AN CHÚIRT UACHTARACH
THE SUPREME COURT

[S:AP:IE:2019:000003]

Clarke C.J.
Mac Menamin J.
Charleton J.
O'Malley J.
Irvine J.

BETWEEN/

DARREN FAGAN, SENNA COOGAN (a minor), SCOUTLARUE COOGAN (a minor) AND DARREN COOGAN (a minor) suing by their father and next friend DARREN FAGAN

APPELLANTS/APPLICANTS

AND

DUBLIN CITY COUNCIL

RESPONDENT

AND

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

AND

THE ATTORNEY GENERAL

NOTICE PARTY

Judgment of Irvine J. delivered the 19th day of December, 2019.

1. This appeal arises out of judicial review proceedings to set aside a decision of the respondent ("the Council") in its capacity as the housing authority for Dublin city.

2. When assessing the first named appellant's (Mr. Fagan's) application for social housing support the Council categorised his household as a one-person household. It concluded that, for the purposes of s. 20 (1) of the Housing (Miscellaneous Provisions) Act 2009 ("the 2009 Act"), he did not "have a reasonable requirement to live together" with his children, the minor applicants, even though at the time he had joint custody and was co-parenting the children with his former partner. The consequences of that determination were first, that for the purposes of considering the type of housing that might be allocated to him under s. 22 of the 2009 Act, Mr. Fagan would be excluded from consideration for accommodation with a separate bedroom for his children, thus significantly impacting on his relationship with his children as hereinafter described. Second, insofar as the Council might decide, in lieu of the provision of accommodation, to meet his housing needs by making a housing assistance payment ("HAP"), the payment would be confined to that which applies to a single person household.

Scope of the appeal

3. Although I will endeavour to do so in greater detail later in this judgment, I will first set out the general scope of the appeal. Instructive in this regard is the determination of this court setting out why leave to appeal was granted and, more crucially, the question to be answered on the appeal. Paragraphs 4 and 5 thereof make clear that at the centre of this appeal lies the question of how a housing authority should apply s. 20(1) of the 2009 Act.

4. Considerations that go beyond this question are therefore not of primary relevance. I will nonetheless return later to consider in some small amount of detail how the statutory scheme operates. Suffice for the moment to refer to that section of the Act which is core to the appeal.

5. Section 20 of the 2009 Act, in relevant part, provides:

> "(1) For the purpose of this section "household" means-
>
> (a) a person who lives alone,
> (b) two or more persons who live together, or
> (c) two or more persons who do not live together but who, in the opinion of the housing authority concerned, have a reasonable requirement to live together.
>
> (2) Where a household applies for social housing support, the housing authority concerned shall, subject to and in accordance with regulations made for the purposes of this section, carry out an assessment (in this Act referred to as a "social housing assessment") of the household's eligibility, and need for, social housing support for the purposes of determining-
>
> (a) whether the household is qualified for such support, and
> (b) the most appropriate form of any such support."

It is the Council's decision that the requirement of Mr. Fagan and his children that they live together is not reasonable for the purposes of s. 20(1)(c) that is the focus of this appeal.

Background to the appeal

6. It is important to record at the outset that the facts relevant to this appeal, and to which I will now refer, are agreed between the parties. Of equal importance is the fact that the Council fully accepts the *bona fides* of Mr. Fagan in his application for social housing support which would allow him have his three children stay with him overnight approximately three times a week.

7. Mr. Fagan is the father of the other appellants, his children aged eleven, five and four. Although he is separated from the children's mother, they appear to maintain a good relationship. Unfortunately, as a family they have experienced difficulty in securing permanent housing and have had to rely on the Council for their housing needs. Regrettably, from time to time they have had to reside in emergency accommodation.

8. In August 2017, Mr. Fagan and his partner decided to separate. As a consequence, they filed separate applications for housing assistance. Having agreed that they should enjoy joint custody of their children, each parent sought to include the children as part of their household when applying to the Council for social housing support. The mother appears to have been registered by the Council as a separated mother with three children and her application progressed on that basis. Mr. Fagan filed the application which is relevant to this appeal on 13th September, 2017. As part of that application he completed a form provided by the Council stated to be "FOR USE IN THE ABSENCE OF COURT DOCUMENTS

OR SEPARATION AGREEMENT" which recorded, *inter alia*, that the children resided on a day-to-day basis with their mother but that it had been agreed that the father would have "overnight access". Whatever the precise meaning or status of this document the parties are agreed that the parents have joint custody of their children and that Mr. Fagan made known his right to overnight access 3 days a week and that he was anxious to parent his children on that basis.

9. The Council's Statement of Opposition makes clear that, in its assessment of whether Mr. Fagan had a reasonable requirement to live with his children such that his household might be categorised as falling within the provisions of s. 20 (1)(c) of the 2009 Act, it took the following factors into account:

    a. Matters required under s. 20 of the Housing (Miscellaneous Provisions) Act 2009;

    b. information relevant to the applicants' housing need;

    c. the purposes of the Housing Acts 1966-2014;

    d. the accommodation available and/or to be made available to the minor applicants with their mother;

    e. in accordance with s. 69 of the Local Government Act 2001, the resources available or likely to be available to the Council and the need to secure the most beneficial, effective and efficient use of such resources;

    f. the prospect of under-utilisation of its housing resources in the event of allocation of bedrooms to the minor applicants in two separate dwellings;

    g. the need of others, including children, on its housing lists for multi-bedroom accommodation.

10. Based on its aforementioned assessment, the Council considered that Mr. Fagan's needs and those of his children did not meet the test provided for in s. 20(1)(c) of the 2009 Act. He was informed that he qualified for a housing assistance payment based on the housing needs of a single person living alone. He was ultimately deemed entitled to a payment of €990 per month, that being the maximum payment available for a single person household, a sum which it is not disputed is insufficient to meet his housing needs if those are to include a separate bedroom for his children.

11. Aside from the events as they unfolded, it is further accepted by the parties that had Mr. Fagan, as a separated parent who enjoys custody/access rights, applied for social housing support to a number of other housing authorities, his housing need might well have resulted in his household being categorised as falling within s. 20(1)(c). To that end, the appellants exhibited housing allocation documentation from South Dublin County Council, Dún Laoghaire-Rathdown County Council and Fingal County Council.

12. Mr. Fagan appealed the Council's decision by way of an internal appeal process but was unsuccessful. Dissatisfied with the outcome of his application, Mr. Fagan issued judicial review proceedings in the High Court seeking primarily an order of *certiorari* of the Council's decision to classify him as a single person and in assessing his housing needs on that basis.

High Court judgment

13. By judgment delivered on 19th November, 2018, Barrett J. refused the relief sought. The High Court Judge found that, in assessing Mr. Fagan's application and classifying his household for the purpose of s. 20(1) of the 2009 Act, the deliberations that had been carried out by the Council were within the limits provided for by the legislation. In other words, the Council had taken into account relevant considerations and had disregarded irrelevant considerations.

14. According to Barrett J., guidance as to what constitutes relevant and irrelevant considerations for the purposes of s. 20(1)(c) of the 2009 Act, is to be found in the reasoning of Lord Hoffmann in the House of Lords decision in *Holmes-Moorhouse v. London Borough of Richmond upon Thames* [2009] UKHL 7. That case had dealt with what the High Court judge considered to be a similar provision in the laws of England and Wales as provided for in Part VII of the Housing Act 1996. Whilst recognising the difference between domestic law and the relevant provisions of that Act, he nonetheless held that the reasoning employed by the Law Lord also applied to the case before him.

15. At para. 6 of his judgment Barrett J. summarised his conclusions, having regard to the *Holmes-Moorhouse* decision, as to the factors to be taken into account by a housing authority when determining whether two or more persons who did not live together had, for the purposes of section 20 (1) (c) of the 2009 Act the "reasonable requirement to live together" :-

> "what is at play is
>
> (1) an impersonal objective standard which appeals to an objective social norm, with
> (2) the Act falling to be interpreted
>
> (i) with liberality having regard to its social purposes, but also
> (ii) with recognition of
>
> (I) the claims of others and
> (II) the nature and scale of the council's responsibilities."

16. Applying this to the facts before him, the High Court judge held that the considerations taken into account by the Council, as listed in the statement of opposition, were within those limits. At para. 8 he concluded:-

> "It seems to the court that, when one has regard to para. 6 of this judgment, all that one sees in the just-quoted description [the statement of opposition] by the Council of the approach that it took to its decision-making is but the practical,

proper and lawful implementation by the Council of, in particular, point (2) referred to in para. 6."

17. The High Court judge then specifically observed that, although the considerations as to resources listed at letters d-g in para. 9 of this judgment were relevant to the allocation of social housing under s. 22(3) of the Act, they were also relevant considerations under s. 20(1) of the 2009 Act. Thus, the judge dismissed the appellants' claim.

Appellants' submissions

18. The appellants' principal submission is that the Council, in its deliberations under s. 20(1)(c), took into account irrelevant considerations and did not give adequate weight to relevant considerations. They argue that the Council impermissibly had regard to, or paid excessive regard to, the resources available to it as a housing authority and had insufficient regard to their requirement to live together so that Mr. Fagan might enjoy his rights as a parent and joint custodian and the children their entitlement to a meaningful relationship with both of their parents. The appellants maintain that the Council unduly fettered the discretion it enjoys under s. 20(1)(c) based upon its consideration of available resources. In aid of that submission, they make the following points:

    a. The emphasis in s. 20(1)(c) is placed upon the reasonable requirement of the persons concerned to live together. Accordingly, any assessment must predominantly focus on the needs of the family unit in question, not resources.

    b. The Oireachtas did not employ language to steer the assessment of the housing authority as to whether a group of applicants should be considered to have a reasonable requirement to live together towards a resource-based assessment as might have been done had s. 20 (1) included words such as "subject to available resources".

    c. Whilst the availability of resources is an important factor to which a housing authority must be entitled to have regard and is one of particular importance when carrying out its role under s. 22 of the 2009 Act, that being the section which deals with the prioritisation and allocation of available housing, it is not a relevant consideration when making an assessment as to whether the requirement of two or more persons to live together should, in accordance with s. 20(1) be considered reasonable.

    d. If persons in the position of Mr. Fagan, i.e. a separated parent who has joint custody of his children and who, with the agreement of the other parent, wishes to co-parent, is to be classified as single person household, even though they require an additional bedroom or bedrooms to give effect to their custody rights, their need for that type of housing will never be recorded in the files of the housing authority. The consequence of the approach adopted by the Council is that, when, as a housing authority, it comes to prepare its estimate of the amount of housing required for households assessed under s. 20 and to compile its housing services plan under s. 16, the needs of those who are in the position of the appellants, of

whom there are currently 895 in Dublin City, will not only not be recorded but will never be provided for.

In these circumstances, the appellants argue that the High Court judge was wrong to afford such wide latitude to the Council in the exercise of its discretion.

19. The appellants also submit that the High Court judge was wrong to rely on the decision in *Holmes-Moorhouse*. They argue that English and Welsh law inextricably links any assessment of whether persons can reasonably expect to live together with the issue of resources. This cannot, however, be unequivocally said about s. 20(1) of the 2009 Act, thus making the authority of limited value in the present proceedings.

20. Furthermore, the appellants submit that there is a statutory duty upon the respondent, the enforceability whereof cannot be mitigated by the fact that limited resources are available to enable it perform such duty. In other words, the respondent cannot limit its obligations vis-à-vis Mr. Fagan by classifying him as a one-person household on the grounds that limited resources are available.

21. Finally, the appellants contend that in failing to classify their household as one to which s. 20(1)(c) of the 2009 Act applies, their rights under Article 8 of the European Convention of Human Rights ("ECHR") and the Constitution have been breached.

The Council's submissions

22. The Council maintains that the High Court judge was correct to find that s. 20(1) afforded it sufficient discretion to conduct the assessment in the manner in which it did. It submits as follows: –

    a. The appellants' contention that the focus of an assessment pursuant to s. 20(1)(c) must be on the requirements of the family unit is misplaced. The plain and ordinary meaning of the words prescribe that it is the opinion of the housing authority, rationally held, which is determinative of any emphasis placed.

    b. It would be unreasonable for a housing authority to not have regard to the availability of resources. To exclude the available resources from its consideration would be contrary to the overall purpose of the housing legislation. Having financial limits placed upon it, a housing authority must be able to consider the issue of resources. Section 69(1) of the Local Government 2001 supports such contention. It sets out in a general manner that a local authority, in exercising its functions, must have regard to the resources available to it.

    c. The court should afford due deference to the respondent in respect of a determination made pursuant to s. 20(1) of the 2009 Act. The Council argues that a housing authority must enjoy a considerable margin of appreciation in light of its expertise as well as the statutory duties and powers conferred upon it.

23. As to the relevance of the *Holmes-Moorhouse* decision, the Council contends that the approach followed by the High Court judge, which was to adopt the general reasoning of

Lord Hoffmann, was permissible in spite of any difference between the respective legislative provisions. Such differences did not affect the force of Lord Hoffmann's *dictum* where he makes broader comments about the kinds of considerations that a housing authority may take into account when allocating scarce resources.

24. Finally, the Council submits that as Article 8 ECHR was not pursued in the High Court, the appellants should not be permitted to rely upon it in the course of this appeal. Furthermore, Article 8 is not relevant to the point of statutory interpretation at the heart of the appeal. Lastly, socio-economic rights, such as the right to housing, do not, in any event, fall within the ambit of Article 8 ECHR.

Involvement of the *amicus curiae* and Attorney General

25. The focus of the *amicus curiae's* submission is that when making a decision pursuant to s. 20(1) of the 2009 Act, the Council is obliged to take the appellant's rights under the Constitution and the ECHR into account. The *amicus* seeks to support this submission by reference to certain ECtHR case law concerning the rights of unmarried separated parents and their children and their ability to enjoy communal family life. It is argued that the application of s. 20(1) as proposed by the Council unlawfully interferes with those rights.

26. The Attorney General's submissions are, by and large, a reply to the submissions made by the amicus. In particular, he urges the court not to engage with the rights issues raised by the *amicus* as they were not raised in the High Court and are of no real relevance to the issue to be determined on the appeal. It is further urged on his behalf that, if the court chooses to engage with the rights so advocated, that those rights extend beyond the scope of the relevant provisions in Constitution and the ECHR. Finally, it is important to record that at the time the Irish Human Rights and Equality Commission ("the Commission") sought liberty to intervene as *amicus*, the Attorney General was clearly concerned that the Commission intended to argue in favour of an unenumerated Constitutional right to housing. However, that concern was, as matters transpired, misplaced given that neither the applicants nor the *amicus* advanced any such argument on the appeal. The *amicus* confined its submission to supporting the interpretation of s. 20(1) as proposed by the appellants but argued that if there was any doubt as to the correctness of that approach, that interpretation was one which was supported by reference to family rights both under the Constitution and the ECHR.

Discussion

27. Having set out the legal submissions, it is perhaps useful to remind ourselves of the fact that, on this appeal, we are primarily dealing with an issue at to how a housing authority should apply s. 20(1) of the 2009 Act. This limited scope was in fact accepted by both the Council and the appellants in their written submissions as well as in oral argument and reflects the determination on the application seeking leave to appeal.

28. What precisely this question entails is the following. This court is not asked to resolve any ambiguity in the words or syntax of the text of the statute, at least not primarily. The function of s. 20(1) is clear. Where an applicant makes a social housing support application on the basis of a requirement to live with another person or persons, the

function of the council is to determine if their requirement to live together is reasonable. What is less clear, however, is how this function is to be exercised. It follows that what this appeal is concerned with is how a housing authority, faced with the requirement that it carry out an assessment under s. 20(1), can lawfully conduct that assessment. More specifically, the question is: how can a housing authority form a lawful opinion as to whether multiple applicants, who do not live together, have a "reasonable requirement to live together"?

29. This is a question which looks at the limits of a discretion conferred by a statute. Here, s. 20(1) confers a discretion on the Council to assess and form an opinion as to the need of two or more persons to live together. Although this initially appears to be a broad discretion, not every opinion which could conceivably be reached by a housing authority would be lawful under the section. The discretion conferred here is based upon an objective yardstick – the reasonable requirement to live together. Compliance with this standard is what is required of a housing authority when conducting its assessment. It is, therefore, the task of this court to determine the four corners within which a housing authority can conduct such an assessment and determine whether any asserted requirement to live together is reasonable. However, it is not for this court to substitute its judgment for that of the Council. Rather its role is to determine whether, in reaching its decision, the Council's approach was permissible. If, at the end of that process, the court concludes that the Council's decision was likely influenced by impermissible factors, the correct approach would be to make an order of *certiorari* with the result that the Council would be obliged to reconsider Mr. Fagan's application based only on relevant considerations.

30. Thus, it is necessary to reflect upon the kinds of considerations which the Council was entitled to take into account when determining whether Mr. Fagan had a reasonable requirement to live with his children, as was his contention, and those which it should have disregarded. It is also necessary to consider whether the decision of the Council should be considered as one which falls outside the four corners of the legislation because excessive weight was placed upon a relevant consideration. It is to be remembered that the appellants argue that if the Council was permitted to rely upon the adequacy of resources, a proposition they have strongly argued against, excessive weight was attached to this consideration on the facts of this case.

31. Looking first at the wording of s. 20(1) itself, as discussed in general terms, the provision imports an objective test. Assessing the plain and ordinary meanings of the words used, that objective test looks at the reasonable requirement of two or more applicants to live together. It is certainly true that the opinion of the housing authority is determinative here, but the opinion that needs to be formed must be an opinion about the requirement of any applicants before it to live together. For this purpose, the housing authority is clearly entitled to interrogate, by reference to the personal circumstances of the applicant and the other person/persons with whom they wish to reside, whether their requirement to live together is objectively reasonable.

32. In making its assessment in a case such as this the Council might, for example, want to be satisfied (i) that the applicant was the father of the children with whom he required to reside, (ii) that the relationship with the children's mother was at an end and that he could no longer share any accommodation she might have (iii) that he was genuine in his stated requirement to have his children reside with him three days a week and (iv) that he had the mother's agreement or was entitled to custody/access on this basis as a matter of law. These are but some practical examples of the factors that might fall to be considered by the Council when considering whether the requirement of any applicant to live with another person or persons might be considered reasonable with the meaning of that word s. 20(1) of the 2009 Act.

33. In my view, it is clear beyond question that the opinion of the housing authority regarding the requirement of persons to live together must be based solely on the requirements of those persons. Consequently, any considerations which go beyond establishing the individual requirements of two or more applicants to live together, cannot form part of such an assessment. They fall outside the test as envisaged by s. 20(1) where the focus of the assessment as to whether applicants have a reasonable requirement to live together must be on the relevant personal and family circumstances of those involved. Such considerations as are listed in the Council's replying affidavit and statement of opposition as concern the availability of resources could not possibly assist the Council in ascertaining whether the appellants "requirement to live together" was "reasonable" in the circumstances. They are irrelevant as a result.

34. Furthermore, the section necessarily implies that any assessment must be made on a case-by-case basis. This is demonstrated by the fact that a housing authority enjoys some discretion pursuant to s. 20(1) to assess a broad spectrum of applicants and classify them according to their requirements. To classify every parent as a one-person household on foot of resources considerations on the basis that their children are already provided for in terms of accommodation as part of the household of the other parent, factors which will arise in all applications where separated parents have joint custody of their children, constitutes a *de facto* policy on the part of the Council. Such a policy inevitably prevents any case-by-case assessment where an applicant has joint custody of their children and the other parent's household has already been assessed as falling within s. 20(1)(c). Regardless of their rights as joint custodians of their children and their resolute desire to live with their children for substantial periods of time, even as much as 50% of the time, their requirement to live with their children is to be automatically assessed as objectively unreasonable. Such an approach has the effect of removing from the Council's assessment any consideration of the reasonability of Mr. Fagan's requirement that his household be considered as one which includes his children and has the effect of a blanket policy, a course of action which falls outside the four corners of s. 20(1).

Legislative framework and s. 69 Local Government Act 2001

35. Although the preceding paragraphs settle how s. 20(1) is to be construed by itself, it does not address the Council's contention that s. 69 of the Local Government Act 2001 ("the 2001 Act") is to be factored into any assessment pursuant to s. 20(1).

36. Section 69 of the 2001 Act provides as follows:

> "Subject to subsection 2, a local authority, in performing the functions conferred on it or under this or any other enactment, shall have regard to-
>
> (a) the resources, wherever originating, that are available or likely to be available to it for the purpose of such performance and the need to secure the most beneficial, effective and efficient use of such resources, …"

37. Looking at the wider framework of the housing legislation is of assistance here. It is well established that in order to ascertain the meaning of an enactment, the interpreter must read the Act as a whole to put the enactment within its proper context. And, it is permissible to have regard to both the proximate and general context in which any particular phrase or provision occurs, including any other such phrase or provision, or indeed the Act as a whole, which may illuminate the correct meaning of any disputed provision. Lord Radcliffe in *In Re Macmanaway* [1951] A.C. 161, said at p. 169:

> "The primary duty of the court of law is to find the natural meaning of the words used in the context in which they occur, that context including any other phrases in the Act which may throw light on the sense in which the makers of the act use the words in dispute."

38. Relevant in this regard is that the Housing Acts and the regulations made thereunder, but in particular the 2009 Act, envisage a set order within which an application for social housing support is to be progressed. First, pursuant to s. 20(1), the composition of the household is established. Then, pursuant to s. 20(2), the household's eligibility for social housing support is assessed and determined.

39. The next step in the process is that under s. 22, a council may allocate dwellings to households qualified for social housing support under s. 20 and may do so, subject to certain discretion provided for in the section, in the order of priority provided for in any regulations made by the Minister. In lieu of housing, the needs of a qualifying household may be met by a housing assistance payment in accordance with Part IV of the Housing (Miscellaneous Provisions) Act 2014.

40. The fact that the various assessments which the Council is obliged to carry out take place in this sequence is important. It tells us that the Council's assessment of the composition of a household under s. 20(1) is but one of the steps to be taken by a housing authority. It is entirely separate from any housing allocation decision made under s. 22 and more particularly under the Council's allocation scheme of 2014, since amended. Such decisions are based on the availability of resources and the need to ensure the most beneficial, effective and efficient use of its limited housing stocks.

41. That the Council is entitled to allocate its housing stock having regard to available resources, and on the basis that it can prioritise those most in need, is beyond doubt having regard to s. 22 of the 2009 Act and the regulations made thereunder. Its entitlement to do so is clearly vital given that the country is in the throes of a crippling

housing crisis with the result that there is a greater than ever demand for social housing. So many families have lost their homes over the past decade, principally due to the collapse of the economy, and have found themselves for the first time in their lives in need of social housing. Then, there is the fact that there has always been a significant sector of society, who, because of factors such as deprived background, poor education, unemployment, low wages or disability, are simply unable to put a roof over their own heads.

42. In a situation where there is insufficient housing stock to meet the demands of qualifying households, and where there are children with no accommodation or who have a greater need than the appellants, it is accepted that in allocating housing to qualified households it is not only permissible but just that the Council should prioritise those households with the greatest need so as to ensure that there is not an underutilisation of bedroom accommodation, as would likely be the case if a house with a separate bedroom for the children was to be allocated to the applicants at this point in time.

43. Nonetheless, it is reasonable to conclude that regardless of the provisions of s. 69 or the 2001 Act, the Council is not obliged to take resources into account when it is assessing the composition of the household under s. 20(1) given that it clearly can and does take the availability of resources into account at a different stage in the process. As the appellants correctly observe, resources are clearly to be taken into account when the Council sets its housing services plan (see: s. 16) and when it comes to determine the priority to be afforded to a particular household when allocating its resources under s. 22. But resources cannot be taken into account in determining whether or not two persons are “reasonable” in their requirement to live together.

44. In circumstances where, such as at the point of allocation, the availability of resources may be taken into account by the Council, I am satisfied that a housing authority would not be acting outside its obligations under s. 69 of the 2001 Act in failing to take such resources into account at the time of an assessment carried out pursuant to s. 20(1).

An aside

45. I will digress momentarily from the task at hand in this appeal, to observe that it in much of the Council’s own documentation, parents such as Mr. Fagan are described as “access parents” when in truth, in many cases where they are so described, they may be nothing of the sort. In many instances, they are joint custodians of their children who want to play a significant role in their upbringing and have such an entitlement either as a result of an agreement with the other parent or as a result of a court order. Regrettably, however, if the other parent’s household has been classified as one which includes the children they are demoted, so to speak, to the role of “access parents”.

46. Gone are the days when it could be assumed that in the event of parental separation the mother should and would take something close to full responsibility for the upbringing of the children and that the father might enjoy a couple of hours access once or twice a week and perhaps some overnight access over holiday periods or at weekends. More and more these courts are seeing agreements between fathers and mothers to jointly parent

their children with week on week off arrangements or some other division of parental responsibilities which affords the children the opportunity to form a lifelong bond with both parents, regardless of their separation.

47. Nonetheless, from the paperwork presented on this appeal, it does appear to be the case that the Council is sensitive in its efforts to ensure that those with the greatest housing needs are prioritised. And, it is not to be faulted for taking the position that it cannot, in circumstances where demand for accommodation greatly exceeds available resources, allocate to two separated parents with children two houses bedroom accommodation for those children, given that those bedrooms will be vacant 50% of the time if at that time there are other parents with children on the housing list who have no accommodation whatsoever or are in greater need.

48. Accordingly, it has to be accepted that, if, on a proper assessment excluding the availability of resources, the Council was to accept that Mr. Fagan had a reasonable requirement to reside with his children, when it came to allocating its housing stock, he might find that his s. 20(1)(c) household was close to the bottom of the Council's list in terms of priority in light of the potential under-utilisation of the additional bedroom/bedrooms which would likely be deemed necessary for such a household.

Holmes-Moorhouse

49. Finally, I am satisfied that the reliance placed by the trial judge on the reasoning of Lord Hoffman in *Holmes-Moorhouse*, was misplaced, principally as the case is distinguishable on its facts. The important distinction is that the question as to whether the dependent children in that case "might reasonably be expected to reside" with their father was a question to be answered in order to determine priority in the allocation of scarce housing resources. It was a decision concerning allocation as opposed to the categorisation of the household that is at the core of this appeal. As I understand it, if the decision of the council under the English statute went in the applicant's favour, the council would have had to have provided him, and the persons with whom he was living, with immediate emergency accommodation. Thus, it would be entirely reasonable for a council to take resources into account in those circumstances. The 2009 Act, however, draws a clear distinction between allocation and categorisation. An assessment as to what is eventually allocated may take resources into account, an assessment as to how a household is composed, however, may not.

50. There are also material textual differences in the respective statutes. The language used throughout Part VII of the Housing Act 1996 (England and Wales) is that persons are to be construed as a household (using the Irish phraseology) where they "might reasonably be expected to reside together". This is to be contrasted with the Irish wording in s. 20(1) which provides that persons constitute a household where they "have a reasonable requirement to live together". As identified by Lord Hoffman in paras. 9-11 of his judgment, "expected to reside together" appeals to an objective social norm as applied in a context of a scheme allocating a scarce resource, or in other words an expectation as to whether, in light of social customs, two or more persons are expected to reside together. The Irish law, however, centrally looks at the requirement of the individual applicants and

not a social norm. The English and Welsh law therefore appears to look less upon the individual requirements of the applicants but more on a more abstract social expectation. Thus, any considerations taken into account would be different between the two jurisdictions.

51. For the aforementioned reasons, the High Court judge was wrong to set the four corners for the assessment prescribed by s. 20(1) as he did. Although the Council indeed enjoys significant discretion when assessing whether two or more persons should be classified as a household for the purposes of s. 20(1)(c), it must form its opinion as to whether the applicants have a reasonable requirement to live together on a case-by-case basis. This requirement is to be assessed with reference to the individual circumstances of the applicants. These are the plain and ordinary meanings of the words contained in the section. There are no words to steer a housing authority's deliberations in any other way, e.g. to the effect that they need to have regard to the resources available to them. The focus lies on the requirement of the applicant/applicants.

52. I also consider it unlikely that the Oireachtas would have intended the section to be interpreted in a manner which undermines children's rights of equal access to their parents.

53. That brings me to one final observation. Having regard to my view as to the proper interpretation of s. 20(1) of the 2009 Act, it has not been necessary to engage with any of the arguments advanced by the applicants or the amicus based on the Constitution or the ECHR. It would in any event have been undesirable to engage with those issues, given that no reliance was placed on any such rights in the court below. That being so I will do no more than observe that the interpretation of s. 20(1) of the 2009 Act as detailed earlier in this judgment is one which would undoubtedly be consistent with the rights, if any, espoused in Article 42A of the Constitution or Article 8 of the ECHR.

54. For all of the aforementioned reasons, I would allow the appeal.