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Direct Provision as Aftercare for Aged-Out Separated Children Seeking Asylum in Ireland

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Authors Note

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Abstract

Ireland’s approach to after-care for ‘aged-out’ separated children is problematic. Currently, upon reaching the age of 18, most separated young people are moved to ‘direct provision’, despite the fact that the State can use discretionary powers to allow them to remain in foster care. Direct provision is the system Ireland adopts providing bed and board to asylum seekers, along with a weekly monetary payment. Separated young people in Ireland are in a vulnerable position after ageing out. Entry into the direct provision system, from a legal and social work perspective, is concerning. Utilising direct provision as a ‘form of aftercare’ emphasises Governmental policy preferences that privilege the migrant status of aged-out separated children, as opposed to viewing this group as young people leaving care. Utilising a cross disciplinary approach, this article reviews the literature to critically analyse these issues from socio-legal and social work perspectives. This analysis will be placed in the context of primary qualitative research with experiences of separated children and young people and key stakeholders. This article concludes, that the administrative and legal approaches to aged-out separated children tend to limit the ability of the State to provide adequate aftercare supports to these young people. Ultimately, their migrant status is privileged over their status as care leavers.

Keywords: aftercare, aged out separated children, direct provision, Ireland, asylum seekers, law, social work practice
Separated children can be defined as those children or young people under the age of 18 who are living outside of their country of origin and separated from their legal or customary caregiver (SCEP, 2010: 3). In the Irish context, while not all separated children seek asylum, the majority do so (Quinn et al. 2014, p 10; Arnold, Goeman and Fournier, 2014, p 491). This article provides a legal analysis of aftercare provision for aged-out separated children living in Ireland. This analysis is contextualised within a qualitative study of the experiences of these children. The study involved qualitative interviews with separated children and young people, foster carers and other key stakeholders. While the majority of the children were in foster care, some had reached eighteen and were living in direct provision. Sixty-nine people took part in total, including 21 children and young people. The study received ethical approval from the Ethics Committee in University College Dublin.

Records suggest that the first separated child to arrive independently in Ireland for the purpose of seeking asylum came in 1996 (Mac Neice & Almirall, 1999). The numbers of separated children seeking asylum has decreased significantly over the last 15 years in Ireland, from 1,085 children in 2001, to 516 children in 2005, with just 98 applications in 2008 and 30 applications in 2014 (Office of the Refugee Applications Commissioner, Annual Report 2014, 24 & 58; Child and Family Agency, 2013, Table 37). The decrease in separated children arriving in Ireland has mirrored the general decline in applications for asylum in
this same period (Office of the Refugee Applications Commissioner, *Annual Report 2014*). It remains to be seen what impact the current refugee crisis will have on numbers of separated children seeking asylum in Ireland. Until 2011, systems for the care of separated children were exceptionally poor, with separated children treated very differently to Irish citizen children in need of care from the State (Irish Refugee Council, 2006; OCO, 2009, Mullally, 2011; Ní Raghallaigh, 2013). The majority of separated children lived in unsupervised hostel accommodation (Ní Raghallaigh, 2013). Towards the end of 2009, *equity of care* became the guiding principle for treating separated children in the same manner as Irish children with child protection needs (Ryan Report, 2009; HSE, 2009). By 2011, the Department of Children and Youth Affairs had confirmed that the long-standing practice of placing separated children in hostels had ceased (DCYA, 2011, 6). The majority of children in the care of the state in Ireland are placed in foster care, with recent data indicating that up to 92.9% of children in care generally live with foster families (Department of Health (2015), Table 4.2). The majority of the remainder live in approved residential homes. All separated children under 12 years of age are now placed immediately in foster care, with those over 12 years of age being accommodated in a number of specialised residential units in the greater Dublin area for a period of needs assessment (Child and Family Agency, 2014; Personal Communication, 2015) Once this assessment is complete, and where family reunification is not possible, the Child and Family Agency will then determine the “*most appropriate placement*” for the separated child (McMahon Report, 2015, para. 5.117). As of October 2014, there were 55 separated children under the care of the Child and Family Agency (Quinn et al, 2014, p. 42), with at least 97
referrals during the whole of 2014 to a specialised social work team for separated children (McMahon Report, 2015, para. 5.116). The majority of separated children arriving in Ireland are 16 or 17 years of age (McMahon Report, 2015, para. 5.116). Within the international context, Ireland is one of only a few countries which primarily uses foster care for separated children (de Ruijter de Wildt et al. 2015).

Ní Raghallaigh’s (2013) study involved qualitative interviews with separated children and young people, foster carers and other key stakeholders. While the majority of the children were in foster care, some had reached eighteen and were living in direct provision. Sixty-nine people took part in total, including 21 children and young people. The study received ethical approval from the University College Dublin Ethics Committee. Notwithstanding the challenges that are faced, including challenges related to the recruitment of foster families, appropriate matching of children and families, challenges within relationships, cultural misunderstandings between carers and young people (Ní Raghallaigh & Sirriyeh, 2015) and occasional placement breakdown, the research participants were primarily very positive about this form of care. For example, the majority of the young people spoke about feeling included in families and feeling a sense support, as illustrated in the following quotation:

Marie, she’s so kind you know, she’s so caring, loving … She’s like my mum. … You can talk to her, you can just say anything … that’s what makes me feel like I’m welcomed …
Like the young people, many carers spoke about the relationships they developed with the foster children:

*I’m just blessed, I think I am anyway and so does my husband, that …we have the kids, we got the kids we got, because it all just kind of melted in together, became a family very quick.*

Carers seemed to enjoy fostering separated children and were committed to their role and to meeting the needs of young people. Stakeholders welcomed the fact that children were no longer living in institutional settings but that instead they were experiencing family life again, usually with individuals who not only cared for them but also encouraged, advocated and guided the young people.

So, while the experience of foster care seemed to be primarily positive, at age 18 the young people became ‘care leavers’. Internationally, evidence suggests that care leavers are at risk of adverse outcomes (Mayock & Vekic 2006, Stein 2006). Aftercare planning and quality aftercare provision is of crucial importance in ensuring best outcomes for care leavers, including separated children (Wade 2011). It is well recognised at an international level that while in a legal sense childhood may end at 18, most young people continue to need support from significant others well into adulthood. This is likely to be even more the case for care leavers given their vulnerability. Indeed, research in the UK found that amongst separated children, increasing age was associated with increased post-traumatic symptoms (Hodes et al. 2008). Problems in the Irish
legal and policy systems tend to compound these situations. For example, the judicial oversight for placing newly arrived separated children into care differs significantly between social work areas (Shannon, 2010, p 236, Arnold & Kelly 2012, Ní Raghallaigh 2013, Quinn et al. 2014). However, the vast majority of separated children are brought into ‘voluntary care’ by the Social Work Team for Separated Children Seeking Asylum (Social Work Team), based in Dublin (Child Care Act 1991, s 4 (as amended)). The Social Work Team are of the view that this type of voluntary arrangement “is OK as a temporary measure (up to two years)” (Personal Communication 2015). This is so as to assist with family tracing and explore possibilities for reunification, or seek the parent(s) permission to place the separated child in voluntary care in the State. The Social Work Team note that “[t]he majority of our cases we have contact with family and the parents have signed [voluntary] care.” The authors of this article have been unable to independently verify this information. Judicial interpretation of the statutory duties on the Child and Family Agency (O’H v Health Services Executive [2007] 3 IR 117) makes clear that voluntary care should only be utilised with the agreement of parents, or a person acting in loco parentis for the separated child. A member of the Social Work Team argued that “[w]e are in loco parentis” and therefore there is no requirement to go through a judicial process (Personal Communication, 2015). This understanding of the Social Work Team is incorrect, as the statutory scheme of the Child Care Act 1991, does not place the Child and Family Agency in the same position as a person acting in loco parentis. Given the vulnerable nature of separated children, who will be without any such legal or social parent, utilising improper legislative powers in order to take the separated child into
underlines the poor understanding and appreciation of legal obligations upon the Child and Family Agency. Other commentators have also expressed concern about this practice (Arnold & Kelly, 2012). The Social Work Team did note that regardless of legal mechanisms (or absence thereof) utilised to bring a child into their care, care provision for separated children is in no way impacted (Personal Communication, 2015). However, this is not necessarily the case as judicial scrutiny as regards the type, form and duration of the care placement for separated children is largely missing, with inevitable negative impact upon aftercare decision-making. As a matter of policy, separated children who reach the age of 18, and become aged-out separated children, are provided aftercare in a system known as “direct provision”. Coupled with the general discretion to provide aftercare to all those leaving care, including aged out separated children, the Child and Family Agency regards direct provision, coupled with some other supports, as aftercare for these young persons.

**Direct Provision, the Child Care Act 1991 and Aftercare for Aged Out Separated Children**

**Direct Provision as Aftercare for Aged Out Separated Children**

Direct provision is the phrase used to describe the system Ireland utilises to provide minimum support to those claiming refugee status (Refugee Act 1996,
s 2), subsidiary protection (European Union (Subsidiary Protection) Regulations 2013 and European Communities (Eligibility for Protection) Regulations 2006) or leave to remain (Immigration Act 1999, s 3(3)(a)). An asylum seeker will be dispersed, with little choice, to one of thirty-four accommodation centres located throughout Ireland. For almost 16 years, the system of direct provision for asylum seekers has existed on an extra-legislative basis without any significant consideration of the impact that direct provision has on the civil, political, economic, social and cultural rights of asylum seekers (Thornton 2007, Thornton 2013, Thornton 2014b, Thornton 2014c). Legislatively prohibited from seeking or entering employment, for the duration of their asylum claim (Refugee Act 1996, s 9), asylum seekers are provided with bed and board, along with a weekly payment, direct provision allowance of €19.10 per week, with generally no entitlement to any other form of monetary supports (Social Welfare and Pensions (No. 2) Act 2009, s 15). The non-legislative and discretionary nature of the direct provision scrutiny has survived human rights legal challenge (Thornton 2015c). The harm caused by the direct provision system has been highlighted by asylum seekers, in numerous reports by international bodies, NGO’s and academics (Reid and Thornton 2014). These reports and testimony suggest that the system has a detrimental impact on mental and physical health and on family life, that children’s development is impaired, that child protection issues arise because of the nature of the accommodation, and that the human rights of individuals living within the system are violated (Amnesty 2011; Arnold, 2012, Children’s Rights Alliance 2011, Nwachukwu et al. 2009, UNHCR 2011). Despite a series of recommendations for the improvement to the system of direct provision
(McMahon Report, 2015; Thornton, 2015a; Thornton, 2015b), there appears to be little governmental appetite to do this. This in spite of the fact that the European Court of Human Rights in *M.S.S. v Belgium and Greece*, has emphasised that asylum seekers are a “particularly underprivileged and vulnerable population group in need of special protection.” (M.S.S. v Belgium and Greece, para. 251; Thornton 2014d). Children leaving the care system have different needs and vulnerabilities over and above other children in Ireland who had not been in the care system (Mayock & Vekic 2006, Stein 2008). Problematically, the Child and Family Agency practice towards aftercare for aged out separated children, tend to limit the ability of social workers to explore accommodation, educational or other support needs for separated young people, beyond what is provided within the direct provision system. Coupled with uncertainty as regards the aged out separated child’s legal and residency status within Ireland, the discretionary legal regime for aftercare, adds to the vulnerability of aged out separated children.

**The Discretionary Legal Regime for Aftercare in Ireland**

Section 45(1) of the Child Care Act 1991 (as amended) provides that the Child and Family Agency *may* assist a person leaving the care system up to the age of 21. This may be extended past 21 where the person is in the process of completing education (Child Care Act 1991, s 45(1)(b) and s 45(2)(b)). While this limited duty to provide aftercare was on a statutory footing since 1991, little operational planning occurred prior to the early 2000s. The predecessor body to the Child and Family Agency, the Health Services Executive (HSE), only
appeared to adopt a policy on aftercare for young people leaving care, due to the increasing levels of homelessness amongst this vulnerable group (Department of Environment, 2002, Health Services Executive 2006, Mayock & Vekic, 2006, Ryan Report, 2011). The discretionary nature of the Child and Family Agency’s powers (LH v Child and Family Agency [2014] IEDC 08 (31 July 2014), para 12), and the limited applicability to children who have spent less than 12 consecutive months in care (Health Service Executive, National Policy, 2012, para 3), has been criticised as “inconsistent and ad hoc” (Holt and Kirwan 2012) and as “arbitrary” (LH v Child and Family Agency [2014] IEDC 08 (31 July 2014), para 14). The Social Work Team have stated that this 12 consecutive month policy has never been applied by them (Personal Communication, 2015). This paints a confused picture as to how discretion is exercised, legal obligations implemented, and policy followed, within the systems in place for provision of aftercare.

The Health Services Executive (HSE) (then responsible for aftercare provision) published its National Policy and Procedure Document for Aftercare Service Provision in 2011 (Dáil Debates, Written Answers, Question No. 173, 17 May 2012). Since 2011, the HSE National Policy and Procedure Document for Aftercare Service Provision has fettered the discretion of the Child and Family Agency in stating categorically, that separated children within the asylum system moving out of care will be accommodated under the direct provision system. While asylum seekers leaving the care system should have their ‘specific complex needs’ considered in an aftercare plan (Health Services Executive 2011, para 2.9),
“On discharge from the [Child and Family Agency] at 18 yrs, young people in the Asylum process are entitled to reside in Direct Provision accommodation should they wish to access basic state supports, such as medical cards, funding for clothes, etc.”

The Child Care Act 1991 states that aftercare can be provided to an individual by “causing him to be visited or assisted”; arranging for completion of education, or entry into a trade or business; and arranging accommodation, by placing the individual in a “hostel or other forms of accommodation” or by co-operating with a housing authority in planning for accommodation (Child Care Act, s 45(2)). The totality of the direct provision system militates against the potential for the Child and Family Agency to fully utilise these discretionary legal powers as regards aftercare. For example, the potential for the Child and Family Agency to arrange that a person leaving the care system enters a business or profession, is prevented by the legislative prohibition on asylum seekers seeking or entering employment. Furthermore, this prohibition, coupled with the small monetary allowance received by asylum seekers, means that practically speaking asylum seekers are excluded from most further education or training options. However, separated young people who are in secondary school when they turn 18 are permitted to complete their secondary education. This means that the ability of the Child and Family Agency to maintain a person in aftercare who is in education would be possible until such point as secondary schooling has been completed, but not thereafter. Section 45(2)(d) of the Child Care Act 1991 permits the Child and Family Agency to arrange hostel accommodation,
which arguably can be provided through the system of direct provision. Arranging for the provision of “other forms of accommodation”, as referred to in the 1991 Act, in general is not provided for aged out separated children. In sum, due to the aged out separated child’s migration status being privileged over their status as a care leaver, the Child and Family Agency have, with some very limited exceptions, elected to do little more than assist in the placing these young people in direct provision accommodation and “causing” these individuals to be visited or assisted in this context. Clearly, given what is known about the direct provision system, the level of assistance that can be provided in such a setting is limited.

The Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers, chaired by Dr Bryan McMahon, (McMahon Report 2015, para. 5.123) stated that,

“Where Tusla [Child and Family Agency] identifies a separated child who reaches 18 as exceptionally vulnerable, they may be allowed to remain temporarily in a Tusla care placement. There are no numbers available on this category.”

The Report (McMahon Report 2015, para. 5.122) outlines that in early 2015 of the 82 aged out separated children in receipt of aftercare support, all of those who did not have a form of residency status upon reaching 18, “in line with Government policy...” were “…required to transfer from care to a Direct
Provision accommodation centre”. Of the 82 young adults receiving aftercare supports, 32 had some form of residency status. The remaining 50 aged out separated children were required to go into direct provision accommodation centres. While the McMahon Report (2015, para. 5.122) states that “various supports” are offered to these 50 young people, no examples of these “various supports” are provided for in the report.

In fact, the McMahon Report (2015, para. 5.124) noted that aged out separated children in direct provision,

“...experience the same lack of purpose as other residents, with no access to work, and limited access to further education and training.”

Indeed, this reflects the findings of the research being discussed here, where stakeholders, carers and young people alike expressed concern about the nature of direct provision. One professional stated:

“The fact that you kind of lie there for 24 hours a day because you don’t have a right to go to education, you don’t have a right to go to work, instead of actually producing something, you’re there in your own mind, all the time: what’s going to happen to me?”

The limited recommendations of the McMahon Report (2015, para. 5.134) on dealing with the needs of aged out separated young people tended to feed into a powerful political narrative that migration status continues to override all other
concerns. The Report also tended to support current practices of the Child and Family Agency whereby aged-out separated young people are placed in the direct provision system (McMahon Report, para 5.134),

“The aftercare plan for a separated child who is awaiting a decision regarding their status should, as far as is practicable and subject to their wishes, accommodate them in a Direct Provision centre located near their foster care or residential placement to facilitate on-going support.”

However, a recommendation that foster carers be provided with education and support in order to build the “independence and resilience” (McMahon Report, para. 5.134) of aged-out separated children in order to prepare these young people for entering direct provision, acknowledged the difficulties they are likely to encounter within this system. There is well documented evidence (FLAC 2009, Thornton 2007, Thornton, 2013, Thornton 2014a, Thornton 2014b, Thornton 2014c) that people living in direct provision have few choices in their everyday life. The inability to choose where they are living, the inability to prepare meals, the inability to seek employment, the inability to choose who they may have to share their sleeping spaces with, all point to the creation of dependence. Thus, it is perhaps ironic that separated children in care are being prepared for ‘independence’.

Direct Provision as Heightening Vulnerability

“…Like me sometimes, I just sit in my room and I cry and cry and cry and cry… I know I’m safe here but its more hard for me than the way I
was back home … sitting in your tiny room thinking like ‘oh God’! I’ve been here like now for four years and I talk to other people and they tell me like ‘Oh we’re here more than like 8 years, 10 years and nothing changes we’re still waiting for the Justice to decide’ so I’ll be thinking Oh God am I going to be like them or am I going to get deported back home and what’s going to happen if I go home” (Young person in direct provision)

This experience is mirrored in other research about this vulnerable group (Bean et al., 2007; Hodes et al., 2008; Barrie & Mendes 2011; Horgan et al, 2012), notwithstanding other debates about the fact that, alongside such vulnerabilities, young people can also demonstrate considerable resilience (Ní Raghallaigh & Gilligan, 2010; Ni Raghallaigh, 2011; Kohli, 2007; Smyth, Shannon & Dolan, 2015). The term ‘suspicious vulnerability’ has been used by others to analyse how governmental and societal concerns are reflected in discourses about the way asylum seekers are viewed to access to mainstream welfare supports (Cook, 1999, Bhabha, 2001, Bhabha and Finch, 2006). Professionals who were interviewed in the study identified a number of different aspects of the direct provision regime that they felt posed risks to the young people. They included the sense of the marginalisation and idleness by virtue of being excluded from the workforce and having limited access to education and financial means. The study found that participants, particularly foster carers and professionals/stakeholders, were concerned about the discretionary nature of aftercare provision. Essentially, the decision as to whether an aged out separated child will move to direct provision or remains in foster care, is made
by the Child and Family Agency. The Social Work Team state that all aged out separated children will receive an aftercare plan, and have access to an aftercare worker “if they want one” (Personal Communication, 2015). The Social Work Team further emphasised that leaving foster care and aftercare planning and preparation prepares the aged out separated child for direct provision (Personal Communication, 2015). In the research study, representatives of the Reception and Integration Agency (RIA), who exercise administrative control over the direct provision system, emphasised that direct provision was not a care facility. Their view was that ‘nobody is in the care of RIA’, although it was acknowledged that centre managers are often asked, by the Child and Family Agency, to ‘keep an eye on young people’. RIA representatives were clear that it was not within their remit to make decisions about who should move or who should not. This was the HSE/Child and Family Agency’s responsibility:

“…if they are deemed to be vulnerable they will not come to us, because that is a decision to be made by the HSE.”

This differed to some degree from the HSE’s/Child and Family Agency’s perspective, in keeping with the McMahon Report, where the criteria were not based on vulnerability but instead, on “exceptional vulnerability”.

“I need to make a case to senior management for why this young person isn’t ready to leave. And the circumstances need to be quite exceptional.

Okay. To do with vulnerability?”
Well, it's to do with exceptional vulnerability, because all of our young people are vulnerable.”

The Social Work Team have noted that they collaborate with the Reception and Integration Agency as regards “health, education, social needs” in consultation with the aged out separated child, residential staff or foster carers (Personal Communication, 2015). Time and time again, practitioners who participated in the research referred to the vulnerability of the young people and to their lack of readiness for leaving the care system, especially when subsequently entering the system of direct provision. Participants spoke of advocating that specific separated children be allowed to remain with their carers or highlighting issues of risk and vulnerability. As one practitioner put it:

“I spent months in correspondence with members of the HSE … setting out all the inherent vulnerabilities in separated children, but specifically related to the individuals whom I was working with, which were serious mental health concerns, suicidal ideation, losing two stone in the process of moving from a foster placement into direct provision accommodation. … and what I received back, was “That’s not vulnerable enough. Sorry”.

These are concerns that are also reported by Martin et al (2011) who question the manner in which young people’s best interests are interpreted once they reach the age of 18. The proposals contained within the McMahon Report (2015) appears to make a clear distinction between the needs of children in the foster care system and the direct provision system designed for ‘for adults’. This
demarcation has had a profound impact on these young people causing high
degrees of stress within foster placements and relationships with carers at this
moment in the young person’s life. Instead of looking forward to becoming
adults, it was noted by one stakeholder:

“A lot of the kids whom I’m working with now are scared to death of
turning 18, and it all starts when they’re 16.”

Within the research, while participants highlighted the immense resilience
displayed by many separated children, they were strongly of the view that these
young people demonstrated on-going vulnerability after reaching the age of 18,
particularly in the context of little support. For young people the difference
between the supports provided while in foster care was in stark contrast to the
system of direct provision. While foster care served to build resilience and
strengths, there was a concern that this became undermined when the move
into direct provision occurred. Many of the professionals expressed frustration
that all the good of foster care became undone. Interestingly, some even
wondered whether the previous hostel system was a better one as the transition
from hostels to direct provision involved less of a jump than the transition from
foster care to direct provision.

“There are lots of kids who are doing really well, both from an education
point and the foster care placement, and purely, from what I can see are
budgetary reasons, they’re now being moved to direct provision at 18.
And very often they’re moved to a hostel that’s completely outside of
where they’ve been living. So they lose all the supports that they have around them. So you nearly go, “What’s the point of putting in two or three years of foster care?” … to actually just pull it straight out from underneath their feet?”

Being able to complete their second level education while in direct provision was helpful for some young people. This meant that the idleness experienced by others in direct provision was not as evident. However, by virtue of their vulnerability they faced particular challenges trying to attend school and study while living in direct provision. One professional alluded to this noting:

“…The act of putting on a school uniform and going to school with 16 boys who are just talking about hurling [a popular Irish sport] when you’ve been moved from your country of origin separated from your family, have been through some sort of horrific trauma … I just think it’s really difficult and when you’ve nobody there to support you through it … they just need that little bit of extra somebody there in the background saying get up and go to school or you know you can do this… they just need that extra boost … but they need it all the time”

**Challenging De Facto Exclusion from Aftercare**

Vulnerability, resilience and risk exist side by side as regards Ireland’s approach towards aged out children within the asylum system. The Child and Family Agency’s interpretation of their legal duties towards aged out separated
young people leaving the care system has been accepted by the Irish High Court. The case of *Enguye v Health Services Executive* ([2011] IEHC 507 (Unreported judgment, Gilligan J., 26 October 2011) was the only occasion that the High Court has had to consider the statutory duties under Section 45 of the Child Care Act 1991 (as amended). While there were two applicants in this case, similar facts and issues arose in both proceedings. Esther Enguye entered Ireland in 2008 at sixteen years of age. As an “unaccompanied minor”, she was taken into care by the Health Services Executive (HSE, then the responsible agency) under Section 4 of the Child Care Act 1991 and Section 8(5)(a) of the Refugee Act 1996 ([2011] IEHC 507, para 2). The applicant was placed in a hostel for separated children in Dublin city upon her arrival. Enguye attended a local school in Dublin. In April 2010, Enguye turned 18, and in June 2010 was dispersed to a direct provision accommodation centre in County Galway, some 200 kilometres away. Arrangements were made in order for Enguye to complete her final year of study, and complete the final State examination, in a school in Galway ([2011] IEHC 507, paras 3-4). After intervention from a clinical psychologist, and support from a civil society organisation, Enguye was able to move back to Dublin and complete the final state examination in her old School ([2011] IEHC 507, para. 5 and para. 28). No State support was being provided to the applicant throughout this time. The civil society organisation, who supported the applicant financially and through accommodation, was facing financial difficulties. The applicant’s claim for refugee status was refused, and she was awaiting determination of an application for leave to remain in Ireland (Immigration Act, s 3). Enguye sought to quash the decision of the HSE that she would not be provided with aftercare
under Section 45 of the Child Care Act 1991, a declaration that the HSE had failed to exercise its statutory powers to provide aftercare to her, and a declaration that the HSE had failed to take into account independent evidence relating to her need for aftercare ([2011] IEHC 507, para. 7). Enguye also sought a declaration that her rights under the Irish Constitution had been breached by the actions of the HSE. The HSE rejected these claims, on grounds that Gilligan J. fully accepted in his decision.

In assessing the applicant’s claims, Gilligan J. stated ([2011] IEHC 507, para. 29),

“The applicants appear to lose sign of the fact that they entered this State as unaccompanied minors, have been provided for while they applied for refugee status…”

In considering the limited nature of the applicant’s residency right to remain in the State until the outcome of whether she would be granted leave to remain, the HSE was entitled to take into account “the asylum and immigration position” of the applicant ([2011] IEHC 507, para. 31). As discussed previously, section 45 of the 1991 Act simply imposes a discretion on the HSE to consider whether aftercare supports should be provided ([2011] IEHC 507, para. 32). In this case, Gilligan J. concluded, that government policy of moving aged out separated children into direct provision accommodation did not fetter the HSE’s ability to provide further aftercare supports, if it was so minded to do so ([2011] IEHC 507, para. 32). So while the discretion of the HSE was enshrined in statute, and
their decision not to fully consider offering the applicant aftercare support “may appear insensitive” ([2011] IEHC 507, para. 34),

“[I]t so happens that on this occasion the decision made by the [HSE] …was in accordance with government policy” ([2011] IEHC 507, para. 32).

As long as direct provision remains Government policy for accommodation of aged out separated children, this judgment suggests that it is unlikely that courts will interfere with any decision reached by the Child and Family Agency as regards aftercare.

There have been some political movement for strengthening the rights generally of all young persons leaving care with the publication of the Child Care (Amendment) Bill in November 2015. With a general election in the offing in Ireland early in 2016, at the time of writing it is unclear whether this legislative proposal will be passed by the Houses of the Oireachtas (Parliament). In any event, this legislative proposal is unlikely to significantly impact in any significant way on aged out separated children leaving care, if it does become law. There is no specific reference or mention of aged out separated children in the Child Care (Amendment) Bill 2015. That said, if this legislative proposal becomes law, it will place a clear legal obligation on the Child and Family Agency to provide for and engage in aftercare planning for aged out separated children (Child Care (Amendment) Bill 2015, Cl 2 and Cls. 5 to 9). In addition, the 2015 Bill states that when preparing the aftercare plan (or a review of the plan), the Child and Family Agency “shall” (i.e. is obliged to) ascertain the views
of the eligible child or adult “as appropriate” (Child Care (Amendment) Bill 2015, Cl. 7 to Cl. 9). However, given that under Clause 2 of the 2015 Bill, an “eligible child” has to have been in the care system for a period of 12 consecutive months since the age of 13 years, it is likely that a considerable percentage of separated children will not be eligible for aftercare planning, given that many arrive when they are aged 17. Given the current practice of the Social Work Team, to disregard Child and Family Agency policy on aftercare, and offer it to all aged-out separated children seeking asylum, this change may impact negatively on this vulnerable cohort. An “eligible adult” who is 18, 19 or 20 and who has not had a care plan prepared for them prior to the commencement of the 2015 Bill (Child Care (Amendment) Bill 2015, Cl. 2 and Cl. 8), can request to be provided with an aftercare plan. Under the 2015 Bill, the Child and Family Agency may have an obligation to engage in aftercare planning in relation to aged out children who have already entered the direct provision system, if this has not already occurred. However, government policy is clear and is unlikely to change. As the McMahon Report (2015) highlights, it appears that there will be no move away from the use of direct provision for separated children who age-out of the care system so provision of after care support seems likely to continue to occur within this context. While the 2015 Bill (if it becomes law), is welcome, its impact upon aged out separated children will, in effect, be limited.

Concluding Remarks

It is a welcome that while under eighteen, separated asylum seeking children in Ireland are not subject to the much criticised system of direct provision which
applies to adult asylum seekers (including children of these asylum seekers). The evidence suggests that, within the Irish context, care provision for separated children is much more child centred than in other jurisdictions given that care is primarily provided through the foster care system. The research study on which this article draws suggests that this system of care is working well for separated children and that it has the potential to facilitate the meeting of their best interests. However, the situation as regards aftercare is very different. Legal, policy and social work approaches to aged out separated children emphasise their ‘difference’ from other young people in need of transitional supports when leaving foster care. The limits of Ireland’s current model for aged out separated children, is to prepare an ‘aftercare plan’. Aftercare planning is done while separated children are children but it is being done in the context of viewing them as migrants first and foremost who have to fit in with the direct provision system upon turning 18. This evidences the State’s trumping of its immigration control function, rather than recognising the vulnerabilities of aged out separated children. It is widely accepted that care-leavers are generally in need of appropriate after care support in order to ensure good long term outcomes. This is of course relevant to separated children also, who, despite their immense resilience in the face of adversity, also display much vulnerability. Within Ireland the provision of after care support is at the discretion of the State agency with responsibility for children in care. It is welcome that the Social Work Team disregard policy and provide the possibility of aftercare planning and support to all aged out separated children entering aftercare. Nevertheless, our socio-legal analysis suggests that when separated children turn 18 their status as adult asylum seekers take
precedence over their status as care leavers. The majority of aged out separated children move into the direct provision system. While representatives of the Child and Family Agency may visit them there and offer assistance, it is evident from the general literature on direct provision and from the specific research study discussed in this article, that this form of accommodation is detrimental to their well being. In addition, for separated children who are under 18, the anticipation of the move to direct provision can mitigate against their best interests by impacting on them during their time in care. As such, the attempts to draw a line between the lives of separated young people as children in care prior to age 18 and as adult asylum seekers once they turn 18 is very arbitrary. It can be reasonably inferred from this discussion, that the Child and Family Agency are anxious not to create a precedent as regards provision of accommodation for aged out separated children, outside of the direct provision system.

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