



The Dimensions of the Best Interest of the Child in Albania

Linert Lirëza

Andon Kume

Faculty of Political Science and Law,
University "Aleksander Moisiu",
Durrës, Albania

Received: 4 January 2023 / Accepted: 25 February 2023 / Published: 20 March 2023
© 2023 Linert Lirëza and Andon Kume

Doi: 10.56345/ijrdv10n104

Abstract

The principle of the best interest of the child is a fundamental principle in international and national law, which requires that in all actions concerning children, their best interests must be a primary consideration. Albania is still a patriarchal society, and traditional cultural norms and practices sometimes conflict with children's rights and welfare. The aim of this paper is to address the challenges related to cultural and social norms and to fully implement the principle in Albanian context. In Albania, this principle is enshrined in various legal instruments, including the Constitution, the Family Code, and the Law on the Protection of Children's Rights etc. As a result, the paper analyses the principal of best interest of the child in custody and guardianship cases, adoption proceedings, divorce process and child protection cases. In this context, the paper is focused in "Balancing the elements in the best-interests assessment". However, despite these legal and institutional frameworks, Albania still faces challenges in fully implementing the principle of the best interest of the child. One of the main challenges is the lack of resources and capacities to adequately protect and promote children's rights, particularly for marginalized and vulnerable children. The COVID-19 pandemic has also exacerbated these challenges, with increased reports of child abuse and neglect. In these conditions, the paper presents appropriate recommendations in order to have full implementation of this principle in Albania.

Keywords: Child, Best interest, Primary, Protection, Rights

1. Introduction

The principle of the best interests of the child is one of the four general guiding principles on children's rights (right to non-discrimination, best interests, right to life, survival and development, right to participation or right to express opinions that are considered). It is closely related to Article 3(1) of the Convention on the Rights of the Child (CRC) and Article 24(1) of the Charter of Fundamental Rights of the European Union. Both instruments give children the right to have their best interests assessed and taken into account in all actions or decisions affecting them, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies.

The best interest of the child is a threefold concept that includes a substantive right, a fundamental and interpretive legal principle, and a rule of procedure that aims to ensure the full and effective enjoyment of all the rights recognized in the United Nations Convention on the Rights of the Child (CRC) and whose primary consideration is to ensure the holistic development of the child (European Migration Network, 2021).

Holistic child development refers to the well-being of the child in a broad sense, which includes basic material, physical, educational and emotional needs as well as the need for affection and security (EMN, 2021). The child's interest assessment is a simple and continuous procedure that should be undertaken in individual cases where decisions need to be made for an individual child, in light of the specific circumstances of each child or group of children, and should evaluate and balance all the elements necessary to make a decision in a specific situation for a particular child or group of children (UNHCR, 2006).

Article 3 of the Convention on the Rights of the Child (CRC) enshrines the principle of the best interests of the child, i.e., it stipulates that in every law, public or private initiative, and in every problematic situation, the best interests of the child must be given preeminent consideration. More specifically, article 3 of the CRC expressly states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." (UNICEF, 2019). Article 3 (1) states that "the best interests of the child" principle shall be "a primary consideration", which provides for special protection of children in any context and acknowledges their unique vulnerability (Kilkelly 2019). The principle is of non-derogable nature, which means it does not allow for limitations even in times of emergencies (Committee on the Rights of the Child, 1992).

The best interest of the child determination, therefore, describes a formal process with strict procedural safeguards designed to determine their best interest for particularly important decisions affecting the child. It should facilitate the appropriate participation of children without discrimination, involve decision-makers with relevant areas of expertise, and balance all relevant factors in order to evaluate the best option (European Commission, 2022).

The CRC Committee highlights the objective to find a harmonized balance between the interests at stake with an explicit awareness and weight of the interest of the child in that particular situation (Committee on the Rights of the Child, 2013). Therefore, the assessment has to be before the balancing of the interests at stake to consider the vulnerability of the child as an individual adequately.

For example, in the case *ZH (Tanzania) (FC) v Secretary of State for the Home Department (ZH (Tanzania) (FC) v Secretary of State for the Home Department, 2011)*, the UK Supreme Court specified that "the best interests of the child" has to be considered first and in a case that no compromise can be found, it can only be outweighed by "the cumulative effect of other considerations" as the principle is "inherently more significant" than other interests (*ZH (Tanzania) (FC) v Secretary of State for the Home Department, 2011*).

2. The Application of Best Interests of the Child in European Courts

The concept of the "child's best interests" is not new. Indeed, it pre-dates the Convention and was already enshrined in the 1959 Declaration of the Rights of the Child (para. 2), the Convention on the Elimination of All Forms of Discrimination against Women (arts. 5 (b) and 16, para. 1 (d)), as well as in regional instruments and many national and international laws.

Within a few years of its solemn introduction, the principle of the best interest of the child has been incorporated within numerous conventions and documents protecting children, both internationally and within individual states, and its use has begun to characterize the decisions of courts at every latitude (UNICEF, 2019).

The context in which the best interest of the child has found greater acceptance and has begun to take on less indeterminate connotations is undoubtedly that relating to the jurisprudence of the European Court of Human Rights. However, in the face of an increasingly frequent recourse to the stereotypical formula "best interest of the child", there have been over the years a number of judicial decisions with very conflicting effects (Council of Europe Portal, 2021).

With the aim of finding the substantive content of this concept, within the different subject areas and in different geographic locations, it can be seen that the issues that have emerged differ considerably according to the context.

In Europe, it has been noted that the principle has developed mainly in relation to cases concerning Article 8 (a norm that protects the right to private and family life), in at least four different contexts and, more specifically, in relation to the right of the child in cases of adoption or foster care, to the right of the child to know their origins, to the right of the foreign child, and finally to the right of the child in cases of international abduction (Council of Europe Portal, 2021). However, it is interesting to note that within the European context, the best interest of the child has been declined in different ways depending on the case under examination. The concept of the child's best interests is complex and its content must be determined on a case-by-case basis. It is through the interpretation and implementation of article 3, paragraph 1, in line with the other provisions of the Convention, that the legislator, judge, administrative, social or educational authority will be able to clarify the concept and make concrete use thereof. Accordingly, the concept of the

child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child. For collective decisions – such as by the legislator –, the best interests of children in general must be assessed and determined in light of the circumstances of the particular group and/or children in general. In both cases, assessment and determination should be carried out with full respect for the rights contained in the Convention and its Optional Protocols

According to General Comment No 14 of Committee on the Rights of the Children, the specific, factual circumstance of the child is the point of departure for assessing the best interests of the child. Elements, which among other aspects relevant to the specific child, may be taken into account when assessing and determining a child's best interests include: Child's identity, Child's view, Preservation of the family environment¹, Care, Protection and safety of the child, Situation of vulnerability, Child's right to health and Access to education.

The most iconic example in the jurisprudence of the European Union is represented by the Zarraga case, concerning a divorce petition before the Spanish courts, in which both parents sought sole custody of the child. The custody was granted to the father who lived in Spain, with the possibility to visit the mother in Germany. After a vacation in Germany, the child had not returned to Spain; the mother claimed that the best interest of the child, namely their right to be heard, had been violated, and requested on these bases that the child be heard to reevaluate the custody issue.

With regards to the alleged violation of Article 24 of the Charter of Fundamental Rights of the EU, which provides for the right of the child to be heard, the Court of Luxembourg noted that it is up to the judge who must rule on the return of a minor to assess whether or not it is appropriate to conduct such a hearing. Therefore, although it takes the form of a right of the minor, the hearing cannot be considered an absolute obligation but must be the subject of careful evaluation by the judge. The judge decided that the best interest of the child is best protected in the form of the child's habitual residence, in this case Spain, and, for this reason, the abducted child should return there.

However, it should be emphasized that the basic best-interests assessment is a general assessment of all relevant elements of the child's best interests, the weight of each element depending on the others. Not all the elements will be relevant to every case, and different element can be used in different ways in different cases. The content of each element will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances, as will the importance of each element in the overall assessment.²

From the other side, The ECHR has a vast body of jurisprudence on children's rights, and has examined many cases under Article 8 of the ECHR (right to respect for private and family life), in particular. Other cases related to the rights of the child have been examined under a range of human rights guarantees protected by the ECHR, such as the prohibition of inhuman or degrading treatment (Article 3 of the ECHR) or the right to a fair trial (Article 6 of the ECHR). The ECtHR regularly refers to the CRC when addressing claims pursued either by or on behalf of children. In some cases, children's rights principles, as articulated by the CRC, have had a profound influence on the ECtHR's reasoning, notably as concerns the Court's interpretation of Article 6 of the ECHR (right to a fair trial) in relation to the treatment of children in conflict with the law.

3. The Best of Interest of the Child in Albanian Context

Albania has ratified the nine core United Nations (UN) international human rights treaties including the UN Convention on the Rights of the Child (UNCRC) in 1992 with its optional protocols and has signed or ratified other human rights conventions including key child-focused ones of the International Labour Organization (ILO). No reservations were made by Albania to any of the core UN treaties and no complaint received under the UNCRC's third optional protocol on communication procedures. The Government submitted its combined fifth and sixth periodic report on the UNCRC and two optional protocols to the UN Committee on the Rights of the Child (CRC) in 2019, but it has not yet been heard by the committee. (CRC state report 2021) The previous Concluding Observations of the CRC were published in 2012. (CRC Observations 2012) From the other side, the constitution of the Republic of Albania provides that every child has the right to be protected from violence, abuse, exploitation and use for work, especially under the minimum age for work, which

¹ Significant relationships (location), quality and duration of child's close relationships, effect of separation from significant relationships, capacity of parents or other caregivers, possibilities of family reunification, preference of care within family environment in order to ensure the full and harmonious development of a child's personality.

² Committee on the Rights of the Children ,General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration

could damage their health, morals, or endanger their life or normal development. In this point of view, Albania has a strong record of ratifying international law on children's rights and related issues.

Albania's Constitution places international law above its national law. It has a developed legislative structure relevant to children's rights. In 2017, two major pieces of legislation were passed: the law on the Rights and Protection of the Child (updated from 2010), and the Code of Criminal Justice for Children (CCJC). The CCJC and the law on the Rights and Protection of the Child guaranteeing free legal aid incorporated international child-friendly justice standards in conformity with the principle of the best interest of the child.

In Albania, the typical cases when the implementation of this principle is required are those of marriage dissolution and appointing of the parent which will have the main responsibility for growing and education of the children after the divorce, cases of marriage dissolution by agreement, in actions and decisions related to wealth, in cases of children abandonment, adoption and custody. In many judiciary cases, the court decides to prevent one of the parents the 'relationship with the child' as long as it poses danger and harms the children's interests. The court has the right to refuse the marriage dissolution by agreement, when it notices that such dissolution harms the children interests. In this case, the courts provides 3 months' time for the spouses, to review the dissolution based on children's best interest. If this does not happen, then the court might dismiss the request and not accept the marriage dissolution.

The court decides for conveyance of real estate, borrowing on the behalf of a minor, pledge of a collateral, inheriting, testament and all other legal actions that threaten or protect the children interest are performed only by a court decision. Even regarding the adoption or the custody, the principle of children's best interest is applied (according to articles 240 and 248 of the Family Code in Albania). The court in each case might remove the custody of one parent and replace it with another, in cases where it noticed an intentional abuse or negligence which harms the children's interests. This intervention can be done directly through psychological reports that court requires by the psychologists and the social workers during the trial. These reports should contain the emotional state of the child, living conditions, family environment and relationship with each parent including other circumstances mainly set by the court, connected and analysed from the perspective of the best interests of the child. Evaluation experts take also the opinion of the child during the interviews regarding the issue of custody after divorce but also in determining the overall family situation of the destructive factors including family violence exercised by one or by both parent.

From the other side, the Family Code sets an age limit for marriage (18 years old) and recognizes the court's discretion, for important reasons, to allow marriage before this age but it does not specify how far this age tolerance will extend. In this context, there is a potential risk of violation of the best interests of the child. However, in Albania, child marriage rates are low, but they are practiced among Roma and in some isolated rural areas. Child marriage is a gendered phenomenon that affects girls and boys differently. In general, the number of boys in early marriages worldwide is significantly lower than that of girls. While married children-girls are also affected by domestic violence and sexual abuse within unequal relationships. If they are pregnant, they often go through complications during pregnancy and childbirth because their bodies are not ready to have children.

Moreover, during the year 2020, Albania Ombudsman Institution have addressed with the initiative the problematic situation and complex situation of two minors, respectively 13 and 16 years old, made parents of a baby, based on the protection of the highest interest of the child.³ In this case should be recommended the necessary for: "Balancing the elements in the best-interests assessment". Despite the treatment and support of local structures for the two minors who become parents, the case highlights the importance of raising awareness that the empowerment and economic support of families in need most help prevent this phenomenon.

Child labor is work that harms a child's welfare and education and prevents his or her development and future living standards. The ILO Convention on the minimum working age (C138) calls for minimum working age be set no lower than the end of compulsory schooling and in any case, not under 15 years of age (or 14 years in developing countries). Albania ratified Convention No. 138 on the Minimum Age in 1998 and Convention No. 182 on the Worst Forms of Child Labour in 2001. The Albanian Labour Code sets the minimum age of employment at 14 years and regulates the amount and type of labour that children under the age of 18 may perform. However, per section 100(2) of the Labour Code provides that young persons from 16 years of age may be employed in difficult or hazardous work, under conditions determined by decree that limit working hours and may regulate working conditions the minimum age of employment at

³ Referring to letter no. 110/1 plot., dated 1.7.2020, the Mayor of Fier city, informed that they handled the case of the 13-year-old minor. The CPU supported the minor mother, with psychological and legal assistance, assistance with food packages, and assisted in registering the child in the civil registry. This case is already being handled and monitored by the CPU in the Municipality of Fier.

14 years and regulates the amount and type of labour that children under the age of 18 may perform.

4. A Brief Panorama of Children's Rights in Albania

According to INSTAT (the Institute of Statistics), the official national statistics agency of Albania, the total population of children aged 0–19 years old (INSTAT figures are not disaggregated to show children between ages 0–18 years) was 656,441 on 1 January 2021. Of these, 335,286 were male (51.07 per cent) and 321,155 (48.93 per cent) were female. The total Albanian population estimate on 1 January 2021 was 2,829,741 inhabitants, with 0- to 19-year-olds comprising approximately 23.2 per cent of the whole. (INSTAT 2021)

The legal framework has had some effect in this social group, such as by reducing the time that children spent in detention, although independent analysis showed that significant gaps in achieving child-friendly justice remain. Changes to birth registration law in 2018 simplified procedures, but Roma children and others in families returning to Albania have reported difficulties in accessing birth registration. Children born outside marriage have the same rights as all other children but if they cannot be registered, they may not enjoy child rights or the provision of key services associated with them.

The minimum age of criminal responsibility is 14 years old, in line with international standards. Children up to 18 years old can be placed in residential care; those with disabilities may stay up to 21 years old. In 2017, Albania approved with a qualified majority the Criminal Justice for Children Code, as part of its efforts to reform the entire justice system. This revolutionary piece of legislation, represents a major conceptual shift from a retributive to a rehabilitative and restorative approach in handling juvenile offending. It seeks to adapt the criminal justice system to the needs of the child for access to justice and legal remedies, protection, education and rehabilitation of those in contact with the law. The entire Code is rooted in the philosophy of supporting the child towards a life away from crime and violence and guided by the UNCRC principle of the best interest of the child.

There are other nuances to the impact of legislative reform in Albania on children's rights. Large scale changes to territorial administration were implemented from 2015 to consolidate good local governance, democracy and the rule of law. This has not yet been fully realized, nor accompanied by the required financial transfers. Child protection workers face difficulties with their roles and responsibilities through lack of resources and support. Implementation has lagged elsewhere in key child rights areas.

The role of the State Agency for the Rights and Protection of Children (SARPC) was strengthened with the Child Rights and Protection law, but the resources awarded to it, financial and human, have not corresponded to its increased responsibilities, including monitoring children's rights locally. The SARPC has experienced further difficulties in its coordination roles with the different tiers of government. (UNICEF 2021)

Children in Albania described feelings of happiness within their families and, to a lesser extent, at school. However, social norms are not strongly rights based and children speak of limited real opportunities to participate and to be heard, at home and in public. Children's rights to privacy have been abused in the media, including for children who are prosecuted for, victims of or witnesses to crime.

From the other side, the criminal legislation exists to protect children against early and forced marriages, but the penalties are negligible: three months' imprisonment or a fine. Child marriage overwhelmingly affects girls, particularly Roma. A 2021 study reported that Roma girls from northern Albania being forcibly married into North Macedonian or Kosovan communities. International committees have expressed concerns about ongoing child marriages in Albania and their damaging consequences, especially for Roma girls.⁴

Many children in Albania, especially in rural areas, leave school before the end of compulsory education to work with their families. Parents are required to pay for supplies, books and even heaters for some classrooms, making school prohibitively expensive for many families and leaving a growing population of vulnerable, unregistered children at risk of trafficking or exploitation. (Muiznieks 2015) The ILO CEACR has expressed deep concern at the grave situation of children begging on the streets in Albania, who are particularly exposed to the worst forms of child labour. In 2000, UNICEF estimated that 31.7 percent of children ages 5 to 14 years in Albania were working in some capacity (UNICEF 2000). Children, especially from the Roma community, work on the streets as beggars and vendors; other Albanian children work on farms. (Hazizaj 2004). Trafficking of Albanian children abroad to prostitution or pedophilia rings in Western Europe remains a problem. One study conducted by the Albanian "Hearth" Psycho-Social Center in 2003

⁴ <https://www.unicef.nl/files/Albania-Child-Notice-2021.pdf>

estimated that 21 percent of Albanian trafficking victims were minors, between the ages of 14 and 18. (Lesko 2004 el)

5. Conclusion

The best interest of the child represents an outstanding evolution in child protection's jurisprudence. However, much still needs to be done in order to uniform the legislation in Albania. It is necessary to make every effort to begin to develop or further strengthen the system of cooperation between domestic and international jurisdictions since the credibility and the effectiveness of systems that protect human rights rest precisely on the protection of the most vulnerable among us all.

In fact, to make the principle of the best interest of the child truly "effective", it would be necessary for the States to guarantee satisfaction to the victims of violations, remedy domestic irregularities and implement the reforms necessary to bring national order in line with the international order.

Alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution should be encouraged in Albania, whenever these may best serve the child's best interests. The preliminary use of such alternatives should not be used as an obstacle to the child's access to justice. Children should be thoroughly informed and consulted on the opportunity to have recourse to either a court proceeding or alternatives outside court settings. This information should also explain the possible consequences of each option. Based on adequate information, both legal and otherwise, a choice should be available to use either court procedures or alternatives for these proceedings whenever they exist. Children should be given the opportunity to obtain legal advice and other assistance in determining the appropriateness and desirability of the proposed alternatives. In making this decision, the views of the child should be taken into account. Alternatives to court proceedings should guarantee an equivalent level of legal safeguards. Respect for children's rights as described in these guidelines and in all relevant legal instruments on the rights of the child should be guaranteed to the same extent in both in-court and out-of-court proceedings.

The remaining challenges are the lack of child protection specialists in local municipalities, an unclear decision-making mechanism to respond to cases of abuse and neglect, no definition of clear protection measures, low capacity of local municipality units to organize and provide services and a lack of state support to municipalities, both in case management and service provision. As a result, Albania should set up child-friendly, multi-agency and interdisciplinary centres for child victims and witnesses where children could be interviewed and medically examined for forensic purposes, comprehensively assessed and receive all relevant therapeutic services from appropriate professionals

Finally, the recent decentralization and the territorial reform in Albania have reduced the number of local authorities, which hopefully will have a positive impact on the establishment of stronger child protection systems in local municipalities, with clearer responsibilities, stronger capacities and better outcomes for children.

References

- Council of Europe Portal (2021). Newsroom on Children's Rights New study on the protection of the best interests of the child in situations of parental separation. Taken from Council of Europe Portal : <https://www.coe.int/en/web/children/-/new-study-on-the-protection-of-the-best-interests-of-the-child-in-situations-of-parental-separation>, accessed on January 19, 2023.
- CRC Observations (2012). Committee on the Rights of the Child Concluding observations: the combined second to fourth periodic reports of Albania. Geneva: UN Convention on the Rights of the Child, 2012, (hereafter: CRC, Observations 2012). Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=ALB&Lang=EN (accessed 20 February 2021).
- CRC, State report (2021), Committee on the Rights of the Child. Combined fifth and sixth periodic reports submitted by Albania under article 44 of the Convention (Geneva): Convention on the Rights of the Child, 2021 (hereafter: CRC, State report 2021). Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=801&Lang=en (accessed 1 March 2021). The Government of Albania submitted this report in November 2019, and the UN published it in February 2021.
- EMN – European Migration Network. (2021). Superiore interesse del minore. Taken from Superiore interesse del minore: <https://www.emnitalyncp.it/definizione/superiore-interesse-del-minore/#:~:text=Il%20principio%20dell%27interesse%20superiore,che%20vengano%20prese%20in%20considerazione>, accessed on January 18, 2023.
- European Commission. (2022). Best interests of the child (BIC). Taken from Migration and Home Affairs: https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/best-interests-child-bic_en, accessed on January 17, 2023.
- Hazizaj A(2000), The Vicious Circle: A Report on Child Labour-Albania, Children's Human Rights Centre of Albania, Tirana, March 2000, Chapter

- Hazizaj A(2004), The Forgotten Children: A Report on the Roma Children's Rights Situation in Albania, Children's Human Rights Centre of Albania, Tirana, April 2000, 11. U.S. Embassy-Tirana, electronic communication dated February 19, 2004.
<https://www.coe.int/en/web/portal>
<https://www.unicef.nl/files/Albania-Child-Notice-2021.pdf>
INSTAT, Population (2021)
- Kilkelly U.(2019), "The UN convention on the rights of the child: incremental and transformative approaches to legal implementation", *The International Journal of Human Rights*, 23(3), 323–337.
- Lesko V, Avdulaj E, Koci M, and Minxolli D (2004), Annual Report 2003 on the Trafficking in Humans, 'The Hearth' Psycho-Social Center, Vlora, December 2003 as cited in U.S. Embassy-Tirana, electronic communication dated February 19, 2004.
- Muiznieks N. (2015). Human Rights Coment Improving protection for victims of forced labour and human trafficking.
- UNHCR. (2006). UNHCR Guidelines on Formal Determination of the Best Interests of the Child . Taken from UNHCR: <https://www.unhcr.org/en-my/4ba09bb59.pdf>, accessed on January 18, 2023.
- UNHCR. (2006). UNHCR Guidelines on Formal Determination of the Best Interests of the Child . Taken from UNHCR: <https://www.unhcr.org/en-my/4ba09bb59.pdf>, accessed on January 18, 2023.
- UNICEF, 2000 Multiple Indicator Cluster Survey (MICS) Report: Albania,
- Unicef. (2019). Latin America and the Caribbean – 30 years after the adoption of the Convention on the Rights of the Child. Taken from Unicef: <https://www.unicef-irc.org/publications/117-child-rights-in-latin-america-from-irregular-situation-to-full-protection.html>, accessed on January 19, 2023.