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## **2008 Janusz Korczak Lecture**

### **“The child’s best interest: a generally applicable principle”**

Organised by

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and given by

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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 out 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 the value and meaning of childhood that gives such gravitas to his work. It is a great honour to deliver the annual Janusz Korczak lecture 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 of us; political leaders, 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. At the heart of any discussion about the best interests principle is the relationship between the principle and the rights of the child, 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 being drafted. Indeed, 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 its reach to an obligation on States to ensure that children's interests are placed at the heart of government and of all decision-making which impacts on children.

The UN Committee on the Rights of the Child which is charged with overseeing implementation of the CRC by State Parties to the Convention has identified article 3(1) as embodying one of four "general principles" in the Convention, of relevance to implementation 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 constantly 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 the child and that the best 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 own 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 be considered in the child’s 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 regard to children. It is a legally binding rule that States must follow. The rule does not state that children’s interests always come first. The aim of the rule is not to encroach on the rights of others, but to facilitate an examination of the interests of a vulnerable group. A child’s best interests should be considered in relation to all actions concerning them, that is when the action directly affects them or regards or touches them.

In general, the CRC does not specifically define “best interests”. However, there is purpose to this lack of specificity – it allows for an appropriate balancing of considerations within a well defined procedural framework. The CRC does define best interests in some 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 children's best interests to develop respect for human rights and for other cultures (Article 29.1(b) and (c)). It is in a child's best interests to maintain contact with both 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 and 30);

A child capable of forming a view on his or her best interests must be able to give it freely and it must be taken into account (Article 12);

Parents have primary decision-making responsibility on behalf of their children (Articles 5 and 18.1) but, if they fail to make the child's best interests a basic concern, the State may intervene to protect those interests (see Article 9.1 for example).

### ***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 but distinct questions: why a best interests determination is needed in the first instance and how such a determination might be made. The first question relates more directly to the basic cultural assumptions which underpin our approach to children and young people, while the second question touches on the notion of determinacy.

What was wrong with the prevailing attitude to children and young people prior to the acceptance of the idea of children as individual rights holders? The basic assumptions which animated that approach are encapsulated in what is sometimes referred to as the welfare approach. According to this view, children’s needs are considered and determined by adults on their behalf and, more significantly, sometimes those needs are not given the weight they deserve because there is no conceptual barrier to having them subsumed into 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 participants in the realization of their rights, a rights-based approach, can overcome this barrier. With regard to an important decision affecting a child, it is perfectly possible for a welfare approach to come up with the same answer as a rights-based approach looking at the best interests of the child. But that is not the point. The point is to consider how we look at that question and what assumptions underpin our approach.

This potential difference in outcome arises from the fact that if children are not treated as individual rights holders, not only is it possible that a determination of what is in their best interests will not take into account all relevant rights, but the question may sometimes not be asked at all. That is where the need for a cultural shift regarding children and young people's rights is placed in stark relief.

That is not to say that the change of emphasis to regarding children as individual rights holders means that the best interests principle always trumps other considerations. That is one of the enduring myths about children's rights which we work so hard to dispel. The issue is not about having a trump card but rather doing away with a blind spot. It is a question of redressing an imbalance rather than 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 with chronic illness. Sick children are very inspiring; their chronological age often belies their experience and ability to engage in difficult decisions. Their experience often means that they speak with ease about things that can often make adults feel ill at ease. In my four years as Ombudsman for Children I continue to see administrative authorities underestimate decisions they make and how those decisions can 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 issue of the child's own view on the subject. Such consideration must be kept under constant review and take account of changing circumstances and evolving capacity. Article 12 of the CRC sets out the rights of children in this regard. It provides:

*State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child*

The status of Articles 3 and Article 12 as two of the four general principles of the UNCRC forges a procedural link between providing for a child's best interests and participation and progressing or securing other rights of the child set out in the CRC. Two ideas help to define this procedural link; firstly, participation in decision making should be consistent with a child's best interests and secondly, children's participation in identifying and/or securing their best interests must be secured. As regards the first, while State Parties to the UNCRC "cannot quote the best interests principle to avoid fulfilling their obligations under Article 12", decision-making about whether to provide for a child's participation, how to do so, and how to treat a child's views/wishes needs to be informed by a commitment to the child's well-being and, at a minimum, to doing no harm to the child.

As regards the need to secure the participation of children, Article 12 recognises and promotes a conception of children as active agents. The status of Article 12 as a general principle of the UNCRC and as a procedural right recognises that, by making appropriate provision for children's participation in decision-making processes affecting them, we can enable children to play an active role in identifying and/or in securing their best interests.

The best interests principle is carried all the way through the wording of Article 12. It provides that we must focus on a child's capacity to form a view and not solely on their capacity to communicate those views. It provides that children have a right to express views freely. These provisions place an onus on all of us to facilitate the participation of children through a medium of their choice which enables them to communicate

their views freely and to the best of their ability. In essence, it requires us to step back from our normal ways of operating: meetings, interviews, and conferencing and to consider, together with children, what will work for them.

And when we are considering ‘what will work for children’, the wording of Article 12 and the best interests principle are guiding tools for our practice. For instance, Article 12 sets no arbitrary age for the determination of capacity. It simply provides that those children capable of forming a view should be provided with an opportunity to express it. This provision highlights the uniqueness of every child. It requires that we adopt an inclusive approach to participation which respects diversity and facilitates the recognition of a child who, despite his or her very young years is capable of forming a view. In considering how to determine capacity and how to determine the “due weight” of any views expressed by a child, the application of the best interests principle is key.

I am very fortunate to have a team of young advisors to assist me in my work as Ombudsman for Children. This group of young people, selected through an open, nationwide, peer selection project were recently asked by my staff for their views on the participation work they have been involved in with my Office and with other organisations. In particular, they were asked to identify what they viewed as evidence of really being listened to by adults. I would like to share with you some of the things they said.

They said that the process of involving children is very important as regards demonstrating to children that you are committed to listening and taking their views into account. Ways that adults can demonstrate to children that they are really listening during and through the process of participation 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 also seeking to understand why.

The clearest sign that adults can give children to demonstrate that they have really been heard is a tangible outcome that reflects 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 very good reasons why adults may not act on children’s views. Regardless of the outcome, it is very important to provide feedback to children on what decision has been taken and why. Feedback of this kind is an outcome too and indicates to children that you value and respect their participation.

As we can see from the feedback from these children and young people, a real understanding and commitment to the best interests principle is a pre-requisite for the design and delivery, together with children and young people, of modes of participation that work for them.

### ***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 the public service, in schools who are truly committed to acting in the best interests of the children they come into contact with. Sometimes, however, there are barriers in the way of those who may wish to consider the best interests of children in decision making or in service provision. I would like to give two examples to illustrate this point. One from a judgment of our Supreme Court, the highest court in our State and one from the experience of my own office in examining complaints where children may have been adversely affected by the action of administrative authorities.

Both of these examples illustrate the lacunae in Ireland which stem from the fact that the best interests principle, and the procedural rule which it comprises are not fully part of our legal or normative framework. Ireland is a dualist State and the UNCRC has not been 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 a child's best interests in certain specific situations, the picture is not complete and I think the following two examples illustrate the impact of this reality.

The Supreme Court case of *N & anor.-v- Health Service Executive and ors.* (otherwise known as the Baby Ann case) is illuminating in considering the procedural importance of carrying out a best interests determination. I should stress that in commenting on this case, I make no comment or evaluation of the decision reached by the Supreme Court but rather the absence of an important consideration in their deliberations.

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 placed for adoption and was with her prospective adoptive parents for a period of nearly two years when the case was decided by the Supreme Court. Her biological parents had changed their mind before an adoption order was made and had sought the return of Ann after she had been with the prospective adoptive parents for nearly a year. This led to a legal dispute between the parties and when the case went before the High Court, the judge found there to be compelling reasons why Ann's welfare was not best served by returning her to her natural parents – the judgment referred to the fact that she had become highly attached to her adoptive parents and other factors suggested that transfer of custody could not successfully be undertaken without causing her emotional and psychological harm. However, in November 2006, the Supreme Court reversed this decision, holding that the biological parents had not failed in their duty to their child and that the child should therefore be returned to them.

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 there is a presumption that the welfare of the child is best met within the natural, marital family. As a result, the test that had to be satisfied for the prospective adoptive parents to become Ann's guardians was that the natural parents had failed in their duty to their child or that there were compelling reasons why Ann's welfare could not be met in the care of her natural parents. The Supreme Court found that neither of these tests was satisfied.

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

“It is perhaps striking that the one person whose particular rights and interests, constitutional and otherwise, were not separately represented, whether by solicitor and counsel or through a guardian ad litem, was the child herself... In my personal view, however, and bearing in mind the terms of such international instruments as the United Nations Convention on the Rights of the Child, or EU Regulation 2201/Nov. 2003 (Brussels 2 bis), this situation should at the very least give pause for thought.”

As I mentioned above, it is possible that the same conclusion would have been reached if the Supreme Court had considered if there were compelling reasons in Ann's interests why she should remain with her adoptive parents. The crucial point is that, given the established jurisprudence outlined above, the Supreme Court Justices did not have to ask that question. While it may not have changed the outcome it would certainly have changed the process.

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 were it required to give due consideration to the rights of baby Ann as part of its decision-making process, it would nonetheless have resulted in a judgment that at least recognised that the child involved also had rights that are worthy of consideration. Of note here, of course, are the child's right to know and be raised by her natural parents, but also relevant is the child's right to have decisions taken that are consistent with her best interests.”

This is one of the main reasons behind calls that have been made for many years by organisations working in the area of children's rights, including my own Office, that the best interests principle should be enshrined in the Irish Constitution. This would equip judges 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 best interests?

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

The second example of barriers to the consideration of a child's best interests is one in the context of decision making by administrative authorities.

My Office can examine complaints against public bodies where I consider that a child has or may have been adversely affected by the action and where there may have been maladministration on the part of the public body concerned. I am obliged to consider the best interests of the child in examining a complaint. Very often we learn that a child's best interests have not been considered during the administration process by the public body concerned. The question of determinacy has not arisen because the question of best 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 made on the basis of a child with a disability. The local authority conceded to having poorly administered the case. We found that the Local Authority concerned had not considered the best interests of the child when processing the housing application made by his mother. However, a review of policies and legislation guiding the administrative decision makers indicated no obligation on the part of the local authority for such consideration.

In that case, we met with the mother and child concerned. What the 12 year old child spoke about was a lack of respect for both himself and his mother, his lack of dignity, and his lack of privacy, and his desire to live in a home which accommodated his needs and enabled both himself and his mother to live with some dignity. He made no reference whatsoever to the house itself. What he had missed out on in the administration process employed in this case was his procedural right to have his best interests considered as a primary consideration in the process. While much of the debate about children's rights in Ireland has centred on cases heard in our courts of law, the most common obstacle to children's rights is the absence on administrative authorities to consider a child's best interests. My belief in the need for Constitutional change is not directed at courts of law but a much more insidious obstacle that is 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 national referendum on the rights of the child. There had been many calls over many years for such a referendum prior to the announcement, including from my Office. The announcement of November 2006 was perhaps in part prompted by the striking down of our statutory rape law as unconstitutional in the summer of 2006 and a commitment given by the Government in September 2006 to conduct an article by article review of our Constitution through the lens of the UNCRC. An Oireachtas (Parliamentary) Committee is currently charged with developing consensus on a wording for the proposed referendum and a date has yet to be set for the holding of the vote.

I wanted to reflect on the discussions we have had in Ireland about the referendum as I think they illustrate some of the challenges inherent in seeking to incorporate and implement the best interests principle within a domestic legal order. All the signs were good 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 as individuals has to be 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 children as individuals, a number of concerns arose. These included; possible conflict between the rights of parents and the rights of children, a perceived threat of unwarranted State intervention in family life. While many of these concerns are real concerns and ones that we need to engage with, the space for that debate soon narrowed. The focus of our national discussions shifted to the need to strengthen legal measures to protect children from sexual predators. Such measures are crucial and are something we have pushed for in our policy 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 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 such as adoption. There is a real reluctance to give expression to the best interests principle along the lines of that expressed in Article 3 of the UNCRC to which the Irish State was a signatory without any reservation. I think it is incumbent on all of us engaged in work with children and in the children’s rights sphere to engage with the sometimes complex topics of perceived conflicts of rights and the issue of state intervention in families.

For our part, in the context of this national discussion in Ireland, we have felt that it is important to recall the content of Article 5 of the CRC which provides:

*States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for 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.*

I completely support the view that the family is to be respected. In fact the State makes a poor parent. With twenty six years experience of working with children I know very well that the most vulnerable environment for some children is their own home and it is for all children that we seek change. The change I seek is not for the State to replace parents but to respond in a *proportionate* way, one that will support, not punish families in difficulty.

It is my experience as Ombudsman for Children in Ireland that parents and family are often the principal advocates for the rights of their children. Parents come to my Office with complaints about a lack of service provision or about actions taken by public bodies which they feel may have infringed their child’s rights. They often want to know where they can go to get assistance to ensure that those rights are respected. Article 5 is a very important provision because it recognises the key role parents and families have 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 presumption that the family 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 and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.*

*Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, 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 those complaints have come from the child’s parents (69%) and an additional 6% from the child’s extended families. In total, 75.1% of complaints coming to my Office come from the immediate and extended families of the children concerned. In these cases, it is the parents and families 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 they do not have a family or 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 European Network of Ombudpersons for Children (ENOC), I hosted the annual meeting of the Network, composed of 32 members from 26 Council of Europe States. The theme of the Conference was "Towards Implementation of the Rights of the Child". While many common 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 and the European Union advance their work and new initiatives on children's rights, they will maintain a clear focus on the need to develop a culture of respect for the rights of the child. Embracing fully the principle of the best interests of the child can contribute to advancing such 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. However, we must do our best to ensure that what may be politically expedient thematic choices do not adversely affect our collective work to promote more generally the rights of children and the core principles of the UNCRC.