

Law

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The Concept of the “Best Interests” of the Child and its Application in Family Affairs

The article will illustrate an important role of the “best interest” concept of the child regarding realization and protection of children’s rights. It will concentrate on the way of its practical application together with the difficulties arising around the concept, particularly in family related cases, where a child is in a need of special care and treatment. After determining the role of the “best interest” concept regarding realization of children’s rights, its subsequent problems of interpretation and determination, the paper will try to answer the question whether the concept is in fact an effective mechanism in guaranteeing protection of their rights.

Keywords: family affairs, child, special care, rights.

Introduction

The concept of the “best interests” of the child has existed for a long time; however, its importance has grown since it has been established in several basic international legal instruments designed to protect rights of children. The notion has been developed after recognition on international level, as well as by a number of jurisdictions, of the fact that children indeed can be regarded as possessors of rights. The Convention on the Rights of the Child, adopted by United Nations (UNCRC) in November 20, 1989, accepted to be one of the fundamental international legal instruments in protecting rights of children, is a prominent example of acknowledging children as holders of rights. The concept of the best interests of the child in UNCRC serves exactly the purpose to lead to recognition that children possess rights, similarly as adults do (however the list of rights children acquire is limited in comparison with adults). Correspondingly, it is not surprising that the term – “best interests” of the child first time has been adopted by UNCRC, which has become not only provision leading to a fundamental right, but also a principle that must be applied by contract states in realization of rights of children (Council of Europe, 2016, p. 33). The aim of the establishment of the notion of best interest is to build up boundaries and frameworks for parents or other persons, empowered to make decisions on behalf of children (Council of Europe, 2016, p.31). Thus, the best interest principle is of fundamental importance designed to ensure the overall well-being of children. Furthermore, it has been recognized universally as a general principle (Council of Europe, 2016, p.19).

The first reported cases date back to the 18th century, when English law gave fathers the possibility to appoint guardians, bestowing them with decision-making powers on behalf of their children and the Chancery courts could supervise these guardians “for the benefit of the infant” (June Carbone, 2014, S111).

Today, the concept of the best interests of the child is widely applied by international, as well as, domestic courts as one of the decisive criteria used in deciding family related cases. The present paper is designed to demonstrate, on the one hand, problematic points related to the determination of the child's best interest conceptually and on the other hand, its application in practice, mainly in child removal cases, where difficulty with respect to adoption of the concept is still in progress.

It is notable that in international law, among generally right holders, the notion of best interests as a basic tool of realizing human rights applies solely to children. In addition, we can find references to best interests in international human rights treaties in very special cases, such as with regard to disabled persons (Convention on the Rights of Persons with Disabilities, 2006, Article 23(2)). In the case of children, the reason is likely to lie in considering the special position of a child, taking into account, for instance, their vulnerability, and the same time can be applied to the disabled, as well. However, one may ask, why exactly the notion of "best interests"? Does it really serve its intended purposes efficiently - guaranteeing high level of security to children's rights? To this extent, it might be surprising that the first fundamental instrument in respect to the protection of children's rights - the 1924 Declaration of the Rights of the Child - does not establish or mention "best interests" at all. But it is regarded to be one of the fundamental legal tools for protecting children's rights by providing general guidelines for ensuring the well-being of a child (Geneva Declaration of the Rights of the Child, 1924). On the other hand, as it is acknowledged, the principle of best interests under UNCRC considers mainly the well-being of a child, but importantly the Convention gives more specific determination of wellbeing, presuming that best interests must be interpreted in deliberation of age, level of maturity, vulnerability of a child, his or her environment and views, the presence and absence of parents, etc. (United Nations Refugee Agency, 2008, p.14). Thus, it seems that the clearer the main principles interpreted leading

to secure children's rights are, the more it is possible to ensure overall well-being of a child.

But still, what is exactly meant by the notion of the "best interest of the child" and is it possible to interpret this at all? How is it applied in practice and what does it do to protect children's rights particularly in family affairs? The following discussion will try to answer these questions, or at least to demonstrate meaning, importance and difficulties arising around the concept of "best interests", focusing on the application of the concept in practice, mainly in "family affairs" with respect to child removal cases, where the child in question is in a great need of special care and treatment.

1. Determination of the Concept of "the Best Interests" of the Child

Before proceeding to the first main part of the present article – meaning, importance and implementation in practice of the aforementioned concept, it would be expedient for clarity to say a little about who children are, what rights do they hold or whether they can be possessors of rights at all.

Article 1 of UNCRC defines a child as "every human being below the age of eighteen years..." As Archard states in his work, "children are young human beings... some children are very young human beings" (Archard, 2014, pg. 1). Bearing in mind children's low awareness of the world around them, lack of capacity in deciding or making choices on their own, there is a much debate in legal literature around the question whether children should acquire rights. Some scholars think that children, as human beings, obviously have rights, while others maintain that given the nature of childhood and rights themselves, suggests that children cannot possess rights. (See: Archard, 2014). For instance, children, lacking certain abilities of agency, must not have rights similarly as adults have. (See Griffin, 2002, pp. 19–30). However, despite the assumption that children lack agency, they nevertheless have

basic interests deserving protection and they should be accorded at least welfare rights (Brighouse, 2002, pp. 31–52). Furthermore, bearing in mind that children gradually become adults, rights should be given to them accordingly. (Brennan, 2002, pp. 53–69). There are also Child ‘liberationists’, who claim that children should acquire all the rights similarly to adults. (See: Archard, 2014). These issues are beyond the scope of this article, thus, it is sufficient to note fact that in the contemporary world children are usually recognized as holding rights or, at least, they acquire fundamental rights and freedoms e.g., by UNCRC, listing a number of children’s rights, such as a child’s right to be treated without any discrimination (art. 2.1); ensuring the child’s care (art. 3.2); right to life (art. 6.1.); ensuring overall development of a child (art. 6.2); right to preserve a child’s identity (art. 8.2); right to be protected from any physical violence, abuse, neglect, maltreatment (art. 19.1); right to express own views according to capabilities (art. 12.1); right not to be separated from parents (art. 9.1), etc. Thus, another question to refer to is determination of the concept of the best interests of the child.

1.1 Interpretation under UNCRC - The Concept of the “Best Interests” of the Child – an Adaptable to Every Single Case or a Determinate One?

Article 3.1 of UNCRC provides the term “best interests” of the child as following: “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.” For a better understanding of the notion of the best interests, in 2013 the Committee on the Rights of Children established General Comment #14, which has been accepted universally as the greatest contribution in determining the best interests’ concept. On the other hand, it has been argued that the concept established in CRC has not been sufficiently foreseen and has not been critically discussed despite of adoption of General Comment #14 of the Committee on the Rights of the Child (Council of Europe,

2016, p.18). Although, the concept of the best interests of the child has been recognized as one of the most essential concepts in the contexts of protecting children's rights, its application in practice has shown to be one of the most difficult concepts to realize.

Nevertheless, the interpretations provided by the Comment have become the primary guidelines for courts, both at international and national levels. The Committee in the Comment interprets the sentence given in Article 3.1 of UNCRC – "...the best interests of the child shall be a primary consideration" in detail. According to the Committee, the words "shall be" should be understood as "a strong legal obligation on States" to resolve cases considering at first the best interests of a child (Committee on the Rights of the Children, (2013), the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) General Comment No. 14, CRC/C/GC/14, paragraph 36); the expression "primary consideration", means that "the child's best interests may not be considered on the same level as all other considerations" (Committee on the Rights of the Children, 2013, para. 37); and finally, the term "primary" means that children's interests must be prior to any other interests in all circumstances (Committee on the Rights of the Children, 2013, para. 40). The Committee suggested a number of circumstances, elements and safeguards for states to take into account while assessing the best interests of a child, such as a child's care, protection, safety; their view; identity; situations of vulnerability; their rights to health and education; preservation of family environment and family relations. Still, however, the listed elements are not exhaustive which actually makes it possible to go beyond them and taking into account the fact that the content of each listed element vary from child to child and from case to case, decision should be made in every case considering individual and each specific circumstances and other factors that might be relevant in every single case (Committee on the Rights of the Children, 2013, para. 80).

As we have seen, the Committee gave quite broad guidelines that the first and foremost factor in decision making process in child related cases must be consideration of the best interests of the child. And because of its broad interpretation, the main difficulty concerns the issue of assessing and determining children's best interests in the case of the adoption of general measures. In other words, how should the concept of best interest be determined or assessed in a case of children and not a particular child? Here the problem refers to the question of how it is possible to apply general measures of best interest if, for instance, there are two children, although in similar circumstances, but whose best interests differ from each other? Obviously, the significant problem in applying the concept of the best interest in practice is the vagueness of the assessment itself. Taking into account the fact that the concept cannot be determined precisely because in each case the application of the concept requires its determination according to individual circumstances, it seems unlikely to agree on a particular definition of the concept. The concept has been criticized by a number of scholars due to its indeterminate nature, its vagueness and uncertainty that leads to different approaches. According to Eveline van Hooijdonk, a member of the Children's Rights Knowledge Center, the principle of the best interests of the child is "inevitably indeterminate, flexible, dynamic, developmentally dependent and context specific" (Council of Europe, 2016, p.41). Furthermore, the best interest principle can be dangerous and give rise to threats to children's rights if the concept is understood or applied wrongly (Council of Europe, (2016, March), p.31).

So, what can we do when scholars claim there is no precise criteria for determining the legal concept of the best interests of a child and that the concept is indeterminate? Jorge Cardona Llorence, a professor of public international law at the University of Valencia and a member of the Committee on the Rights of the Child, suggests that a primary consideration while assessing, determining and interpreting the concept must be objective criteria (Council of Europe, 2016, p.12). In Llorence's view, the concept is

designed to guarantee that all fundamental rights of children provided by the UNCRC are protected, effectively realized and pursued to ensure a child's overall development. Thus, the concept of the best interest should not be understood as what is best for a child in every single case, but as an instrument of ensuring a child's overall development and the full and effective realization of their rights established under the Convention (Council of Europe, 2016, p.12).

Another suggestion is that the child's best interest principle should be adopted and applied together with the UNCRC as a whole and not as an isolated principle (Council of Europe, 2016, p. 35). This offer has been widely considered by European Court of Human Rights by interpreting the European Convention on Human Rights in light of the terms provided by the UNCRC. The European Convention on Human Rights is regarded as one of the fundamental international instruments ensuring basic civil and political rights to all persons, including children. Although not specifically focused on the rights of children, a number of its provisions make reference to the protection of the rights of children and among them is Article 8, guaranteeing the right to respect for private and family life. It is worth mentioning that the Convention says nothing about the best interests of the child, but the case law of the European Court of Human Rights reveals a number of decisions concerning the best interests' concept in respect of rights of children, that will be discussed later in this paper.

Thus, bearing in mind the valuable contribution of the Committee in trying to provide clear and precise guidelines with respect to the concept of the best interests of the child, one will not be able to find perfect and more or less specific criteria for determination of concept neither in the General Comment, not in UNCRC itself.

1.2. Collision of Interests

A further question is about what should be done or what criteria should be applied in cases when a child's best interests are in conflict with other interests, such as public interests, interests of other children, parents, other persons, etc.? The Committee in its General Comment suggests that in both cases, when a child's best interests come into conflict with another child's or children's best interests and in cases when a child's best interests conflict others interests, for instance public, parents interests or so on, a decision must be made on a case-by-case basis. (Committee on the Rights of the Children, 2013, para. 39.) But what happens if achieving a fair decision is very difficult in a particular case? Here the Committee answers the question as following:

“If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and are not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.” (Committee on the Rights of the Children, 2013, para. 39.)

The UNCRC provides not only individual right of the child, but also gives guidance of the child's relationship to others, especially to his or her family. Unfortunately, in practice, the main standard of the UNCRC – taking the child's best interests as a primary consideration is often violated by a number of factors such as financial interests of adults, their selfishness, immigration policy, purported imperatives of security and social defense, all these factors are leading to destruction of consideration of the child's best interests (Council of Europe, 2016, p.37). Correspondingly, these reasons give rise to the ill-treatment of children by families, institutions, their separation from families, and in certain cases they are put in prison.

Some scholars argue that due to the requirement of taking the child's best interests as a primary consideration, other parties' interests involved in a particular case are likely to be violated. On the other hand, there are facts that illustrate how the concept of the best interests of the child can be misused and thus violated rights of a child. One of the clearest examples relates to a child's custody in divorce cases, where it is quite possible that interests of parents and the child or children can conflict. In these kind of cases parents, caretakers, or other family members might have different opinions on what is the best for the child or children. Moreover, as already mentioned, due to existing possibility of misuse the child's best interests in order to secure other parties' or parents' interests, children's interests and their parents' or others' interests should be strictly separated from each other (Council of Europe, 2016, p.42). In addition, while determining the best interests of the child no less attention should be paid to the child's own views, in other words, it is important to consider what the child considers to be his or her best interests. With this regard, in order to arrive at correct and fair best interest decisions, the child's thoughts, feelings, beliefs, his or her perspectives must be taken into consideration, together with their age, maturity and capacities (Council of Europe, 2016, p.42). In fact, it is possible that none of the mentioned criteria can be sufficient in the decision-making process for every individual case.

Fortunately, there are cases where difficulties regarding vagueness do not require the help of the CRC, namely, by setting strict criteria that a child's best interests must be given greater weigh in comparison with other interests. Such cases concern matters of adoption (Article 21), where it is stipulated for states to recognize that the best interests of the child shall be "the paramount consideration," which means that in adoption cases the basic and decisive criteria in decision making is a particular child's best interest. This principle is provided also in further Articles of the Convention – Article 9 – separation from parents, Article 10 – family reunification, Article 37 – separation of children from adults while being in detention, Article 40 – procedural guarantees, such as parents' presence at hearings in criminal cases.

But still, some scholars think that resolving conflicts between a child's interests and the interests of other persons or other interests is vague and still leaves significant room for manipulation. Due to the concepts' very broad nature, it can be applied by individual estimation that is likely to lead to a great threat of applying the principle in a wrong way and thus we arrive to the main difficulty arising from its assumption as a discretionary concept.

2. Applying the Concept of the Best Interests of the Child in Family Affairs

A number of international human rights instruments, including the 1948 Universal Declaration of Human Rights, namely Article 16.3 states that "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Article 18 of the UNCRC requires the State to support parents and legal guardians in performing their parenting responsibilities (as provided in Articles: 3.2, 7, 9, 10, 18 and 29). In the United States, the significance of family integrity and preference for removing a child from his or her family only as a last resort is provided in the statutes of around twenty-eight States as a primary guideline concerning family-related cases (Gateway Children's Bureau/ACYF, 2012, p.2). While almost twelve States additionally highlight the importance of guaranteeing special care, treatment of the children removed from their families (Gateway Children's Bureau/ACYF, 2012, p.2). For the development of the child, respect for and support to the family is generally recognized as a key element of a states' actions. Support to the families include not only requiring parents to realize the needs and rights of their children by knowing their children's basic needs, but to raise awareness of the significance of involvement of both parents in the child's upbringing, development and care (United Nations Committee on the Rights of the Child, United Nations Children's Fund, Bernard van Leer Foundation, 2006, p.13). The European Court of Human Rights is also not an exception in stressing the importance of a family. The Court has established a certain standard by ruling in custody and access rights cases that the

fundamental element of family life is preserving the close relationship between a child and parents even in cases when parents are separated (see, for example, *Diamante and Pelliccioni v. San Marino*, 27 September 2011, No. 32250/08, paragraph 170; and *Qama v. Albania and Italy*, January 2013, No. 4604/09, paragraph 79). Considering this, it can be easily said that the interests of the child are generally best met when the child remains with or joins his or her family.

2.1 Concept of the Best Interests of the Child in the Child Removal Cases

There are cases where decision makers face serious challenges. For instance, one might say that poor environment and poverty are not conditions where a child's best interests can be met. However, would it be rational to decide strictly that in such cases, for the purposes of the best interests of the child concerned, the child should be removed from a poor family? The difficulty in child removal cases come from various factors such as leaving children in some cases in abusive families, sometimes it takes too long to put a child into care or even sometimes they are not taken into care at all. Correspondingly, all these strains lead to breaches of children's rights. Additionally, there is another factor to be taken into account - in securing the rights of children not to be separating from their parents, showing that the child will be placed in a beneficiary environment is not sufficient.

Article 9 of the UNCRC puts an obligation on the state parties that "*a child shall not be separated from his or her parents against their will, except ... that such separation is necessary for the best interests of the child.*" In other words, the best interests of the child must be a decisive factor in the decision making process with respect to cases concerning the removal of a child from his or her family. The Committee also stated in the General Comment that a child should only be separated from his or her parents as a measure of last resort,

and that separation should not take place if less intrusive measures could protect the child (Committee on the Rights of the Children, 2013, para. 61).

Cases that concern removing a child from his or her family and placement in care represent one of the domains where the European Court significantly applies the concept of the best interests of the child. In cases when the European court has ruled that decisions to remove children from poor families (and place them in care) was not in the best interests of the concerned, the court has ruled that authorities should have ensured that the families received the proper support instead of removing children from their families (*Wallová and Walla v. the Czech Republic*, 26 October 2006, no. 23848/04; *Saviny v. Ukraine*, 18 December 2008, no. 39948/06). The importance of the Court's approach is derived from the establishment of a particular standard with this regard; that is, the child's best interests in cases concerning placement in care comprises two parts: first, guaranteeing the child's development in a sound environment and second, preserving the child's ties with biological family, except of the cases where it is not in the best interests of the child. (See *Gnahoré v. France*, 2000, No. 40031/98, paragraph 59.) The Court reiterates that in the decision making processes everything possible must be done to "rebuild" the family, (*Gnahoré v. France*, 2000, paragraph 59) which follows from the interests of both parents and children. A quite different decision to the latter case has been made in *Levin v. Sweden* (*Levin v. Sweden*, 15 March 2012, No. 35141/06) where the Court found no breach of Article 8 in respect to an applicant suffering from insufficient contact with her three children placed in public care. The Court's decision was based on the evidence brought before the Court by the national authorities that contact with the mother caused a significant harm to the children and restricting the relationship between the children and the parent was necessary to avoid further obstruction to their development and injury to their health. It is worth noting that the Court came to the decision after carefully examining the relationship between the children and the parent with the help of relevant experts and professionals.

While assessing cases generally with respect to the best interests of the child, the European Court always takes all possible measures to conduct a careful examination of all circumstances in order to make a fair decision, including, of course, the involvement of the children, obtaining all possible evidence and so on. The attitude of the Court is explicitly shown in *B.B. and F.B. v. Germany* (*B.B. and F.B. v. Germany*, 14 March 2013, Nos. 18734/09 and 9424/11). In the present case the national authorities rely on a 12-year-old girl, claiming that she and her younger brother had been permanently beaten by their father, placed the children in a care home. After a year it turned out that the girl had lied about being beaten from her father. After investigating all the circumstances of the case, the Court found that the national court had not taken into account evidence made by medical professionals, refuting the girl's claims. Therefore, the Court found a violation of Article 8 by ruling that decision was made upon the insufficient reasons. Family ties may be severed in very exceptional circumstances, when maintaining family ties would cause serious harm to the child and demonstrating that the child concerned will be placed in a more beneficial environment is not enough. The main point again and again lies in the careful examination of what is best for the child.

Taking family ties as one of the decisive factors for determining the best interests of the child is widely established in the United States, as well. In the decision making process relating to child removal cases, among a number of factors, in around twenty-one States and the District of Columbia in the United States, the courts apply one of the fundamental principles, implemented in the States' statutes, that is – “the emotional ties and relationships between the child and his or her parents, siblings and household members or other caregivers” (Gateway Children's Bureau/ACYF, 2012, p. 4).

Another example can be taken from Canadian legislation, specifically, Canadian Family Law sees the best interests of the child as one of the main principles. (Feldstein, 2014, p.6). The principle accords rights to children and on the other hand, puts obligations on parents towards their children. “You

can separate and live apart from your spouse or common-law partner, but you cannot divorce your children... Once you are a parent, you are a parent for life” (Feldstein, 2014, p.6). As in various jurisdictions described above, the Canadian Court does not suggest any precise criteria for assessing and determining the concept of the best interests, rather according to the court, what is the best for every child is decided upon an individual interpretation (Feldstein, 2014, p.6).

An interesting decision was delivered in recent case by the European Court against Georgia. Before discussing the judgment, it is notable that the notion of the best interests of the child was adopted for the first time in Georgia in 2016 with the adoption of the Juvenile Justice Code of Georgia, which is related solely in cases concerning criminal cases. With respect to family affairs, Georgian legislation says nothing about the best interests of the child. However, as a Member State, Georgia is compelled to ensure full harmonization of the national legislation with the fundamental provisions of the European Convention and to consider the decisions of the European Court on the national level. The case was brought before the Court by the aunt of three children, whose residence was registered at their father’s place after the death of their mother. Accordingly, local authorities while deciding child-related cases especially cases concerning removal of children, the principle of the best interests of the child should be taken in to primary consideration. In the recent judgment, delivered in 2016, the Court ruled that the current legislation of Georgia with respect to the right of a child to be guaranteed legal representative, who will be responsible for defending his or her interests, does not correspond to international standards. The Court followed that no clear references are considered in the current legislation about powers and functions of legal representatives. The Court reiterated that the legal representative has to provide the child concerned with the adequate information about the courts process and a decision should be made by considering the child’s views and desires. Due to the lack of involvement of the child in the decision making procedure and the fact that the national court

had not taken into account the children's best interests and their will to stay with their aunt, the Court found a violation of Article 8 (see *N.Ts. and Others v. Georgia*, 10 Feb, 2016, No.71776/12).

2.2 Conflicting Interests of Children and Parents in Child Removal Cases

Generally, the notion of the best interests of the child takes into account where conflict arises between the interests of children and those of parents, first of all, interests of the children should be taken into consideration. It can be justified, as mentioned above, by the vulnerability and lack of capabilities of children to have agency of their own. The European Court in its case law often highlights this approach: the child's best interests may override those of the parents (see e.g. *Krisztian Barnabas Toth v. Hungary*, 12 February 2013, no. 48494/06, paragraph 32).

Another domain where the European Court examines the best interests of the child concerns identity issues, where conflict of interests between the child and the parent or parents in question arises. The approach of the Court is interesting with this regard because, typically, in these kind of cases the competing interests of the child concerned and putative parent or parents are at stake. In such cases the Court frequently recalls that one has right to know their origins and personal identity (See *Odièvre v. France*, 2003, No. 42326/98, paragraph 29; See *Mikulic v. Croatia*, 2002, No. 53176/99, paragraph 64), while on the other hand, there is a putative parent's interest, as well of being protected from revealing his or her past. In one of the cases against Hungary (*Krisztián Barnabás Tóth v. Hungary*, 12 February 2013, No. 48494/06), the Court has found no violation of Article 8 where the national authorities refused the applicant's requirement on establishing his biological paternity action of a child who had already been adopted by his wife and recognized by another man. The Court's approach with this regard has been based on the best interests of the child, namely, the Court has been satisfied with the

evidence that the child had developed emotional ties with the adoptive family who provided her with necessary care and support and the establishment of the biological father's paternity would give rise to serious injury to the child. However, the Court has highlighted that the applicant's interest in establishing paternity cannot be denied and should be taken into consideration, but in this particular case this interest could not overcome the best interests of the child. Thus, according to the Court, in the decision-making process in these kind of cases, the important point is to find a fair balance between the competing interests of children and parents by weighing up these interests, but if harmonization cannot to be achieved, the best interests of the child prevails. An interesting decision has been carried out in *Kruškovic v. Croatia*, where the Court found violation of Article 8 with respect to an applicant who was refused by the national authorities to register as a father of his biological child, born out of wedlock, because of the deprivation of legal capacity. The Court's main point was that the children "born out of wedlock also had a vital interest in receiving information necessary to uncover the truth about an important aspect of their personal identity, that is, the identity of their biological parents" (*Kruškovic v. Croatia*, 21 June 2011, No. 46185/08, paragraph 41). A similar approach has been developed by the Court in *Godelli v. Italy*, (*Godelli v. Italy*, 25 September 2012, No. 33783/09) where the applicant, abandoned at birth, was refused to access information about her origins due to the birth mother's choice not to disclose her identity.

The European Court applies similar approach in respect of adoption cases. In *Aune v. Norway* (*Aune v. Norway*, 28 October 2010, No. 52502/07) the Court found no violation of Article 8 in respect to an applicant, being addicted to drugs and committing serious abuses to her 5 month-old son after which the child had been adopted by his foster parents. Despite the fact that the applicant's situation improved the Court ruled that she was still unable to care for her son. Considering that the child did not have any emotional or social ties to her biological mother, but instead was vulnerable, taking into account the best interest of the child, the Court justified the national authorities'

decision on placing the child into foster care. Thus, the decision represents a clear example of when the family ties can be severed upon primarily considering the child's best interests. In *Pini and Others v. Romania*, the applicants were an Italian couple, complaining that the domestic court's decisions on the adoption of two Romanian children were not executed. In fact, the children had been placed in a private institution which refused to hand over the children and the children themselves expressed unwillingness to leave the institution. The Court, interpreting Article 8 in the light of UNCRC and the Hague Convention on Protection of Children and Cooperation concerning Intercountry Adoption, found no violation of Article 8, relying its decision mainly on the best interests of the children and maintaining that in adoption cases, considering its purposes to provide a child with family and not a vice versa, the child's interests must always prevail those of the parents (*Pini and Others v. Romania*, 2004, Nos. 78028/01 and 78030/01).

In some cases, however, the European Court sometimes gives a wide margin of interpretation to Member States that in particular cases can be somewhat dangerous with respect to considering the best interests of the child. For instance, in *Harroudj v. France* (*Harroudj v. France*, 4 October 2012, No. 43631/09) the applicant who had taken Algerian girls into legal care was unable to adopt her because of the family law of the child's country of origin. Legal care is not regarded as an equal measure to adoption, even though there are similar effects with respect to guardianship. Taking into account a wide margin for interpretation by Member States on these matters, the Court found no breach of Article 8. Obviously, one may assume that such a decision raises questions with respect to primarily considering the best interests of the child.

As evidenced in this article, the principle of the best interests of the child is significantly applied in family affairs with respect to child removal cases. The Parliamentary Assembly of the Council of Europe adopted Resolution 2049 and Recommendation 2068, "Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe

member states” in April, 2015. According to the report of the Parliamentary Assembly, national legislation of member states mainly meet the key requirements of international law. Member states while deciding cases concerning removing a child from a family, are applying high standards in order to maximize the protection of the child’s best interests and with this regard, they generally use the concept of serious harm. Although the wording can vary from state to state, generally, the concept of serious harm may consider different kinds of abuse, such as physical, sexual, emotional or psychological abuse.

The Parliamentary Assembly set several principles based on the case law of the European Court in respect of child removal cases, as guidelines for member states. The first principle is preserving family ties, trying to “rebuild” family and to use removal of a child from families only as a last resort. The second principle obliges the contract states to give families appropriate support, first of all, in order to avoid the removal of a child from a family and, furthermore, to maintain and increase the number of family reunifications. The third principle calls on member states to minimize and where possible to eradicate practices concerning severing family ties completely, namely removing a child from parental care at birth, adoption of a child without parental consent, and when that is not possible, avoid unreasonable lengths of time for taking a child into care. The fourth principle makes it clear that it is essential that the persons responsible for removal and placement decisions to be properly qualified and well-trained in order to make appropriate decisions in every single case; it is important that these persons are not overloaded with their work. The final principle involves data collection, specifically, collecting data from member states on ethnic minority status, immigrant status, socio-economic background, and the length of time spent in care until family reunification. This will lead to taking proper measures in the problematic fields of violations of children’s rights.

Conclusion

In conclusion, it can be said that the notion of the best interests of the child, designed as a standard for deciding cases concerning rights of children, serves as a basic tool for securing fundamental rights and freedoms of children. Difficulties arising around its determination might not be surprising considering its abstract nature and the fact that for every single child their best interests must be determined individually, on case-by-case basis. This paper shows that the concept has become a universally accepted principle by international legal instruments, basically by UNCRC and accordingly, has made a significant positive contribution in the decision-making process with respect to child related cases both at international and national levels.

On the other hand, the vagueness of the concept of the best interests of the child might serve not always as a tool protecting the rights of children, but instead as a threat violating them if the concept is applied in a wrong way and is based solely on one's estimations. Because of its broad interpretation, there is significant room for the decision makers to manipulate and apply the principle according to their own views. As this paper has tried to demonstrate, the notion of the best interests of the child considers the overall well-being of the child that can be understood in various ways. Although, the United Nations Committee has established General Comments aiming at setting clear guidelines for the application of the best interests' notion, evidence show that this is not sufficient.

The best interests of a child should be a primary consideration for everybody including judges, medical professionals, psychologists, educators and other professionals and institutions that are working with children and youth. Therefore, the concept of the best interests must be clear enough in order for them to assess and determine children's interests and make right decisions with respect to children's human rights generally.

Although the concept is still broad and vague, its proper application effectively serves the basic aim of its existence – securing rights of children. Despite the existing critiques, the effectiveness of the concept is clearly seen from the case law discussed above. In order to preserve the well-being of children and to protect their rights, I think, it is of vital importance that the concept of the best interests of the child be interpreted in accordance with the terms of UNCRC and the guidelines set by the UN Committee. Obviously, it is much fairer to assume that the concept of the best interests of the child makes positive contribution; I would say, it is a basic mechanism to provide security for children, who are in the need of special care and treatment, so as described above. Leaving aside its vagueness and broad nature, as scholars suggest, the best solution in this situation is the permanent training of the persons, professionals, working on child right cases in order them to be capable to make fair and correct assessment and determination of each single child's best interests in every individual case.

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