
Organised by Thomas Hammarberg, Commissioner for Human Rights

and given by Emily Logan, Ombudsman for Children, Ireland, & Chairperson of the European Network of Ombudsmen for Children (ENOC)

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When Commissioner Hammarberg gave me a copy of Janusz Korczak’s book about the child’s right to respect, I was immediately struck by the clarity at the heart of his writings. He speaks of the need to afford more respect for the interests of children, not as a matter of goodness or charity but as a right. His rights-based analysis is one we see more commonly these days, but what differentiates Korczak’s writing is that his analysis of the world is perceived through the lens of a child. It is this profound understanding of childhood that gives such gravitas to his work. It is a great honour to deliver the annual Janusz Korczak lecture in his name, and I would like to thank Commissioner Thomas Hammarberg for affording this privilege to me.

In this paper to which I will speak during the lecture, I want to reflect on the best interests principle set out in the UN Convention on the Rights of the Child (CRC). I want to think about what the principle means and what it demands of all members of the legislature, members of the judiciary, administrative authorities, international organisations and Ombudsmen for Children alike. As Ireland’s first Ombudsman for Children, I have engaged with the principle in the work of my Office and in the context of an ongoing national discussion in Ireland about Children’s Rights and plans to enshrine those rights in our Constitution.

The heart of any discussion about the best interests principle is the relationship between the principle and the rights of the child. This is something with Janusz Korczak so eloquently touches on in his writings. I want to talk about the significance of that relationship and how the best interests principle can only truly operate when children themselves are viewed as individual rights holders.

**Origins and content of the best interests principle**

The best interests principle was not in itself novel when the UN Convention on the Rights of the Child was drafted. It was included in a number of other international human rights instruments, most notably the 1959 Declaration on the Rights of the Child and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women.

The best interests principle is set out in Article 3(1) of the CRC which provides:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

What was perhaps novel about this statement of the best interests principle was its scope. For the first time, it extended an obligation on States to ensure that children’s interests are placed at the heart of government and of all decision-making with impacts on children.

The UN Committee on the Rights of the Child which is charged with overseeing implementation of the CRC has identified article 3(1) as embodying one of four “general principles” in the Convention, of the whole Convention. The others are non-discrimination (article 2); maximum survival and development (article 6); and the participation of the child (article 12).

The basic premise of the CRC, taken as whole, is the application of its provisions with the best interests of the child in mind. In addition to Article 3, the best interests provision is set out in other articles of the CRC. In these contexts, the best interests principle is expressed in stronger terms - as a necessary requirement or as the paramount consideration:

Article 9.1 (child protection) states a child shall not be removed from its family unless it is necessary for the best interests of the child;

Article 9.3 (custody) states a child can maintain contact with both parents except if it’s contrary to the child’s best interests;

Article 18.1 (parental decision making) states that parents have the primary responsibility for bringing up interests of the child will be their basic concern;

Article 20.1 (deprivation of family environment) refers to situations where a child cannot be allowed to remain in a family in its best interests;

Article 21 (adoption) states that, in adoption systems “the best interests of the child shall be the paramount consideration”;

Article 37(c) (deprivation of liberty) states a child in detention shall be separated from adults unless it is in the best interests of the child not to do so; and
Article 40(2)(b)(iii) (criminal proceeding) sets out a right to have parents present in court, unless it would best interests for them not to be there.

The best interests principle comprises a procedural rule, it governs how we go about decision-making with legally binding rule that States must follow. The rule does not state that children's interests always come not to encroach on the rights of others, but to facilitate an examination of the interests of a vulnerable group should be considered in relation to all actions concerning them, that is when the action directly affects them.

In general, the CRC does not specifically define "best interests". However, there is purpose to this lack of appropriate balancing of considerations within a well defined procedural framework. The CRC does define specific instances as set out below:

In the case of actions and decisions affecting an individual child, it is the best interests of that individual child which must be taken into account;

It is in a child's best interests to enjoy the rights and freedoms set out in CRC. For example, it is in child respect for human rights and for other cultures (Article 29.1(b) and (c). It is in a child's best interests to parents in most circumstances (Article 9.3);

It is in the best interests of indigenous children to be raised in the indigenous community (Articles 5, 8.2 A child capable of forming a view on his or her best interests must be able to give it freely and it must be 12);

Parents have primary decision-making responsibility on behalf of their children (Articles 5 and 18.1) but, best interests a basic concern, the State may intervene to protect those interests (see Article 9.1 for exar

Relationship between the best interests principle and the rights of the child

When considering the need for a clear articulation of the best interests principle, it is worth noting two related reasons why a best interests determination is needed in the first instance and how such a determination might be relates more directly to the basic cultural assumptions which underpin our approach to children and young people's rights. The basic assumptions which animated that approach are encapsulated in what is sometimes referred to as the children's rights holders? The basic assumptions which animated that approach are encapsulated in what is sometimes referred to as the children's rights holders. According to this view, children's needs are considered and determined by adults on their behalf, sometimes those needs are not given the weight they deserve because there is no conceptual barrier to their being subsumed under the needs of other individuals or groups. They are not always a full part of the equation.

Moving from a welfare approach to one that considers children as having an inherent value and active participation, a rights-based approach, can overcome this barrier. With regard to an important decision affecting children, it is possible for a welfare approach to come up with the same answer as a rights-based approach looking at the needs of the individual child. This potential difference in outcome arises from the fact that if children are not treated as individual rights holders, a determination of what is in their best interests will not take into account all relevant rights sometimes not be asked at all. That is where the need for a cultural shift regarding children and young people's rights holders is most stark.

That is not to say that the change of emphasis to regarding children as individual rights holders means that all other considerations. That is one of the enduring myths about children's rights which we work on but not about having a trump card but rather doing away with a blind spot. It is a question of redress giving the best interests principle a disproportionate weight.

Relationship between the best interests principle and Article 12 of the UNCRC

I have spent twenty six years working for children. Much of my previous career was spent working with children and young people's rights. Their decision-making capacity often means that they speak with ease about things that can often make adults feel ill at ease. Ombudsman for Children I continue to see administrative authorities underestimate decisions they make have a profound effect on children.

In order to assess the best interests of a child, those involved in decision making must fully consider the best interests principle working for children. Much of my previous career was spent working with children and young people's rights. Their decision-making capacity often means that they speak with ease about things that can often make adults feel ill at ease. Ombudsman for Children I continue to see administrative authorities underestimate decisions they make have a profound effect on children.

State parties shall assure to the child who is capable of forming his or her own views the right to express matters affecting the child, the views of the child being given due weight in accordance with the age and...
The status of Articles 3 and Article 12 as two of the four general principles of the UNCRC forges a procedural link for a child's best interests and participation and progressing or securing other rights of the child set out in the Convention. Firstly, participation in decision making should be consistent with a child's best interests. Secondly, the inclusion of children needs to be consistent with their best interests. For instance, Article 12 sets no arbitrary age for the determination of capacity. It simply states that a child's view should be provided with an opportunity to express it. This provision highlights the recognition of a child's capacity and how to determine capacity. The clearest sign that adults can give children to demonstrate that they have really been heard is a tangible outcome that reflects the feedback of children. Giving children enough time to share their views and providing feedback on their wishes is essential. This requires that we adopt an inclusive approach to participation which respects diversity and facilitates the participation of children in decision-making processes affecting them.

The best interests principle is carried all the way through the wording of Article 12. It provides that we must form a view and not solely on their capacity to communicate those views. It provides that children have a right to express their views freely and to the best of their ability. In essence, it requires us to step back from our normal modes of operating: making assumptions, trying to understand why a child holds a particular view, but also seeking to be open to critical comments that children may have; giving young people direct access to adults in positions of authority; conducting a dialogue with children that involves answering their questions and asking them questions in return; and being open to critical comments that children may have; giving children enough time to share their views; and trying to understand why a child holds a particular view, i.e. not only finding out what a child thinks, but understanding why.

The clearest sign that adults can give children to demonstrate that they have really been heard is a tangible children's views and shows that they have taken part in effecting change. Children can understand that being heard is not all about outcomes and outputs and that there can be may not act on children's views. Regardless of the outcome, it is very important to provide feedback to children and to consider, together with children, what will work for them. As regards the need to secure the participation of children, Article 12 recognises and promotes a concept of participation. The status of Article 12 as a general principle of the UNCRC and as a procedural right recognises the right of children's participation in decision-making processes affecting them, we can enable children to identify and/or secure their best interests.

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The best interests principle as a procedural tool – implementation

In my work as Ombudsman for Children in Ireland, I have come across many people working in service provision, in schools who are truly committed to acting in the best interests of the children they come into contact with. However, there are barriers in the way of those who may wish to consider the best interests of children in service provision. I would like to give two examples to illustrate this point. One from a judgment of our Supreme Court in our State and one from the experience of my own office in examining complaints where children affected by the action of administrative authorities.

I am very fortunate to have a team of young advisors to assist me in my work as Ombudsman for Children. People, selected through an open, nationwide, peer selection project were recently asked by my staff for participation work they have been involved in with my Office and with other organisations. In particular, they were asked to identify the good and bad aspects of the process. They said that the process of involving children is very important as regards demonstrating to children that adults are really listening and taking their views into account. Ways that adults can demonstrate to children that they are listening to children include:

- giving children enough time to share their views;
- conducting a dialogue with children that involves answering their questions and asking them questions in return;
- being open to critical comments that children may have;
- giving young people direct access to adults in positions of authority;
- trying to understand why a child holds a particular view, i.e. not only finding out what a child thinks, but understanding why.

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Both of these examples illustrate the lacunae in Ireland which stem from the fact that the best interests rule which it comprises are not fully part of our legal or normative framework. Ireland is a dualist State at heart, which means that although ratification of certain treaties can be done and will be incorporated into our domestic law. As such, it cannot be invoked before our Courts. While there are provisions in our domestic laws providing for the consideration of children as individual rights, there is a lack of recognition of children as individual rights in the procedural importance of carrying out a best interests determination. I should stress that I make no comment or evaluation of the decision reached by the Supreme Court but rather the absence of due consideration to the rights of the child involved.

The Supreme Court case of N & anor.-v- Health Service Executive and ors. (otherwise known as the Baby Ann Case) is illuminating. The case centred on the future of a child who, in the interests of anonymity, was referred to simply as Ann. She had initially been referred for adoption and was with her prospective adoptive parents for a period of nearly two years when the High Court ruled that Ann should be returned to her natural parents. The Supreme Court, however, reversed this decision, holding that Ann’s welfare could not be met in the care of her natural parents.

It should be noted that while variations of the best interests principle can be found in Irish legislation, it is not contained in the Constitution. There is established case law in Ireland, based on the provisions of the Constitution, that the welfare of the child is best met within the natural, marital family. As a result, the test that had to be satisﬁed by the Supreme Court in the case of N & anor.-v- Health Service Executive and ors. (otherwise known as the Baby Ann case) before considering the procedural importance of carrying out a best interests determination was whether the natural parents had failed in their duty to their child and that the child should therefore be returned to them.

As I mentioned above, it is possible that the same conclusion would have been reached if the Supreme Court Justices had been compelled to ask the question: given the rights of this child, and with due regard to the rights of other relevant parties, what is in the child’s interests? As I mentioned above, it is possible that the same conclusion would have been reached if the Supreme Court Justices had been compelled to ask the question: given the rights of this child, and with due regard to the rights of other relevant parties, what is in the child’s interests?

In the words of a prominent Irish academic commenting on the case:

"While it is diﬃcult to say with certainty whether the Supreme Court would have reached the same conclusion, it would nonetheless have been reached if the Supreme Court had recognised that the child involved also had rights that are worthy of consideration. Of note is the right to know and be raised by her natural parents, but also relevant is the child’s right to have decisions with her best interests.”

This is one of the main reasons behind calls that have been made for many years by organisations working with children, including my own Office, that the best interests principle should be enshrined in the Irish Constitution to ask the question: given the rights of this child, and with due regard to the rights of other relevant part interests?

While the foregoing refers to Constitutional jurisprudence, it reﬂects a wider lack of recognition of children as individual rights. I feel that we in Ireland have yet to embrace that cultural shift. A Constitutional amendment would be a signiﬁcant step in the area of child protection and would provide important guidance to legislators, policy makers and administrative authorities.

One of the Supreme Court Justices did, however, make the following comment relating to the absence of Ann’s rights in this case:

"It is perhaps striking that the one person whose particular rights and interests, constitutional and otherwise, are represented, whether by solicitor and counsel or through a guardian ad litem, was the child herself... In my personal view, how the tests were applied would have resulted in a judgment that was not best served by the Supreme Court. Her biological parents had changed their mind before an adoption order was made and have not failed in their duty to their child or that the child should therefore be returned to them.

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The second example of barriers to the consideration of a child’s best interests is one in the context of decision-making by public bodies.

My Office can examine complaints against public bodies where I consider that a child has or may have been subjected to maladministration on the part of the public body concerned. I am interested in the child’s best interests for the purposes of examining a complaint. Very often we learn that a child’s best interests have not been taken into account during the administration process by the public body concerned. The question of determinancy has not arisen because the interests has never been asked in the first instance.
For example, in 2007, my Office published the results of an investigation into an application for housing for a child with a disability. The local authority conceded to having poorly administered the case. We found that the local authority had not considered the best interests of the child when processing the housing application made by his parents. The administrative decision makers indicated no obligation on the part of the child to seek further consideration.

In that case, we met with the mother and child concerned. What the 12 year old child spoke about was a family whose members have their own rights, and their own dignity, and their right to live in a home which accommodated his needs. He enabled both himself and his mother to live with some dignity. He made no reference whatsoever to the procedures that were missed out on in the administration process employed in this case. It was his procedural right to have his be Federal considering the process. While much of the debate about children’s rights in Ireland has centred on courts of law, the most common obstacle to children’s rights is the absence on administrative authorities of respect. My belief in the need for Constitutional change is not directed at courts of law but a much more public administration systems and other public sectors.

**Some challenges linked to the implementation of the best interest principle**

In November 2006, the Taoiseach (Prime Minister of Ireland) announced that the Government planned to hold a referendum on the rights of the child on the 2007 General Election ballot paper. There had been many calls over many years for such a referendum prior to the national discussion in Ireland about the referendum as I think they illustrate inherent in seeking to incorporate and implement the best interests principle within a domestic legal order when our then Taoiseach expressed his intentions for the referendum. He said:

“It appears increasingly clear that the inadequate recognition in our constitutional law of the rights of children addressed. That is an essential first step in creating a new culture of respect for the rights of the child.”

When it came to unpacking the concept of providing recognition in our constitutional law for the rights of the child, a number of concerns arose. These included: possible conflict between the rights of parents and the rights of the child; threat of unwarranted State intervention in family life. While many of these concerns are real concerns, we engage with, the space for that debate soon narrowed. The focus of our national discussions shifted to the measures to protect children from sexual predators. Such measures are crucial and are something we have had research work at the Ombudsman for Children’s Office. However, consideration of the wider need to protect the rights of the child is falling victim to the limited debate on measures to protect children from sexual predators. Proposals before the Oireachtas (Parliamentary) Committee provide for the consideration of the best interests of the child only in certain specific situations. The focus of our national discussions shifted to the measures to protect children from sexual predators. Such measures are crucial and are something which we believe in and research work at the Ombudsman for Children’s Office. However, consideration of the wider need to give full recognition to the rights of the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

For our part, in the context of this national discussion in Ireland, we have felt that it is important to recall the CRC which provides:

*States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the mer or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in the manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise of the rights recognized in the present Convention.*

I completely support the view that the family is to be respected. In fact the State makes a poor parent. My experience of working with children I know very well that the most vulnerable environment for some children is for all children that we seek change. The change I seek is not for the State to replace parents but to respect their rights. It is my experience as Ombudsman for Children in Ireland that parents and family are often the principal in working with children. Parents come to my Office with complaints about a lack of service provision or about action which they feel may have infringed their child’s rights. They often want to know where they can go to seek those rights are respected. Article 5 is a very important provision because it recognises the key role parents are in ensuring that their child can access the rights to which they are entitled.

We also make sure to recall that the UNCRC is consistent with the Irish Constitution in terms of its presur environment is the optimal environment for a child’s growth and wellbeing. The Preamble to the Convention states:

“Convinced that the family, as the fundamental group of society and the natural environment for the growth of members and particularly children, should be afforded the necessary protection and assistance so that it is able to undertake its responsibilities within the community.”
Recognising that the child, for the full and harmonious development of his or her personality, should grow in an atmosphere of happiness, love and understanding”.

Since my Office was established in April 2004, we have received 1710 complaints. The vast majority of these complaints came from the child’s parents (69%) and an additional 6% from the child’s extended families. In total, 75.1% of the complaints received at the Office come from the immediate and extended families of the children concerned. In these cases, it is the parents who act as the principal advocates for children’s rights and welfare.

The proportion of complaints coming from families also demonstrates the vulnerability of children when the family cannot play, for any reason, this advocacy role. Where children do not have this family support, Article 5 of the Convention provides that the State shall respect the responsibilities, rights and duties of other persons legally responsible for the child to assist the child in the exercise of their rights.

Together with my staff and our panel of young advisors at the Ombudsman for Children’s Office, we will continue to engage with the challenges faced in seeking implementation of the best interests principle both in the context of the referendum discussions and in the context of our work more generally.

I would like to leave you with a final piece of information for your consideration. Last week in my capacity as chair of the ENOC, I hosted the annual meeting of the Network, composed of representatives of Council of Europe States. The theme of the Conference was “Towards Implementation of the Rights of the Child”. While many concerns exist across Europe, the breadth of issues raised reminded me of the danger of limiting any debate on children’s rights.

I would also like to share my hope with you that, as more international organisations such as the Council of Europe advance their work and new initiatives on children’s rights, they will maintain a clear focus on the respect for the rights of the child. Embracing fully the principle of the best interests of the child can contribute to advancing a culture. It can be tempting to pick certain themes or issues to focus on and think that this is the right thing to do our best to ensure that what may be politically expedient thematic choices do not adversely affect our work more generally the rights of children and the core principles of the UNCRC.

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1 The lecture was given in the framework of the Conference “Building a Europe for and with Children, towards a strategy for 2009-2011” organised jointly by the Council of Europe and the Swedish Chairmanship of the Council of Europe.