

IHRC & Law Society of Ireland

10th Annual Human Rights Conference

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PROMOTING AND PROTECTING HUMAN RIGHTS IN IRELAND

The Family & Human Rights – Articles 41 and 42

“On the contrary, the Articles at least in general terms, state propositions that are by no means eccentric, uniquely Irish or necessarily outdated: there is a working assumption that a family with married parents is believed to have been shown by experience to be a desirable location for the upbringing of children; that as such the family created by marriage is an essential unit in society; that accordingly, marriage and family based upon it is to be supported by the State. Consequently the State’s position is one which does not seek to pre-empt the family but rather seeks to supplement its position so that the State will only interfere when a family is not functioning and providing the benefits to its members (and thus the benefits to society) which the Constitution contemplates. In that case, the State may be entitled to intervene in discharge of its own duty under the Constitution and to protect the rights of the individuals involved. This is not to say that these Articles do not express a distinctive view and do so with considerable force.”

(Nottingham County Council v. B, Unreported 15/12/2011, Supreme Court, O’Donnell J [2001] IESC 48)

PROMOTING AND PROTECTING HUMAN RIGHTS IN IRELAND

The Family & Human Rights – A Constitutional Presumption

- Both parents and children have a right to have the family protected in its constitution and authority.
- There is a constitutional presumption that the welfare of a child is to be found within the family.
- This is the case unless there are compelling reasons why that cannot be achieved or it is an exceptional case where parents have failed in their duty towards the child pursuant to Article 42.5 (*In re JH* [1985] I IR 395)
- Parents have a right and a duty to provide for the education of their children and to cater for their other personal rights. [*The Adoption (No 20) Bill 1987*, [1989] 1 IR 656)

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The Family & Human Rights – Personal Rights of the Child

- The starting point is *G. v. An Bord Uchtála*, [1981] IR 32
- O’Higgins CJ. recognised the right of the child “to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being”.
- This approach was adopted and expanded upon to some degree by Geoghegan J in *F.N. v. The Minister for Education* [1995] 1 IR 409
- Doubts were expressed by the Supreme Court in *D.T. v. The Minister for Education* [2001] 4 IR 259 as to whether the approach of O’Higgins CJ. in *G. v. An Bord Uchtála* correctly states the law.

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The Family & Human Rights – Personal Rights

- A child has a right to have decisions in relation to guardianship, custody or upbringing taken in the interests of his/her welfare. This right is entitled to protection pursuant to Article 40.3 (*F.N. and Another v. C.O. and Another* [2004] 4 IR 311, Finlay Geoghegan J.)
- However the Court in considering the child's welfare must have due regard to the right of the child to be educated by the family and to be provided by his or her parents with religious, moral, intellectual, physical and social education.
- A child who is sufficiently mature to form and articulate views is entitled to have those views taken into account in decisions concerning his or her guardianship, custody or upbringing. Again this right is entitled to protection under Article 40.3.

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The Family & Human Rights – The Interplay of the Various Rights

- In regard to the interplay of the various rights the constitutional presumption that the welfare of the child is to be found within the family is central.
- The real issue may be how readily, and in what circumstances, that presumption can be rebutted.
- An important consideration may be whether a family is functioning and providing benefits to its members and to society as contemplated under the Constitution.

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The Family & Human Rights – The Proposed Article 42A

- Article 42A.1 expressly recognises the natural and imprescriptible rights of all children.
- The State shall as far as practicable by its laws protect and vindicate those rights.
- Article 42A.2.1 State intervention is still confined to exceptional cases where there has been a failure of duty by the parent. However the failure of duty is defined by reference to the effect on the child.
- The safety or welfare of the child is likely to be prejudicially affected.
- The State may only intervene by proportionate means as provided by law.

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The Family & Human Rights – The Proposed Article 42A

- Article 42A.2.2 expressly requires that provision shall be made by law for the adoption of any child where there has been a failure of duty for a period prescribed by law and where the best interests of the child require that such adoption shall take place.
- Article 42A.3 requires that provision be made by law for the voluntary placement and adoption of any child. This allows the adoption of a child of married parents.

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The Family & Human Rights – The Proposed Article 42A

- Article 42A.4.1 requires that provision be made by law that the best interests of the child shall be the paramount consideration in the resolution of the main types of proceedings which affect children.
- Article 42A.4.2 requires that provision shall be made by law that the views of any child, who is capable of forming his or her own views, be ascertained and given due weight in the resolution of the main types of proceedings which affect children.