



World Refugee Day Celebration 2009 Ireland

Summary of UNHCR/Trinity Conference on the Best Interests of the Child

On 17th June 2009, UNHCR¹ in cooperation with the Centre for Post-Conflict Justice at Trinity College Dublin², and supported by the European Commission's Representation in Ireland³, organised a conference titled "In the Best Interests of the Child: Meeting the Needs of Separated Children Seeking Asylum in Ireland".⁴ The event brought together academics, practitioners and advocates in the areas of refugee and child protection to discuss the scope and application of the Best Interests of the Child Principle in the context of separated children outside their country of origin.

The conference's two sessions focused on "The Best Interests of the Child Principle in International Law" and "Challenges of Implementation: Irish Law and Practice respectively". Session one was chaired by Ms Rosemary Byrne, Director for the Centre for Post-Conflict Justice at Trinity and Commissioner with the Irish Human Rights Commission. The session had presentations by Prof Michael Freeman of University College London⁵ on "the Best Interests of the Child Principle in International Law - 20 Years On", and a presentation by Ms Emilie Wiinblad Mathez, Protection Officer with UNHCR Ireland, on "the Best Interests of the Child and the Asylum Procedure: UNHCR Standards and Recommendations".

Section two was a panel session chaired by Ms Suzanne Egan, Commissioner, Irish Human Rights Commission⁶ and lecturer⁷. Panellists were: Mr Geoffrey Shannon speaking on "Gaps in legislation for the protection of Separated Children seeking asylum in Ireland"; Ms Jeannette Lever from the HSE⁸ speaking on "Best Interests of the Child for Separated Children in Ireland - Application and Practical Challenges"; Ms Jyothi Kanics from the Irish Refugee Council speaking on "Best Interests of the Child for Separated Children - Gaps and Recommendations"; and Ms Sophie Magennis, Head of Policy and Legislation, Ombudsman for Children's Office⁹ giving an overview of "The role of the Ombudsman for Children in Safeguarding the Principle of the Best Interests of the Child for Children Seeking Asylum". Each session was followed by a brief question and answer session.

The following is a resource package with the summaries of each of the presentations and links to core documents referred to by speakers.

¹ See www.unhcr.org

² See www.tcd.ie/cpcj/

³ See www.euireland.ie

⁴ Programme available at <http://www.unhcr.ie/pdf/Programme.pdf>

⁵ See <http://www.ucl.ac.uk/laws/academics/profiles/index.shtml?freesman>

⁶ See www.ihrc.ie

⁷ <http://www.ucd.ie/law/staff/suzanneegan/>

⁸ See www.hse.ie

⁹ See www.oco.ie

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Session One: Twenty Years On: The Best Interests of the Child Principle in International Law

Chair: Rosemary Byrne, Director, Centre for Post-Conflict Justice

Keynote address:

The Best Interests of the Child Principle in International Law – 20 Years On

Professor Michael Freeman, University College London

The keynote address was delivered by Professor Michael Freeman of University College London. Professor Freeman is an international expert in children's rights and has published widely in the areas of family law; child law and policy; and children's rights amongst others. He is the founding editor of the International Journal of Children's Rights and has authored over 60 books including *The Best Interests of the Child* published in 2007.

Prof Freeman focussed his keynote address on the scope of Article 3 of the Convention of the Rights of the Child¹⁰ (CRC) dealing with the best interests of the child and its interpretation both in case law and in the context of other key provisions of the CRC such as Article 2 on non-discrimination and Article 12 on the views of the child.

Article 22 – Protection and Assistance to Refugee Children – The challenge of protection and age assessments and giving appropriate care.

Prof. Freeman first examined the provisions of Article 22 of the CRC which encompasses a commitment to provide protection and assistance to child refugees. The practical application of this commitment raises particular issues in relation to determining the age of refugees when for instance a child without documentation and whose appearance may not correspond with their actual age presents. It was noted that standards in documentation were not the same the world over and it could not be assumed that children had ever been in receipt of official identification. The possibility that a child could be referred to adult services, if the age was not correctly assessed, was highlighted as a concern, especially as the provision of care and housing may not be age appropriate. The practice of detaining unaccompanied children was also called into question as a potential violation of Article 3 of the CRC dealing with the best interests of the child.

Other relevant considerations under Article 22 were the need for access to counselling and education, with Denmark identified as one of the better countries to provide such services to unaccompanied children. The importance of fully appreciating the context of the child's circumstances was stressed. It was said that there was a general lack of understanding of the kind of persecution these children may face (such as implications of being a child soldier, trafficking and female genital mutilation), as well as the child's difficulties in coping with post-traumatic stress, a new language and culture.

Article 3 Interpretation of the Best Interests of the Child

The best interests of the child principle was described as a long established concept, although it was gaining a new interpretation in International law. While often seen as a neutral concept, it was submitted that it is in fact an undetermined concept without a static definition which could be value laden and subject to culturally specific interpretations. The need to take into account long term interests as well as the immediate interests of the child in assessing best interests was emphasised. Although these may not be readily apparent and it may be impossible to anticipate future scenarios, an ongoing assessment could ensure that they are taken into account.

¹⁰ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>

Looking at the UN Convention on the Rights of the Child, Prof. Freeman noted that on its face the Convention purports to deal with *rights* rather than *interests*, and Article 3 dealing with the best interests of the child does not specifically create either rights or interests. This being so, it was pointed out that the Convention does perceive rights in terms of interests. This led to consideration by Prof. Freeman of the question: to what extent is it possible to argue that there are more important considerations than a child's best interests? It was concluded that the Convention itself informed and constrained this question through the rights contained within it, and any conflict with the provisions of the Convention could not be said to be in the best interests of the child. The strength of rights over interests was noted in Article 2 under which State parties must respect and recognise the rights set out in the Convention.

In considering the scope of Article 3, which stipulates that the best interests of the child should be "a primary consideration", Prof. Freeman questioned whether the Convention should rather speak of the best interests of the child as "the" (rather than "a") primary consideration, or indeed whether the best interests of the child should be afforded protection as the "determining", "paramount", or "only" consideration. It was also noted that the French translation which used "superior" rather than "primary" gave an indication of the weight which should be given to the interpretation of "primary" in Article 3.

Article 3 Defined Through Case Law

Prof. Freeman then went on to highlight a number of cases dealing with the best interests principle from a variety of jurisdictions. In the Canadian case of *Baker v. Canada*¹¹ it was said that those who are looking to take actions in relation to children should be "alert, alive and sensitive" to the child's best interests and give them "substantial weight". A broad definition of the type of actions which concern children was employed in the Australian case of *Theo*¹² where the best interests of the child had to be considered in an action where the child in question was not the subject of the litigation but was nevertheless indirectly affected by it. In that case the fact that Australia had ratified the Convention gave rise to a legitimate expectation on behalf of a Malaysian man that the best interests of his Australian children would be considered before his deportation.

The United States decision of *Beharry v. Reno*¹³, although reversed on appeal, looked to the best interests principle in the CRC as a fundamental principle of customary international law despite the United States' failure to ratify the Convention itself.

Best Interests of the Child in the Context of Asylum Law

According to Prof. Freeman, when applying the best interests of the child principle in the context of asylum law, any conflict of interests which arises is likely to be between the State and the child. States' concerns over immigration control should not be allowed to override the best interests of the child, as confirmed in the Australian case of *Wan*.¹⁴

The comments of the Committee on the Rights of the Child¹⁵ to the effect that a child should not be returned if to do so would violate their fundamental human rights were discussed, with the most important right seen as that contained in Article 6 of the Convention encompassing the

¹¹ *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 Available at <http://www.canlii.org/en/ca/scc/doc/1999/1999canlii699/1999canlii699.html>

¹² *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995) 183 CLR 273 Available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1995/20.html>

¹³ *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002).

¹⁴ *Wan v Minister for Immigration & Multicultural Affairs* [2001] FCA 568, available at http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/568.html

¹⁵ UN Committee on the Rights of the Child (CRC), CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>

right to life.

However, it was acknowledged that the asylum process did raise difficult questions in relation to children: had a child been sent on their own or had they been trafficked? What should be done if so? According to some Canadian authority, if a child risks being re-trafficked they should not be returned.¹⁶

The importance of taking into account the views of the child (as mandated under Article 12 of the Convention), were also highlighted and the Norwegian initiative of using “child conversations” was praised as an innovative way to encourage children's views to be expressed in a child friendly, less formal environment¹⁷.

Prof. Freeman noted the lack of limitation clauses (due to national security etc.) in the CRC which made it a “blank sheet” without the constraints of the European Convention on Human Rights¹⁸.

In concluding, Prof. Freeman outlined the importance of Article 2 in preventing discrimination against children on the grounds of their nationality. Most crucial he said was that adequate strength to be given to the meaning of “primary” under Article 3 which he argued should be given as broad an interpretation as possible.

¹⁶ See *Shu. Ping Li v Canada* FCTD IMM-932-00 (11 December 2000)

¹⁷ See further: Lidén and Rusten, “Asylum, Participation and the Best Interests of the Child: New Lessons from Norway” (2007) 21 *Children & Society* 273 Subscription based access at <http://www3.interscience.wiley.com/journal/118497105/issue>

¹⁸ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>

The Best Interests of the Child and the Asylum Procedure: UNHCR Standards and Recommendations

Emilie Wiinblad Mathez, Protection Officer, UNHCR Ireland

The second presentation was given by Ms Emilie Wiinblad Mathez, Protection Officer with UNHCR in Ireland. Ms Wiinblad has worked with UNHCR since 1998 and has served in India, Tanzania and Geneva and in Ireland since 2006. Before joining UNHCR, she was Associate Legal Officer for the International Criminal Tribunal for Rwanda.

Emilie Wiinblad Mathez gave an account of UNHCR's Guidelines on the Best Interests of the Child and discussed how the best interests principle should be incorporated into national asylum systems, particularly in the context of a best interests of the child determination. The full presentation is available at <http://www.unhcr.ie/public-statements/bestinterests.html>.

Best interests of the Child and National Asylum Systems

Ms Wiinblad Mathez began by discussing Article 3 of the CRC¹⁹ which clearly indicates that the best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. This was said to apply to all unaccompanied or separated children whether they are nationals or not and whether they are identified in the State or at the border. It was noted that as part of a national system of child protection, States are expected to have measures in place for unaccompanied and separated children, including measures to identify such children, to appoint a guardian and arrange for their immediate care and needs. Even after these initial requirements are met, the best interests principle contained in Art. 3 continues to operate and provides guidance on what further action is necessary, including: how basic information about the child should be obtained, in relation to decisions to separate children from accompanying family or adults, placement in state care, family tracing, family reunification, application for asylum or other protection status, reporting the child as a victim of trafficking, or pursuing another solutions including return to the country of origin. It was also highlighted that this applies also to actions and decisions in relation to the asylum process.

A number of relevant policy documents concerning UNHCR's mandate and role with regard to children were identified.²⁰ General Comment No. 6 from the Committee on the Rights of the Child²¹ was referred to as a key document in understanding the scope of the CRC in relation to separated children outside their country of origin. UNHCR's Guidelines on Determining the Best Interests of the Child²² were also cited as an important reference tool.

Best Interests of the Child Determination

The UNHCR's Guidelines were said to be a guide to best practice in considering what process should be used to determine the best interests of the child. The Guidelines draw a distinction

¹⁹ Convention on the Rights of the Child, available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm>

²⁰ These were as follows: UN High Commissioner for Refugees, UNHCR Policy on Refugee Children, 6 August 1993, EC/SCP/82, available at: <http://www.unhcr.org/refworld/docid/3f9e6a534.html>; UN High Commissioner for Refugees, Refugee Children, Guidelines on Protection and Care, 1994, available at <http://www.unhcr.org/refworld/pdfid/3ae6b3470.pdf>; UN High Commissioner for Refugees, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997, available at <http://www.unhcr.org/refworld/docid/3ae6b3360.html>; Separated Children in Europe Programme, SCEP Statement of Good Practice, 2004, Third edition, 2004, available at: <http://www.unhcr.org/refworld/docid/415450694.html>; and UNHCR's Executive Committee Conclusion on Children at Risk No. 107 (LVIII) - 2007, 5 October 2007, available at: <http://www.unhcr.org/excom/EXCOM/4717625c2.html>

²¹ UN Committee on the Rights of the Child (CRC), CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6 available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>

²² UN High Commissioner for Refugees, UNHCR Guidelines on Determining the Best Interests of the Child, May 2008, available at: <http://www.unhcr.org/refworld/docid/48480c342.html>

between, on the one hand, a Best Interests Assessment (BIA) which is an ongoing assessment of relevance to all decisions pertaining to the child, and a Best Interests Determination (BID), which is a formal determination requiring strict procedural safeguards, such as a panel decision and documentation. The UNHCR's suggestions on when to use a BID are based on the language of the CRC, General Comment No. 6 and an assessment of the child's situation based on: 1) whether the parents are absent or unable to exercise basic parental responsibilities, 2) whether the decision has a fundamental impact on the future of the child, and 3) whether a complex balancing of factors and rights is required to determine the best interests of the child. Taking these into account, it was explained that UNHCR recommends that a BID take place in the following situations: a) the identification of durable solutions for unaccompanied and separated refugee children, b) temporary care arrangements for unaccompanied or separated children in exceptional situations; and c) possible separation of a child from his or her parents against their will.

Best Interests of the Child Determination in the National Context

Although the UNHCR Guidelines were written to guide UNHCR staff in their international operations, it was argued that there was a good case for using a BID in national decisions concerning whether to make an asylum claim for a child. This decision was identified as key in determining a whole range of issues in the child's case such as the applicable procedures, care and potential long term and durable solutions.

The Elements of a BID

In relation to the BID process itself, the key elements of a BID were identified as encompassing: in the first place, some recommended safeguards which provide amongst other things for the participation of the child and persons with different relevant expertise; secondly, there should be a separation of the information-gathering and decision-making functions, and a non decision-making supervisor should be appointed to manage the process; thirdly, the decision should be taken by a panel; and fourthly, the decision and all procedures should be fully documented. The qualifications of those involved were also seen as important and the information gatherer was referred to as a child welfare officer with expertise in the areas of age-specific interviewing, age assessment, child rights, cultural awareness and psychosocial counselling. The panel must consist of relevant authorities who can make a determination and who have solid knowledge and experience in both child rights and refugee law, as well as other relevant protection standards. The role of the guardian is one of making sure that the process is implemented in the best interests of the child and can act as a "go-between" for the child in dealings with this process.

Ms Wiinblad Mathez ended her presentation with a quotation from a Child Advocate in the US who indicated the benefits of the UNHCR Guidelines in practice as providing the necessary roadmap to ensure a thoughtful process for developing a best interests of the child determination for separated children. In the words of the Child Advocate "I cannot overstate the relief I felt when I first read the framework for developing best interests recommendation detailed in the UNHCR BID Guidelines. With some adaptation, the BID guidelines (...) ensure a thoughtful process for developing best interests recommendations".

Gaps in Legislation for the Protection of Separated Children Seeking Asylum in Ireland

Geoffrey Shannon, Special Rapporteur for Child Protection

Geoffrey Shannon is one of two Special Rapporteurs for Child Protection in Ireland. A practicing solicitor, he is also a senior lecturer at the Law Society of Ireland and the Irish expert member of the Commission on European Family Law. He is the editor of the Irish Journal of Family Law and has written extensively on family and child law issues. He was speaking in a personal capacity on this occasion.

Geoffrey Shannon gave an account of the current legislative framework in Ireland, in which he said significant gaps exist, leaving some children seriously vulnerable. Although one of the key recommendations of the Ryan Report had been for robust inspection, it was noted that the standard required in hostels where separated children may be accommodated fell far short of this. While the HSE have put in place a protocol to deal with missing children it has neither been published nor scrutinised.

Current Legislative Framework and Gaps

In an Irish context he submitted that the 1991 Child Care Act²³ was relevant to unaccompanied children and no Supreme Court decision had contradicted its application in this context. However, it was emphasised that the Act does not adequately cater for the interests of separated children, nor was it intended to do so. The presumption under section 4 & 5 of the Act (dealing with voluntary care and accommodation) is that there is an existing guardian and there is little provision for scrutiny in cases where a guardian subsequently emerges. It was pointed out also that Section 5 of the Act (concerning accommodation) was designed to deal with homelessness and not unaccompanied children.

In particular, the identification of unaccompanied children and addressing their particular vulnerabilities were seen as notable challenges in this area. Although the National Children's Strategy²⁴ had said that every separated child would have a guardian *ad litem*, this commitment had not been followed through on, nor was the issue adequately addressed by the Children's Acts Advisory Board²⁵.

Another issue of concern raised was the provision of "absolutely inappropriate accommodation" in Garda stations for unaccompanied children arriving out of hours. It was noted that the Supreme Court has pronounced against discrimination based on the status of a child. However, it was felt that there was a tendency to label these children as "unaccompanied" or "separated" and he emphasised that they must be treated as children first and foremost.

Child Trafficking

In considering the reasons for the arrival of unaccompanied children in Ireland Mr Shannon found that many are the victims of child trafficking although there was a reluctance to accept this as a fact at an official level. He pointed out that since 1999 over 2500 children have been reunited with a family member within this jurisdiction however in many cases reunification is rushed and is not independently validated and there exists little in the way of checks to ensure

²³ Child Care Act 1991, available at: <http://www.irishstatutebook.ie/1991/en/act/pub/0017/index.html>

²⁴ See Department of Health and Children, National Children's Strategy, 2000, available at: http://www.dohc.ie/publications/national_childrens_strategy.html and more generally: <http://www.omc.gov.ie/viewdoc.asp?fn=%2Fdocuments%2FAboutus%2Fstrat.htm#1>

²⁵ See further: The Children's Acts Advisory Board, website at: www.caab.ie

that trafficking was not occurring. It was noted that the Ombudsman for Children is addressing this matter at present.

Recommendations

To conclude, Mr. Shannon emphasised that more guidance and legislation was needed with regard to the issue of the guardian *ad litem*. The Ryan Report was referred to as a “wake up call” and we were reminded that the State does not merely have negative obligations with regard to children, but must uphold its positive obligations in this area.

Best Interest of the Child for Separated Children in Ireland – Application and Practical Challenges

Jeanette Lever, HSE Social Work Team for Separated Children

The acting Principle Social Team for Separated Children Seeking Asylum Ms Jeanette Lever, presented the practical application and challenges facing the HSE social work team in relation to the best interests of the child principle. The area covered by the HSE social work team under Ms Lever is the HSE Dublin Mid Leinster which has the remit to provide health and social services to Separated Children Seeking Asylum that present in their area. There are other teams around the country that work with such children, but this is the only team dedicated to this client group specifically and they take in the greatest numbers.

The Work of the HSE Team for Separated Children

Ms Lever stressed that their work is based in the Child Care Act 1991 and it therefore follows that in their decisions separated children seeking asylum are children first, with an absolute right to care and protection. They are children first and asylum seekers second. The unique situation of each of the separated children is what they assess and respond to. In this regard the service is guided by some underpinning principles including that the welfare of the child is of paramount concern; that the best interests of the child should be the deciding factor in all decisions and that the young person's wishes are taken into account in relation to decisions such as whether to make an asylum claim.

A number of decisions on needs are taken once a child is referred to the service, they include their immediate needs when they arrive such as care arrangements, medical and educational needs and potentially psychological assistance which may be required to support the child. Other important decisions for which the social work team plays a key role are decisions in relation to age-assessment and whether to make a protection application for the child.

Challenges in the Provision of Care

While aiming to ensure that separated children have equal opportunity and care compared with other children in care, Ms Lever recognised that this was not currently always the case. Some of the difficulties include that the service is only available Monday to Friday from 9 a.m. to 5 p.m. and children have needs outside these hours as well. Other difficulties arise when different rights of the child are weighed such as their right to freedom of movement and their need for protection, which may come into play when young persons go missing from the service. The area of age assessment is also one in which the service is facing difficulties as no full method is available and they have to ensure both that children are identified and not treated as adults and that adults are not in fact placed wrongfully with other children.

One area that was particularly highlighted both by Ms Lever and by participants is that of family reunification both in country of origin and in Ireland. The starting point is that it is always in the best interests of the child to be reunified with family, however careful assessment is required and resources are not always available to ensure follow up monitoring.

Separated Children and the Asylum Process

In relation to separated children and the asylum process, Ms Lever explained that when an asylum or protection application is made the young person is accompanied throughout the system by a project or social worker and their legal representative from the Refugee Legal Service. Whether to make an asylum application can be one of the more complex decisions as the child may not fit into the very tight asylum categories, but may nevertheless have protection concerns or need for legalization of their stay. If an application is not made the young person risks being in Ireland without status until s/he turns 18 years when a decisions to deport can follow.

Ms Lever ended her presentation highlighting that steps were taken to improve the services including in relation to phasing out hostel accommodation and replace it with foster and residential care units and increased cooperation with the Gardaí in relation to children going missing while in the care of HSE.

Best Interests of the Child for Separated Children – Gaps and Recommendations

Jyothi Kanics, Separated Children's Officer, Irish Refugee Council

Jyothi Kanics is Separated Children's Officer at the Irish Refugee Council and has been actively engaged in anti-trafficking efforts since the mid-1990s. She is a member of La Strada International's Advisory Board and former Head of the Anti-Trafficking Unit at the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe.

Jyothi Kanics gave an overview of the work of the Irish Refugee Council (IRC) to protect separated children and drew on some case studies which highlighted the gaps that existed in the system. Recommendations were made both in response to the Immigration, Residence and Protection Bill 2008²⁶ and in the wider context. For the full version of Jyothi Kanic's presentation please see:

www.irishrefugeecouncil.ie/media/Irish_Refugee_Council_statement_BID_17_June_2009.doc

The Work of the Irish Refugee Council to Protect Separated Children

The key long-term goals of the IRC in this area were identified as being the generation of greater awareness of and respect for the rights of separated children, ensuring equitable treatment and care for separated children, and for each separated child to be identified, supported and assisted in securing a "durable solution" (long-term stability and safety) in a timely and child friendly manner that prioritizes their best interests.

In their work in the areas of research, monitoring, advocacy and policy development the IRC have published regular reports such as Making Separated Children Visible.²⁷ They are also engaged at a national and European level with other organisations such as Action for Separated Children in Ireland (a joint lobbying forum), the Refugee Immigration Practitioners Network (with the Immigrant Council of Ireland²⁸ and the Refugee Legal Service²⁹) and in the Separated Children in Europe Programme (SCEP)³⁰. The SCEP's Statement of Good Practice³¹ has been used by the IRC both as a tool for advocating for change as well as for monitoring progress.

Policy Recommendations – Immigration, Residence and Protection Bill 2008

In their recent submission to the Irish Government in relation to the Immigration, Residence and Protection Bill 2008, the IRC recommended that a formal best interests determination process be put in place. Draft amendments to the Bill were also prepared as a separate document to be considered in whole or part and tabled by interested TDs. The amendment language illustrates how recommendations could be implemented in areas such as the composition of a best interests determination panel, and the identification and protection of separated children.

Case studies Illustrating Current Gaps and Concerns.

Several illustrative case studies were provided which served to highlight where the system was failing with regard to separated children. In one case, the IRC were contacted after a child of unknown age with no ID or legal status who was not attending school was discovered by a

²⁶ Bill No. 2 of 2008. Available at <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2008/0208/document1.htm>

²⁷ Irish Refugee, Council, Making Children Visible, 2006, available at <http://www.irishrefugeecouncil.ie/media/children.pdf>

²⁸ See further: Immigrant Council of Ireland, website at: www.immigrantcouncil.ie

²⁹ See further: Refugee Legal Services, website at: www.legalaidboard.ie/lab/publishing.nsf/Content/Refugee_Legal_Service

³⁰ See further: Separated Children in Europe Programme, website at: www.separated-children-europe-programme.org

³¹ Statement of Good Practice, Separated Children in Europe Programme, 2004. Available at http://www.separated-children-europe-programme.org/separated_children/good_practice/index.html

social services inspector in a residential care home outside of Dublin. After consultation with the IRC, a guardian *ad litem* was appointed and the child's issues were systematically resolved. Another case focused on the legal limbo faced by children without legal status when they turn 18 and potentially face deportation. It was emphasised that durable solutions were needed for children in care which included after care planning and support.

Family reunification was also seen as an area of concern with more than 50% of separated children coming to reunite with family in Ireland and very little in the way of follow up or supports. The IRC had been contacted when family reunification had broken down in cases of suspected trafficking, abuse or abandonment. The need for long term solutions in these cases was reiterated.

Key Recommendations – Moving Towards Best Practice

In conclusion, Jyothi Kanics summed up the key recommendations of the IRC in this area. While she pointed to recent initiatives such as the draft HSE Operational Policy for Separated Children and the National Action Plan to Prevent and Combat Human Trafficking³², she said that further national policy and guidance was needed. A continued exchange of good practice should occur and take into consideration documents such as the forthcoming UNHCR Guidelines on Asylum Claims for Children and the revised SCEP Statement of Good Practice. Children themselves should be given more information and be allowed to participate in child-friendly procedures which would include a comprehensive assessment of their best interests.

³² Department of Justice, Equality and Law Reform, National Action Plan to Prevent and Combat Trafficking of Human Beings in Ireland 2009-2012, available at: <http://www.justice.ie/en/JELR/Final%20National%20Action%20Plan2.pdf/Files/Final%20National%20Action%20Plan2.pdf> Executive summary here: <http://www.justice.ie/en/JELR/Executive%20Summary%20Document.pdf/Files/Executive%20Summary%20Document.pdf>

The Role of the Ombudsman for Children in Safeguarding the Principle of The Best Interests of the Child for Children Seeking Asylum

Sophie Magennis, Head of Policy and Legislation, Ombudsman for Children's Office

Sophie Magennis is Head of Policy and Legislation in the Ombudsman for Children's Office and has over ten years experience in international human rights law. This has included work with Amnesty International, the Council of Europe, the Department of Foreign Affairs and as an independent consultant.

Ms Magennis gave an overview of the challenges faced in implementing the best interests principle in Ireland. She referred to the work of the Ombudsman for Children at present with separated children living in hostel accommodation, almost 30 of whom are participating in a special advisory group. In her presentation she highlighted the need to engage with the best interests principle in politics and society, to listen and respect the voice of children, and to avoid the denial of rights to children through the misuse of the best interests principle.

Engagement with the Best Interests Principle: Politics and Society

In the context of our engagement with the best interests principle Ms Magennis emphasised the need for a greater understanding of the principle's meaning in practice. The proposed constitutional referendum on the rights of the child was said to have highlighted reservations held in some circles about the best interests principle as set out in Article 3 of the Convention on the Rights of the Child.³³ Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, has recommended that the best interests principle as set out in the Convention on the Rights of the Child be incorporated into the Constitution³⁴ and the Ombudsman for Children's Office has reiterated this recommendation. Despite this, in its current articulation the proposal for constitutional reform includes only a limited and restricted best interests principle. Ms Magennis highlighted the need to engage with those who may be fearful of the best interests principle and to illustrate how the best interests principle sits well alongside family rights which are also recognised and guaranteed by the Convention on the Rights of the Child.

Lack of Respect for the Voice of the Child in Ireland

The Report of the Commission to Inquire into Child Abuse (the Ryan report) was said to have clearly identified the importance of listening to children.³⁵

In its documentation of gross, systemic, and widespread violations of the rights of children placed in institutions in Ireland, it also documented instances where some brave children alerted the authorities to the abuse only to be faced with retribution and silence. It was emphasised by Ms Magennis that the lessons of the Ryan report must be learned and never repeated. She stressed that proactive mechanisms were needed and referred to the concerns expressed by the UN Committee on the Rights of the Child in 2006 about the lack of legal and practical measures in Ireland to ensure that children can exercise their right to express their views as set out in Article 12 of the Convention on the Rights of the Child.³⁶ The UN Committee also recommended that Article 12 be given expression in the Irish Constitution.

Potential Dangers Attached to the Misuse of the Best Interests Principle

It was noted that the best interests principle should not be used to deny core rights (such as the

³³ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>

³⁴ Council of Europe: Commissioner for Human Rights, Report by the Commissioner for Human Rights, Mr Thomas Hammarberg, on his visit to Ireland 26 - 30 November 2007, 30 April 2008, CommDH(2008)9, available at: <http://www.unhcr.org/refworld/docid/482056a70.html>

³⁵ Report of the Commission to Inquire into Child Abuse (May 2009), available at <http://www.childabusecommission.com/rpt/>

³⁶ See Committee on the Rights of the Child, Concluding Observations: Ireland. CRC/C/IRL/CO/2 (29/09/2006), available at: <http://daccessdds.un.org/doc/UNDOC/GEN/G06/450/74/PDF/G0645074.pdf?OpenElement>

right to protection, the right to seek asylum, the right to a nationality, the right to education and the right to the best available health care) to children and young people. For example, children have a right to seek asylum and they should be facilitated in the exercise of this right. Best interests determinations should not be used to frustrate the exercise of this right.

Similarly, any best interests-based decision to limit a separated child's right to freedom of association for child protection reasons should be recorded, subject to review and in compliance with the requirements of legitimacy, necessity, and proportionality.

In all such instances the article 12 rights of the child concerned must be respected and the best interests determinations reviewed in light of changing circumstances and the evolving capacity of the child.

Finally, best interests determinations cannot be used in respect of absolute rights which cannot be limited in any way. Such rights include the protection from torture, inhuman or degrading treatment or punishment including non-refoulement guarantees and the right to life.

*Recommendations*³⁷

In order to overcome the obstacles to implementation it was said that further debate, awareness raising and consultation with children and young people was needed. A Constitutional amendment should incorporate the best interests principle and the child's right to express their views. Any domestic law, such as the Immigration, Residence and Protection Bill would need to be compliant with these provisions.

The involvement of children in decisions concerning them was also seen as important in order to avoid what could otherwise be a disempowering process. This should involve preparation, updates and follow-up with the child. Clarity was needed both in relation to the rights and entitlements of separated children, as well as regarding the policy, practices and procedures concerning them. It was emphasised that there should be transparency and the possibility for review of the decision making process and children themselves should be afforded an opportunity to challenge the decisions. Documentation of decisions should include an outline of the views of the child and the weight attached to those views.

³⁷ More information can be found in the UN Committee on the Rights of the Child's General Comment number 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/G05/438/05/PDF/G0543805.pdf?OpenElement> and the UNHCR's Guidelines on Determining the Bests Interests of the Child, available at: <http://www.unhcr.org/refworld/docid/48480c342.html>

Questions:

The floor was opened to questions and comments during the Conference with much discussion focusing on the disappearance of unaccompanied children from State care as reported in the Irish Times that day.³⁸ The issue of accountability was discussed and Geoffrey Shannon concluded that ultimately the State was responsible for the care and welfare of these children. Sophie Magennis from the Ombudsman for Children stressed that lines of accountability should be clear with clearly assigned roles and cooperation among the various State agencies.

Also discussed was the use of the Convention on the Rights of the Child in Irish Law. Prof. Freeman considered that it was certainly gaining greater recognition amongst the English judiciary.

An enquiry was made by another member of the floor as to what training was available for practitioners hoping to better serve the needs of unaccompanied children. It was noted that the UNHCR provided inter-agency training. Jyothi Kanics from the Irish Refugee Council urged practitioners to use materials such as the UNHCR Guidelines on Determining the Best Interests of the Child in their arguments while noting that children needed more information about procedures and their rights and the implementation of child friendly processes was necessary.

The summaries are prepared by UNHCR Ireland. They do not reflect the opinion of the organisation. Please refer to links for full statements where available.

*UNHCR Ireland
July 2009*

³⁸ See: "Disappeared: 20-plus children missing from HSE care" in the Irish Times, 17th June 2009, available at: <http://www.irishtimes.com/newspaper/ireland/2009/0617/1224248983892.html>

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Key Documents:

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www.tcd.ie/cpcj

Irish Human Rights Commission

www.ihrc.ie

Health Service Executive

www.hse.ie

Irish Refugee Council

www.irishrefugeecouncil.ie

Ombudsman for Children's Office

www.oco.ie