**Children’s rights law in the global human rights landscape:**

**isolation, inspiration, integration?**

**The broader relevance of features of children’s rights law**

The ‘best interests of the child’ principle

**Helen Stalford**

**Abstract**

This chapter explores how interpretations and applications of the best interests principle have evolved in relation to decisions involving children. This will set the scene for exploring the actual and potential use of the principle to mediate decisions in other (adult) human rights contexts. The analysis interrogates in particular whether the best interests principle can be transposed to adult human rights contexts without significantly undermining its effectiveness in protecting children’s welfare as a primary objective. In doing so, the chapter explores the extent to which the best interests principle has been used (and, indeed, abused) to uphold the interests of adult parties.

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**Introduction**

The best interests principle is the normative axis around which decisions relating to children revolve. While Article 3(1) CRC is the most commonly cited reference for this principle, it finds expression in a number of earlier and subsequent international texts, notably the 1959 Declaration on the Rights of the Child,[[1]](#footnote-1) the 1979 Convention on the Elimination of All Forms of Discrimination Against Women,[[2]](#footnote-2) and the UN Convention on the Rights of Persons with Disabilities.[[3]](#footnote-3) Despite the fact that best interests is universally regarded as a central tenet of children’s rights, its precise definition remains elusive and its application highly inconsistent and contingent upon subjective interpretation. In the words of Mnookin, the enormity of the task associated with determining what is in a child’s best interests, “poses a question no less ultimate than the purposes and values of life itself.”[[4]](#footnote-4) The UN Committee on the Rights of the Child has, somewhat obliquely, characterised the principle as: a substantive right, entailing an intrinsic obligation on all states to ensure that the child’s best interests are a primary consideration informing all decisions concerning the child; a fundamental interpretative legal principle requiring that if a legal provision is open to more than one interpretation, the interpretation that most effectively serves the child’s best interests should be chosen; and a rule of procedure requiring procedural guarantees to be put in place to enable decisions around what is in the child’s best interests to actually occur and be evidenced in practice.[[5]](#footnote-5)

Added to this, it is accepted that best interests does not operate in isolation from other children’s rights; on the contrary, it is intimately linked with and instrumental to the exercise and enforcement of other rights set out in the Convention.[[6]](#footnote-6) This, in turn, has generated extensive guidance on how to determine best interests in a range of substantive contexts at international and domestic level. Consider, for example, the best interests determination guidelines of the UN High Commissioner for Refugees,[[7]](#footnote-7) as well as the various welfare checklists[[8]](#footnote-8) and toolkits that have been developed at national level, particularly in a family law and medical law context. Indeed, at the national level, particularly in Western legal systems, the best interests principle has gained considerable traction and even been elevated to a status of ‘paramount’ importance.[[9]](#footnote-9)

It is not surprising that best interests appeals to other areas of (adult) human rights. The concept offers a neat, rhetorical device that can be shared by the range of professionals and authority figures engaged in decision-making on behalf of vulnerable individuals. It focuses everyone’s attention on the common goal of achieving the best possible outcomes for them, and it offers a convenient shorthand for the range of intrinsic and extrinsic factors that are instrumental to protecting individuals’ well-being and nurturing their potential in the short, medium and longer term. The principle has been appropriated, in particular, in a clinical health care context for adults deemed to lack capacity to make decisions for themselves. In England and Wales, for example, the Mental Capacity Act 2005 gives statutory force to the best interests test[[10]](#footnote-10) and best interests is a dominant rhetoric informing debates around end-of-life decision-making[[11]](#footnote-11) and forced sterilisation.[[12]](#footnote-12)

Efforts to appropriate the best interests standard are driven by a mixture of pragmatic, philosophical and ethical considerations.[[13]](#footnote-13) But this chapter cautions against extending the best interests too readily to other decision-making contexts, first and foremost because the principle has been developed specifically in a children’s rights context to respond to the distinct needs and vulnerabilities of children. It cannot be readily transposed to other human rights contexts without potentially undermining or attenuating the purpose for which it was originally intended. Its explicit focus on children, and particularly its emphasis on paramountcy or primacy, begs the question as to how states and other duty-bearers could meet the obligations inherent in the principle of best interests if it were broadened out to other communities of rights holders, namely adults, on the same terms. This contention will now be considered in more depth.

1. **Upholding the child-specificity of the best interests principle**

It is difficult to imagine best interests, as it is currently conceived, operating effectively in many adult human rights contexts as a general principle, aside from the narrowly defined contexts referred to above involving adults who are mentally and physically vulnerable. Certainly, there is a strong argument in favour of limiting it exclusively to children or, at most, to adults whose cognitive, mental, emotional and physical functions render them comparable to children in terms of their vulnerability and their dependency on adults to make decisions on their behalf. But the best interests principle extends well beyond these paternalistic dynamics. It has evolved with the twin purpose of enabling children to fully exercise their rights by ensuring that obligations towards them are fulfilled and to assist decision-makers in achieving an outcome that will have the most positive (or the least negative) impact on them.[[14]](#footnote-14) The process of conceptualising and embedding best interests within a rights framework has not been straight-forward or uncontested, however. During the drafting of the UN Convention on the Rights of the Child there was considerable debate as to whether a principle grounded in ‘interests’ and ‘needs’ should be included at all within a Convention that explicitly endorses *rights.[[15]](#footnote-15)* What the drafters arrived at in the end is, in the words of Philip Alston, “a carefully formulated and balanced statement of values to which [nearly all states] have formally subscribed.”[[16]](#footnote-16)

Since then best interests in the context of children’s rights has come to represent a number of ideals and aims. First, it is a mechanism for rendering children’s interests visible in decision-making processes that are routinely dominated by adults. As Freeman asserts, “in a world run by adults, there would otherwise be a danger that children’s interests would be completely ignored.”[[17]](#footnote-17) Second it provides an approach to purported clashes between adults’ (typically parents’) desires and interests and the interests of the child (for instance in the context of disputes around child contact and residence). Such an approach is based on a ‘King Solomon-type’ philosophy,[[18]](#footnote-18) that a willingness to sacrifice one’s own desires for the sake of those of one’s child is what being a parent is all about.[[19]](#footnote-19) It is also generally accepted (in principle at least) that it is right and fair that children’s interests should carry more weight in such decisions because their outcome is likely to have much more profound effects on children in the immediate and longer term. Take a family relocation application for instance: the decision to relocate a child, uproot him or her from their school, friends, social commitments, cultural and linguistic environment and, in many cases, from regular contact with the other parent and perhaps even siblings, can have a profound impact on a child’s life opportunities, education, sense of identity, health and happiness, arguably to a much greater extent than on that of the parent who has requested the relocation. Such factors have to be weighed up carefully against the likely benefits that such a move might bring, demanding what John Eekelaar refers to as an ‘imaginative leap’ as to what the child might have chosen for him or herself once they reach maturity.[[20]](#footnote-20) This interpretation links in with the third, more utilitarian function of best interests: that investing in children’s interests maximises the welfare of society as a whole; it creates the circumstances in which children can be nurtured to develop into rounded, fulfilled and responsible citizens, contributing to a community that we all want to be part of in the short and longer term.[[21]](#footnote-21)

This cursory overview of how best interests is conceptualised highlights, perhaps, the difficulties of applying such functions to adult-related human rights decision-making. The concern is that this would lead to one of two possible consequences: first it would mark a shift towards what Stephen Parker refers to as ‘an artificial and sterile universalism’[[22]](#footnote-22) potentially divesting the principle of any distinctiveness and, ultimately, undermining its effectiveness in protecting children’s welfare. Second, it risks contriving decision-making processes by seeking to conceptualise them within a (child-focused) framework that is ill-adapted to accommodate the different variables and contexts that shape adults’ lives. The following section explores these possible outcomes in more depth.

1. **Avoiding an artificial and sterile universalism**

Any suggestion that best interests be extended to other human rights contexts raises a number of practical and conceptual questions. First and foremost, questions arise as to the ways in which the principle would have to be adapted to respond to the very different variables shaping decision-making around adults. For instance, it is difficult to envisage how the notions of primacy or paramountcy – the cornerstones of the best interests principle - would prevail, particularly in matters concerning both adults and children. What would happen, for instance, if there was a clash between the best interests of the child and the best interests of an adult in a given set of circumstances such as disputes over custody and access, or cases of parental child abduction involving allegations of domestic abuse perpetrated by the father against the mother? One of the most common arguments in favour of extending the best interests principle to other (adult) parties in such cases is based on notions of fairness and achieving equality of arms. This argument objects to the way in which best interests blindly prioritises children’s needs over and above the interests of other parties implicated in proceedings, leading to an artificial, one-sided justice that undermines adult parties’ (notably parents’) rights, and neglects to acknowledge that a more balanced assessment of the different parties’ interests might be instrumental to upholding the interests of the child.[[23]](#footnote-23) The way in which child contact is addressed in domestic violence cases provides a good illustration of this tendency. In England and Wales, ongoing contact with the non-resident father is often endorsed in some manner or form, provided it is consistent with the welfare of the child.[[24]](#footnote-24) Many have argued, however, that the interests of the mother are not sufficiently taken into account in such circumstances and that the current legal approach perpetuates circumstances in which the abuser can exert ongoing control and coercion over the mother.[[25]](#footnote-25)

Whilst there are clearly cases in which the welfare of adults in acutely vulnerable circumstances requires specific protection, it should not be to the detriment of enhanced consideration of the interests of children. Children begin at a distinctly disadvantaged position as compared to adults by virtue of the fact that they typically have little control over the living circumstances in which they find themselves. On a day-to-day basis they have very limited autonomy; parents and other adults routinely act as the gatekeepers permitting or refusing their access to and enjoyment of their rights, even for those children who have capacity to make autonomous decisions. They depend on adults to transport them, to support them financially, to feed and clothe them, to guide them in understanding the difference between what is right and wrong, safe or dangerous, healthy or unhealthy. A special mechanism such as best interests enables decision-makers to isolate and distinguish children’s needs from those of their parents, particularly in cases where parents are simply unable or unwilling to accept that their children’s needs are not coterminous with their own needs or desires.

Of relevance in this regard are developments in new reproductive technologies which both reflect and endorse growing recognition of individuals’ ‘right’ to parent. Built into most forms of assisted reproduction in the UK now is some obligation to consider the best interests of the child likely to be born as a result of such procedures,[[26]](#footnote-26) but how would such an obligation be affected if the best interests of the adult receiving treatment had to be weighed equally against those of the potential child? Consider the impact that elevation of best interests in favour of adults might have, for instance on children’s right to know their genetic heritage if sperm donors could argue that it is equally in their own best interests to remain anonymous. Consider also how, in a surrogacy arrangement gone wrong, the courts would balance the competing interests of commissioning parents, those of the surrogate mother, and the interests of the child if there was an obligation to uphold the best interests of all.[[27]](#footnote-27) If the best interests of the child is to remain paramount or even primary that would surely imply an inferior iteration of best interests for adults/parents implicated in the same decision; their interests would have to be a *secondary* or *minor* consideration. Conversely, if the best interests of the child were not to remain paramount but were to be considered in equal measure to the interests of the adults surely this would lead to widespread, routine breaches of the CRC, not to mention the domestic articulation of the principle.

Either way, we end up with a principle that is vulnerable to dilution or corruption if applied too freely to adults. Certainly there is some evidence of this already occurring: in the context of assisted reproduction, for instance, it has been noted that the obligation to consider the welfare of any children born as a result is only superficially adhered to and that, for the most part, adults’ reproductive autonomy almost always takes precedence over any speculative child welfare concerns. In a surrogacy context, for instance, there is no requirement to consider the suitability of the commissioning adults to act as parents of a child born of such arrangements.[[28]](#footnote-28) The prevailing (and some would argue, erroneous) presumption is that it is almost always in the child’s best interests to be born, save for exceptionally rare instances when he or she would be exposed to a life that is “not worth living”. Any other approach, it is argued, is tantamount to licensing parenthood in a highly discriminatory way.[[29]](#footnote-29) In the same vein, it is probable that a more explicit obligation to consider the best interests of prospective parents in such contexts would merely reinforce the current, implicit obligation to uphold adults’ reproductive autonomy.

That are, of course, numerous situations in which an adult-focused application of the best interests principle is simply inconceivable, particularly where such interests have to be balanced with wider public policy concerns. Take for instance best interests in the context of immigration and asylum law. Immigrants’ right to family life is protected under Article 8(1) of the 1950 European Convention on Human Rights. Immigrants’ exercise of their right to family life in the host country can be trumped, however, by ‘the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’ (Art 8(2)). This provision has spawned an abundant jurisprudence largely endorsing an expansive interpretation of Article 8(2), leading to a situation in which unlawfully resident adult claimants can avoid removal only in the most exceptional of cases, where there are “insurmountable obstacles”[[30]](#footnote-30) to establishing family life elsewhere.[[31]](#footnote-31) For the most part, states enjoy a wide margin of appreciation in regulating immigration into their own regions with a view to curbing the injurious economic, political, cultural and social impact of such flows. Effectively, therefore, even if it did have an explicit mediating function, the best interests of immigrants – adults and children alike – will always be relegated to the notional ‘best interests’ of the broader public, save in the most exceptional of cases. This is not just the case for immigration cases involving adults, though: the fact that states persist (and the UK is a particular culprit) in allowing tens of thousands of unaccompanied children to languish in refugee camps across Europe offers a sobering illustration of how best interests operates as a vacuous mantra rather than a transparent and coherent call to action.[[32]](#footnote-32) Similarly, best interests in a criminal justice context often pales into insignificance where the focus is on punitive sanctions, avoiding recidivism and obtaining justice for the victim.[[33]](#footnote-33) It is, therefore, highly unlikely that the best interests principle could provide any meaningful, politically palatable framework for determining how to dispose of adult claims in such contexts.

In addition to the more pragmatic difficulties associated with extending the best interests principle is the concern that it would serve to transpose disempowering decision-making opacity commonly associated with children’s best interests assessment to adult contexts. This not only risks attenuating adults’ right to autonomy and self-determination, but also risks entrenching a predominantly paternalistic model of best interests from which, for many years now, activists have been trying to extricate children’s rights.[[34]](#footnote-34)

1. **Entrenching and reinforcing opaque decision-making**

One of the key strengths of best interests (its adaptability to different contexts, depending on how it is interpreted) is also its greatest weakness. Its indeterminacy has been highlighted as rendering it susceptible to manipulation to serve adultist agendas and to sanction “…untested assumptions about what is good for children.”[[35]](#footnote-35) Over 40 years ago, Robert Mnookin raised serious concerns about the wisdom of deploying such a speculative, highly subjective and acutely unpredictable framework to inform often life-changing decisions.[[36]](#footnote-36) It has also been questioned whether it is even possible, let alone desirable, to achieve determinacy and predictability in decision-making, particularly when it comes to lives characterised by constant fluctuations in living conditions, family constellations and physical and mental health.[[37]](#footnote-37)

The holy grail of determining what is in the best interests of individuals is all the more elusive when one takes account of what Parker refers to as “a collapse in consensus over certain kinds of values to do with conformism and individuality, material success and personal contentment, gender differentiation and so on.”[[38]](#footnote-38) In Western democracies, at least, we have increasingly less defined conventions and a less prominent sense of shared values (other than perhaps a shift towards libertarianism) to guide decisions, making it increasingly difficult to ascribe a generalised set of circumstances or ideals to a best interests assessment. Whilst we might still hang onto the artificial assumption that best interests can be determined by reference to shared values or wisdom, in reality best interests assessments are unnervingly instinctive and highly contingent on the subjective assessment and value framework of the decision-maker.

In extending best interests to other human rights arenas, therefore, we risk completely losing grip on what is already a slippery, highly contested concept. This would not only inhibit progress in children’s rights, but would risk distorting assessments of adult autonomy and self-determination – quite literally straitjacketing them. One only has to look at the best interests standard in the context of medical decision-making and disability to see how readily it is used to reinforce a highly paternalistic, protectionist agenda and, as a consequence, to divest individuals of their decision-making autonomy. Moral and legal philosophers such as John Stuart Mill have resolutely rejected any attempts to impose constraints on an individual (adult’s) liberty for the purpose of promoting his or her own good. But it is also conceded that there is a class of persons (children, the profoundly disabled or mentally incapacitated) with respect to which paternalistic interventions can be justified because of their inherent vulnerability. And so, there are multiple legal and policy interventions that are paternalistic in nature. But the application of this principle to such cases has not been without its problems: legal academics and practitioners alike have grappled over what the components of the best interests formula in such cases might be; what kinds of benefits and burdens can be factored into such decisions; how the interests and well-being of a profoundly disabled, barely communicative person should be assessed and measured; whose perspective/value judgment on quality of life governs; to what extent should the views and wishes of the individual inform determinations of their best interests; and how should those views be elicited and interpreted (whether it is permissible, for instance, to consider the interconnected interests of other persons such as surrounding family and care givers). An increasing preoccupation, particularly in times of austerity, is the weight that should be attached to the interests of society more broadly when faced with the financial burden of supporting expensive, specialised and highly individualised treatment .

The lack of coherent guidance on how to interpret best interests in such contexts has led to significant inconsistency and uncertainty in the outcome of decisions. In an adult decision-making context, this has generated ongoing criticism that such decisions are based on the competent decision-maker’s assumptions or prejudices about the value and quality of a disabled person’s existence, and that decisions are often made more in the interests of protecting public resources than upholding the rights and dignity of the individual.[[39]](#footnote-39)

In England and Wales, for instance, The Mental Capacity Act (MCA) 2005 was heralded as a “ground-breaking legal framework” to empower and protect those who lack capacity to make decisions for themselves.[[40]](#footnote-40) The best interests principle is a cornerstone of this legislation: ‘*An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done or made, in his best interests’*.[[41]](#footnote-41) As a result, the best interests standard forms the basis for all court decisions made and actions carried out on behalf of people who lack capacity to make those decisions for themselves. Section 4 of the MCA provides the relevant checklist of factors that should be taken into account to facilitate this assessment. Yet official reports on its implementation reveal that practitioners are all too quick to assume incapacity in relation to decision-making. Decisions are not always carried out within the best interests framework, and the best interests idiom is too often used as a smokescreen for capricious and stifling paternalism.[[42]](#footnote-42) Practitioners are accused of imposing restrictions on patients ‘without any consideration of the person’s capacity to consent or the need to maximise decision-making capacity.’[[43]](#footnote-43) Criticism is also commonly levelled at how vulnerable individuals’ views about what is in their best interests in a care or mental health context are only considered *alongside* other factors such as the view of their carer or health practitioner, thereby diluting the influence of the individual’s own views, wishes and feelings. Such were the conclusions of the House of Lords’ review in 2014 of the Mental Capacity Act 2005 in England and Wales. Its findings also pointed to a pervasive lack of commitment to the empowerment and enablement promised by the statute and a high degree of inconsistency and confusion as to when best interests should rebut autonomous decision-making.[[44]](#footnote-44) This is made all the more possible by the absence of any reference to paramountcy or primacy within the Act and by the routine absence of any independent assessment.[[45]](#footnote-45) Similar criticisms are advanced by John Coggon who expresses fears that the best interests test, if not properly monitored and transparently applied with due consideration for the social and cultural values of the patient rather than those of the medical practitioners, cedes too much power to the medical profession.[[46]](#footnote-46)

These concerns resonate with persistent concerns about the dominantly paternalistic approach to best interests in a children’s rights context. Despite legal recognition and abundant empirical research that children’s best interests can best be determined by hearing directly from the child,[[47]](#footnote-47) the child’s right to have a say in determining what is in his or her best interests is routinely ignored or trumped in favour of (often unchallenged) protectionist presumptions. The default position of excluding children from direct participation in public care and private family proceedings is a case in point, as is the ease with which medical practitioners can ignore the views even of the most competent child and administer or withhold treatment, purportedly in the pursuit of his or her best interests.[[48]](#footnote-48)

Even more problematic is the way in which best interests is routinely dispensed with when it comes to securing individuals’ access to social and economic rights. Whilst applying best interests to decision-making around children’s basic civil rights is challenging, the concept almost completely loses traction when determining how public resources should be allocated in the context of welfare provision, access to education, adequate housing and legal aid, the very scaffolding supporting individual welfare on a day-to-day basis.[[49]](#footnote-49) Similarly, as already noted, in an adult-decision-making context, the commitment to best interests is readily calibrated in the light of broader, often highly pragmatic questions about the interests and capacities of the family and care-givers or around the interests of society in avoiding extraordinary expense or allocating scarce public resources in an equitable fashion.[[50]](#footnote-50) Such concerns point not only to the way in which best interests is interpreted, but also (and perhaps more) to the processes used (or abused/ignored) to determine it and to the (lack of) resources invested in realising it and rendering decision-makers accountable for precisely how they have arrived at their assessment.

Notwithstanding these challenges, a final argument that cautions against extending the principle too readily to adult human rights contexts is that the principle already accommodates the interests of adults as it stands.

1. **The best interests principle is not antithetic to the interests of adults**

It is perhaps useful to be reminded that the best interest principle is not just a framework for determining whether and how other aspects of children’s rights should be fulfilled, or for resolving conflicts between the rights of children and the rights of others. Importantly, it operates to *vindicate* the rights of (adult) others. The text of Article 3(1) is very carefully worded to reflect the fact that the best interests of the child shall be “a primary consideration”, not “the primary consideration” or “a/the paramount consideration”. This wording was the product of extensive, heated debate following which the drafters settled on a formula that accommodated situations in which the competing interests of others,justice and society at large should be of equal if not greater importance than the interests of the child. As Stephen Parker notes:

*“It is clear that the drafters’ preference for the indefinite rather than the definite article in this phrase is interned to indicate that child’s best interests are not to be considered as the single overriding factor....The objective implicit in opting for the word ‘a’ is to ensure that there is sufficient flexibility, at least in certain extreme cases, to enable the interests of those other than the child to prevail...Nevertheless, the formulation adopted would seem to impose a burden of proof on those seeking to achieve such a child-centred result to demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist’*[[51]](#footnote-51)

This is certainly the approach of the European Court of Human Rights when interpreting Article 8 ECHR: the best interests of the child prevails only after a detailed consideration of *all* the parties’ rights and interests.[[52]](#footnote-52) This is evident, for instance, in the law relating to parental child abduction which discourages, save in the most exceptional of cases, individual assessments of the child’s best interests in favour of a policy of immediate, automatic return to their left behind parent and country of habitual residence.[[53]](#footnote-53) This, it is presumed, is generally in the best interests of all children whilst also protecting the interests of the left behind parent. In more routine domestic proceedings, children’s interests are generally balanced against those of adults in a sensitive and successful way. Children’s well-being and progress are intimately linked with the well-being and progress of their parents or others with whom they are emotionally and socially connected; an unhappy parent generally implies an unhappy child and vice versa.[[54]](#footnote-54) Relational theorists acknowledge as much in asserting that to polarise children and adults’ interests is neither helpful nor realistic.[[55]](#footnote-55) In theory, therefore, best interests should operate to reflect and reinforce healthy interdependency between children and adults rather than subvert it.

A good example of where this has been acknowledged and operated to adults’ benefit is in the context of immigration and asylum. The UK Supreme Court, in the seminal case of *ZH Tanzania*, has stated unequivocally that the best interests of children should be placed at the centre of decisions around the deportation of their parents*.*[[56]](#footnote-56)This represents the culmination of a line of jurisprudence that places significant emphasis on the rights of the child to know and be cared for by their parents in the country with which the former have the most intimate connection, notwithstanding the latter’s questionable immigration status. Immigration appeals based on Article 8 of the European Convention, therefore, commonly support a finding that deportation of a family member is disproportionate and unlawful because of its impact on any children residing in the host state.[[57]](#footnote-57) In other words, the best interests of the child are best promoted and exercised by enabling the members of a genuinely supportive family to live in close proximity to one another unless there is a clear justification for ordering otherwise.[[58]](#footnote-58) The public policy principles associated with upholding immigration control and thwarting applicants’ attempts to profit from their unlawful entry and residence can be outweighed by the higher principle of upholding the best interests of the child.[[59]](#footnote-59) Indeed, the narrative of the case law has gone even further in suggesting that foregrounding children’s best interests in an immigration context is a public policy device in its own right. In that sense, protecting children’s best interests extends beyond an individualised assessment; it is conductive to promoting the interests of the entire family unit, and indeed, the interests of the community at large.[[60]](#footnote-60)

**Conclusion**

Exploring arguments to extend the best interests principle to other areas of human rights demands some careful reflection on the value and, indeed, persistent limitations of the concept as it is applied to children. The concept is designed to act as an antidote to processes, cultures of thinking and behaviour which are so often stacked against children. It promises much in terms of protecting and nurturing children’s capabilities and positioning them on the best possible trajectory to achieve their potential. One can appreciate its appeal in informing decisions involving adults, particularly those with distinct vulnerabilities akin to those of children. However, attempts to apply it to such contexts have been less successful than perhaps we might have hoped. There is something inherently problematic about extending a concept that remains fraught with imperfections in terms of its articulation and its application. There is still significant variance in the way that best interests is applied across different contexts by different decision-makers and there is still a lack of understanding or clarity as to how and why children’s best interests should be privileged over the interests and rights of other parties, such that in practice it is used to legitimise decisions that may actually be hostile to children’s interests. As such, there is still much to be done to create better consistency and certainty in decision-making and to render best interests assessments less vulnerable to misguided or self-interested agendas. Indeed, commentators have explored the value of alternative normative frameworks such as dignity,[[61]](#footnote-61) capability,[[62]](#footnote-62) well-being[[63]](#footnote-63) and the ethic of care[[64]](#footnote-64) to protect and promote individuals’ (including children’s) essential needs and wishes.

The objectives pursued by children’s human rights, and particularly the Convention on the Rights of the Child, of laying down universally applicable standards are necessarily confined to *children* as a discrete community of rights holders. The aim of the Convention was never to create a blue print of human rights protection for people generally, and it potentially weakens the impact of the best interests principle – and indeed of the Convention more generally - should it be interpreted in such an expansive way. By allowing the principle to be appropriated too readily by decision-makers in an adult human rights context, we risk perpetuating and entrenching what are already undesirable trends or practices, reinforcing exclusively paternalistic approaches that polarise welfare assessments on the one hand and individual autonomy on the other, and divesting the principle of any potential it has to act as a persuasive mechanism for promoting children’s rights.

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1. Principles 2 and 7. [↑](#footnote-ref-1)
2. Art 5(b). [↑](#footnote-ref-2)
3. Arts 7(2), 23(2), and 23(2) and (4). [↑](#footnote-ref-3)
4. J Mnookin, ‘Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy’ (1975) 39 *Law and Contemporary Problems,* 226 at 260, cited in M Freeman, *Commentary on the United Nations Convention on the Rights of the Child, Article 3: The Best Interests of the Child* (Leiden, Martinus Nijhoff 2007). [↑](#footnote-ref-4)
5. CRC Committee General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration UN Doc 2013 CRC/C/GC/14, para 6. [↑](#footnote-ref-5)
6. The best interests principle is explicitly referred to in Articles 9(1) and (3), 18(1), 20(1), 21, 37(c) and 40(2)(b)(iii) of the CRC but as one of the four General Principles, underpins the interpretation of all other rights listed in the Convention. For further discussion of the General Principles see Lundy, chapter X [↑](#footnote-ref-6)
7. UNHCR *Field Handbook for the Implementation of UNHCR BID Guidelines* (2011) [↑](#footnote-ref-7)
8. # ‘Welfare’ and ‘best interests’ are commonly used analogously although the former term implies a rather narrower, paternalistic interpretation whereby decisions are made on behalf of rather than in collaboration with children.

   [↑](#footnote-ref-8)
9. See for instance s.1 Children Act 1989 which governs public and private family law proceedings involving children in England and Wales which asserts that the welfare of the child is ‘paramount’ and contains a checklist of factors that need to be taken into account when determining what is in the welfare of the child. [↑](#footnote-ref-9)
10. See also S Choudhry ‘Best interests in the MCA 2005 – What can healthcare law learn from family law?’ (2008) 16 *Health Care Anal* 240 for an analysis of what decision-makers operating within the scope of the Mental Capacity Act 2005 can learn from family law’s practical use of the best interests standard. [↑](#footnote-ref-10)
11. S Woods, S.**‘**Best Interests: Puzzles and Plausible Solutions at the End of Life’**(**2008)**16**(3) **Health Care Analysis** 279; R Huxtable ‘Autonomy, best interests and the public interest: treatment, non-treatment and the values of medical law.’ **(**2014) 22(4) *Medical Law Review*459 [↑](#footnote-ref-11)
12. G Cohen ‘Regulating Reproduction: The Problem with Best Interests’ *Minnesota Law Review*, 423;.and Cohen, G. ‘Beyond Best Interests’ (2012) 96(2) *Minnesota Law Review,* 1187*.* [↑](#footnote-ref-12)
13. S McGuinness ‘Best Interests and Pragmatism’ (2008) 16 *Health Care Anal* 208 [↑](#footnote-ref-13)
14. Zermatten refers to these functions as the ‘control criterion’ and the ‘solution criterion’ respectively, See J Zermatten, ‘The Best Interests of the Child Principle: Literal Analysis and Function’ (2010) 18 *International Journal of Children’s Rights* 483-499. [↑](#footnote-ref-14)
15. For a discussion of the importance of interpreting welfare within a more active, rights-based context, see J Fortin ‘Accommodating Children's Rights in a Post Human Rights Act Era’ (2006) 69(3) *Modern Law Review,* 299 at 312. [↑](#footnote-ref-15)
16. P. Alston ‘The best interests principle: Towards a reconciliation of culture and human rights’ (1994) 8 *International Journal of Law and the Family,* 1, at p.19. [↑](#footnote-ref-16)
17. M Freeman *Article 3: The Best Interests of the Child*(Leiden,Martinus Nijhoff Publishers 2007) at p.40 [↑](#footnote-ref-17)
18. For the biblical account of the ‘Wisdom of King Solomon’ see [1 Kings 3:16-28](http://tools.wmflabs.org/bibleversefinder2/?book=1%20Kings&verse=3:16-28&src=HE). For a children’s rights critique of this philosophy see J Elster ‘Solomonic Judgements: Against the Best Interests of the Child’ in *Solomonic Judgements: Studies in the Limitations of Rationality* (Cambridge University Press 1989) part III. [↑](#footnote-ref-18)
19. Freeman (n.17) [↑](#footnote-ref-19)
20. J Eekelaar ‘The Emergence of Children’s Rights’ (1986) 6 *Oxford Journal of Legal Studies* 161, at 170 [↑](#footnote-ref-20)
21. Although for a critique of this investment model, see C Piper ‘Investing in Children’s future: too risky?’ (2010) 22(1) *Child and Family Law Quarterly* 1 [↑](#footnote-ref-21)
22. S Parker ‘The Best interests of the Child – Principles and Problems’ (1994) 8 *International Journal of Law and the family* 26 [↑](#footnote-ref-22)
23. See for instance C O’Mahony and others who attempt to shine a spotlight on the oft neglected rights and interests of parents in public law proceedings: 'Representation and participation in child care proceedings: what about the voice of the parents?' (2016) 38(3) *Journal of Social Welfare and Family Law* 302. See also H Reece, 'The paramountcy principle: Consensus or Construct?' (1996) 49 *Current Legal Problems,* 303*;* J. Herring, 'The Human Rights Act and the welfare principle in family law: conflicting or complementary?' [1999] 11(3) *Child and Family Law Quarterly* 223. [↑](#footnote-ref-23)
24. See cases P (Contact: Supervision) [1996] 2 FLR 314 (applying Re O (A Minor) (Contact: Imposition of Conditions) [1995] 2 FLR 124) which affirm that the welfare of the child is of overriding importance; the interests of the parents are only relevant in as much as they have an impact on the child’s welfare. [↑](#footnote-ref-24)
25. See further the evidence of M Coy and others *Picking up the pieces: domestic violence and child contact,* (London, Rights of Women and Child and Woman Abuse Studies Unit 2012). [↑](#footnote-ref-25)
26. Human Fertilisation and Embryology Act 2008 s. 13(5). [↑](#footnote-ref-26)
27. For an example of how this challenging balancing act was achieved with the child’s best interests in mind, see *Leeds Teaching Hospital NHS Trust v A* [2003] EWHC 259. [↑](#footnote-ref-27)
28. Surrogacy Arrangements Act 1985. See further B Hale ‘New Families and the Welfare of Children’ (2014) 36(1) *Journal of Social Welfare & Family Law* 26; and C Fenton-Glynn ‘Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements’ (2016) 24(1) *Medical Law Review* 59. [↑](#footnote-ref-28)
29. E Blyth ‘To be or not to be? A critical appraisal of the welfare of children conceived through new reproductive technologies’ (2008) 16 *International Journal of Children’s Rights* 505. [↑](#footnote-ref-29)
30. In the UK, see *R (Mahmood) v Home Secretary* [2001] 1 WLR 840; *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 [2004] AC 368; and more recently *R ( Nagre ) v SSHD* [2013] EWHC 720 (Admin) [↑](#footnote-ref-30)
31. See C Smyth ‘The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?’ (2015) 17 *European Journal of Migration and the Law* 70 at p.79 for a comprehensive analysis of how the best interests principle has been interpreted in more than 30 ECtHR cases. [↑](#footnote-ref-31)
32. T Brown and others *Put Yourself in Our Shoes: Considering Children’s Best Interests in the Asylum System* (2015, Law Centres Network) [↑](#footnote-ref-32)
33. K Hollingsworth ‘Bright Lines and Best Interests: Children, Age and Rights in Police Detention: R (HC) v Secretary of State for the Home Department’(2014) 26(1) *Child and Family Law Quarterly* 78 [↑](#footnote-ref-33)
34. L Kopelman ‘The Best interests standard as threshold, ideal and standard of reasonableness’ (1979) 22 *Journal of Medicine and Philosophy* 271;C Piper ‘Assumptions about Children’s Best Interests’ (2000) 22(3) *Journal of Social Welfare and Family Law* 261 [↑](#footnote-ref-34)
35. J Eekelaar ‘Beyond the Welfare Principle’ (2002) 14(3) *Child and Family Law Quarterly* 237 [↑](#footnote-ref-35)
36. R Mnookin ‘Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy’ (1975) 39 *Law and Contemporary Problems* 226. [↑](#footnote-ref-36)
37. J Eekelaar, ‘The interests of the child and the child’s wishes: the role of dynamic self-determinism’, (1994) 8 *International Journal of Law, Policy and the Family* 42, at p. 43; S Holm and A Edgar (2008) 16(3). ‘Best interest – a philosophical critique’ *Health Care Analysis,* 197. [↑](#footnote-ref-37)
38. S Parker (n 21 at p.36). [↑](#footnote-ref-38)
39. I Wise and M Spurrier, ‘A gilded cage is still a cage’ (2014) May *New Law Journal* 7. [↑](#footnote-ref-39)
40. T Spencer-Lane ‘Lost in Translation’ (2013) June *New Law Journal* 8. [↑](#footnote-ref-40)
41. s. 1(5). [↑](#footnote-ref-41)
42. Spencer-Lane (n 40) [↑](#footnote-ref-42)
43. (Care Quality Commission (2003) Monitoring the Use of the MCA Deprivation of Liberty Safeguards in 2011-12, cited in Spencer-Lane, 2013). [↑](#footnote-ref-43)
44. Select Committee on the Mental Capacity Act 2005, Mental Capacity Act 2005: Post-Legislative Scrutiny, HL Paper 139 (March 2014). For further discussion, see **Cave, E.** (2015). Determining capacity to make medical treatment decisions problems implementing the mental capacity act 2005. *Statute Law Review* **36**(1): 86-106. Similarly, the UK Supreme Court has responded to an established trend in holding people with disabilities in care placements that are tantamount to forced imprisonment, concluding that even arrangements purported to be made in disabled people’s best interests may still violate their fundamental rights and require stringent justification. See further *Cheshire West* [2014] UKSC 19 discussed in Wise and Spurrier (n 32). [↑](#footnote-ref-44)
45. Choudhry (n 10) [↑](#footnote-ref-45)
46. J Coggon ‘Mental Capacity Law, Autonomy, and Best Interests: An Argument for Conceptual and Practical Clarity in the Court of Protection’. (2016) *Medical Law Review* forthcoming. [↑](#footnote-ref-46)
47. See for example D Archard and M Skivenes ‘Balancing a Child’s Best Interests and a Child’s Views’ (2009) 17 *International Journal of Children’s Rights* 1; Kay Tisdall and Fiona Morrison, “Children's Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experiences” 14 *Law and Childhood Studies: Current Legal Issues* 156 (2012). [↑](#footnote-ref-47)
48. M Freeman ‘Rethinking Gillick’ (2005) 13 *International Journal of Children’s Rights* 201; E Cave ‘Goodbye Gillick? Identifying and resolving Problems with the Concept of Child Competence’ (2014) 34(1) *Legal Studies* 103 [↑](#footnote-ref-48)
49. B Kelly, ‘Best interests, mental capacity legislation and the UN Convention on the Rights of Persons with Disabilities’ (2015) 21(3) *British Journal of Psychiatric Advances* 188. [↑](#footnote-ref-49)
50. See the ECtHR decision in *McDonald v. The UK* (Application no. 4241/12), Judgment of20 May 2014, for an illustration of how states can defer to their margin of appreciation and public policy arguments to justify the constriction of social care for the disabled, even if it is acknowledged as contrary to their well-being. Cantor, N.L. ‘The bane of surrogate decision-making: defining the best interests of never-competent persons’ *The Journal of Legal Medicine,* 26, pp.155-205, at p.156. [↑](#footnote-ref-50)
51. Parker (n 21, at p.12-13). [↑](#footnote-ref-51)
52. Choudhry (n 10) [↑](#footnote-ref-52)
53. ## Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ L 338/6, Art 1.

    [↑](#footnote-ref-53)
54. For a very recent empirical insight into the complexities of disentangling children’s interests from those of their parents, see R George, A Gallwey and K Bader ‘How Do Parents Experience Relocation Disputes in the Family Courts?’ (2016) 38(4) *Journal of Social Welfare and Family Law*, forthcoming. [↑](#footnote-ref-54)
55. G Mannion ‘Going Spatial, Going Relational: Why “listening to children” and children's participation needs reframing’, (2007) 28(3) *Discourse: Studies in the Cultural Politics of Education* 405. [↑](#footnote-ref-55)
56. *ZH v (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4. See also Section 55 of the Borders, Citizenship and Immigration Act 2009 which imposes a statutory duty on the Secretary of State and those acting on his behalf to ensure that all decisions relating to entry and residence of immigrants safeguard and promote the welfare of any children concerned.. [↑](#footnote-ref-56)
57. See for example *Nunez v. Norway*, Application no.55597/09, ECtHR Judgment of 28 June 2011 [↑](#footnote-ref-57)
58. See further H Wray, “Greater than the sum of their parts: UK Supreme Court decisions on family migration”**,** in M Sunkin (ed.) *Public Law* (Sweet & Maxwell 2016) at 839 [↑](#footnote-ref-58)
59. H Stalford and S Woodhouse ‘*Rights realised or Rights defeated?: Responses to Family Migration in the UK’* in J Eekelaar  *Family Law in Britain and America in the New Century: Essays in Honor of Sanford N. Katz* ([Brill Nijhoff](http://www.brill.com/search/imprint/brill-nijhoff) 2016) 265. Subsequent cases reinforce this point. See *H (H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25 (per Lord Kerr at paragraph 98); JO and Others (section 55 duty) Nigeria [2014] UKUT 517 (IAC); MK (section 55 – Tribunal options) [[2015] UKUT 223 (IAC)](http://www.bailii.org/uk/cases/UKUT/IAC/2015/233.html); and EV (Philippines) & Ors v Secretary of State for the Home Department [[2014] EWCA Civ 874](http://www.bailii.org/ew/cases/EWCA/Civ/2014/874.html). [↑](#footnote-ref-59)
60. See Lord Kerr in *HH above note:* “although the child has a right to her family life and to all that goes with it, there is also a strong public interest in ensuring that children are properly brought up” (paragraph 33). [↑](#footnote-ref-60)
61. M Freeman ‘Why it remains important to take children’s rights seriously’ (2007) 15 *International Journal of Children’s Rights* 5 [↑](#footnote-ref-61)
62. R Dixon and M Nussbaum ‘Children's Rights and a Capabilities Approach: The Question of Special Priority’ (2012) 97*Cornell Law Review* 550 [↑](#footnote-ref-62)
63. ## K Tisdall ‘Children’s rights and children’s wellbeing: Equivalent policy concepts?’, (2015) 44(4) *Journal of Social Policy* 807

    [↑](#footnote-ref-63)
64. J Herring *Caring and the Law* (Hart Publishing 2013) [↑](#footnote-ref-64)