actions of public bodies meets the demands of the Convention, an international treaty binding on the State.

3 Committee on the Rights of the Child, *General Guidelines regarding the form and content of initial reports to be submitted by state parties under Article 44 para 1(a) of the Convention*, CRC/C/5 30 October 1991, available at www.ohchr.org, (25 January 2011), at para 13.

4 On Ireland, see *Concluding Observations: Ireland*, CRC/C/15/Add.85 (1998) and *CRC/C/IRL/CO/2* (2006), available at www.ohchr.org (25 January 2011).

5 See Kilkelly, 'The CRC at 21 : Assessing the Legal Contribution' *Northern Ireland Legal Quarterly* (2011).

Also relevant here are the human rights treaties which Ireland has ratified but which are not specific to children. These include the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights. A more relevant treaty, however, is the European Convention on Human Rights (ECHR) which Ireland has both ratified and given further effect in domestic law via the ECHR Act 2003. Under section 3 of the 2003 Act, organs of the state (including public bodies like local authorities and the Health Service Executive) are required to perform their functions in a manner that is compliant with ECHR obligations.⁶ Although the ECHR has few provisions of direct relevance to children, the European Court of Human Rights (ECtHR) has now an established jurisprudence on children's rights having considered the position of children in a wide range of cases concerning alternative care, child protection, treatment of the family and the right to education for example. Apart from ECHR case-law on substantive rights issues, the European Court often emphasises the practical and effective importance of ECHR rights meaning that its judgments usefully address issues of process and decision-making, which can be especially useful in auditing exercises of this kind.

Of supplementary relevance – as they are not binding authorities on the state – are the numerous recommendations and other declarations from bodies like the United Nations General Assembly, and the Council of Europe. The latter has recently emerged as a significant source of authority in the area of children and the Committee of Ministers has adopted a number of important instruments that provide support for those seeking to ensure greater implementation of children's rights standards in practice. For example, the Recommendation on the Rights of children living in Residential Institutions (2005) and the Recommendation on Child Friendly Justice (2010) are particularly noteworthy in that respect. Finally, there are those treaties that have not yet been ratified by Ireland. The most important of these is arguably the United Nations Convention on the Rights of Persons with Disabilities, which Ireland signed on 3 March 2007 but has not yet ratified. Even though this treaty does not bind Ireland, however, it reflects established international consensus on important rights issues.

Methodology

The research undertaken here was a desk-based study designed to produce an analysis of compliance by public bodies with Ireland's human rights obligations in cases investigated by the Office of the Ombudsman for Children under the Ombudsman for Children Act 2002. The methodology involved conducting a children's rights audit with a view to examining whether and to what extent international human rights obligations are relevant, engaged and fulfilled by the actions of the public body concerned. This work involves three stages:

⁶ On the ECHR in Irish law see O'Connell, 'Watched Kettles boil (slowly): the Impact of the ECHR Act 2003,' in Kilkelly (Ed) *ECHR and Irish Law*, 2nd Ed, (Jordans, 2009), chapter 1.

- A Considering the facts as set out in the Investigation Statement;
- B Identifying the relevant human rights obligations and examining the application and interpretation of those obligations in the specific context of the case under consideration;
- C Drawing conclusions, to the extent to which that is possible, as to the compatibility with international human rights obligations of the acts and omissions complained of.

The aim was to produce a report that met these objectives but was also accessible and succinct. The Investigation Statements are written in this style; they are not detailed assessments of the law and policy framework on which particular decisions were based, for example, but instead provide an overview of the nature of the problem complained of, the public body's response to the problem and the assessment of these issues by the Office of the Ombudsman for Children under the 2002 Act. For this reason, a similar style was followed here; there is little detailed explanation or analysis of the compliance of law and policy with international children's rights standards. Instead, the report reviews and considers the compatibility of the public body's decision-making, as investigated by the Ombudsman for Children and detailed in the Investigation Statements, with those standards. The report also identifies, where relevant, what additional recommendations might be made to ensure greater compliance by administrators with children's rights standards. In conclusion, regard is had to some of the themes or issues that emerge from this process from a children's rights perspective both in terms of the actions of administrative bodies, and the operation of the Investigation function itself.

The following section considers the 10 Investigation Statements from a children's rights perspective. The analysis of each statement follows the same format and is divided into three main parts: an outline of the complaint and the findings of the OCO Investigation; a summary of the relevant international standards and obligations, and the conclusions on whether and to what extent those obligations were met.

Investigation Statement 1: Failure to provide appropriate housing in the case of a child with a disability

Summary of the Case

The Complaint

The complaint was brought to OCO by Ms Y, the mother of a 13 year old boy who was diagnosed with an advanced form of a progressive and disabling disease. He is now fully paralysed and needs help with everyday tasks. The boy and his mother live in a local authority dwelling. As soon as Ms Y's son was diagnosed, she applied to the local authority for a transfer to a different public dwelling as she knew they would need a specially adapted home to meet his changing needs. In 2000, she was given overall medical priority and offered a new dwelling. Ms Y asserted that at the time she was concerned that the dwelling was not being adapted to meet her son's specific needs. In correspondence with Ms Y, the local authority stated that the newly offered dwelling had been adapted in consultation with her son's occupational therapists. However, Ms Y asserts that no such consultation took place. The medical advice given to Ms Y made it clear that the new dwelling would only meet her son's needs into the very near future. She therefore felt that she had to turn down the offer and request a more appropriate solution. Ms Y felt that because of her refusal the local authority decided that no other dwelling would be adapted for her son and states that at the time she was not told that a refusal would mean the loss of overall medical priority. Ms Y asserted that the local authority had refused to review her case despite several requests and representations from her and medical practitioners caring for her son. At the time they came to OCO, they complained that the accommodation was unsuitable, and did not allow him dignity or independence.

OCO Findings

OCO found that the unsuitability of the family's accommodation was likely to significantly curtail the boy's home life and have an adverse effect on his general quality of life freedom, independence and dignity. It was concluded that the decisions taken by the local authority did not have the best interest of the child as a prime consideration. In addition, the Investigation found that:

- The house was not adapted for the boy's needs;
- Loss of medical priority was not justified;
- Between 2000 and 2005, despite at least nine medical representations, no correspondence was received by Ms Y explaining that she could get her case reviewed because of her son's deteriorating condition and his changing needs, and how this could be done. Instead she was sent 11 generic letters stating that the local authority had no plans to adapt another dwelling for her.
- There appear to be no written guidelines/policy on what does or does not get referred to the Chief Medical Officer. The case was marked by poor record keeping, and decision-making that was not 'formalised, adequate or clear'.

- Despite improvements to the local authority's complaints and appeals procedures, there is still a 'lack of clarity on what officially constitutes a formal complaint'.

In conclusion, OCO found that the action and lack of action on behalf of the local authority had adversely affected the child and were contrary to fair and sound administration. A number of recommendations were made to ensure that the local authority:

- Immediately review Ms Y's case and adopt a proactive approach to finding a suitable solution to their housing problem.
- Develop systematic and timely review of housing applications made in the context of a child with a serious medical condition or a disability.
- Adopt clear and transparent criteria in relation to securing medical priority status so that relevant cases are referred to the chief medical officer.
- Give consideration to the holistic needs of the child in co-operation with other relevant agencies.
- Take steps to improve information flow and communication including access to the complaints and appeals mechanisms.

Summary of Relevant Children's Rights Standards

A range of children's rights standards are relevant here drawn primarily from the CRC (both general provisions, non-discrimination and provisions specific to children with disabilities) and General Comment No 9 of the Committee on the Rights of the Child on the Rights of Children with Disabilities.⁷ The main points are summarised as follows:

- Under Article 23 (1) of the CRC states recognise that a child with a disability 'should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.' Under Article 23(2), children with disabilities have a right to special care and states shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. The Committee on the Rights of the Child has noted that the assistance must be 'appropriate to the child's condition and the circumstances of the parents or others caring for the child.'⁸ It has also highlighted in the context of ensuring that children with disabilities receive adequate family support that this should include

⁷ Committee on the Rights of the Child, General Comment No 9 *The Rights of Children with Disabilities* CRC/C/GC/9 (2006) available at www.ohchr.org 25 January 2011.

⁸ *Ibid.*, para 12.

‘material support in the form of special allowances as well as consumable supplies and necessary equipment, such as special furniture and mobility devices that is deemed necessary for the child with a disability to live a dignified, self-reliant lifestyle’.⁹

- According to the Committee, in order to meet the requirements of Article 23, states must ‘develop and effectively implement a comprehensive policy by means of a plan of action which not only aims at the full enjoyment of the rights enshrined in the Convention without discrimination but which also ensures that a child with disability and her or his parents and/or others caring for the child do receive the special care and assistance they are entitled to under the Convention.’¹⁰
- Under Article 23(3), such assistance shall be designed to ensure that the child has ‘effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.’¹¹
- Article 2 CRC prohibits discrimination in the enjoyment of CRC rights, including on the grounds of disability. In this regard, it is relevant that Article 27(1) recognises the right of every child to ‘a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.’ Moreover, Article 27(3) requires states to take appropriate measures to assist parents to implement this right and to provide ‘material assistance and support programmes, particularly with regard to nutrition, clothing and housing’.
- Article 3 of the CRC provides that the best interests of the child shall be a primary consideration in all actions affecting the child.¹² According to the Committee, ‘Article 3 should be the basis on which programmes and policies are set and it should be duly taken into account in every service provided for children with disabilities and any other action affecting them.’¹³

With respect to the right of children with disabilities to enjoy the right to healthcare under Article 24 of the CRC, the Committee has noted that not only must health policies address early detection of disabilities, they must also address the questions of prevention, early intervention and rehabilitation.¹⁴ In this regard, the Committee has recommended that the systems in place must be capable of early intervention including treatment and rehabilitation providing ‘all necessary devices that enable children with disabilities to achieve their full functional capacity in terms of mobility, hearing aids, visual aids, and prosthetics among others’. These provisions should be offered ‘free of cost, whenever possible, and the process of acquiring such services should be efficient and simple avoiding long waits and bureaucracies’.¹⁵

9 Ibid, para 41.

10 Ibid, para 13.

11 See also Article 15(3) of the Council of Europe Revised Social Charter.

12 See Article 7 of the Convention on the Rights of Persons with Disabilities.

13 Committee on the Rights of the Child, General Comment No 9, *The Rights of Children with Disabilities*, para 29.

14 Ibid, para 51.

15 Ibid, para 57.

In addition to the specific CRC provision on the rights of children with disabilities, and the guidance offered by the Committee on the Rights of the Child in this area, the Committee's more general guidance on the measures necessary to implement the Convention is also relevant here. Article 4 of the CRC requires states to take 'all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.' With regard to economic, social and cultural rights, this shall be done to the maximum extent of available resources. The Committee has remarked on the increasing development at the national level of 'a wide variety of new child-focused and child-sensitive bodies, structures and activities'¹⁶ which indicate a willingness to give higher political priority to children and an increasing sensitivity to the impact of governance on children and their human rights.¹⁷ According to the Committee, states must 'see their role as fulfilling clear legal obligations to each and every child' and not a charitable process, where favours are bestowed on children.¹⁸ As the Committee notes, the 'development of a children's rights perspective throughout Government, parliament and the judiciary is required for effective implementation of the whole Convention'.¹⁹ More specifically, the Committee considers that Article 3, the requirement that the best interests of the child are a primary consideration in all actions, must be broadly interpreted to require '[e]very legislative, administrative and judicial body or institution ... to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.'²⁰ Accordingly, it is apparent that the effective implementation of Article 3 of the CRC requires specific consideration to be given in administrative decision-making to how children's rights and interests are or will be affected by the decisions or actions taken, or not taken.

The Committee has also noted that there are few administrative departments or actions that do not affect children and in this context it has highlighted the need for cross-sectoral coordination to recognize and realize children's rights across Government, and between different levels of government'.²¹ The Committee has proposed that states should 'review the machinery of government from the perspective of implementation of the Convention', and its general principles more particularly.²² Moreover, rigorous monitoring of implementation is also required and this should be 'built into the process of government at all levels but also independent monitoring by national human rights

16 Committee on the Rights of the Child, General Comment No 5, *General Measures of Implementation*, CRC/C.GC/5/2003, para 9.

17 Ibid, para 10.

18 Ibid, para 11.

19 Ibid, para 12.

20 Ibid.

21 Ibid, par 27.

22 Ibid, para 38. See also para 12.

institutions, NGOs and others.²³ It has stressed the need for self-monitoring of the implementation of the CRC and proposed that child impact assessment and evaluation be 'built into government at all levels and as early as possible in the development of policy' to ensure the Convention is fully implemented.²⁴ Particular regard must be had to the way in which states can ensure compliance with Article 3 (the best interest principle) and 'do so in a way which further promotes the visible integration of children in policy-making and sensitivity to their rights'.²⁵ Training, education and the adoption of a comprehensive strategy for the dissemination of information and awareness about the Convention and children's rights is an essential part of this process.²⁶

Conclusion

Taking into account the international standards and the summary of the facts above, the key children's rights issues in this investigation were as follows:

- The local authority failed to vindicate the child's rights under Article 23 (1), (2) and (3) of the CRC. There was a resulting failure to secure to the child his dignity, privacy and independence as provided for by Article 23(1). Similarly, the child did not have his needs met, despite his apparent eligibility, contrary to Article 23(2).
- The local authority also failed to take steps to ensure that their actions took into account the rights and interests of the child concerned, contrary to Article 3(1) of the CRC. This was accentuated by the apparent lack of awareness among local authority officials of the implications of their actions (and omissions) for the child, and the absence of any mechanism whereby the impact of their actions/omissions on the child could be assessed.
- It is not clear whether there is a policy or action plan in this area, as recommended by the Committee on the Rights of the Child. To the extent that there is, it would not appear to have been sufficient to ensure that the child received the special care and assistance to which he was entitled under the CRC.
- The absence of a cross-sectoral mechanism to ensure that the rights of the child were taken into account in the crucial area of housing also appears to have been a problem;
- The lack of information on the housing application process and the child's entitlements appears to have acted as a barrier to the effective vindication of his rights in this case. While the Ombudsman for Children rightly found that the issues here raised an issue of poor administration, the absence of a mechanism, at local authority level, to prompt a meaningful response to the very serious concerns raised on the child's behalf by his mother and numerous healthcare professionals delayed the resolution of the matter.

23 Ibid.

24 Ibid, para 45.

25 Ibid, para 47.

26 Ibid, paras 66-70.

Contrary to the guidance of the Committee on the Rights of the Child, the mechanism did not operate effectively but rather frustrated efforts to ensure that the rights of the child were vindicated in a timely and effective manner.

The recommendations made by the Ombudsman for Children in light of her findings in this case – to resolve the issue, ensure children are central to the process, implement clear and user-friendly systems, adopt a more integrated approach and improve information and communication – are logical, practical and, if implemented, would have the effect of both preventing such problems from arising in the future and ensuring that they would be resolved more quickly in the event that they did arise again. The following recommendations might also have been made from a children’s rights perspective.

Local authorities should:

- Introduce a system of child impact assessment and evaluation of all actions affecting children;
- Undertake a spot-check review of cases concerning the accommodation needs of children with disabilities to ensure sufficient weight is attached to their rights under the CRC;
- Provide children’s rights training for all staff involved in local authority decision-making in this area.

Investigation Statement 2:

Provision of school transport for 23 children

Summary of the Case

The Complaint

This complaint concerned the eligibility of 23 children for free school transport to secondary school in a town in the South East. In September 2005, these children were originally deemed 'fully eligible' for such transport (entitling them to free transport) because they were found according to the map held by the local VEC to be within the catchment area (Placename A). According to the map held by Bus Éireann (who provide the service for the Department of Education and Science) however, these children were in a different catchment area (Placename B) meaning that they were downgraded to 'concessionary' status (which entitled them to part-paid transport but only if there was a space on the relevant bus). In implementation of the relevant policy, the fact that there were no spaces on the relevant bus meant that these children were not granted school transport. An independent review of the two catchment areas was commissioned at the request of the Minister for State with responsibility for School Transport at the Department of Education and Science. This found, on 4 August 2007, that the area known as Placename A was in the Placename B catchment boundary area. Because of the proximity of the report to the start of the school year, bus transport for the children was sanctioned for that year only, with transport in subsequent years dependent on the outcome of the OCO investigation. This was commenced in August 2007.

OCO Findings

The findings of the investigation undertaken by OCO were as follows:

- There were significant discrepancies and a lack of rigour applied with regard to the use of maps by the VEC, Bus Eireann and the Department of Education and Science. While the differences in the boundaries on these maps appear to be small, they are 'extremely significant when viewed as the key criterion in application for school transport'.²⁷ The Department would appear to have abrogated its responsibility for drawing and maintaining the integrity of school transport boundaries by accepting the map held by Bus Eireann.
- There was some confusion in delineating the responsibility of the VEC and Bus Eireann for determining eligibility of pupils for school transport. A particular issue arose in this instance because of the use of different maps, the thickness of the boundary wall and the fact that the 23 children affected lived on or close to this boundary wall. Although the parents had a copy of the School Transport Scheme, they were not aware at the time that different maps were being used.
- The lack of accuracy and the differences in the maps used meant that the boundary line could be shown to be in at least four different positions.

²⁷ Ombudsman for Children, *A Statement based on a complaint regarding the provision of school transport for 23 children*, December 2008, p 10.

- The Department of Education and Science is ultimately responsible for the School Transport Scheme but its failure to monitor this adequately has led to successive variations of the maps occurring.
- The combined actions of the Department, Bus Eireann and the VEC in the implementation of the School Transport Scheme were based on 'undesirable administrative practices' and were contrary to 'fair or sound administration'. The mapping system is 'unclear, uncertain and inaccurate'.²⁸
- In addition, the operation of the School Transport Scheme was found to interfere with the exercise of parental and pupil's choice regarding which school they chose to attend.

In order to ensure transparency, clarity and good communication and administration in this area, the Ombudsman for Children recommended that:

- The Department of Education and Science devises the catchment boundary areas in relation to secondary schools and that these would be contained in a 'master map' held by the Planning section and copied and distributed to the relevant stakeholders;
- This should not be changed by any of those parties, without prompting a review;
- Monitoring should be undertaken to ensure compliance with the Scheme, and to examine the accuracy and integrity of the maps.

Summary of Relevant Children's Rights Standards

This complaint concerned the unfair and unsound administration of the School Transport Scheme and was a highly relevant case for the application of the Ombudsman for Children's function. Its review from a children's rights perspective is complicated by the fact that there are few specific international children's rights standards on school transport. At the same time, it is apparent from the complaint that the administration of the Scheme had serious consequences for the rights of children to access education. The complaint also raises concerns about the extent to which the process by which children's entitlements to school transport, as recognised by national law and policy, are implemented so as to respect children's rights.

Accordingly, it is considered that the following standards are relevant here:

- Article 28 of the CRC recognises the right of the child to education. Article 28(1)(b) provides that states must encourage the development of different forms of secondary education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance

²⁸ Ibid, p 15.

in case of need.²⁹ In that way, the School Transport Scheme falls within the scope of Article 28(1).

- Although Article 2 of the First Protocol to the European Convention on Human Rights recognises the right to education and requires regard to be had to the religious and philosophical convictions of parents in the education and teaching of their children. This does not entitle parents to enrol children in a school of their choice unless very serious and weighty convictions are engaged.³⁰ What is important is that the primary objective of Article 2 has been found to guarantee a right of equal access to existing educational facilities, and so it may be that where the school transport scheme is administered in a way to interfere with this right, then an ECHR issue might arise either under Article 2 alone or read together with Article 14 (the non-discrimination provision).
- Article 2 (1) of the CRC prohibits discrimination in the enjoyment of CRC rights on any ground.
- As highlighted above, Article 3 of the CRC requires that the best interest of the child shall be a primary consideration in all actions concerning the child. Moreover, Article 3(3) requires that states must ensure that 'the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities'.
- It is clear from Article 4 of the CRC that the state party has ultimate responsibility for taking all measures to ensure the Convention's implementation. Decentralisation of power - through devolution or delegation of government - does not in any way reduce the direct responsibility of the Government to fulfil its obligations to all children within its jurisdiction, regardless of the state structure.³¹
- The Committee on the Rights of the Child has highlighted the increase in the devolution of responsibilities for children's services to the private sector (whether NGO, not for profit or for profit organisations are involved).³² It has expressed the view that accountability and monitoring are vital where the private sector has a role in the implementation of children's rights.³³ Transparency and clarity in such arrangements and the regular review and monitoring of the partner activities by the primary state body is also important.³⁴
- Related to this, the Committee has noted that few state bodies have no effect on children's rights. According to the Committee, the recognition and realisation of children's rights requires visible cross-sectoral coordination across Government.³⁵

29 See also Article 13 of the International Covenant on Economic, Social and Cultural Rights and Committee on Economic, Social and Cultural Rights, *General Comment on the Right to Education (Art 13) E/C.12/1999/10*.

30 See Kilkelly, *The Child and the ECHR* (Ashgate, 1999), pp 62-75.

31 Committee on the Rights of the Child, *General Measures of Implementation*, para 40.

32 Committee on the Rights of the Child, General Day of Discussion, *The Private Sector as a service Provider and its role in the implementation of child rights*, 2002, available at www.ohchr.org (25 January 2011).

33 *Ibid*, p 7.

34 *Ibid*, p 7. See also Committee on the Rights of the Child, *General Measures of Implementation*, paras 43-44.

35 Committee on the Rights of the Child, *General Measures of Implementation*, para 27.

The purpose of coordination is *inter alia* to ensure that the obligations inherent in the Convention are not only recognized by 'those large departments which have a substantial impact on children' such as education ... but right across Government ... and at all levels.³⁶ Rigorous monitoring is a vital part of this co-ordination.

Conclusions

There are few international standards relating directly to children's rights with respect to school transport and there is relatively limited express provision for parental choice in education (beyond the duty to ensure respect for parental convictions and the right to access non-state facilities). At the same time, it is important that both Article 28(2) of the CRC (and Article 13 of the ICESCR) imposes on the state a duty to ensure that secondary school is available and accessible to every child; this, taken both alone and together with Article 2 of the CRC, could be interpreted to require a school transport scheme that is fair and equitable. The Investigation clearly found that this was not the case here.

In addition, and taking the other international standards into account, the following points can be made:

1. Consideration of what was at stake for the children and their families did not appear to form part of the decision-making or administrative process in this case. Notwithstanding that the scheme was discretionary, scant regard was had for how it might be administered in the best interest of the children affected. It is arguable that the authorities failed to consider the best interests of the child as a primary consideration both in how the Scheme was established and how it was administered.
2. The Department of Education and Science failed to take responsibility for the administration of the School Transport Scheme and in particular to ensure that it operated in a transparent manner that was fair to all children. As the government department with responsibility in this area, it fell to the Department of Education and Science to ensure that those operating the Scheme on its behalf – including the VEC and Bus Eireann (regardless of whether this is a private or public body) – fulfilled their responsibilities. With respect to Article 28(1) of the CRC, the Committee on the Rights of the Child has made it clear that it is necessary to undertake regular and rigorous monitoring of bodies who exercise delegated functions on behalf of the state. This clearly did not happen here.

36 Ibid, para 37.

The OCO recommendations provide entirely sensible and practical means to ensure that the School Transport Scheme operates in a fair, transparent and equal manner. In support, the following two recommendations might be made to further compliance with children's rights obligations:

- The relevant policy should state unequivocally that responsibility for the scheme's clarity, and transparent and fair administration rests with the Department of Education and Science;
- The policy should make clear that in administering the scheme, the best interests of the child must always be a primary consideration.

Investigation Statement 3: The refusal by a County Council to grant tenancy of a local authority dwelling

Summary of the Case

The Complaint

The complaint concerns the failure by a County Council to grant a father who is the sole legal guardian of his four children, one of whom has cerebral palsy, tenancy of a specially adapted house in which the children currently live with their maternal grandmother. As a result of the County Council's failure to grant him tenancy, he has been unable to live together with his children.

The parents were granted tenancy with the County Council in 1996. Their third child was born in 1998 and diagnosed with cerebral palsy. In February 1999, they requested a transfer to accommodation that would be suitable for her special needs. In 2001, the Council obtained a report detailing the daughter's specific needs and in 2002, the family were appointed tenants of accommodation (hereafter known as the home), which was deemed to be most suitable to meet the needs of their daughter. The family made considerable improvements to the house in 2002. In April 2004, the parents separated and in June 2004, the District Court granted a sole custody order to the father. Despite this, the parents agreed that the mother would return to the family home to care for the children and the father would move to live with his father. In January 2005, the mother was appointed sole legal tenant to the home but in October 2006, she died leaving her parents living with the children in the home. The County Council agreed verbally that the grandparents could remain in the house as they did not want the children to move at such a difficult time. The children's grandfather subsequently died. The father approached the Council with regard to being granted tenancy of the home (the grandmother could not be granted tenancy as she was the owner of a property) but the County Council stated in December 2006 that it would not grant him tenancy unless and until he produced 'evidence that he has full time physical care and control of the children' (p 5).

OCO Findings

The findings of the investigation undertaken by OCO were as follows:

- It was unclear what policy or procedure guided the County Council in their decision-making and actions in the case and in particular, the position of the County Council that the father was required to produce evidence that he has full-time physical care and control of the children. On inspection, the County Council files contained a certified copy of the custody order. The Ombudsman for Children found that by refusing to accept the validity of the court order, the actions of the County Council were taken 'without proper authority'.³⁷
- The County Council stated that they were 'keen to accommodate the children' and had allowed the children to remain living at the home as they believed that a move

³⁷ Ibid, p 8.

would be traumatising for the children. Although this was 'well intentioned', denying the father tenancy meant that the children were unable to live with him and moreover lived with the uncertainty and fear of losing their home.

The Ombudsman for Children recommended that:

- The County Council work to resolve the immediate and long-term housing situation for the children;
- The County Council, and possibly the Department of the Environment, Heritage and Local Government, develop policies and procedures that can provide guidance in situations of this nature;
- The County Council review and improve information and record-keeping.

Summary of Relevant Children's Rights Standards

This complaint raises a number of issues from a children's rights perspective, both under the Convention on the Rights of the Child and with respect to the European Convention on Human Rights. They can be summarised as follows:

- Under Article 8 of the ECHR, children and parents - like the parties to this complaint - enjoy a right to respect for their family life. According to the facts, the failure to grant the father tenancy frustrated his efforts to live together with his children and to exercise the right of custody granted to him by the District Court. The case-law of the European Court of Human Rights (ECtHR) provides that where such rights have been granted on the basis that they are in the best interests of the children, domestic authorities are under an obligation to take all reasonable steps to make them effective.³⁸ Even though this duty does not necessarily fall on the local authority in the Irish context, the fact that it was within the County Council's power to take action to make the custody order effective and that they actively refused to do so, raises serious issues about the compliance by the County Council with their obligations under Article 8 ECHR.³⁹ Moreover, implicit in Article 8 is an additional procedural duty to proceed expeditiously in cases involving children.⁴⁰
- Article 3 of the CRC requires that in all actions concerning children, the best interest of the child must be a primary consideration. As highlighted above, the Committee on the Rights of the Child has found that the application of Article 3 requires that administrative bodies systematically consider how children's rights and interests are

38 See for example *Hokkanen v Finland* (1994), 17 EHRR 293.

39 Section 3 of the ECHR Act 2003 requires that 'every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.' Legal remedies are available under s 3(2).

40 See for example *W v UK*, (1988) 10 EHRR 95; *Hokkanen v Finland* (1994) 17 EHRR 293. On the prejudicial effect of delay see Bainham, *Children – the Modern Law*, 3rd Ed, (Jordans, 2005), pp 47-48.

or will be affected by their decisions and actions.⁴¹ The introduction of child impact assessment mechanisms is highly recommended.

- Article 4 of the CRC requires states to take all appropriate action to implement the Convention. This has been found to require that the provisions of the CRC are given legal effect in domestic law.⁴² At the very least, the general principles of the CRC – including the best interests requirement – should be given expression in relevant law and policy to ensure they are applied by national authorities.⁴³
- In terms of what rights are relevant here, it is important that Article 7 of the CRC recognises the child’s right to know and be cared for by his/her parents. Moreover, Article 9 requires that separation of children from their parents must only take place where it is deemed to be in the best interests of the child, in accordance with applicable law and procedures. Accordingly, there is no provision in the CRC for children to be separated from their parents unless that is found by a competent body to be contrary to the children’s interests. Similarly, it is important that under the CRC, parents have the primary responsibility for the care and upbringing of their children. Under Article 18(2), however, states are required to provide ‘appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities’.
- With respect to the child with cerebral palsy, for whom the home had been found suitable, it is relevant that children with disabilities have a right to special care under Article 23 of the CRC, and that states must ensure the extension to the eligible child of the care and assistance appropriate both to the child’s condition and to the circumstances of those caring for the child. See further standards above (under Investigation Statement 1).

Conclusions

A number of issues arise in this case from a children’s rights perspective:

1. Notwithstanding that, as the Ombudsman for Children found, the County Council acted with good intentions in this case, the fact remains that its decision-making was not only flawed insofar as it was not based on any policy or procedure but it was also arguably contrary to its obligations under the ECHR. Faced with two options – with no statutory requirements pulling it in either direction – it is submitted that the County Council was obliged under the ECHR Act 2003 to take the step that was most consistent with ECHR law, ie to grant tenancy to the person who was in any event the legal guardian of the children concerned and a previous holder (with the other of his children) of tenancy. Accordingly, it would appear that the County Council failed to act in a manner consistent with respect for the father and his children’s right to respect for family life under Article 8 of the ECHR.

⁴¹ Committee on the Rights of the Child, *General Measures of Implementation*, para 45

⁴² *Ibid*, para 19.

⁴³ *Ibid*, para 20. See also para 22 which requires that sectoral laws (health, education, justice, etc) also incorporate the Convention’s general principles.

2. It is not clear that the County Council proceeded with sufficient urgency, as ECHR obligations require, in resolving the issue preventing the father from living with his children.
3. More generally, it is relevant that - as the Ombudsman for Children found - the County Council appeared to have no basis in law or policy to demand evidence of the father's de facto care of his children, in addition to the evidence that he had legal rights of custody prior to awarding him tenancy. The result was that the children were denied the right to live with and be cared for by their father (Art 7 CRC) in the only setting deemed appropriate for this purpose (Art 23 CRC). Accordingly, the County Council's actions failed to take account of what was in the best interests of all of the children concerned, contrary to Article 3 of the CRC.
4. A final point to be made relates to the absence of guiding policy or procedure in this area. Clearly, this contributed to the denial of the family's rights in this case and this highlights a failure to take the legislative and policy measures necessary to implement the Convention as required by Article 4.

In order to ensure greater compliance with children's rights standards, the recommendations made by the Ombudsman for Children might also have included the following:

- Those working in local authorities should receive training on children's rights under the CRC and the ECHR. As public bodies, they should be made aware of their obligation under the ECHR Act 2003 to act in a manner consistent with ECHR obligations.
- Any policy drafted by the Department of the Environment, Heritage and Local Government to provide guidance for local authorities in this area should incorporate the general principles of the CRC – notably the best interests requirement and the right of the child to be heard under Articles 3 and 12 – and the relevant case-law of the European Court of Human Rights. It should require co-ordination with specialist departments like the Office of the Minister for Children and Youth Affairs and the Department of Justice and Law Reform in the exercise of functions in this area.

Investigation Statement 4:

The delay in a suitable placement being made available to a young person by the HSE

Summary of the Case

The Complaint

Special care is intended to make emergency or crisis provision for a child at serious risk where a period in secure custody is necessary to keep the child safe, to meet his/her immediate needs and ensure stabilisation of the child's circumstances so that transfer to a less secure, therapeutic environment is possible. Attempts to legislate for special care provision have been unsuccessful and until the Child Care (Amendment) Bill 2009 is enacted, power to make Special Care Orders remains within the jurisdiction of the High Court. This is complicated by the fact that, according to the High Court, the determination of criminal charges against a child must take precedence over an application for Special Care. This means that children's right to access Special Care can be compromised when their behaviour results in criminal charges being brought against them. The role of HSE National is to ensure that only those cases that it considers meet the criteria for Special Care, set out in its policy, are referred, by way of application, to the High Court. These referrals come from divisions of the HSE – in this case HSE West – and the now defunct Children Acts Advisory Board also had a role to advise on the matter.

This complaint concerns a boy, aged 15 at the time of complaint, who was caught up in this complex administrative and legal process. The boy brought his complaint to the Ombudsman for Children in November 2007. At the time he was residing in Finglas Child and Adolescent Centre (FCAC) having been remanded there in June 2007 by the Children Court. He understood that he was to be remanded there for a four week period for assessment and that recommendations had been made in relation to a future placement. His complaint related to the length of time that he had been in FCAC and the alleged delay by the HSE in securing a suitable placement for him. The investigation focused on the administrative actions taken by the HSE in relation to providing a suitable placement for the young person and the processes and procedures followed by the HSE in this regard. The issue of delay in a future placement being made available was also key.

The HSE has been involved with this young person and his family since 2005. He has experienced a range of problems, including violence, which escalated in mid-2007 and since 2005 he has had numerous interventions and assessments. He was remanded by the (criminal) Children Court to FCAC for this purpose and FCAC in turn recommended a forensic assessment. In November 2007, this assessment recommended that an application for a Special Care order be made. This recommendation was rejected by HSE National and following the appointment of a Guardian ad Litem proceedings were instituted in the High Court to challenge the refusal to make the Special Care application. Throughout this time, the boy was remanded monthly by the Children Court. Eventually a place in High Support was found and he consented to that, beginning in February 2008.

OCO Findings

This young person was on remand for a very lengthy period from 25th June 2007 until mid January 2008, during which time he was deprived of his liberty with differing explanations being offered for this. According to the Ombudsman for Children, the difficulties and delays in this case arose as a result of the 'divergent views' which prevailed among professionals in relation to the most suitable placement to meet his needs. Moreover, the time involved in making the decision about the Special Care application appeared to have impacted directly on the length of time the young person spent on remand.⁴⁴

The Ombudsman for Children concluded that following the young person's detention on remand in June 2007, HSE West acted promptly both in convening a case conference, attempting to set up the appropriate placement and pursuing the correct procedure with a view to making a Special Care application following the FCAC recommendation. The Children Acts Advisory Board also appeared to have acted promptly. Nevertheless, there was a significant period of time involved in making a decision regarding the special care application – received by HSE National on 9 August - and a decision made on 14 November 2007.

The Ombudsman for Children found that there were different views about which placement best suited the young person's needs, with HSE National preferring High Support, with others, including HSE West, preferring Secure Care. There also appeared to be some confusion about the availability of an alternative placement in High Support while the young person was in FCAC. The lack of clarity about the availability of this placement directly impacted on the options known to HSE West in relation to alternative placements, and it is likely that this impacted on the information the HSE was able to provide to the Children Court in this regard.

CAAB and HSE National differed as to whether the young person met the criteria for a Special Care application, but there was no formal mechanism to facilitate resolution of this situation. This difference in views may have influenced the belief held by HSE West that there was a possibility of securing a Special Care placement complicating things further.

By the time the decision was made regarding the Special Care application, the young person had been detained on remand for a period of four and a half months – longer than the initial period (three months) for which a Special Care order can be made. According to the Ombudsman for Children, HSE National's view on the boy's eligibility for Special Care appeared to be based on the time that had elapsed while the boy was on remand and the fact that a period of stabilisation – one of the purposes of Special

⁴⁴ Ombudsman for Children, A Statement based on a complaint regarding the delay in a suitable placement being made available to a young person by the HSE, August 2010, para 3.23.,

Care – had already taken place. Accordingly, the delay in making the decision ‘directly influenced the rationale for the decision and negated the need for further containment and stabilisation’.⁴⁵ In other words, at least one element of the boy’s eligibility for Special Care was determined by the delay in dealing with the case. The passage of time meant that regardless of other circumstances he no longer met the criteria.

It is unclear why a definitive decision regarding the Special Care application was not made following the FCAC assessment in August 2007, especially given that the expressed view of HSE National from the outset was that the young person did not meet the criteria. Here, the fact that the boy faced criminal charges appeared to be central in that the position of HSE National was that the ongoing criminal proceedings were material to its decision. Further disagreement and lack of clarity prevailed about the significance of the High Court ruling in the case in July 2007, and the availability of a High Support placement, both of which affected the progression of High Support as an alternative placement to Special Care. The lack of integration and co-ordination across the admissions process for Special Care and High Support placements caused particular concern.⁴⁶

In conclusion, the Investigation found that:

- the lapse of time in making a decision not to apply for a Special Care order - from August until November – amounted to an ‘undesirable administrative practice’;
 - the lack of a consultation process between HSE National and CAAB, given that there were different opinions, similarly amounted to an ‘undesirable administrative practice’.
- Responsibility for this communication rests with the HSE.

Although the young person benefited to a degree from his time at FCAC, he experienced ‘feeling in limbo’ arising from the length of time he was awaiting a decision about his onwards placement. The usual time for a placement at FCAC is four to eight weeks. He was detained on remand for seven months and in addition to this being too long for a remand/assessment placement, it was not the placement recommended by relevant professionals as being suitable to his needs. OCO also concluded that the delay in providing an onward placement from FCAC resulted in a delay in a placement being provided where he could benefit from longer term therapeutic involvement. The length of time on remand and the delay in providing the onwards placement were found to have adversely affected the child concerned.

According to the Ombudsman for Children, the intertwining of the criminal and civil systems in this area may be inevitable for children who present with a mix of welfare and justice problems and the needs of such vulnerable children cross different court

⁴⁵ Ibid, para 3.34.

⁴⁶ Ibid, para 3.42.

jurisdictions as well as different parts of the legal system. The result of the current jurisprudence is that children who face criminal charges cannot access special care, even where this is recommended, until these proceedings are concluded. This situation will continue until legislation addressing this issue is enacted.

The Ombudsman for Children's Office recommended that:

- A national strategy for special care be developed by the HSE;
- A written appeals procedure in relation to applications for special care be developed;
- Improved integration be provided across HSE provision, specifically special care and high support;
- The young person in this case receives an acknowledgement of the difficulties in this case, and an explanation of steps being taken by the HSE to address these difficulties.

Responses from the HSE confirmed that all the above matters are being progressed. The Ombudsman for Children welcomed this progress but repeated the conclusion that ultimately a boy with significant welfare needs was detained on remand for seven months while the relevant authorities determined the most appropriate way to meet his welfare needs.

Summary of Relevant Children's Rights Standards

Numerous international instruments concern the rights and treatment of children in conflict with the law and, children without parental care are also treated as a separate category. However, children in need of secure care receive little specific attention within international standards and children caught in between the care and criminal justice systems even less so. This clearly affects the level of analysis to which the above complaint can be subjected from a children's rights perspective. That said, the analysis falls into two categories: ECHR law and CRC standards.

ECHR Law

Even though the ECHR makes little provision for children's rights, children with complex needs were contemplated by Article 5 of the ECHR which covers the right to liberty. Under Article 5(1)(d) children ('minors') can be deprived of their liberty for the purpose of 'educational supervision' and 'and 'for the purpose of bringing him before the competent legal authority'. It is not entirely clear what form of detention this allows for children, although three judgments of the Court have shed light on this issue and are directly relevant to this complaint. First, in the *Bouamar* case in 1987, the Court held that the confinement of a juvenile in remand prison was contrary to the Convention because

the detention did not serve its intended purpose of educational supervision.⁴⁷ In this case, the boy had been placed in detention on remand pending the availability of a place in a dedicated juvenile facility, where he would receive ‘educational supervision’. As to whether this was compliant with Article 5(1)(d), the Court held that it was insufficient that a child be detained for the purpose of educational supervision, he/she must actually be provided, speedily, with the appropriate facilities to ensure that these objectives are met’. The fact that the applicant in *Bouamar* was subsequent to several consecutive remand placements – where he was placed while they identified a suitable place to meet his needs - enhances further the relevance of this judgment to the instant case.

In 2000, the Court considered the application of Article 5(1)(d) to the placement of a young girl in a secure unit by the local authority for protective purposes under s 25 of the Children Act 1989.⁴⁸ The applicant argued that her placement in secure accommodation did not constitute ‘educational supervision’ within the meaning of the Convention and was thus unlawful. On the facts, the Court noted that the detention order was made in the context of a long history of efforts to ensure the best up-bringing for the applicant, and that both the care order and the application for a secure accommodation order were intended to keep her in safe surroundings which appeared necessary given her mental condition. As to whether this was compatible with Article 5 (1)(d), the Court noted that ‘educational supervision’ should not be equated rigidly with notions of classroom teaching and in the context of a young person in local authority care it must

embrace many aspects of the exercise by the local authorities of parental rights for the benefit and protection of the person concerned.

No violation was found. According to this author writing elsewhere, ‘what is clear from the *Koniarska* case and the subsequent application of the decision by the English Court of Appeal⁴⁹ is that placing a young person in secure accommodation to address his/her need for protective care is not contrary to the Convention in principle, but the legality of that decision is dependent on the child’s needs being met in an appropriate facility.’⁵⁰

The case of *DG v Ireland* is also relevant here.⁵¹ Here, the applicant complained that his detention in St Patrick’s Institution for ‘care’ rather than remand purposes was not compatible with Article 5(1)(d) of the ECHR. What concerned the Court was not that the boy was detained in a penal institution despite the fact that he did not face criminal

47 *Bouamar v Belgium* (1988), 11 EHRR 1. See further Kilkelly, ‘The Human Rights Act 1998: Implications for the Detention and Trial of Young People’ (2000) 51(3) *Northern Ireland Legal Quarterly* 466.

48 *Koniarska v UK*, 12 Oct 2000, unreported.

49 *W Borough Council v DK & Ors*, Court of Appeal, 16 Nov 2000.

50 Kilkelly, *Children’s Rights in Ireland: Law, Policy and Practice* (Bloomsbury Publishing, 2008).

51 *DG v Ireland*, (2002) 35 EHRR 1153. See also Kilkelly, ‘DG v Ireland: Protecting the rights of children at risk: a lazy government and unruly courts’ 24 *Dublin University Law Journal* (2002) 269-290.

charges, but rather the fact that the regime did not meet the demands of 'educational supervision'. Accordingly, regardless of whether a secure facility has 'care' or 'justice' objectives, the placement of a young person there will only be ECHR compliant where it meets the demands for educational and rehabilitative care.

International Standards

As in other areas, the Convention on the Rights of the Child is the key instrument detailing the rights of children here. According to Article 3, the best interests of the child is a primary consideration in all actions concerning children and must therefore guide all the decisions made in the context of providing children with alternative care. According to the Committee on the Rights of the Child, this requires an individualised approach to providing for the alternative care of children, meaning 'more tailored solutions based on the actual situation of the child, including her/his personal, family and social situation'.⁵² This provides 'better opportunities for the assessment of the child's long-term development and it respects the principle of the best interests of the child'. The Council of Europe Recommendation on Child Friendly Justice provide, similarly, in assessing best interests of the child their views and opinions should be given due weight, all other rights of the child should be respected and a comprehensive approach should be adopted so as to take account of all interests at stake including psychological and physical well-being and legal, social and economic interests of the child.⁵³

Also important here is Article 12 of the CRC, which contains a duty to ensure that children can express their views in all matters affecting them and a requirement to ensure that those views are given due weight in accordance with the child's age and maturity. In the context of alternative care, the Committee on the Rights of the Child has recommended that children should be heard throughout the protection measure process, before making the decision, while it is implemented and also after its implementation. For this purpose, it has recommended the establishment of a special mechanism, such as a family conference, which values children as partners.⁵⁴ In this regard, the Council of Europe Recommendation on Child Friendly Justice highlights the importance of providing children with information about their rights, and the systems and procedures governing determination of their best interests.⁵⁵

More specifically, the following standards are pertinent:

- Article 20 provides that a child temporarily or permanently deprived of his/her family environment, or in whose own best interests cannot be allowed to remain

⁵² Committee on the Rights of the Child, *General Day of Discussion on Children with Parental Care*, (2005), para 667.

⁵³ Council of Europe Recommendation on Child Friendly Justice, section III, para B.

⁵⁴ Committee on the Rights of the Child, *General Day of Discussion on Children with Parental Care*, (2005), para 664.

⁵⁵ See section IV, A, 1.

in that environment, shall be entitled to special protection and assistance provided by the State. The Committee on the Rights of the Child recommends that states 'ensure that the placement of children in alternative care is based on 'a carefully conducted assessment of the needs and best interest of the child by a competent and multidisciplinary group of experts and that a short- and long-term plan, including the goals of the placement and the measures to achieve these, is available at the time of the placement and is regularly adapted to the development of the child.'⁵⁶

- Under Article 25, children who have been placed by the competent authorities for the purposes of care, protection or treatment of their physical or mental health, have the right to a periodic review of the treatment provided and all other circumstances relevant to his/her placement.
- Article 37 provides that a child shall not be arbitrarily deprived of his/her liberty and that detention shall be in conformity with the law and used only as a measure of last resort and for the shortest appropriate period of time.
- For children charged with or accused of committing a criminal offence, Article 40 of the CRC recognises the child's right to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. Under Article 40 (2)(a)(iii), states shall ensure that every child accused of infringing the criminal law has the right to have the matter 'determined without delay' in a fair hearing according to law. According to the Committee on the Rights of the Child, there is international consensus that for children in conflict with the law the time between the commission of the offence and the final response to this act should be as short as possible. The longer this period, the more likely it is that the response loses its desired positive, pedagogical impact, and the more the child will be stigmatized.⁵⁷ In fact, the Committee has recommended that states set and apply time limits for the period between the commission of the offence, the decision to prosecute and the final decision of the adjudicator.⁵⁸ Moreover, these should normally be shorter than those acceptable in the case of an adult. States should also provide for the maximum involvement possible of parents in this process.⁵⁹
- Article 40(3)(b) of the Convention provides that a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

56 Ibid. para 654.

57 Committee on the Rights of the Child, *Children's Rights in Juvenile Justice* CRC/C/GC/10 (2007), para 51.

58 Ibid, para 52.

59 Ibid, para 54.

- The Council of Europe Recommendation on Child Friendly Justice places particular weight on the need to avoid undue delay in cases concerning children. It requires particular regard to be had to the requirement of proceeding urgently in proceedings involving children, and in family cases, they require that courts exercise 'exceptional diligence to avoid any risk of adverse consequences on the family relations'. This is supported by the case-law of the European Court of Human Rights under Article 8 of the ECHR.⁶⁰

Conclusions

In addition to the questions of poor administration found by the Ombudsman for Children in this investigation, the application of international children's rights standards to this case allow for the following conclusions:

- The continuing remand of the child in Finglas Child and Adolescent Centre and the failure to provide him with the care he was determined to need raises a very serious issue of compatibility with Article 5(1)(d) of the ECHR. His detention was not for the purposes of 'educational supervision' as this provision requires and the application of the ECtHR jurisprudence make clear that the interim placement was not sufficiently proximate to the placement eventually provided to satisfy the demands of Article 5. Furthermore, the child's detention on remand was not in compliance with the Article 37 duty that it be a measure of last resort and for the shortest appropriate period of time;
- It does not appear that the best interests principle guided the decision-making in this case. In addition, there would not appear to have been any structures ensuring that this informed the outcome, notwithstanding the statutory obligation on the HSE in this regard;
- The child did not receive the care and protection he required at the appropriate time, as required by Article 20 of the CRC. Whether this was High Support or Secure Care, no attempt was made to make a decision on the basis of the child's best interest and to implement that decision;
- Although this issue was not specifically addressed in the Investigation Statement, the child does not appear to have been kept informed about or been involved in the decision-making in his case contrary to the Article 12 of the CRC and the Recommendation on Child Friendly Justice;
- Despite pending criminal charges, there does not appear to have been any attempt to deal with these in an expeditious manner, as the standards require. This is particularly pertinent given that there appears to have been an impediment to the application for Special Care.

⁶⁰ See for example *W v UK*, (1988) 10 EHRR 95; *Hokkanen v Finland* (1994) 17 EHRR 293 and the accompanying discussion in Kilkelly, 'Child Law and the ECHR: Lessons for Ireland' in Kilkelly, (ed) *ECHR and Irish Law*, 2nd Ed (Jordans, 2009).

- Delay was a serious obstacle to the vindication of the child's rights in this case. Moreover, the priority of avoiding undue delay appeared to play no part in the decision-making process.

The Investigation Statement identifies the measures that have been taken to prevent the above scenario from being repeated. In particular, it notes the provision for the enactment of legislation and the development HSE policy in this area. It is important that both legislation and policy take into account the international standards highlighted above, especially those of the ECHR which bind the HSE in particular. In addition, it is recommended that the best interests principle, the right of children to participate in decision-making, and the duty to avoid delay are primary considerations in all decision-making in this area. The compatibility of current decision-making practices and approaches with the HSE's obligations under Article 5 of the ECHR in particular should be carefully examined.

Investigation Statement 5: Eligibility for Concessionary School Transport for a Child with Special Needs

Summary of the Case

The Complaint

Mr W complained to the Ombudsman for Children on 14 March 2008 on behalf of his daughter L, aged 9, who has profound special needs. He complained about the failure on the part of the Department of Education and Science School Transport Section to make concessionary school transport available for his daughter with the result that she was only able to attend school on a sporadic basis with serious, adverse consequences for her and their family life. He complained that the relevant policy was implemented in an absolute manner by the School Transport Section notwithstanding the viability of alternative solutions which he presented to them.

OCO Findings

Eligibility for school transport is determined on either a 'full' or a 'concessionary' basis. Concessionary school transport is possible only where there is space on the relevant school bus and where the applicant is prepared to make a contribution towards the cost. It is policy of the Department of Education and Science not to allow children with special needs to avail of concessionary school transport primarily because this is discretionary and does not guarantee school transport for the child.

L's family had identified a particular school near their home as best placed to meet her needs. The Special Educational Needs Organiser (SENO) at the Department of Education and Science disagreed with their choice, and considered that an alternative school was preferable. As the school was outside the relevant catchment area, it fell to L's parents to make an application for concessionary school transport. This was turned down because concessionary school transport is not appropriate for children with special needs on the ground that it cannot be guaranteed. However, L's father made enquiries and discovered that there was a bus picking up a short distance from their home which was wheelchair accessible and had space for L. He offered to contribute to the cost so that the Department of Education and Science would not have incurred any additional cost in making this transport available to enable L to attend the school of their choice. The Department refused citing that children with special needs are not eligible for concessionary school transport. As a consequence, L's parents had to bring her to school with the result that her attendance was sporadic at best, with serious knock-on effects on her education, her personal development and family life generally.

Following its investigation, the Ombudsman for Children found that although there were some elements of the concessionary school travel scheme that make it unsuitable for children with special needs, the failure to apply the policy with flexibility in the individual circumstances of the case was improperly discriminatory. According to the Ombudsman for Children, decisions of this nature should be made with respect to the

individual circumstances of the child concerned. Although there were obstacles to its use in this case, these were largely capable of being overcome – in particular, as L’s father established there was a place on the relevant bus, which was wheelchair accessible, the family was willing to pay the additional costs and was also willing to drive L to a pick-up point because the bus did not pass their house. Despite this, the rule of not allowing concessionary transport to be applicable in the case of children with special needs was applied as a fixed policy. This was the case despite the hardship that it created for L and her family and the important and detrimental impact that it had on their lives and on L’s education and development.

According to the Ombudsman for Children, the policy should be flexible in its approach and should aim to consider the best interests of the child, assessed individually. The fact that the barriers could and were being overcome in this case should have triggered a wider policy response, leading to a re-examination of the blanket prohibition that applied. Had this been the case, the genuine local efforts made to resolve this problem might have had greater impact.

In conclusion, the Ombudsman for Children found that the actions of the authorities were improperly discriminatory and contrary to fair administration. Indeed, it found that the general rule that applied was similarly improperly discriminatory and contrary to fair administration. The Ombudsman for Children recommended that the Department of Education and Science revise its existing policy on school transport to allow concessionary transport for children with special needs in certain circumstances.

Summary of Relevant Children’s Rights Standards

As noted above in relation to investigation statement no 2, there are few directly relevant international standards on school transport. As was also noted above, however, school transport is linked to the duty to make education accessible to children. This is a particularly profound connection in the instant case, where the gravity of the child’s special needs meant that the failure to allow her to use available school transport, on the grounds that she was technically ineligible, deprived her of her right to education. Accordingly, the following standards are relevant here:

- Similar to the other cases above, Article 3 of the CRC requires that the best interests of the child is a primary consideration in all actions taken about the child. This principle should be incorporated into law and policy and implemented via the adoption, *inter alia*, of child impact assessment of decision-making.⁶¹

61 Committee on the Rights of the Child, *General Measures of Implementation*, para 45.

- Under Article 23 (1) of the CRC, states recognise that a child with a disability 'should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.' Under Article 23(2), states shall 'encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition'. The Committee on the Rights of the Child has noted that the assistance must be 'appropriate to the child's condition and the circumstances of the parents or others caring for the child.'⁶²
- Under Article 23(3), special assistance should be designed so that the child has 'effective access to and receives education ... in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.'
- The Committee on the Rights of the child has recognised the importance of transport in the lives of children with disabilities. In particular, it has urged states to 'set out appropriate policies and procedures to make public transportation safe, easily accessible to children with disabilities, and free of charge whenever possible, taking into account the financial resources of the parents or others caring for the child.'⁶³
- The Committee has also highlighted the importance of the family to the disabled child. In particular, it has noted that children with disabilities are best cared for and nurtured within their own family environment 'provided that the family is adequately provided for in all aspects'.⁶⁴ The provision in Article 18 of the CRC that the state has a duty to support parents in ensuring that the best interests of the child are their basic concern has particular resonance here.
- Article 28 of the CRC recognises the right to education, whereas Article 29 sets out the aims of education. According to the Committee on the Rights of the Child, effective access of children with disabilities to education has to be ensured to promote 'the development of the child's personality, talents and mental and physical abilities to their fullest potential'.⁶⁵ Education also has to provide the child with the 'empowering experience of control, achievement, and success' to the maximum extent possible for the child.⁶⁶ The Committee has also noted that 'inclusive education should be the goal of educating children with disabilities, but that the manner and form of inclusion must be dictated by the individual educational needs of the child.'⁶⁷

⁶² Committee on the Rights of the Child, *The Rights of Children with Disabilities*, para 12.

⁶³ *Ibid*, para 39.

⁶⁴ *Ibid*, para 41.

⁶⁵ *Ibid*, para 62. See also General comment No 1 Aims of Education.

⁶⁶ *Ibid*, para 64.

⁶⁷ *Ibid*, para 66.

- Article 2 guarantees Convention rights without discrimination on any ground including disability. Article 7(1) of the Convention on the Rights of Persons with Disabilities requires similarly that states take 'all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children'.
- Article 9 of the Convention on the Rights of Persons with Disabilities also requires that states ensure that transport is accessible and available without discrimination to persons with disabilities in order to allow them to live independently and participate fully in all aspects of life. Under this provision, states are under a duty to identify and dismantle barriers to the equal access by persons with disabilities *inter alia* to transportation, including in rural areas.
- Article 2 of the First Protocol to the ECHR guarantees the right to education and read with Article 14 of the ECHR, prohibits discrimination in education. Although the state enjoys a certain margin of appreciation as to how it guarantees the right to education, whether discrimination is present in a given case will depend on the procedural safeguards available to the individual to challenge the exercise of any discretion applied.⁶⁸ In particular, ECHR case law requires that any difference in treatment between children with disabilities and children without disabilities must pursue a legitimate aim. There must be a reasonable relationship of proportionality between that aim and the means used to achieve it.

Conclusions

The Ombudsman for Children's Office found that the actions taken in this case showed evidence of improper discrimination. Viewed from a children's rights perspective, the following conclusions can also be drawn:

1. It would appear that a *prima facie* case can be established that the treatment of the girl in this case amounted to discrimination reading Article 2 of Protocol 1 of the ECHR, together with Article 14. Although the basic policy not to allow children with disabilities to access concessionary school transport provision might be said to pursue a legitimate aim, the means used to execute that aim (a blanket and inflexible policy) could be said to be disproportionate, especially given the impact of that decision on the child's right to education.
2. More generally, it is apparent that L's treatment fell short of what is required by various provisions of the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities in that she could not access education, despite its central importance to her personal development and well-being, because of the failure to take a more flexible approach to the application of the School Transport Policy.

⁶⁸ *DH and Others v Czech Republic*, 7 February 2006, paras 206-207.

3. It is apparent that the best interests of the child did not guide the decision-makers in this case. The assertion of what was in the child's interests by the child's father in particular did not trigger a re-evaluation of the merits of the decision, to the extent that such an evaluation had taken place in the first instance.
4. The authorities do not appear to have acted with an awareness of the detrimental impact that their inflexible position had on the child's family. Rather than being supported to vindicate her right to education, the family's wishes and perhaps more importantly their initiative in seeking a workable solution to the problem appear to have been given little weight.

In addition to the recommendations made by the Ombudsman for Children, the following might also be recommended here:

- As the Ombudsman for Children has pointed out, school transport policy should be reviewed to ensure an individual decision making process in each case. School transport policy should be reviewed to ensure its consistency with the right to education under the ECHR and generally.
- Relevant decision-makers should be trained on children's rights to sensitise them to the rights and interests of children and their families, and to generate awareness about their obligations, especially under the ECHR Act 2003.

Investigation Statement 6: Inability by a child with autism to avail of home tuition under the July provision scheme for 2003-2005

Summary of the Case

The Complaint

The complaint was brought to the Ombudsman for Children's Office in February 2007 by a mother on behalf of her son who has an autistic spectrum disorder (ASD). He had been attending mainstream primary school and was in receipt of maximum resource teaching hours since 2003 as a result of his diagnosis. In 2006, a professional working in the area of autism advised the mother of the availability of home based tuition under the 'July Provision' scheme administered by the Department of Education and Science. This scheme provides for the extension of educational provision through the month of July for children with severe or profound disability (to prevent them falling behind or regressing over the holiday period) with a grant for home tuition where the child's school is not participating in the school based scheme. The mother applied for the grant on behalf of her son to facilitate home based provision in 2006 and also requested retrospective payment for the years 2004-2005 on the basis that she believed that her son had missed out on 40 hours of tuition annually which was available with this scheme. Home based tuition under the July Provision scheme was sanctioned for 2006 but the application for retrospective payment was refused.

OCO Findings

The investigation by the Ombudsman for Children's Office concerned:

- The processes and procedures for identifying and notifying potential recipients of the July Provision scheme and the home based tuition;
- Whether the administrative actions of the Department of Education and Science constituted maladministration, and if so whether the child had been adversely affected.

The eligibility criteria for the July Scheme (home based provision) are that

1. the child must have a diagnosis of ASD or other severe disability; and
2. the child must be attending a school which is not participating in the scheme.

The educational needs of children with autism are provided through

- special schools;
- special classes in mainstream schools; and
- mainstream schools with resource teaching support.

Since 2001, the Department of Education and Science contacts special schools and mainstream schools with special classes annually to invite them to participate in the scheme. The school notifies the Department of its intention and schools that do not

intend to participate in the July provision are informed of the home tuition scheme; it is the school's responsibility to advise parents of this.

According to OCO, the Department of Education and Science did not inform mainstream schools of the availability of the July Provision scheme for children with autism (on the grounds that it was not envisaged for these pupils). Instead, such parents heard about the availability of the scheme by word of mouth and these cases were dealt with on a case-by-case basis. The Department acknowledged that there was no system in place to enable identification of children attending mainstream school who were diagnosed with autism as there was no record held centrally of the schools that had been allocated resources for such children. This situation was rectified in 2007 following OCO intervention.

Following its investigation, the Ombudsman for Children's Office concluded that:

- The development of the July Provision scheme was based on a memo sent to the Department of Finance by the Department of Education and Science in 1997. There is no policy document or circular which details the guidelines to be followed in its administration.
- There is no evidence that the Department of Education and Science had a procedure in place regarding identifying and notifying parents of children with autism in mainstream schools of the availability of the grant for home based provision.
- Even though applications came to and were granted by the Department, the Department did not take any steps to rectify the situation, specifically to review the procedure for communicating the availability of the scheme to potential recipients. This is likely to have been exacerbated by the lack of policy in this area.
- The absence of clear or written policy or guidance can lead to difficulties administering the scheme, giving rise to an undesirable administrative practice.
- The child in question has benefited greatly from the availability of the home based tuition made available to him since 2006. The fact that it was not available to him previously despite his eligibility for the Scheme due to the lack of communication and inadequate planning by the Department of Education and Science to ensure that those likely to be eligible be made aware of the Scheme has been to his detriment.

The Ombudsman for Children recommended that the Department of Education and science:

- Ensure that all children entitled to apply for the July Provision scheme are made aware of its availability;
- Consider developing processes for raising awareness of services available;
- Develop appropriate policies and guidelines to underpin the scheme;
- Consider what alternative measures could be taken to mitigate the adverse effect on the child.

Summary of Relevant Children's Rights Standards

It has been highlighted above that a range of international instruments make provision for children's rights in education (Article 28 CRC and Article 2 of the First Protocol to the European Convention on Human Rights), and make special provision for children with disabilities (Article 2 of the CRC prohibits discrimination on this ground; Article 23 makes specific provision for children with disabilities, as does Article 7 of the Convention on the Rights of Persons with Disabilities). The provisions that are especially relevant to this complaint are as follows:

- Article 23 (2) of the Convention on the Rights of the Child recognises the right of children with disabilities to special care and places an obligation on states to encourage and ensure the extension, subject to available resources, to the eligible child ... of assistance for which application is made.
- Under Article 23(3), such assistance shall be designed to ensure that the child has 'effective access to and receives education, training ... rehabilitation services ... in a manner conducive to the child's achieving the fullest possible social integration and individual development.'
- The value of effective education to children with disabilities is stressed in the Committee on the Rights of the Child's General Comment No 9, where the importance of individualised education is highlighted.⁶⁹ Aware of the challenges of inclusive education for children with disabilities, the Committee has highlighted the need for children to receive individualised supports to enable their education in the mainstream setting. Close co-operation between those in different educational settings is particularly important in this context.⁷⁰
- Article 4 of the CRC requires all measures to be taken to implement Convention rights. Moreover, the Committee on the Rights of the Child has recommended that states 'develop and effectively implement a comprehensive policy by means of a plan of action which not only aims at the full enjoyment of the rights enshrined in the Convention without discrimination but which also ensures that a child with disability ... receive(s) the special care and assistance they are entitled to under the Convention.'⁷¹
- Under Article 3 of the CRC provides that the best interests of the child shall be a primary consideration in all actions affecting the child.⁷² According to the Committee, 'Article 3 should be the basis on which programmes and policies are set and it should be duly taken into account in every service provided for children with disabilities and any other action affecting them.'⁷³

69 See para 65 for example.

70 See paras 66-67.

71 Committee on the Rights of the Child, General Comment No 9, *The Rights of Children with Disabilities*, para 13.

72 See Article 7 of the Convention on the Rights of Persons with Disabilities.

73 Committee on the Rights of the Child, General Comment No 9, *The Rights of Children with Disabilities*, para 29. See also Committee on the Rights of the Child, General Comment No 5, para 12.

- Under Article 42, states undertake to make the principles and provisions of the Convention widely known to children and adults alike. The Committee on the Rights of the Child has stressed the importance of raising awareness among children and those who work for and with them about their rights under the Convention.⁷⁴ Information campaigns, training and the adoption of strategy for dissemination are key elements of the effective implementation of the Convention. In 2006, the Committee recommended that Ireland '[u]ndertake, with the involvement of children, awareness-raising campaigns which focus on prevention and inclusion, available support and services for children with disabilities.'⁷⁵
- The Committee on the Rights of the Child has made it clear that for rights to have meaning, remedies must be available to redress violations. Moreover, where rights are found to have been breached, there should be appropriate reparation, including compensation.⁷⁶

The Convention on the Rights of Persons with Disabilities (CRPD) also contains numerous provisions relevant to the situation under consideration here. For instance,

- under Article 4(1)(h), states undertake to provide accessible information to persons with disabilities about the various forms of assistance, support services and facilities available to meet their needs;
- Under Article 4(3), states are required to consult closely with and actively involve persons with disabilities, including children with disabilities, through their representative organizations in the development and implementation of law and policy designed to implement the Convention and with respect to other decision-making processes concerning issues relating to persons with disabilities.
- Under Article 9, states are required to promote appropriate forms of assistance and support to persons with disabilities to ensure their access to information.
- Under Article 8, immediate, effective and appropriate measures, including awareness raising programmes, must be taken to raise awareness about persons with disabilities, including children with disabilities, and their rights.
- Article 24 concerns the right of those with disabilities to access effective education that meets their needs. Of particular note is the requirement that persons with disabilities receive the support required, within the general education system, to facilitate their effective education and that effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

⁷⁴ Committee on the Rights of the Child, General Comment No 5, paras 66-70.

⁷⁵ Committee on the Rights of the Child, Concluding Observations: Ireland, CRC/C/CO/IRL/2, para 42(b).

⁷⁶ Committee on the Rights of the Child, General Comment No 5, *General Measures of Implementation*, para 24.

Conclusions

The investigation of the Ombudsman for Children's Office concluded that the child had suffered treatment to his detriment because of an undesirable administrative practice, namely the failure to ensure that all children entitled to apply for the July Provision scheme were made aware of its availability and the failure to enact appropriate written policy in this area. From a children's rights perspective, the following points can be made:

- Notwithstanding that Article 23(2) of the CRC is drafted in very limited terms, it is clear that its minimum standard was not reached on this occasion. Despite deciding that children with a diagnosed disability were entitled to special educational provision, the Department did not bring this eligibility to the relevant children and their families. The result is a de facto denial of the July Provision to those who were otherwise eligible and an undermining of the special support put in place to assist children like the boy involved here.
- Contrary to obligations under the CRC and to the guidance of the Committee on the Rights of the Child, the failure to adopt a written policy and plan appropriately for the implementation of the July Provision undermined its effective implementation generally. More specifically, it undermined the Scheme's purpose in the case of the child concerned here (and arguably many more children). In this regard, the Department of Education and Science was clearly not acting on the principle that the best interest of the child are a primary consideration in all actions concerning the child.
- Contrary to provisions of both the CRC and the CRPD, obligations were not met to raise awareness about the right of children with disabilities to access available supports for which they were eligible.
- As a result of the above, the child concerned was denied an element of his right to education through the negligent omissions of the Department of Education and Science.
- The Department of Education and Science refused to pay the mother of the child for the period of time that her son was unable to avail of the July Provision scheme due to her lack of awareness of its availability. In light of the above conclusions, it is at least arguable that having been denied access to educational provision for which he was eligible, the child was entitled to some form of redress in order to give effect to the right in question. Given the serious consequences for the child of not having access to the scheme and the fact that he would have had such access had it not been for the Department's failure to bring it to his mother's attention, it is submitted that some form of redress/compensation for the adverse effect suffered should have been forthcoming.

Investigation Statement 7: The Administrative Actions of the Department of Education and Science with respect to an application for a home tuition grant made by a child with Autism.

Summary of the Case

The Complaint

The complaint was made by M in February 2008, on behalf of her son, A, who has autism. As a result of his disorder, A received 20 hours tuition per week for the school year 2004/2005 under the Home Tuition Scheme. In advance of starting primary school in September 2005, his mother arranged ten hours per week home tuition to assist with the transition and applied to the Department of Education and Science in August 2005 for same. The application was supported by a HSE educational psychologist. The application was not immediately sanctioned but M was not unduly concerned as she had experienced such delays with a similar application for her other son B, in respect of whom payments had been backdated to the start of the school year. However, on this occasion, M's expenses were not processed (the family spent €10,305 on a tutor over the course of the year) and correspondence and phone calls made to the Department of Education and Science allegedly went unanswered. She was then notified by letter on 5 July 2006 that the grant would not be awarded for her son.

OCO Findings

Following its investigation of the matter, the Ombudsman for Children's Office concluded that:

- There was no specific policy document in existence at the relevant time governing how the Home Tuition Grant was to be administered. For 2005/2006, the terms of the scheme were contained in the application form. According to the Department, the policy of not commencing tuition prior to approval of the grant was set out in the 2002 Home Tuition Guidelines and was also set out on the application forms, although not in 2005/2006.
- The application with respect to A was received by the Department of Education and Science in August 2005 and a decision was communicated to M in July 2006. Other correspondence in respect of B was issued to M in September 2005 indicating a change in policy and confirming that home tuition would only be supported as an interim measure until a suitable school placement could be secured. M did not receive this letter and further correspondence from M to the Department in respect of A went unanswered.
- The Department advised the Ombudsman for Children's Office that following a review of the Home Tuition Scheme it had been decided to discontinue the practice whereby children in full-time education would also be able to avail of home tuition grants. A's application was refused on this basis.
- Retrospective payments were refused on the grounds that it was not good financial practice. This is despite the fact that it contrasted with what had occurred in the immediate past in the family's dealing with the Department.

Accordingly, the OCO investigation found that:

- There was a serious omission on the part of the Department of Education and Science to communicate adequately to the complainant with respect to A's application. Requests for clarification went unanswered and the application was not processed, but was placed on file erroneously. This amounted to an undesirable administrative practice contrary to fair and sound administration.
- The basic administrative expectation from a public body, ie that it will acknowledge, process, determine and communicate an application received within a reasonable time did not occur here.
- M did not receive any indication that she would not be reimbursed for the tuition paid for her family for A. Clearly, the change in policy and period of transition – indicated in the correspondence with respect to B (in December 2005) - gave rise to some uncertainty and in response M took active steps to clarify the situation but to no avail. According to the Ombudsman for Children's Office, this effectively put the Department on notice of the administrative failings which had occurred and yet no reply was forthcoming until July 2006.
- The decision of M to continue to pay for A's tuition was not unreasonable in the circumstances given the uncertainty, the previous practice of making retrospective payments and the fact that B's situation, despite the change in policy, was continuing as before.
- A was clearly adversely affected by the situation that unfolded. A range of services could have been made available to him with the monies spent by M on his home tuition and as a result, he (and his siblings who also have autism) lost out on having these educational and therapeutic needs met.

In summary, the above amounted to an undesirable administrative practice which was contrary to fair and sound administration. This had an adverse effect on A through denial of his rights to due process and procedural expectation and through contributing to the lack of funding within his family to provide further educational and therapeutic resources for his benefit.

Summary of Relevant Children's Rights Standards

These complaints draw on the following children's rights standards some of which repeat standards highlighted above:

- Article 3 of the CRC requires the best interests of the child are a primary consideration in all actions taken concerning the child. According to the Committee on the Rights of the Child, this means that '[e]very legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions.'⁷⁷ In its Concluding Observations in 2006, the Committee recommended that the Government ensure that the Article 3 principle is applied 'in all political, judicial and administrative decisions, as well as projects, programmes and services that have an impact on children'.⁷⁸
- Article 23 of the CRC provides for the right of children with disabilities to special care and makes limited provision for a child with disabilities to access supports and services for which he is eligible and for which application has been made. According to the Committee on the Rights of the Child, this assistance has to be 'appropriate to the child's condition and the circumstances of the parents'.⁷⁹ This need for individualised supports to be tailored to meet a child's needs is apparent from the Committee's guidance.⁸⁰
- Article 4 of the CRC requires the state to take all appropriate measures, including legislative measures, to implement Convention rights. Moreover, in order to meet the specific requirements of Article 23, states must 'develop and effectively implement a comprehensive policy by means of a plan of action which not only aims at the full enjoyment of the rights enshrined in the Convention without discrimination but which also ensures that a child with disability and her or his parents and/or others caring for the child do receive the special care and assistance they are entitled to under the Convention.'⁸¹ In 2006, the Committee expressed concern that 'the legal framework inadequately addresses the specific needs of children with disabilities and their access to necessary health services and educational facilities'.⁸²
- The Committee on the Rights of the Child has also highlighted the importance of information to children with disabilities and their families. Information ensures that children and their families can be adequately educated on the disability, including its causes, management and prognosis. It has noted that this knowledge is 'extremely valuable as it does not only enable them to adjust and live better with their disabilities,

77 Committee on the Rights of the Child, *General Comment No 5*, para 12.

78 Committee on the Rights of the Child, *Concluding Observations: Ireland, CRC/C/IRL/CO/2006*, para 23.

79 Committee on the Rights of the Child, *General Comment No 9*, para 12.

80 *Ibid*, para 63.

81 *Ibid*, paras 13 and 18.

82 Committee on the Rights of the Child, *Concluding Observations: Ireland, CRC/C/IRL/CO/2006*, para 41.

but also allows them to be more involved in and to make informed decisions about their own care.⁸³

- The Convention on the Rights of the Child is clear about the importance of the family to children. For example, Article 18(2) requires that parents are adequately supported to enable their fulfilment of their responsibilities towards their children. This is true of the family of a child with disabilities also and the Committee on the Rights of the Child has noted the importance to children with disabilities of ensuring that their families are adequately supported and resourced to care adequately for their children.⁸⁴

Conclusions

The dominant feature of this case was poor administrative practice against which children's rights standards provide little real protection. Even though children with disabilities have no explicit right under the CRC to any particular kind of support or resource, and the terms of the Home Tuition Scheme were legitimately changed making A ineligible for this Scheme, the complaint nonetheless raises two important children's rights considerations.

1. There was a failure to put a written policy in place in respect of the Home Tuition Scheme and to ensure the effective operation of and oversight of communication and other protocols for the review of applications and the communication of decisions. As the Committee on the Rights of the Child makes clear, the absence of such infrastructure undermines the implementation of both the CRC and domestic policy. The failure to ensure that those affected by the policy in question, and to communicate the change to that policy which had an adverse affect on A highlights a failure to take the child's best interests into account in the administration of the policy. Decision-making does not appear to have been informed by what is in the best interests of child A raising both substantive and procedural issues with respect to the implementation of Article 3.
2. The delayed communication of the decision to refuse A retrospective payment for the tuition left the family substantially out of pocket and deprived A and his siblings of other additional supports and resources necessary both for the children and the family as a whole. The manner in which the application was (mis)handled took the decision-making capacity away from the family in this case, reducing the parents' ability to make decisions in the best interests of all their children. This is contrary to international standards which, by contrast, urge support for parents in the exercise of their child-rearing responsibilities.

83 Ibid, para 18.

84 Ibid, para 41.

Investigation Statement 8: Investigation into HSE provision for a mother and her baby, both in the care of the state.

Summary of the Case

The Complaint

This complaint was based on an own motion investigation by the Ombudsman for Children with respect to the treatment of a young mother in the care of the HSE, A, and her young son, B. The girl, aged 16 years, contacted the Office in June 2009. She had been in the care of the HSE and since January 2008 she had been living in a residential unit. In September 2008, the HSE were made aware by her that she was pregnant. Placement in a mother-baby unit was discussed in January 2009 and in March 2009 a pre-birth child protection conference was convened at which the concerns about both prospective parents' abilities to care for the baby were discussed. Although she denied physical violence, there was some concern that the girl was at risk of harm from the father and his family. A recommendation was made that the mother and baby be placed in a Cork unit for an initial period of three months after the birth of the child and it was also proposed to seek legal advice regarding safeguarding the mother and baby through the legal system.

A moved to Cork in March 2009 but she was very unhappy there and threatened to kill the baby if she was not allowed to return to her home county. She returned there nine days later. The child protection case conference was reconvened on 9 April 2009 as the proposed child protection plan had changed. It was decided that the HSE would apply for an interim care order for the baby on his/her birth. Legal advice was to be provided to A and she was to be referred for therapy/support and a teen parenting programme. A notification regarding the baby was forwarded to the Child Protection Notification System (CPNS) for consideration as to whether the baby should be placed on the system due to concerns about possible neglect. The case was discussed by the CPN management team in April when it was indicated that a private fostering placement was being sought.

The baby was born in May 2009 and mother and baby moved into a foster family together. Difficulties arose following the father's visit to the family, after which A became hostile and requested that B be placed in foster care. She made a decision to leave the foster home and return to her home town and her baby was placed in a separate foster placement at the end of May. The mother consented to a voluntary care agreement at that time although some days later she requested that the baby be returned to her care.

At a child care review held in respect of the baby in June 2009, the plan outlined that the baby should remain in foster care until a full assessment could be carried out in relation to attachment issues and bonding and for A to avail of therapeutic intervention in order to address her ongoing needs. A social work assessment in relation to the baby was to be undertaken to determine how the baby's needs could be met in the long term and it was

noted that should consent to the placement be withdrawn then legal proceedings would be initiated. Access was arranged for the mother and father of the baby once a week for 1.5 hours. This was held in an access centre close to the baby's placement which involved the parents travelling approximately 45 minutes.

The investigation undertaken by the Ombudsman for Children's Office focused on the administrative actions of the HSE in relation to service provision, with particular regard to the procedures followed in relation to:

- Placement planning and provision for both children prior to and after the birth of the baby;
- Assessing the needs of both children and of the mother's ability to care for the baby;
- The determination of frequency and facilitation of access facilitating and supporting the mother/baby bond, and
- Child welfare and protection concerns.

The purpose of the investigation was to examine whether the actions complained of had an adverse effect on the child(ren) involved and whether they raised concerns under section 8(2) of the Ombudsman for Children Act 2002.

OCO Findings

The HSE were aware of A's pregnancy from September and following the social work meeting in January 2009 the social worker met with her and advised that a decision had been made in relation to her future care and that a placement in the Cork unit had been secured. Although she was informed, the Ombudsman for Children notes that it is unclear what level of consultation and participation took place with her regarding the options available. In fact, it is apparent that she was given the 'choice' of the Cork unit or a care order. It is clear that there was little suitable provision for the girl and her baby in her home county, although it is not clear what other options or placements were explored or considered. The HSE acknowledged that the distance of the Cork unit from her home county impeded any planning or transition placements. The HSE also acknowledged that the Cork unit was not a suitable placement and moreover, they admitted that the move caused difficulty for A because of her strong connection with and support systems in her home county. The Ombudsman for Children found that there was no evidence that this factor – and the girl's previous experience with isolation and loss – were taken into account.

Similar difficulties were encountered identifying a suitable placement for A and her baby following the child's birth.

The investigation concluded that the HSE had adhered to their obligations under the Child Care Regulations with respect to the convening of child in care reviews. The

care plans were devised and recorded although not all forms were completed or were available for review by OCO. In particular, A's form for her own review in June 2009, and her form as a parent for her baby's review in June 2009 were not provided. These were particularly relevant given the decisions being made at the time in relation to the care of both children. There were no other reports from professionals involved with either of the children for the meeting as is required by HSE national guidance. There were no separate records of the meeting itself. In this regard, it is difficult to know who attended the meetings, or how this information was followed-up or shared, relevant not least because it is not clear what referrals and recommendations for supports and services were progressed. The inadequacy of the record keeping makes it difficult to know what led to delays or difficulties progressing the recommendations. The care plans, although adopted, were short on detail/information and timeframes, and they were not consistently signed by the Principal Social Worker, the child or the parent. The absence of separate minutes from the Child in Care reviews meant that it is not possible to conclude that A attended all of these meetings. It is welcome, however, that both mother and baby had a separate social worker.

In the absence of an agreed framework for the assessment of parenting capacity, the Ombudsman for Children's Office found some discrepancy as to whether the assessment had been completed. However, the prevailing view appeared to be that assessment was an ongoing process. There appeared also to be different understandings about what the assessment involves and the sequencing of involvement in different pre- or co-requisite programmes. Amid this contradictory information, the matter was clearly allowed to drift without a definitive timeline for the determination of the matters involved. In this regard, OCO drew the very serious conclusion that a baby in respect of whom child protection concerns had been raised had been waiting for an assessment for six months notwithstanding that this assessment was needed to plan the child's future. The absence of a framework and timeline for action had resulted in 'substantial time elapsing' (p 15) in the case. Moreover, the practice of not completing a formal assessment report was highlighted as a significant problem especially given it deemed to provide the basis for long term and significant interventions in the lives of children. A herself was unclear what the assessment involved and its timeframe. In the meantime, the baby was in voluntary care with A having the impression that if she withdrew her consent the HSE would apply for a care order. In the meantime, however, OCO concluded that there continued to be a lack of clarity in regard to the plans regarding the future care of the baby; failure to make plans gave rise to continued uncertainty for both children. Despite their concerns for the baby, sufficient to place the child's name on the Child Protection Notification System, there was no separate written Child Protection Plan for the baby other than that drawn up at the case conference before his birth (in April 2009).

As noted above, throughout the time that the baby was in separate foster care, the mother had very limited access – once per week for 1 ½ hours. Although there appeared to be some acknowledgement that more access was desirable this did not take place due to geographical limitations and concerns about the mother’s relationship to her child. According to OCO, the limited nature of access raises questions about the HSE plans for reunification and the ongoing status of the case. It is also likely, according to OCO, to impact on the development of a relationship between both children. This is particularly important given that no plan for long term foster care had/had been formally made.

In summary, the OCO investigation concluded that several administrative actions on the part of the HSE constituted an undesirable administrative practice under section 8(b) as follows:

- Placement provision: the Cork placement was not suitable to meet A’s needs and placed a vulnerable person a long way from her home and key supports.
- Care Planning: while some planning took place there are gaps in the care plans in relation to the time frame for the assessment process and clarity regarding the circumstances in which the baby would be returned to A’s care.
- Assessment: separate assessments of the needs of both children were not completed.
- Child Protection: no specific child protection measures were put in place notwithstanding concerns about both children.
- Overnight stays for children in care: there was no appropriate guidance available to guide the decision-making process here.
- Record-keeping: OCO found a lack of separate records in relation to child in care reviews and contradictory information on files relating to the baby’s safety.

The following were found to be contrary to fair and sound administration:

- Legal status: although A consented to voluntary care she subsequently requested that the baby be returned to her. As the HSE has yet to conclude an assessment, there is an ongoing failure to resolve the legal status of the baby.

The HSE’s actions concerning access was concluded to have been based on erroneous or incomplete information. In particular, access was extremely limited despite the failure to conclude an assessment determining plans for the baby’s future.

The OCO investigation concluded that both children had been adversely affected by these actions.

OCO recommended that the HSE West should

- Ensure that separate comprehensive assessments of the needs of both children are completed within a reasonable time frame;
- Work with the mother to resolve the situation regarding the baby's legal status;
- Improve record keeping.

Moreover, HSE National should

- Undertake a review of service provision available for children in the care of the HSE who have their own child;
- Develop national guidance in relation to the assessment process to be followed;
- Provide clarity about the purpose of the various meetings held and identify the most appropriate forum for addressing child protection concerns for children in care;
- Consider the policy and procedures that should apply when a child in care has their own baby to ensure that the individual needs of each child are met.

Summary of Relevant Children's Rights Standards

This complaint raises serious issues about the HSE's compliance with children's rights standards predominantly under the Convention on the Rights of the Child and the European Convention on Human Rights. Under the ECHR Act 2003, the HSE, as an organ of the state, is required to act in a Convention compliant manner and so case-law of the European Court of Human Rights in this area is particularly relevant. The following section outlines some general principles under the CRC, and then considers some more detailed issues under ECHR law.

Article 3 of the CRC requires that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' Article 3(2) requires that all appropriate legislative and administrative measures must be taken to ensure that children receive the care and protection necessary for their wellbeing and Article 3(d) requires states to ensure that 'the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities. In its Concluding Observations in 2006, the Committee on the Rights of the Child recommended that the Government ensure that the Article 3 principle is applied 'in all political, judicial and administrative decisions, as well as projects, programmes and services that have an impact on children'.⁸⁵

⁸⁵ Committee on the Rights of the Child, Concluding Observations: Ireland, CRC/C/IRL/CO/2006, para 23.

Article 12 is also relevant in this context. In particular, this provision requires that children are entitled to be heard in decision-making that affects them and the Committee on the Rights of the Child has recommended that states ensure, through legislation, regulation and policy directives, that the child's views are solicited and considered in decisions regarding placement in foster care or, development of care plans and their review, and visits with parents and family.⁸⁶ The Committee has also recommended that particular measures be taken to ensure children's participation in administrative decision-making is possible and in this regard it has highlighted the need for such proceedings to be child-friendly and accessible.⁸⁷ According to Article 12(2), children's participation in decision-making can be achieved through either direct involvement or indirect representation.

The CRC recognises that children without parental care are an especially vulnerable group. Under Article 20 a child deprived of his/her family environment is entitled to special protection and assistance provided by the state. Such children are entitled to alternative care and when considering solutions Article 20(3) requires states to pay due regard to the desirability of continuity in a child's upbringing. Decisions regarding the placement of children in care should respect fully the child's right to be consulted and to have his/her views duly taken into account in accordance with his/her evolving capacities, and on the basis of his/her access to all necessary information.⁸⁸

Under Article 25, children placed in the care of the state are entitled to a periodic review of their treatment and of all other circumstances relevant to the placement.

With respect to the treatment of the baby, the following provisions are relevant:

- Under Article 7, the child has a right as far as possible to know and be cared for by his or her parents. Separation of a child from his/her parents shall only take place where it is determined by competent authorities to be in the best interests of the child and Article 9(2) further provides that 'all interested parties shall be given an opportunity to participate in the proceedings and make their views known'. According to Article 9(3), states shall 'respect the right of the child who is separated from one or both parents 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'.
- Parents are also entitled to support under the CRC. Article 18() in particular requires that the state 'render appropriate assistance to parents ... in the performance of their child-rearing responsibilities' and also requires the state to 'ensure the development of institutions, facilities and services for the care of children'.

⁸⁶ Committee on the Rights of the Child, General Comment No 12, para 54.

⁸⁷ *Ibid*, para 66. See also the Council of Europe Recommendation on Child Friendly Justice.

⁸⁸ UN Guidelines for the Alternative Care of Children, para 6.

- Children have a right to be protected from harm and states are required to take all appropriate measures to protect them from all forms of violence including in the care of parents. Article 19(2) provides that states should adopt protective measures including 'effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.'⁸⁹

Also relevant to this complaint is the case-law of the European Court of Human Rights especially regarding the obligations of the state to respect family life under Article 8 of the ECHR. Although there is extensive jurisprudence in the area of alternative care, its main points can be summarised as follows:

- Family life is enjoyed between a mother and her child regardless of the circumstances of the birth.⁹⁰ In addition to ensuring that any interference with this right is in accordance with Article 8(2) – where it must be in accordance with law, pursue a legitimate aim and be proportionate – the state will also be required in certain circumstances to fulfil positive obligations to respect the family life tie. In particular, the Court has held that respect for family life must ensure:
 - the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family.⁹¹
- With respect to the compatibility with the Convention of placing children in care, the European Court has tended to focus not on the merits of any particular intervention but on its implementation. As a result, it has regularly scrutinised arrangements for contact between a child in care and his/her parent and plans for their reunification. As a matter of principle, the Court has established that in most cases a care order is intended to be temporary in nature and that it should be implemented accordingly. This has consequences for the choice of placement for the child and in this context special importance is attached to the practical considerations that affect the implementation of contact arrangements. For example, in the pivotal decision of *Olsson v Sweden*⁹² the Court was highly critical of the fact that the Olsson children were placed in three different care homes and one child was placed with foster carers 800 km from the others and from his parents. This meant that although contact was permitted the parents found it very difficult to maintain contact in reality. Thus, although the authorities had acted in good faith in placing the children with the respective foster carers, the Court held that administrative difficulties such as the

89 See further Committee on the Rights of the Child, General Comment No 13, *Article 19: The right of the Child to be protected from all forms of violence*, CRC/C/GC/13 2011.

90 *Marckx v Belgium*, Series A no 21 (1979).

91 *Ibid*, para 31.

92 *Olsson v Sweden*, Series A no 130, 11 EHRR 259.

lack of appropriate foster families, could play no more than a secondary role in the implementation of the care order.⁹³

- The Court has also held in a long and steady line of cases that that Article 8 includes a right for parents to have measures taken with a view to them being reunited with their children and an obligation for the national authorities to take such action.⁹⁴ It has considered regular contact between parents and their children to be an essential part of that process and it has been highly critical of situations where contact was not permitted, was limited or was frustrated by practical considerations.⁹⁵
- Emphasis on the goal of reunification means that a care order should be discontinued as soon as circumstances permit, and any measures of implementation should be consistent with the ultimate aim of reuniting the family.⁹⁶ According to the case-law of the European Court, there is a positive obligation on the authorities to respond to changes in circumstances which might lead to the termination of a care order and accordingly, the authorities must undertake regular reviews of the family's situation to see whether there has been any improvement and if so, to take reasonable action directed at reuniting them.⁹⁷
- There are also strong procedural protections implicit in respect for family life. In particular, the Court has held that what is involved here is whether:
 - the parents have been involved in the decision-making process to a degree sufficient to provide them with a requisite protection of their interests.⁹⁸
- The Court has recognised that regular parental involvement in the decision-making process is essential given that decisions as to the child's welfare may evolve from a continuous process of monitoring on the part of the domestic authority. In this regard, regular contact between social workers and parents has been found to provide an appropriate channel for the communication of parents' views and thus parental involvement at this level appears sufficient to satisfy this procedural requirement. But the Court has recognised that this is often not a level playing field and accordingly it has identified elements of the process necessary to ensure effective participation in this regard. In particular, it considers it essential that a parent be placed in a position where he/she may obtain access to information which is relied on by the authorities in taking decisions relevant to the care and custody of a child. Otherwise, it has noted, the parent will be unable to participate effectively in the decision-making process or put forward in a fair or adequate manner those matters militating in favour of his or her ability to provide the child with proper care and protection.⁹⁹

93 Ibid., para 82.

94 See *Eriksson v. Sweden* (1989) 12 EHRR 183, para. 71; *Margareta and Roger Andersson v. Sweden* (1992) 14 EHRR 615, para. 91, and *Olsson v. Sweden* (no 2) (1992) 17 EHRR 134, para. 90.

95 See for example *Andersson v Sweden, Series A no 226-A*, 14 EHRR 615 and *Johnansen v Norway*, No 17383/90, 1996-III, p 979 (1997) 23 EHRR 33.

96 *Olsson v Sweden*, no 10465/83, Series A no 130, 11 EHRR 259, para 81.

97 *K and T v Finland*, No 25702/94 [GC] (2003) 36 EHRR 255, para 179.

98 *W v UK*, Series A, No 120, 10 EHRR 95 para 64.

99 See *McMichael v UK*, no 16424/90, Series A no 307-B, 20 EHRR 205, para 87.

Conclusion

There is no doubt that this was a complicated case. The HSE was concerned with one girl placed in voluntary care and then had to respond to the needs of a teenage mother and her baby, with their respective individual and collective needs. The Investigation has identified significant administrative failures with the way in which the matter was handled by the HSE locally and nationally and has made recommendations to address these shortcomings. Although some of the same issues arise from a children's rights perspective, additional conclusions can also be drawn regarding HSE compliance with children's rights standards in the case of both children.

Two points of principle arise in the first instance:

Best Interests: At a level of principle, it is not apparent that what was in the two children's best interests was the paramount concern through the handling of the case. Although both children were entitled to have consideration given to their interests, it would appear that once she became a mother the HSE focus appeared to shift to what was in the interests of the baby with the latter interests become paramount over the mother's. While that may be understandable, it should not have undermined the mother's entitlement to have her interests as a young person in care given consideration also. Moreover, it is not clear that the young person's rights as a parent were given due consideration as required by the Child Care Act 1991.

Right to Participate: A further point of principle was that the mother did not appear to have been consulted, to have participated or to have been played an active role in the decision-making around her own care or that of her baby. This would appear to be out of line with domestic and international standards. The absence of these principles as factors to inform the way in which decision-making was undertaken in this case appear to have resulted in significant gaps in the process. The failure to ensure that the mother, as the parent, was sufficiently involved in the decision-making process about the care of her baby would appear to raise a question about ECHR compliance in this case.

In terms of the substantive issues:

- As the Ombudsman for Children noted, the absence of a definitive time line or plan allowed both mother and baby to drift along in care with significant periods of time elapsing in their lives without any decisive action being taken as to their future care. There was no regular or systematic review of the progress being achieved in either case individually or collectively. This is particularly problematic from the baby's perspective given the very limited contact the mother had with the baby. This would appear to be out of line with both CRC and ECHR standards.
- Related concerns arise regarding the use of long term care in this case without the necessary documented assessments underpinning this. Although no definitive decision had been made that the baby was to stay in long term foster care this presumption had begun to inform arrangements, especially the contact arrangements. Little consideration appeared to be given to the fact that contact was a right of both children. Nor does the handling of the case appear to have been informed by the basic principle that here was a family relationship worth protecting and supporting. Indeed, even though no decision had been taken in the case, there was a real risk that the drift combined with the extremely limited contact arrangements would make it difficult if not impossible to allow the relationship between mother and baby to continue or indeed survive. In this sense, the goal of reunification was certainly not the guiding factor and respect for family life appeared absent from the considerations given attention.
- There are also concerns about the 'voluntary' nature of the process. The mother, herself a very young and vulnerable person, does not appear to have had the independent representation, advocacy or support to participate in the various conferences or meetings concerning either her care or the care of her newborn baby. She does not appear to have been kept up to date or informed about progress in either her case or that of her baby. The failure to ensure that she was facilitated and supported to participate raises serious questions about the legitimacy of the voluntary nature of the HSE intervention in this case. This is particularly the case where, as the Investigation statement indicated, the mother was given a choice, at one point, of a voluntary care order or a section 18 care order application.

Investigation Statement 9: Appropriate care for a young person who died in HSE care

Summary of the Case

The Complaint

This complaint, submitted by a mother in June 2007, concerned the HSE care of her son K, who died in the care of the State in December 2006. The complaint related to the services provided by the Child and Adolescent Mental Health Services (CAMHS) and the Child Care and Social Work Service, both HSE services between September 2005 when the parents first contacted them for help, and December 2006 when K died.

Significant issues arose in the handling of this complaint by the Ombudsman for Children's Office that involved legal action and other delays in the communication of relevant information to the Office. Thus, although the complaint was made in June 2007, relevant case files were not handed over until March 2008. The legal proceedings were concluded in July 2009, which allowed the investigation to proceed.

The mother made a series of complaints about the manner in which K was treated by HSE services, which concerned the HSE response to his abuse allegations, inadequate provision for his care, poor communication both between HSE services and with the parents, and failure to ensure the boy was safe and protected at appropriate times.

According to the OCO preliminary investigation, the principal concerns related to:

- The forward planning regarding supports and diagnoses during K's time in HSE care;
- The adequacy of supports/services provided to K;
- The management of the disclosure by K of an allegation of sexual abuse.

K was referred to CAMHS in September 2005 and shortly afterwards a treatment plan was developed involving referral to enable K to access supports and therapy in a variety of areas. Between September and December, K and his parents met with the clinical team on nine occasions. K was referred to the social work department by CAMHS in September 2005 on the basis that his behaviour (drink and drug taking, sleeping rough) was putting him at extreme risk. The family also presented at that time in serious crisis and so respite care and parenting support were put in place. In summary, Social Work involvement included 10 meetings and 18 telephone calls with K and his family between October 2005 and January 2006.

The situation deteriorated. K rejected the option of placement in care and a short-term foster placement broke down. He was out of home and considered 'high risk' with suicide feelings. He refused to meet the CAMHS psychiatrist and attempted to take his own life in late February 2006. From January until May 2006, various interventions, meetings and case conferences took place with CAMHS and the Social Work department

which involved referrals for additional support for K and his family. It also included a referral for a special care placement in March 2006. The High Court issued a special care order in May 2006 and he remained in a Special Care Unit until his discharge to a residential home in August 2006. From August his attendance at CAMHS deteriorated, with ten appointments offered but not attended. The family's non-attendance during that period was discussed with professionals and the family at a strategy meeting in October 2006 although the meeting minutes do not record this. In November there is evidence that the family decided to break off contact with CAMHS. K only stayed for two days in the residential home. He then stayed with a woman, who was not approved by the HSE, during which time a further application was made for his placement in a Special Care Unit. This was refused by the admission panel. In a report dated November 2006, there was an allegation of extra-familial sexual abuse of K. The matter was investigated, including an interview with K who confirmed the allegation and the matter was notified to the Gardai. Other services recommended for him at that time included Youthreach, and attendance at a residential respite programme. The Guardian ad Litem criticised the care arrangements in place for K in a report and continued to express concern that he was homeless, and a vulnerable young person at risk. The case was due before the High Court for review in November 2006. The matter was adjourned and on a late date in November social workers had a meeting with K and the woman he was residing with and discussed the alleged abuse of him. According to the investigation, procedures in the Children First (National Guidelines for the Protection and Welfare of Children) were not followed in that K's parents were not informed/did not consent to his being interviewed, and K was not accompanied by a support person at the interview. In November, an initial notification of child abuse was made and further plans were made to place K in a Special Care Unit given his status as a child at serious risk. In December the High Court made an order in respect of K to be placed in a Special Care Unit until earlier December. A report of the principal social worker recorded that he died by suicide.

OCO Findings

The mother had complained to OCO that there was a lack of assessment of K's mental health by CAMHS, a failure to take the family's concerns seriously and a willing acceptance of K's cancellations of his appointments. They also complained that K had not been permitted to remain in secure care long enough to address his problems, his care arrangements were informal and he was informed that he was returning to secure care despite being suicidal. She also complained that there was inappropriate management of K's disclosure of sexual abuse.

The Investigation by the Ombudsman for Children's Office found that administrative actions on the part of the HSE were either based on erroneous or incomplete information, or based on an undesirable administrative practice. The OCO found that:

- Appointments with CAMHS were offered to K following his discharge from a Special Care Unit without parental involvement. K did not attend any of these appointments but his parents were not informed on each occasion.
- Contact with K by mobile phone appears to have taken place without parental approval.
- The absence of a placement plan for K in a Special Care Unit (separate from the care plan) meant that his onward placement was not systematically reviewed. Moreover, insufficient attention was paid to the clearly expressed views of K about his onward placement and the views of his mother about his readiness to leave the Special Care Unit.
- K was admitted to the care of the HSE on a voluntary basis on three occasions. K's mother signed the forms but never received copies of these and received little information about the process.
- K remained in the care of a family over whom there were some concerns without having this placement assessed.
- The explicit comment by K that he would commit suicide if forced to return to the Special Care Unit was not addressed comprehensively.
- There was a delay informing his mother of the disclosure of sexual abuse about which K was interviewed on his own without parental consent or involvement.
- Contact was made with the alleged abuser without ensuring that K was safe.
- The HSE failed to implement the Children First National Guidelines on Child Protection.
- There was a lack of clarity about the purpose of different meetings, and the sharing of important information with other disciplines and agencies.
- The HSE allocated a very complex case to a community care social worker who had only been in the social work department for three weeks. There was an absence of intensive supervision and support for newly recruited social workers.

Following the investigation, the Ombudsman for Children's Office made the following recommendations:

- For CAMHS, parents should be fully informed of appointments made by the team and when young people do not attend, parents should be advised as soon as possible thereafter. Guidelines should be drawn up with regard to direct contact with young people by mobile 'phone.
- For the Social Work department, recommendations made concerned the identification of onward placement prior to admission to secure care, the requirement to have

a placement plan in place, the documentation of views of young people and their parents in respect of Secure Care and ensuring that parents receive copies of relevant forms concerning the young person. In addition, it recommended that the HSE should assess the suitability of all arrangements of children with whom they are working and that the HSE should assess on a multidisciplinary basis any threat to self-harm made by a young person to a member of staff.

- Further recommendations were made to the Social Work Department with regard to implementation of Children First, implementing guidance on interviewing children, making arrangements to ensure the protection of children who disclose abuse from the alleged abuser. They should review the different types of meetings held in connection with the management of children's cases, develop a set of criteria to govern the allocation of cases to different grades of social worker and ensure that staff involved in traumatic events, such as the death of a child, have appropriate support and counselling.

Summary of Relevant Children's Rights Standards

As with above Statements, relevant international children's rights standards fall into two categories here: those falling under the UN Convention on the Rights of the Child and those found in the case law of the European Court of Human Rights (ECtHR).

In relation to the CRC, the following are the relevant standards:

- Article 3 of the CRC requires that the best interests of the child be a primary consideration in all actions affecting the child whether undertaken by public or private social welfare institutions. Under Article 3(2), states undertake to ensure the child such protection and care as is necessary for his or her well-being. Under Article 3(3) states must ensure that 'the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.' In its Concluding Observations in 2006, the Committee recommended that the Government ensure that the Article 3 principle is applied 'in all political, judicial and administrative decisions, as well as projects, programmes and services that have an impact on children'.¹⁰⁰
- Related to this, Article 18(2) requires states to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and ensure the development of institutions, facilities and services for the care of children.
- Article 6 of the CRC recognises the right of the child to life, survival and development.

¹⁰⁰ Committee on the Rights of the Child, Concluding Observations: Ireland, CRC/C/IRL/CO/2006, para 23.

- Article 12 requires states to assure to the child who is capable of forming his/her own views the right to express them freely in all matters affecting the child and be given due weight in accordance with the child's age and maturity. To this end, the child shall be provided the opportunity to be heard 'in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'
- Article 19 requires states to take all appropriate measures to protect the child from all forms of injury, neglect, violence and ill-treatment. Under Article 19(2), such protective measures shall include establishing social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.¹⁰¹ Moreover, Article 37 requires states to take all appropriate measures to promote physical and psychological recovery and social reintegration of children who are victims of any form of neglect, exploitation or abuse. The Committee has advocated a child-rights approach to child protection whereby emphasis is placed on supporting the strengths and resources of the child him/herself and all social systems of which the child is a part including the family, the school and the community.¹⁰²
- In relation to alternative care, Article 20 provides that a child deprived of his/her family environment shall be entitled to special protection and assistance provided by the State. According to the UN Guidelines for the Alternative Care of Children, it is the role of the State, through its competent authorities, 'to ensure the supervision of the safety, well-being and development of any child placed in alternative care and the regular review of the appropriateness of the care arrangement provided.'¹⁰³ Decisions regarding the placement of children in care should respect fully the child's right to be consulted and to have his/her views duly taken into account in accordance with his/her evolving capacities, and on the basis of his/her access to all necessary information.¹⁰⁴ The UN Guidelines also recommend that children in care should be offered access to a person of trust in whom they may confide in total confidentiality. This person should be designated by the competent authority with the agreement of the child concerned.¹⁰⁵
- Under Article 25, children who have been placed by the competent authorities for the purposes of care, protection or treatment of their physical or mental health, have the right to a periodic review of the treatment provided and all other circumstances relevant to his/her placement.

¹⁰¹ See further standards in the Committee on the Rights of the Child, General Comment no 13, *Article 19: the right of the child to freedom from all forms of violence*.

¹⁰² *Ibid*, para 52.

¹⁰³ UN Doc 64/142, para 5.

¹⁰⁴ *Ibid*, para 6.

¹⁰⁵ *Ibid*, para 98.

- More generally, Article 24 recognises the right of the child to adequate health and health care.

Case law of the European Court of Human Rights under Articles 2 (right to life), 3 (prohibition on torture, inhuman and degrading treatment) and Article 8 (respect for family life) also provides an important benchmark against which the actions of the HSE must be measured, especially due to the obligations placed on organs of the state to act in a convention compliant manner under the ECHR Act 2003.

This case law can be summarised as follows:

- Article 2 of the ECHR requires states to ensure that the right to life is protected by law. This does not place an onus on states to prevent all loss of life but implicit in Article 2 is an obligation to protect an individual where the authorities know or ought reasonable to have known that their life was at risk.¹⁰⁶ Related to this, Article 2 encompasses a right to an effective, independent investigation where a person dies in the care of the state.¹⁰⁷
- A similar obligation applies under Article 3. According to the Court, authorities are required to take effective measures to protect children from treatment that falls within the scope of this provision.¹⁰⁸ This includes treatment suffered at the hands of private individuals, and has also applied to suicide where the authorities ought to have been able to take effective steps to intervene.¹⁰⁹
- Under Article 8 of the ECHR, the state is required to take steps to protect family life including where the child is placed in the care of the state. In this context, Article 8 includes an obligation to ensure that parents are sufficiently involved in the decision-making process to ensure protection of their family life interests.¹¹⁰ This requires that parents are not only present at relevant decision-making events like case conferences but that they are supported, including by receiving the necessary information, to make that participation genuine and effective.¹¹¹ According to the Court, this information must be volunteered and not dependent on the parent making a request for such information.¹¹²

106 *Keenan v UK* (2001) 33 EHRR 38.

107 See *Jordan v UK* (2001) 37 EHRR 52. This investigation must be (i) on the State's own initiative; (ii) capable of leading to a determination of responsibility and the punishment of those responsible; (iii) independent both institutionally and in practice; (iv) prompt; (v) allow for sufficient public scrutiny to ensure accountability; and (vi) allow the next-of-kin to participate.

108 *Z and Others v UK* (2002) 34 EHRR 97.

109 In *Keenan v UK* the prisoner died by suicide and a violation of Article 3 was found because there was a lack of sufficient psychiatric assessment, a failure to properly monitor his condition and an inappropriate decision to detain him in a punishment block.

110 *W v UK* (1998) 10 EHRR 29.

111 See *McMichael v UK* (1995) 20 EHRR 205, where failure to disclose relevant information to the father resulted in a finding that Article 6 had been violated.

112 See for example *TP and KM v UK* (2002) 34 EHRR 2.

Conclusions

This is clearly a difficult and complex case. From the information available, however, a number of difficulties arise from a children's rights perspective. Some of these arose in the investigation by the Ombudsman for Children's Office. Others are entirely separate. They can be summarised as follows:

- It is clear that despite attempts to organise meetings, therapy and other interventions, the voice of the young person was not always heard. This is most pronounced in the expression of his opposition in returning to the Special Care Unit and his threat to take his life. It is also part of the general way in which the case was handled by both the Social Work Department and CAMHS. Genuine engagement with K with respect to his care does not appear to have been achieved at any stage; he does not appear to have had an advocate, or an independent representative of any kind in which he could confide and through which his views could be communicated perhaps more forcefully to decision-makers.
- There do not appear to have been adequate or effective steps taken to respond to the risks that he faced and in this way K's right to protection from harm was not fully vindicated. These include a failure to approve the family with whom he ended up living and to find a more workable solution to his needs, short of detention. Nor was K's safety the paramount concern in the way in which the allegations of sexual abuse were handled. Concern for the risks that the alleged abuser might pose to other children determined the timing of the interview by the HSE, not K's welfare. In this regard, there was a failure to ensure the full implementation of the Children First National Guidelines.
- The authorities were bound to protect K from harm and to ensure his right to adequate health care services. It is undeniably difficult, sometimes, to ensure that vulnerable children engage effectively with the services designed to provide them with support and treatment. Although there will always be a limit to what professionals can do when clients do not want to engage, it is vital to ensure effective protection of children's rights that services of outreach and advocacy and support are put in place to act as a bridge between a child in severe difficulty and the service that may help them out of this difficulty. This is particularly important concerning mental health services, when a child's life may be at risk. An approach to such services that is child-centred and child-friendly will require mechanisms to be put in place to support children to access services when they do not want to engage.

- ECHR law recognises the rights of parents to be involved in decision-making regarding their children's care. In this case, however, the mother does not appear to have enjoyed the right to be kept informed or to be supported - through information and advocacy - to participate effectively in the decision-making process around the care of her son. In fact, she appeared frequently to lack necessary information about her child's care and did not enjoy access to appropriate channels of communication that were necessary to ensure that her concerns about her son's wellbeing received an adequate response. Although she received parental support interventions at times, there lacked an integrated approach on the part of the HSE (particularly important when the child in care with her consent) to involve her as a partner in the determination and implementation of plans for K's treatment and care.
- Although the investigation by the Ombudsman for Children's Office has enquired into the administrative failures in this case, ECHR obligations require a comprehensive, timely and effective investigation to be conducted into deaths in care. As advised to government, the Ombudsman for Children recommended the establishment of an independent Child Death Review mechanism.

Investigation Statement 10: Provision of supports and therapeutic services and care for a child with special needs in foster care.

Summary of the Case

The Complaint

The complaint concerns the treatment of a foster child, B, who is diagnosed as being multiple disabled visually impaired (MDVI). B is in a long-term foster care arrangement with the K family. Despite the family's clear commitment to ensuring that B's needs were met, and advocating - with the social worker at particular times - to ensure that the HSE met its obligations to him, B has experienced particular difficulties having his needs for supports and therapeutic services met.

In particular, the foster parents complained that:

- The HSE has not fulfilled its duties and responsibilities to provide appropriate supports and services to B under the National Standards for Foster Care 2003.
- The level and quality of services being provided is insufficient to address his needs;
- The refusal to provide a specially adapted vehicle for B was having an adverse effect on his quality of life given the serious nature of his disability. Difficulties in communication with the HSE were experienced.

OCO Findings

There have been significant shortcomings in the allocation of a social worker to B and in the care review and planning process in this case. In addition, review of the care plans in place, as required by statute, did not occur in a number of years. The Investigation concluded that the following were communicated to the HSE over a period of years, largely without success, namely that

- B did not have an allocated social worker contrary to national policy;
- B's special transportation needs require immediate action, and
- B's health and developmental needs were not being adequately met by the level of therapies being received.

It is clear that B did not have an allocated social worker for very long periods of time during his foster care by the K family. This was contrary to national policy and according to OCO, constituted an undesirable administrative action.

There were significant problems adhering to the care planning and review process in this case. Service provider X provided the majority of services that B needed but it was unable to provide sufficient therapy for B in certain areas, notably occupational therapy. A situation developed from August 2007 whereby B's social worker requested a separate service to provide therapy to B. This allowed the service to be offered and according to the Investigation Statement resulted in the situation that now prevails in that much of B's

therapeutic needs are being met by a third party organisation being asked to do so by one individual social worker. Apart from other concerns, this appears to be outside the care planning process. In this regard, the Ombudsman for Children's Office found there to be inadequate and insufficient planning with respect to B to deal specifically with his complex and wide ranging needs. Moreover, the care planning process in place for B appeared to be no different than that of any other foster child without such special needs. This is perhaps related to the fact that the contract between the HSE and the K family is the standard fostering contract and does not take account of B's very considerable special needs. These actions were found to be based on an undesirable administrative practice and contrary to fair and sound administration.

B had significant transportation needs that ultimately required the provision of a specially adapted vehicle for him to be safely transported outside of the family home. As B had outgrown the car seat provided by the HSE and transporting him in the family car had become very hazardous, the family requested provision for an adapted vehicle in August 2007. This was refused, forcing the family (such was the essential and basic nature of the support needed) to pay for the vehicle from their own resources and to continue to seek reimbursement. The parents and the social worker continued to express concern about the seriousness of the situation with the social worker advocating on B and the family's behalf that

- A the adapted vehicle was essential to the child's wellbeing and continued ability to access services and enjoy a quality of life outside the home and
- B that the National Fostering Guidelines ('Diversity') expressly provide that the HSE should assist in this matter.

They were informed that there was no funding available for motor vehicles purchased by foster carers and that the new all-inclusive foster payment introduced in 2001 resulted in the abolition of discretionary payments meaning that any additional needs were to be paid for out of the existing allowance. The family were eventually reimbursed following third party intervention on their behalf and because they might have been under the (mistaken) belief that the HSE had undertaken to provide such support. This decision, OCO noted, had nothing to do with making provision for the child's needs. By contrast, application for a housing adaptation grant was successful and appeared to have been granted on the basis of B's needs.

From a legal perspective, the OCO concluded that even since the revision of the payment structure (which occurred after the contract had been agreed with family K), there did not appear to be any impediment to providing further assistance to a child in foster care. If the allowance is deemed to provide for day to day expenses, large capital expenditure could not be fairly classified as falling into this category. The Investigation also concluded that

there is no element of discretion with respect to the need of B – this need is absolute – and the HSE’s failure to make provision for that need is in breach of the National Guidelines. The need should also have been taken into account as part of the planning process, and not a matter argued eight years after the placement as to what the foster family’s expectations were at the outset. Such factors should not be a material consideration in the decision as to what provision is necessary to meet the needs of a child in foster care. Rather, this should be determined by what is in the best interests of the child.

The K family experienced particular difficulties securing B’s needs, in particular accessing and communicating with the particular section(s) of the HSE who did not appear to be able to co-ordinate the family’s requests internally. It is clear that the administrative burden was on the family to advocate on his behalf – especially in the absence of an allocated social worker and other more efficient administration - and to seek to have his needs met by the HSE, despite the latter’s statutory obligation in this regard. The Investigation found that the level of assistance provided to the family in this regard was insufficient and constituted an undesirable administrative practice. Although there was genuine advocacy and petitioning on B’s behalf through work done by the social workers who were periodically involved in his life, the failure to ensure that B had an allocated social worker for a substantial period of his life to act as a constant advocate had a direct and detrimental impact on B.

More generally, the Investigation found that the manner in which resources are allocated to meet the needs of children with special needs – whether in care or not – does not operate so as to ensure that the best interests of individual children are met, but rather weighs up the circumstances of the case, the argument made for the resources in question and the availability of resources to meet that request. The approach does not allow for the prioritisation of children with special needs within this process in that if the resources do not stretch to the provision of the service in question, then it will not be provided regardless of the nature or seriousness of the need. In this regard, the Ombudsman for Children’s Office found that B was adversely affected by his treatment as follows:

- The therapies available have been inadequate to meet his needs and this has had and continues to have an adverse effect on his health, welfare and development;
- His physical wellbeing was placed at risk for a substantial period of time through lack of support in the provision of adequate transport assistance. This also impacted on his development and welfare with respect to the corresponding curtailment of his external activities;
- The failure to ensure that he was allocated a social worker to advocate independently on his behalf and to provide B with a voice and representation in matters that affected him impacted on him and the family who were forced to take up this role but without professional support.

In addition, the foster family were in this instance forced to take steps, including significant financial outlay, to mitigate the adverse impact of the HSE's actions on B.

According to OCO, the findings of the investigation are relevant not only to B and his circumstances, but to the manner in which foster families like the K family are supported to ensure that the needs of children in their care are met. In the Statement, the Office expressed the view that a child in foster care with such serious therapeutic needs should have access to a system of effective advocacy coupled with a system of service provision that:

- Contains sufficient planning in the individual care plan process to allow reasonable foreseeable resources and supports to be arranged and provided as they are needed;
- Is proactive with respect to the actions to be taken;
- Contains the relevant professionals allocated to the positions necessary to ensure a co-ordinated approach to service delivery and minimum impact on foster family life by alleviating the need for constant advocacy;
- Is based on ensuring that the best interests of the child are addressed.

With respect to B, OCO recommended that the HSE:

- liaise immediately with all relevant people and bodies to identify B's current therapeutic needs;
- ensure that those needs are met without delay;
- make all reasonable efforts to ensure that his future therapeutic needs are identified and addressed in a co-ordinated and timely fashion, including by addressing the level of advocacy work required of foster carers;
- devise an individual long-term care plan to expressly set out the commitment to provide the therapies and resources that B requires for his health, welfare and development.

In respect of all children with special needs in foster care, the OCO recommended that the HSE:

- systematically review the status of all such foster children to ensure they have been allocated a social worker;
- revise the structure and process of how the statutory reviews of care plans take place to ensure they occur at a frequency that may address the ongoing needs of that child in a timely manner;
- revise fostering arrangement process to ensure that issues such as the procurement of specialist equipment and therapies which may be required are discussed and recorded at time of placement;

- devise a separate administrative scheme to ensure the funding, advice and assistance is made available to identify and address the special transport needs of those children;
- prioritise the provision of services and therapies for children with special needs in the care of the state fostering arrangements;
- provide OCO with a copy of its proposed policy dealing with issues raised in this complaint.

Summary of Relevant Children's Rights Standards

As the Investigation Statement highlights, the relevant instrument here is the Convention on the Rights of the Child and the accompanying General Comment on the Rights of Children with Disabilities.¹¹³ Also relevant (although not ratified by Ireland) is the Convention on the Rights of Persons with Disabilities.

The relevant standards can be summarised as follows:

- Article 2 of the CRC prohibits discrimination in the enjoyment of Convention rights on a range of grounds including disability. According to the Committee on the Rights of the Child, states are required to take effective measures to prevent discrimination and prejudice against children with disabilities.¹¹⁴
- Article 3 of the CRC provides that the best interest of the child shall be a primary consideration in all actions taken concerning the child. The Committee on the Rights of the Child has noted that Article 3 should be the basis on which programmes and policies are set and it should be duly taken into account in every service provided for children with disabilities and any other action affecting them.¹¹⁵ More generally, the Committee has noted that every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions.¹¹⁶
- Article 6 provides for the right of the child to life, survival and development. The Committee on the Rights of the Child expects states to interpret 'development' in its broadest sense 'as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development'.¹¹⁷ Implementation measures should be aimed at achieving the optimal development for all children.
- Article 12 provides for the right of the child to have a say in decisions made affecting him/her through a representative if appropriate.¹¹⁸ UN Guidelines

¹¹³ Committee on the Rights of the Child, General Comment No 8, *The Rights of Children with Disabilities*, CRC/C/GC/9 2007.

¹¹⁴ *Ibid*, paras 8-9.

¹¹⁵ *Ibid*, para 29.

¹¹⁶ Committee on the Rights of the Child General Comment no 5, *General Measures of Implementation*, CRC/C/GC/5 2003, para 12.

¹¹⁷ *Ibid*.

¹¹⁸ See also Article 9(3) of the Convention on the Rights of Persons with Disabilities.

recommend that foster carers also have their voices heard and have the opportunity to influence policy.¹¹⁹

- Because children's special and dependent status creates 'real difficulties' for them in pursuing remedies for breaches of their rights, states need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives.¹²⁰ According to the Committee on the Rights of the Child, these should include 'the provision of child-friendly information, advice, advocacy, including support for self-advocacy'.¹²¹
- Under Article 18, the state is required to support families in their child-rearing responsibilities by providing them with appropriate assistance and ensuring the development of institutions, facilities and services for the care of children. The Committee on the Rights of the Child has recommended that this should include material support in the form of special allowances as well as consumable supplies and necessary equipment, such as special furniture and mobility devices that is deemed necessary for the child with a disability to live a dignified, self-reliant lifestyle, and be fully included in the family and community.¹²²
- Children are entitled to special care where they cannot be provided for care in their own families. Because of the additional challenges associated with fostering children with disabilities, the Committee on the Rights of the Child has recommended that organizations that are responsible for foster placement of children must, therefore, conduct the necessary training and encouragement of suitable families and provide the support that will allow the foster family to appropriately take care of the child with disability.¹²³
- Article 23 provides that children with disabilities have the right to enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community. According to the Committee on the Rights of the Child, the inclusion of children with disabilities is the overriding goal in the implementation of this provision.¹²⁴ A plan of action is essential to ensure the implementation of this provision.¹²⁵
- Children with disabilities are entitled to special care under Article 23(2), and should have access to assistance which is appropriate to the child's condition. Although this provision is dependent on available resources, the Committee urges states to make the provision of the needs of children with disabilities a high priority investing the maximum resources in their inclusion in society.¹²⁶

119 UN Guidelines for the Alternative Care of Children, para 121.

120 Committee on the Rights of the Child General Comment no 5, *General Measures of Implementation*, para 24.

121 Ibid.

122 Committee on the Rights of the Child, General Comment No 8, *The Rights of Children with Disabilities*, para 41. See also Article 4 (1)(h) and (i) and Article 20 of the Convention on the Rights of Persons with Disabilities.

123 Committee on the Rights of the Child, General Comment No 8, *The Rights of Children with Disabilities*, para 46.

124 Ibid, para 11.

125 Ibid, para 13.

126 Ibid, para 14.

- Under Article 23(3), such assistance shall be provided free of charge where possible and designed to ensure that the disabled child has 'effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his/her cultural and spiritual development (Article 23(3)).
- In order to secure the rights of children with disabilities, the Committee has recommended that 'national laws and regulations should contain clear and explicit provisions for the protection and exercise of the specific rights of children with disabilities, in particular those enshrined in Article 23.¹²⁷
- States are recommended to adopt a plan of action needs to be adopted to plan for the implementation of the rights of children with disabilities. These should be strategic planning documents with measureable outcomes.¹²⁸ Ensuring sufficient resources are available is an important part of the planning process. In this regard, the Committee has recommended that resources allocated to children with disabilities should be 'sufficient - and earmarked so that they are not used for other purposes - to cover all their needs, including programmes established for training professionals working with children with disabilities such as teachers, physiotherapists and policymakers; education campaigns; financial support for families; income maintenance; social security; assistive devices; and related services.'¹²⁹
- States are also recommended to set up an internal co-ordinating mechanism to reflect the fact that many organisations and agencies may be involved in the provision of services in these areas.¹³⁰ More generally, the Committee has noted that 'effective implementation of the Convention requires visible cross-sectoral coordination to recognize and realize children's rights across Government, between different levels of government and between Government and civil society.'¹³¹
- Article 24 of the CRC recognises the right of every child to the highest attainable standard of health and provides that states shall strive to ensure that no child is deprived of his or her right of access to such health care services. Under Article 24(2), states are required to take all measure to ensure the provision of necessary medical assistance and health care to all children. Securing the right to healthcare to children with disabilities will frequently require multi-disciplinary intervention. According to the Committee on the Rights of the Child, these professionals should 'collectively identify a plan of management for the child with disability that would ensure the most efficient healthcare is provided.'¹³²

127 Ibid, par 17.

128 Ibid, para 19.

129 Ibid, para 20.

130 Ibid, para 21

131 Committee on the Rights of the Child General Comment no 5, *General Measures of Implementation*, para 27. See also paras 37-39.

132 Committee on the Rights of the Child, General Comment No 8, *The Rights of Children with Disabilities*, para 58

- Article 25 provides for the right of a child in the care of the state to a periodic review of the treatment provided and all other circumstances relevant to his or her placement.
- Article 27 recognises the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Although parents have the primary responsibility to secure the conditions of living necessary for the child's development, states shall take appropriate measure to assist parents in this regard, and in particular, shall provide material assistance and support programmes.
- Article 28 provides for the right to education and commits states to achieving this right progressively and on the basis of equal opportunity. In this regard, Article 29 provides that the right to education shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential.
- Article 31 of the CRC recognises the right of the child to play, rest and leisure. Moreover, states shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Conclusions

Many of the issues raised by the children's rights standards summarised above have already been identified and discussed in the Investigation Statement. Nonetheless, the following section summarises the conclusions to be drawn about the issues in the complaint from a children's rights perspective.

1. There was a clear failure in this case to take adequate and effective measures to ensure that decision-making was informed by the rights and best interests of the child. As the Ombudsman for Children's Office explains in the Investigation Statement, the system within the HSE did not operate to ensure that B's needs were met in a timely manner despite the fact that they were foreseeable and should have been part of the planning and review process. In this respect, the HSE's actions also fell short of standards contained in Article 25 (right to regular review) and Article 18 (family support) of the CRC. Despite the requirement on the HSE to ensure that the child's welfare was the first and paramount consideration, this principle did not guide the decision-making process or the implementation of national policy including in the appointment of a social worker, in the proper planning and provision for B's significant developmental and care needs and the manner in which his serious and urgent transport needs were addressed.
2. Clearly, B's rights under numerous CRC provisions – Articles 6, 12, 23, 24, 28 and 29 - were not met. This has hampered his development and had a significantly detrimental impact on his life and the enjoyment of his rights.

3. Apart from the ultimate remedy provided by the OCO complaints mechanism, there was no avenue redress open to B and his foster parents to have his serious and urgent needs addressed in a timely and effective manner. The fact that the family and B had no social worker for large periods of time meant that they were denied the relevant advocacy services that would have helped the family to secure B's rights. Moreover, they were denied the formal link with the HSE that would have enabled their request for assistance to be addressed. This required them to make constant and various inquiries to different parts of the HSE with a view to having B's basic needs met. With respect to the transport issue, the fact that the child was being transported by the family in hazardous conditions should at the very least have prompted urgent action given that it raised a serious question of B's safety. In this regard, the absence of a co-ordinating mechanism within the HSE to deal with such matters holistically is a significant gap in putting the effective measures in place to ensure the implementation of B's Convention rights.
4. The absence of dedicated, independent representation for B, in the form of social work support, also meant that the burden of the significant advocacy required to have his basic needs met fell on his foster parents. This not only left the family with few resources to invest in B and their children, but also put the family under financial pressure. In this respect, the HSE could be said to have abdicated its responsibility to provide B's care and protection and to ensure that his welfare was the first and paramount consideration under s 3(2)(b) of the Child Care Act 1991. This burden must have interfered with the life of his foster family on which it must have placed serious strain. In this regard, the HSE's actions could be said to have undermined the family, rather than supported it to meet B's needs.

Common Themes

This review has considered 10 investigation statements from a children's rights perspective concerning school transport, local authority housing provision, special needs provision, HSE provision for alternative care and the handling of a child protection complaint. The following observations are made about the themes that emerge from this audit:

- It is a dominant feature of these Investigations that with few exceptions they highlight a lack of awareness about the impact of administrative decision-making on the lives and rights of children and their families. Decision-making that affected children directly, and sometimes indirectly, was not informed by its impact on the children concerned; nor was it informed by children's rights principles. In particular, the parameters of the child's best interests and the child's right to be heard were not used to guide administrative actions or decision-making to any great extent if at all. The procedures, and in some cases those applying them, were not sensitive to the needs or rights of children or their families.
- Other considerations appeared to dominate over ensuring that the rights and interests of individual children are met. In particular, the apparently blind pursuit of the goal of policy implementation and the application of blanket and inflexible rules (or rules perceived to be inflexible) was a feature. In this respect, the individual children appeared to be largely invisible in the decision-making process. At the very least, their rights, entitlements or interests do not appear to have been a priority. This is particularly acute in the cases about housing and education matters, and is less evident but nonetheless present also in the alternative care complaints (e.g. 8 and 9).
- There appear to be few checks and balances in administrative decision-making processes, and few mechanisms for challenging the decision being made or the position adopted. Repeated requests for information, for flexibility or for review appeared to fall on deaf ears. This is indicative of excessive bureaucratisation of public decision-making, and suggests a disconnect between administrative decision-makers and those affected by those decisions.
- At least some, if not all of the cases indicated a lack of awareness about the needs and rights of individual children as recognised by international instruments to which Ireland is a party. Although it is not entirely unexpected, for example, that housing officials within a local authority or county council are not familiar with their obligations to respect the rights of children, the same 'excuse' cannot be used for organisations like the HSE with a statutory mandate in this area.
- In many instances, the case for a potential breach of ECHR rights could be made out and the lack of awareness among administrative authorities, notably the HSE, of ECHR obligations is a matter of very serious concern.
- A further particularly worrying common theme is the failure to ensure the implementation of national law and policy. The failure to rigorously apply the best interests principle and to ensure children's voices are heard as the Child Care Act 1991

requires is of serious concern as is the failure to ensure adherence of the Children First National Guidelines.

- The lack of effective and timely remedies to resolve the issues raised in these complaints is an additional and separate concern. The absence from the decision-making process of an awareness of how quickly harm is done to children (by depriving them of education, separating them from parents, providing for their care etc) is very stark as is the apparent failure to appreciate the relationship between timely decision-making and good administration. Numerous conclusions can be drawn from a structural point of view. One specific point worth mentioning here is the apparent absence from decision-making structures of any child impact assessment or other mechanism to review policy to ensure that it continues to meet the needs of the public, generally, and children, where relevant, in particular. Similarly, without OCO intervention, it is not clear whether any review of the area of decision-making complained of would have been initiated. In fact, the adversarial stance adopted by certain state bodies when confronted by an OCO investigation proves the point about how difficult it is for individual children and their families to seek to have their rights vindicated. In certain cases, the apparent unwillingness to take a constructive and wholehearted approach to the resolution of the disputes and the review of the areas of policy arising does not augur well for reform.
- Children's rights training – both under the CRC and related instruments and the ECHR – is an urgent priority for all public bodies.

On a substantive level, two particular issues concerning the administration of alternative care are worthy of further investigation. The first concerns the use of voluntary care, i.e. a care placement to which the parent consents and the second concerns the use of long-term care. Although it is difficult to say from the limited information provided in the Investigation Statements, it would appear from these complaints that voluntary care lacks the transparency and independent oversight that applies when care orders are made by the courts. In particular, it is not clear who oversees the implementation of such placements, who is responsible for monitoring the adequacy of the care planning and contact issues, and what remedies are available for those dissatisfied with how these matters are handled. It is also difficult to determine how genuinely voluntary such care placements are, as one case above highlights starkly. The second issue relates to the use of long-term care. It is not clear what factors determine the choice of long-term care over adoption, for example, and it might be useful to explore the use of this resource – and the relevant care planning issues - in more detail from a children's rights perspective.

OCO Investigation Function and Children's Rights Standards

This research shows that there is clear overlap between the various functions of the Ombudsman for Children's Office and the implementation of children's rights standards. The issues highlighted above have come to the fore in advocacy and policy work, in research commissioned by the Ombudsman for Children's Office and in the area of law reform and advice to Government. This research aims to shed light on the relationship between the Investigation function and children's rights standards. In some of the complaints considered above, there was some similarity between the approach taken by the Investigation and the children's rights perspective applied here. In others, probably in the majority of cases, the approaches were distinct at least in part if not completely. That is not to say that there is no relationship between the administrative grounds on which the investigation function rests and the children's rights standards. The question is how this can be enhanced, if indeed that is the objective.

Before considering whether compliance with children's rights standards can be incorporated, directly or indirectly, into the grounds under section 8(2) it is important to first consider what is known about the s 8 grounds and how they are applied. It is not known whether the Ombudsman for Children's Office has internal or other guidance on what the s 8 grounds mean in practice, or how they are interpreted or applied in specific cases. If not, it might be useful – perhaps by way of an awareness raising exercise - to publish guidance on good administration in children's cases. This could also provide a useful mechanism within which to consider the relationship between good administration and children's rights compliance and would provide the opportunity to tease out the relationship between these two areas. This would allow consideration, for example, of what child-friendly administration or decision-making looks like. Could such a process envisage giving priority to avoiding delay (a particularly problematic issue for children), to ensuring that the child's best interests are taken into account or to ensuring children's views are heard in the process? In other words, can a decision concerning a child that fails to consider that child's best interests ever be considered to be one of good or fair administration. Similarly, if a decision concerns a child directly, could the decision ever be considered 'proper' or 'sound' if the authority in question does not consult with the child concerned?

It is not envisaged that this process would necessarily change the parameters of the investigation function (the grounds for which resonate and have meaning beyond OCO of course). But, co-operation, say between the research and the Investigation functions of the Office, might develop this current project into a further exercise aimed to raise the standards of public administration in children's matters and ensuring that administrative bodies are aware that higher standards are expected in the case of children and their families. In other words, the Office might adopt the first guidance on Child Friendly Administration.

Related to this, but also generally, it might be useful if the authorities, bodies and agencies against whom complaints can be made to the Office, were surveyed as to their awareness of the OCO mandate. From this point, there may then be scope for ongoing dialogue with them about how they might achieve higher standards of good administration in children's case.

