

# Scoping Paper on Care Status of Unaccompanied and Separated Children

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## 1. INTRODUCTION

This paper was drafted as a contribution to discussions on unaccompanied and separated children in Ireland organised by Tusla – the Child and Family Agency, with the support of the Children’s Rights Alliance.

This paper is confined to one aspect of those wide-ranging discussions: the care status of unaccompanied and separated children. The objective of this paper is to identify how best to put in place a coherent approach to the care status for unaccompanied and separated children and how this can be done in a manner that (i) protects the rights of unaccompanied and separated children under national and international law; and (ii) is workable given the workforce capacity pressures currently being experienced by Tusla – Child and Family Agency (CFA). This paper is based on the law as it currently stands. It does not include proposals to amend the law or explore the impact of proposals under the General Scheme of the Child Care (Amendment) Bill 2023.

Several related issues raised during the discussions so far require further discussion and exploration but are unfortunately beyond the scope of this paper: (i) aftercare supports; (ii) age assessments and age disputed minors; (iii) independent guardianship model and (iv) family reunification.

*Terminology:* In this paper the term “an unaccompanied or separated minor” refers to a third-country national or stateless child (under the age of 18 years) with no adult or legal guardian responsible for them (some but not all of whom may be seeking international protection) and a child residing in Ireland under the Temporary Protection Directive (2001/55 EC) due to the war in Ukraine.<sup>1</sup>

*Current Practice:* The Child and Family Agency currently provides services to unaccompanied and separated children under various statutory provisions of the Child Care Act 1991:

- Section 5: Accommodation for homeless children
- Section 4: Voluntary care agreement
- Sections 13, 17 & 18: Judicial care orders

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<sup>1</sup> This Directive was activated by [EU Council Decision EU 2022/382](#) of 4 March 2022, to provide immediate protection in EU countries for people displaced by the Russian invasion of Ukraine.

There is no statutory or policy guidance on which provision of the Child Care Act should be used to meet the needs of unaccompanied and separated children. Each of these provisions bestows on the child different rights and also grants the court and the CFA varying levels of authority in respect of the child. These differences are mapped out in a grid below.

It is beyond the scope of this paper to set out and examine international and national law and jurisprudence on the rights of unaccompanied and separated children. However, it is notable that in its Concluding Observations for Ireland issued in 2023, the UN Committee on the Rights of the Child recommended among other things that Ireland “40. (d) Ensure that all asylum-seeking children, including children with disabilities, have prompt access to housing, education, health services, social protection, psychosocial and integration support and reasonable accommodation; [and] (f) Develop national guidelines on ensuring the rights of unaccompanied children”.

## 2. DOMESTIC LEGAL AND POLICY FRAMEWORK

The statutory and policy frameworks governing child protection and child care (Article 42A of the Constitution; Child Care Acts 1991 to 2022; Child and Family Agency Act 2013; Children First Act 2015 and related Guidance) and relevant criminal justice statutes apply to all children under 18 years in the State, including children who are identified as an unaccompanied or separated minors. Under this framework the child has a right to be protected from harm, to have their views heard and decisions made in their best interests.

Section 14 of the International Protection Act 2015 provides that where it appears to an immigration officer that an individual is a minor (under 18 years) and is unaccompanied the officer shall, as soon as practicable, notify the Child and Family Agency. After this notification, the individual is considered a child and the Child Care Acts 1991 and Child and Family Agency Act 2013 and other enactments relating to the care and welfare of children shall apply accordingly.

However, the Child Care Act 1991 Act does not contain any reference to unaccompanied or separated children. Thus the Act (and policy) are silent on the appropriate provision under which such an unaccompanied or separated child should (or may) be admitted to or maintained in care. Such children may meet the threshold for admission to care under section 4, section 13 (emergency care order), section 17 (interim care order) or section 18 (care order) of the 1991 Act.

Under section 9 of the Immigration Act 2004, there is a duty on all non-EEA foreign nationals born outside of Ireland to apply for immigration permission and to register at the local immigration office from the age of 16 years.

Under Irish law, the age of legal majority is 18 years. As a general rule, a child is unable to provide consent. A parent, legal guardian or person acting in *loco parentis* must provide consent on the child's behalf. Consent is important in many aspects of a child's life, including health interventions and engagement in school and sporting activities.

One exception to the general rule on consent is that under section 23(1) of the Non-Fatal Offences Against the Person Act 1997 a child of 16 and 17 years may consent to surgical, medical and dental treatment without the agreement of their parents.<sup>2</sup> However, the 1997 Act is very limited in its scope, the provision is framed as a criminal law defence and it is unclear if a child aged 16 or 17 years can refuse medical treatment or social care interventions. The 1997 Act does not apply to mental health assessment and treatment. These are covered under the Mental Health Act 2001, section 2 of which sets the age of consent for treatment at 18 years.

Issues of consent are also likely to arise in relation to applications for a residency permit; naturalisation; Irish Travel Document or to avail of passport services, such as renewing an expired passport.

In circumstances where a child's parent or legal guardian is contactable but resident in another jurisdiction, clarity is needed on if (and how) such an individual can provide consent on behalf of their child. For example, would an affidavit drawn up by an appropriately qualified lawyer in another jurisdiction be sufficient?

A child (under 18 years) does not have legal standing in court so requires a next friend to initiate judicial proceedings, appeal an order, make an application to have an order discharged or a direction varied. An unaccompanied or separated child is not permitted to make an application for international protection on his or her own behalf. However, section 15(4) of the International Protection Act 2015 provides that the Child and Family Agency may facilitate the making of an application for international protection on behalf of a child to whom it is "providing care and protection".

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2 See also HSE, National Consent Policy 2022 (HSE 2022) 46.

### 3. EXAMINATION OF CARE OPTIONS

#### 3.1 Accommodation for Homeless Children (Section 5)

An unaccompanied or separated child may be provided with accommodation under section 5 of the Child Care Act 1991. Section 5 provides that:

*5.—Where it appears to the Child and Family Agency that a child is homeless, the Agency shall enquire into the child's circumstances, and if it is satisfied that there is no accommodation available to him which he can reasonably occupy, then, unless the child is received into the care of the Agency under the provisions of this Act, the Agency shall take such steps as are reasonable to make available suitable accommodation for him.*

##### *Features of section 5*

- *Aim:* The purpose of this provision is to provide accommodation to a child who appears to be homeless.
- *Under 16s:* National policy holds that a homeless child under 16 years of age is considered a child protection and welfare concern and referred for assessment.<sup>3</sup>
- *Care status:* Being accommodated by the CFA under section 5 does not change the child's care status. The child is not in the care of the CFA. Parental responsibility remains with the child's parent/s or guardian. As the CFA is not the child's legal guardian, it cannot provide consent on the child's behalf.
- *Care entitlements:* Being accommodated by the CFA under section 5 is not considered a care placement and so the statutory safeguards (allocated social worker, Care Plan, periodic child-in-care review and access to court) afforded to a child in care do not apply. Instead, a lower standard of safeguards is provided under national policy (key worker and a placement plan).<sup>4</sup>
- *Aftercare:* Being solely accommodated under section 5 does not count towards eligibility for aftercare.
- *Oversight:* There is no judicial oversight of decisions under this provision.
- *Advocacy:* There is no right to access an independent guardian / advocate or to be appointed a solicitor.
- *Views of the child:* There is no independent mechanism to hear the views of the child.

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3 Health Service Executive, 'National Policy and Procedures on the Use of Section 5 of the Child Care Act 1991' (2012).

4 Tusla, Child and Family Agency, 'Alternative Care Practice Handbook' (2014) 156.

- *Time limit:* There is no statutory time limit on the use of section 5 but national holds that the CFA must carry out a periodic review every three months.<sup>5</sup>

*Observation:* The provision of accommodation under section 5 appears to be an inadequate response to the care needs of an unaccompanied or separated child. As the child has no legal guardian in the State, the question arises as to who can provide consent on behalf of a child accommodated under section 5.

In addition, is the CFA permitted to make an application for international protection in respect of a minor for whom it is providing “accommodation” but not “care and protection” (as specified in section 15(4) of the International Protection Act 2015)?

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5 Tusla, Child and Family Agency, ‘Alternative Care Practice Handbook’ (2014) 157.

### 3.2 Voluntary Care (Section 4)

An unaccompanied or separated child may be admitted to care under section 4 of the Child Care Act 1991. Section 4 empowers the CFA to admit a child into care under its own power where it appears the child is lost, orphaned or abandoned. If a parent presents themselves and wishes to resume custody of the child, the child must be returned to them. Section 4 also grants the CFA power to admit a child into care under a voluntary agreement with the consent of the child's parents.

In its 2023 inspection report, while acknowledging the provision of emergency care to unaccompanied and separated children, HIQA criticised the inappropriate use of section 4 for:

*Social workers and managers provided a timely emergency response to unaccompanied children on their initial point of entry into the country, and they were provided with an emergency placement when required.*

*However, the practice of using section 4 of the Child Care Act 1991, for voluntary care, was unsafe. Where consent could not be obtained from parents, the duty and intake teams signed the voluntary agreement in the parent's absence. This practice meant that Tusla staff members who had no legal authority in relation to the child were consenting to the placement of the child within their own organisation, as well as for any medical treatment if required.<sup>6</sup>*

#### *Features of section 4*

- *Aim:* The purpose of this provision is to provide care and protection to a child.
- *Care status:* Under section 4, the CFA admits a child into its care. Decision making in respect of the child transfers to the CFA but it must have regard to the wishes of the child's parent or person in *loco parentis*.
- *Care entitlements:* Under section 4, a child is entitled to be provided with a registered care placement and the statutory safeguards (allocated social worker, Care Plan, periodic child-in-care review and access to court) afforded to a child in care apply.
- *Aftercare:* Being in care under section 4 counts towards eligibility for aftercare.

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6 HIQA (2023) Report of an inspection of a Child Protection and Welfare Service: Separated Children Seeking International Protection. 34.



- *Judicial Oversight:* There is no judicial oversight of decisions under this provision. However, a child may (via a next friend) make a section 47 application to the District Court.
- *Advocacy:* There is no right to access an independent guardian / advocate or to be appointed a solicitor.
- *Views of the child:* The views of the child should be heard by the social worker but there is no formal mechanism to hear the child's views.

*Observation:* Section 4 is an appropriate mechanism for the initial admission of an unaccompanied or separated child to care but problems with consent arise in relation to the maintenance of a child in care.

Does the child's identity as an unaccompanied or separated children trigger the duty under section 16 to initiate judicial proceedings. Section 16 provides that where it appears to the CFA "that a child requires care or protection which he is unlikely to receive unless a court makes a care order or a supervision order in respect of him, it shall be the duty of the Agency to make application for a care order or a supervision order, as it thinks fit."

### 3.3 Care Orders (Sections 17 and 18)

The Child and Family Agency may initiate proceedings to secure a judicial care order under sections 13 (emergency care order), 17 (interim care order) or 18 (care order) of the 1991 Act. As section 13 (emergency care order) is time limited (maximum of eight days) is not included in the discussion below. Section 17 and section 18 orders for unaccompanied and separated children are usually granted under the third of three possible criteria. The criterion is that the “the court is satisfied that: (c) the child's health, development or welfare is likely to be avoidably impaired or neglected and that the child requires care or protection which he is unlikely to receive unless the court makes” such an order. While this provision is general in its phrasing it has proven adequate to date.

#### *Features of sections 17 and 18*

- *Aim:* The purpose of this provision is to provide care and protection to a child.
- *Care status:* Under sections 17 and 18, the CFA admits a child into its care. Decision making in respect of the child transfers to the CFA. While the court may have regard to the wishes of the child's parent or guardian, it can dispense with their consent. Under a section 18 care order, the CFA acquires the authority to consent on behalf of the child to necessary medical or psychiatric care; and to make an application for international protection, residence permit or passport services and the court can provide consent (by way of a section 47 application) for the CFA to make an application for naturalisation.
- *Parental rights and reunification:* Efforts towards family reunification are not hindered by the granting of a section 17 or section 18 order. Indeed, efforts towards family reunification should be formally reviewed at each periodic child-in-care review. The granting of a section 18 care order does not permanently sever parental rights. It transfers such rights to the State for the period of the order. At any time, a parent or guardian can communicate to the CFA that they wish to resume the care and custody of the child. In such circumstances the CFA may apply to the court to discharge the care order. While the Adoption Amendment Act 2017 does provide for involuntary adoptions of children in care, strict eligibility criteria apply. It is unlikely that a court would deem a child (in particular a Ukrainian child here under the Temporary Protection Directive) eligible for adoption in circumstances where their parent (resident in another jurisdiction) objects to the adoption and indicates their interest in resuming care for the child.

- *Care entitlements:* Under sections 17 and 18, a child is entitled to be provided with a registered care placement and the statutory safeguards (allocated social worker, Care Plan, periodic child-in-care review and access to court) afforded to a child in care apply.
- *Aftercare:* Being in care under sections 17 and 18 count towards eligibility for aftercare.
- *Oversight:* There is judicial oversight of decisions under these provisions.
- *Advocacy:* At the discretion of the judge, the child may be appointed either a guardian *ad litem* (GAL) or a solicitor.
- *Views of the child:* The views of the child may be communicated to the court by the social worker and/or the GAL or the child may seek to communicate or meet with the judge.

*Observations:* The application for a section 18 care order provides the most robust response to the care needs of an unaccompanied or separated child. However, it is acknowledged that applying for a care order is resource intensive. To streamline the process of applying for a section 18 order, consideration could be given to engaging with the President of the District Court and sitting judges in the Dublin Metropolitan District Court to seek their co-operation to hold consolidated hearings. Uncontested applications concerning unaccompanied and separated children could be grouped together and scheduling for hearing on a specific day and time each week/month. This would reduce the number of times the allocated social worker/s and CFA legal representative/s need to attend court. As these hearings are uncontested, it should allow for the prompt scheduling of section 18 hearings, which would reduce the need for multiple extensions of the initial section 17 interim care order.

The unaccompanied or separated child should be informed of the implications of being admitted to care under a judicial order. The child's views on whether or not they wish to be admitted to care should be ascertained by the social worker and included as part of the grounding affidavit. Where a child does not assent to the CFA's application for a care order, the child should be appointed their own solicitor under section 25 of the 1991 Act.

In child care proceedings, the judge may appoint a guardian ad litem (GAL) under section 26 of the 1991 Act to hear the views of the child and provide the court with their expert opinion on what is in the best interests of the child. A GAL is usually only appointed for the duration of the court proceedings and then discharged. Further discussion is needed on what model of independent guardian/advocate may be introduced and if this individual could fulfil the role of the GAL (if necessary) in judicial proceedings.

#### 4. ENTITLEMENTS AND AUTHORITY UNDER RELEVANT STATUTORY PROVISIONS

The table below sets out the entitlements for the child and the authority granted to the court and the CFA under relevant sections of the Child Care Act 1991.

	Section 5	Section 4	Section 17	Section 18
Child is in the care of the State	No	Yes	Yes	Yes
Time in care counts towards eligibility for aftercare	No	Yes	Yes	Yes
Entitled to a social worker	No (key worker)	Yes	Yes	Yes
Entitled to a care plan	No (placement plan)	Yes	Yes	Yes
Judicial decision on admission to care	No	No	Yes	Yes
Judicial discretion to review care	No	No	Yes	Yes
Entitled to be appointed a GAL	No	No	Yes	Yes
Entitled to be appointed a solicitor (made party to child care proceedings)	No	No	Yes	Yes
Entitled to make a section 47 application to the court (via next friend)	No	Yes (but little used)	Yes	Yes
The judge can give directions in relation to the child to medical or psychiatric examination, treatment or assessment of the child	No	No	Yes	N/A (see below)
CFA has authority to give consent to any necessary medical or psychiatric examination, treatment or assessment with respect to the child	No. 16/17yr olds may consent	No	No	Yes
CFA has “the like control over the child as if it were his parent” (can provide consent for the child to engage in school activities)	No	No	No	Yes
CFA has authority to give consent to the issue of a passport to the child, or to the provision of passport facilities for him, to enable him to travel abroad for a limited period.	No	No	No	Yes
CFA has authority to make an application for international protection	No	Yes	Yes	Yes
CFA has authority to make an application for residence permission	No	Yes	Yes	Yes
CFA has authority to make an application for naturalisation	No	No	No	Yes, based on a s.47 direction

## APPENDICES

### Appendix A: Extracts from the Child Care Act 1991 (as amended)

#### Section 4 (Voluntary care)

4.—(1) Where it appears to the Child and Family Agency that a child requires care or protection that he is unlikely to receive unless he is taken into its care, it shall be the duty of the Agency to take him into its care under this section.

(2) Without prejudice to the provisions of Parts III, IV, IVA (as amended by the Child Care (Amendment) Act 2011) and VI, nothing in this section shall authorise the Child and Family Agency to take a child into its care against the wishes of a parent having custody of him or of any person acting in loco parentis or to maintain him in its care under this section if that parent or any such person wishes to resume care of him.

(3) Where the Child and Family Agency has taken a child into its care under this section, it shall be the duty of the Agency—

(a) subject to the provisions of this section, to maintain the child in its care so long as his welfare appears to the Agency to require it and while he remains a child, and

(b) to have regard to the wishes of a parent having custody of him or of any person acting in loco parentis in the provision of such care.

(4) Without prejudice to the provisions of Parts III, IV and VI, where the Child and Family Agency takes a child into its care because it appears that he is lost or that a parent having custody of him is missing or that he has been deserted or abandoned, the Agency shall endeavour to reunite him with that parent where this appears to the Agency to be in his best interests.

#### Section 16 (Duty to make application for a care order)

16.—Where it appears to the Child and Family Agency that a child requires care or protection which he is unlikely to receive unless a court makes a care order or a supervision order in respect of him, it shall be the duty of the Agency to make application for a care order or a supervision order, as it thinks fit.

#### Section 17 (Interim care order)

17.—(1) Where a justice of the District Court is satisfied on the application of the Child and Family Agency that—

(a) an application for a care order in respect of the child has been or is about to be made (whether or not an emergency care order is in force), and

(b) there is reasonable cause to believe that any of the circumstances mentioned at paragraph (a), (b) or (c) of section 18(1) exists or has existed with respect to the child and that it is necessary for the protection of the child's health or welfare that he be placed or maintained in the care of the Agency pending the determination of the application for the care order,

the justice may make an order to be known and in this Act referred to as an "*interim care order*".

(2) An interim care order shall require that the child named in the order be placed or maintained in the care of the Child and Family Agency—  
(a) for a period not exceeding twenty-nine days, or  
(b) where the Child and Family Agency and the parent having custody of the child or person acting *in loco parentis* consent, for a period exceeding twenty-nine days,  
and an extension or extensions of any such period may be granted (with the consent, where an extension is to exceed twenty-nine days, of the persons specified in *paragraph (b)* on the application of any of the parties if the justice is satisfied that grounds for the making of an interim care order continue to exist with respect to the child.

(3) An application for an interim care order or for an extension of such an order shall be made on notice to a parent having custody of the child or to a person acting *in loco parentis* except where, having regard to the interests of justice or the welfare of the child, the justice otherwise directs.

(4) Where an interim care order is made, the justice may order that any directions given under subsection (7) of section 13 may remain in force subject to such variations, if any, as he may see fit to make or the justice may give directions in relation to any of the matters mentioned in the said subsection and the provisions of that section shall apply with any necessary modifications.

### **Section 18 (Care order)**

18.—(1) Where, on the application of the Child and Family Agency with respect to a child, the court is satisfied that—

(a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or  
(b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or  
(c) the child's health, development or welfare is likely to be avoidably impaired or neglected,  
and that the child requires care or protection which he is unlikely to receive unless the court makes an order under this section, the court may make an order (in this Act referred to as a "*care order*") in respect of the child.

(2) A care order shall commit the child to the care of the Child and Family Agency for so long as he remains a child or for such shorter period as the court may determine and, in such case, the court may, of its own motion or on the application of any person, extend the operation of the order if the court is satisfied that grounds for the making of a care order continue to exist with respect to the child.

(3) Where a care order is in force, the Child and Family Agency shall—  
(a) have the like control over the child as if it were his parent; and  
(b) do what is reasonable (subject to the provisions of this Act) in all the circumstances of the case for the purpose of safeguarding or promoting the child's health, development or welfare; and shall have, in particular, the authority to—  
(i) decide the type of care to be provided for the child under section 36;  
(ii) give consent to any necessary medical or psychiatric examination, treatment or assessment with respect to the child; and  
(iii) give consent to the issue of a passport to the child, or to the provision of passport facilities for him, to enable him to travel abroad for a limited period.

(4) Any consent given by the Child and Family Agency in accordance with this section shall be sufficient authority for the carrying out of a medical or psychiatric examination or assessment, the

provision of medical or psychiatric treatment, the issue of a passport or the provision of passport facilities, as the case may be.

(5) Where, on an application for a care order, the court is satisfied that—

(a) it is not necessary or appropriate that a care order be made, and

(b) it is desirable that the child be visited periodically in his home by or on behalf of the Child and Family Agency,

the court may make a supervision order under section 19.

(6) Between the making of an application for a care order and its determination, the court, of its own motion or on the application of any person, may give such directions as it sees fit as to the care and custody of, or may make a supervision order in respect of, the child who is the subject of the application pending such determination, and any such direction or supervision order shall cease to have effect on the determination of the application.

(7) Where a court makes a care order, it may in addition make an order requiring the parents of the child or either of them to contribute to the Child and Family Agency such weekly or other periodic sum towards the cost of maintaining the child as the court, having regard to the means of the parents or either of them, thinks fit.

(8) An order under *subsection (7)* may be varied or discharged on application to the court by the parent required to contribute or by the Child and Family Agency.

## **Appendix B: Extracts from the International Protection Act 2015**

### **Section 14 (Unaccompanied child seeking international protection)**

14. – (1) Where it appears to an officer referred to in section 13 that a person seeking to make an application for international protection, or who is the subject of a preliminary interview, has not attained the age of 18 years and is not accompanied by an adult who is taking responsibility for the care and protection of the person, the officer shall, as soon as practicable, notify the Child and Family Agency of that fact.

(2) After the notification referred to in subsection (1), it shall be presumed that the person concerned is a child and the Child Care Acts 1991 to 2013, the Child and Family Agency Act 2013 and other enactments relating to the care and welfare of persons who have not attained the age of 18 years shall apply accordingly.

### **Section 15 (Application for international protection)**

15. – (4) Subject to sections 21 and 22, where it appears to the Child and Family Agency, on the basis of information, including legal advice, available to it, that an application for international protection should be made on behalf of a person who has not attained the age of 18 years (in this subsection referred to as a “child”) in respect of whom the Agency is providing care and protection, it shall arrange for the appointment of an employee of the Agency or such other person as it may determine to make such an application on behalf of the child and to represent and assist the child with respect to the examination of the application.

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