



African Human Rights and Access to Justice Programme Legal Opinion Case No. 87

Legal Expert: Nerida Nthamburi
National lawyer: Centre for Human Rights and Empowerment

Legal opinion developed for determining issues of child custody and implementation of international standards on child custody.

Summary of opinion:

The applicant, a woman is claiming custody of her children whom her husband took away from her. Nigeria is a signatory to the UDHR and to the Convention on the Rights of the Child and is bound by these instruments to apply certain standards with regard to child custody. This case primarily concerning questions on the custody of the children should focus on the 'best interest of the child' standard.

Question on which opinion is sought:

The case turns on three questions 1) What are the international human rights standards applicable in the of case child custody; 2) Does the Constitution and other laws of Nigeria incorporate these standards? 3) What remedies are available to W?

Brief Case Facts

The plaintiff a young woman was married under customary law to her husband who was a naval officer with the Nigerian Navy. In 2002, her husband took away their two children on the pretence of taking them on holiday. He never returned the children and later told the plaintiff that he had taken the children to live with his parents in a different state from the plaintiff. All efforts to get in touch with the children have proved futile. The plaintiff has filed suit claiming that she should have custody of the children who are minors and who she claims are in need of motherly care.

International Legal Obligations for Nigeria

Nigeria operates a dualistic system of law therefore regional and international treaties after ratification or accession have to be incorporated into domestic law by statute and cannot operate as a direct source of individual rights. Nigeria is a party to various international and regional instruments that require the State to ensure the human rights of women and girls, including the Covenant on Civil and Political Rights ("ICCPR"), Convention on the Rights of the Child ("CRC"), the Convention on the Rights of the Child ("CRC") and the African Charter on Human and Peoples' Rights ("African Charter").

The UDHR provides for equal rights between men and women and recognizes the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace. The UDHR upholds the family as the natural and fundamental unit in society and in particular establishes the right of men and women to marry and found a family, their equal rights as to the marriage, during the marriage and at its dissolution.¹ Although the UDHR is not legally binding on states, the rights comprised therein have become part of customary international law.

Nigeria is a dualist state and therefore treaties ratified do not have the force of law unless they have been domesticated. Nevertheless, the *Bangalore Principles on Judicial Conduct*², adopted in 1988 by a group of lawyers and judges from a number of Commonwealth countries including the then Chief Justice of Nigeria, espouse the principle that national courts should consider international norms where domestic law seems vague or uncertain. A new recognition has now come about concerning the use which may be made by judges of international human rights principles and of their exposition by the international courts, tribunals and other bodies established to give them content and effect. This has happened as a reflection of the growing body of international human rights law, of the instruments both regional and international which give effect to it, and as a result of the recognition of the importance of its content for people everywhere. The Principles state:

- (1) International law (whether human rights norms or otherwise) is not, as such, part of domestic law in most common law countries;
- (2) Such law does not become part of domestic law until Parliament so enacts or the judges (as another source of law making) declare the norms thereby established to be part of domestic law;
- (3) The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty-even one ratified by their own country;
- (4) But if an issue of uncertainty arises (as by a lacuna in the common law, obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and
- (5) From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which makes it part of domestic law.

Within the above limits, the *Principles* identified the tendency for national courts to consider international norms where domestic law seemed uncertain. Significantly, the *Principles* state that they expect a judge to apply international norms where there is uncertainty, ambiguity and obscurity in a constitutional provision or statute. In Australia, New Zealand, Britain and other countries of the common law, which, until now, have adhered scrupulously to dualism, a change is gradually coming about. This is one of the most interesting developments occurring in the domestic law of many countries at this time.

¹ Article 16, UDHR

² Available at http://www.transparency.org/building_coalitions/codes/bangalore_conduct.html accessed on 13th May 2005.

The African Charter on Human and People's Rights

The African Charter has been enacted into law by the Nigerian National Assembly and is therefore applicable and binding. In contrast to other multilateral instruments, Nigeria has explicitly incorporated the African Charter into its domestic law. In 1996 the Nigerian Supreme Court in *Ubani v Director of State Security Services & Anor*³ held that the Charter is superior to the Nigerian Municipal laws. The Supreme Court has specifically highlighted Article 18 of the African Charter, which among other guarantees, states that "[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions." Moreover, Article 42 of Nigeria's Constitution prohibits discrimination on the basis of sex.

Although the African Charter does not contain a definition of discrimination against women, it mandates equality treatment between men and women. Article 2 of the Charter guarantees enjoyment of rights and freedoms enshrined in the Charter to all persons without discrimination. It states that:

“2 *Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.*”

Equality in the context of parental rights and responsibilities

International human rights law recognizes gender equality in parental rights and responsibilities on the understanding that the child's interests are paramount. CEDAW requires States Parties to ensure, on a basis of equality of men and women;

“The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases, the interests of the children shall be paramount.”⁴

The principle of equality therefore, in respect to parents with regard to their children, is not only confined to a subsisting marriage. It continues to operate even when the marriage ceases. H and W in this regard have the same rights and responsibilities towards their daughter irrespective of their current marital status. Parents have the right and responsibility of parenting their children and this can only be realized where there is access to the child by either parent.

The rights of a child are recognized in several international human rights treaties but fully articulated in the CRC. The Convention places equal emphasis on all the rights of children. There is therefore no hierarchy of human rights as all the rights are indivisible and interrelated. Decisions with regard to any one right must therefore be made in the light of all the other rights in the Convention. For example, it is not sufficient to ensure that a child receives shelter, health care, and education only for that child to be denied access to either of his or her parents. When a parent is denied access to his or her child, the effect is the

³ *Ubani v Director of State Security Services & Anor* (2000) 3 CHRLD 94

⁴ Article 16(d)

reduction of that parent's practical rights towards bringing up the child. The right to parental care is specifically protected in the Convention. Children have the right to live with their parents unless it is deemed incompatible with the child's best interests. It is for this reason that the CRC governs the obligations of states to ensure children are not separated from their parents without a due judicial process.⁵

Article 5 requires that States Parties respect the responsibilities, rights and duties of parents to provide appropriate direction and guidance in the exercise by the child of the rights recognized in the Convention. This duty is emphasized in Article 14(2) requiring States Parties to respect the rights and duties of the parents to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. The right and duty of parents to bring up their children is further articulated in Article 18(1) recognizing the principle that both parents have common responsibilities for the upbringing and development of the child. To this end, access to a child by either parent is very vital for without it, the latter principle cannot be in effect. This is not to say that separated parents should care for their children equal amounts of time nor that they should contribute equal amounts of money to the financial support of the children. But while the quantities may differ, the qualities should be the same and geared at ensuring the *best interest of the child* principle. This should be achieved in practice and not just in law.

Human rights law lays down a number of standards governing the treatment of children. At the heart of these principles is the need to ensure the best interests of the child are met. The best interest standard recognizes the child's humanity. It is so important to the understanding of children's rights that the Committee on the Rights of the Child considers it a guiding principle of the CRC⁶. The application of this principle is not only confined to institutions but also to private persons. The principle must also be maintained in actions concerning children undertaken by institutions. Article 3(1) CRC stipulates:

“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.”

The broad wording of this article may be construed to refer to proceedings that concern the child in which he or she is not and should not be the primary actor. An example of this would be divorce proceedings, which may concern a child, but are based on the wishes of the two adults involved. In each and every circumstance and decision affecting the child, the various possible solutions must be considered and due weight given to the child's best interests. This approach prevails in all cases, from direct interventions by States in their jurisdictions to the private context of family life. Courts and other institutions settling conflicts of interest should base their decisions on what is best for the child. This notwithstanding, due consideration must be given to the opinions expressed on the subject by the parents. A consideration of the will of the parents corresponds to the recognition of Article 9 of CRC “...on the basis of which State Parties shall respect the responsibilities, rights and duties of parents to provide appropriate direction and guidance in the exercise by the child of the rights recognized in the CRC”.

⁵ Article 9(1) of the CRC

⁶ Article 3 of the CRC

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa specifically relates the best interest principle to the enjoyment of same rights and responsibilities of parents towards their children in a separation or divorce. It obliges State Parties to enact appropriate legislation to ensure that:

“In case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance”.⁷

Parental rights and responsibilities take the place of custody as the court's principle focus in determining issues of co-parenting. This concept recognizes that a court needs to consider every aspect of the child rearing process and not simply physical custody. Courts in most jurisdictions are obligated to apply the standard of the best interests of the child in determining how to assign parental rights and responsibilities. This means that the Nigerian court shall above all else consider the safety and well being of the child in tackling the parental rights and responsibilities order. This means that the court is looking at the impact of the order on the child. The court will take a number of issues into consideration when making a custody order. It should however not consider departure from the family residence as a factor in determining parental rights and responsibilities when the departing parent has been physically harmed or seriously threatened with physical harm by the other parent and the harm or threat was the reason of departure.

The best interest principle has become the predominant guideline in child custody cases. Courts in different jurisdictions have applied this principle in decisions involving children. In *Finlay v. Finlay*,⁸ an American case, the court said that in custody disputes the court is bound to make its determination based solely upon what is in the best interests of the children. Again in *Chodree v. Vally*,⁹ a South African case, the judge held that in the case of right to access, like other relationships between parent and child, a parent has both rights and obligations, which are regulated and governed by the interests of the child. It was further said that the fact that R through circumstances beyond her control, had had no meaningful contact with her father did not mean that a relationship could not develop between them. And that though the respondent might be justified in being concerned at the effect that the appearance of the applicant in her life might have on R, it was the respondent's responsibility to give her the necessary encouragement to get to know her father. The judge argued that the fact that there presently seemed to be no attachment at all between father and child was not fatal. He referred to *B v. S*¹⁰ where at the time of the appeal, there had been no contact between the father and his child for over 5 years. But the fact that the daughter, through circumstances beyond her control, has had no meaningful contact with her father will not necessarily mean that a relationship cannot be developed between them. The judge then concluded that on balance, R's interests would be better served if the applicant were to have access to her.

⁷ Art 7(c)

⁸ 240 NY 429

⁹ 1996 (2) SA 28 (W)

¹⁰ 1995 (3) SA 571 (A)

Generally the best interests of the child are a primary consideration as stipulated under Article 3 of the CRC. In particular cases best interests may be the paramount consideration. The CRC states in Article 9 that in cases concerning child custody, States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence and goes on to state that with regard to continuing contact with one or both parents, States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 3 covers decision-making by all three arms of government: legislative, administrative and judicial. It also governs decisions by public social welfare institutions. Government decision-making relating to custody, residence, contact, care and protection must make children's best interests the paramount consideration.

What are the child's best interests?

The CRC does not explicitly define a child's best interests. Even so, some points are very clear from the Convention:

1. In the case of actions and decisions affecting an individual child, it is the best interests of that individual child which must be taken into account.
2. It is in a child's best interests to enjoy the rights and freedoms set out in CRC. For example, it is in children's best interests to develop respect for human rights and for other cultures (article 29[1](b) and (c)). It is in a child's best interests to maintain contact with both parents in most circumstances (article 9[3]).
3. It is in the best interests of Indigenous children to be raised in the Indigenous community (articles 5, 8 [20 and 30]).
4. A child capable of forming a view on his or her best interests must be able to give it freely and it must be taken into account (article 12).
5. Parents have primary decision-making responsibility on behalf of their children (articles 5 and 18.1) but, if they fail to make the child's best interests a basic concern, the State may intervene to protect those interests (see article 9[1] for example).

Other considerations are clearly permitted by the general principle. Article 3[1] provides for a child's interests to be *among* the first considerations rather than requiring them to be the first considered or favoured. There are circumstances in which the community or other parties might have equal or even superior interests so that a child's interests may not prevail. By providing that the best interests of the child are 'a primary consideration' rather than *the* primary or the *paramount* consideration, Article 3 allows decision-makers to balance the best interests of the child against 'equally weighty' primary considerations of their own choosing, such as religious or economic considerations. However this discretion is restricted. The Committee on the Rights of the Child has often advised governments that they should ensure spending decisions are made with due regard for the best interests of children, particularly those from vulnerable groups.

As summarised by Mason CJ and Deane J in an Australian decision *Ab Hin Teob*, '[A] decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it'.

Where the CRC makes the child's best interests the paramount consideration it would be very rare that any other could justify setting aside those interests.

Best interests under Nigerian law

CRC establishes minimum standards. Where Nigerian domestic law sets a higher standard it must not be diluted.¹¹ If, for example, the best interests of the child are the paramount consideration when CRC only requires primary consideration, the higher standard must be retained. The CRC is not directly implemented in Nigeria and it is not part of Nigerian law. However it is of persuasive value in Nigerian courts, which have in the recent past been guided by international human rights standards in making decisions. Additionally the ratification of the CRC by Nigeria gives rise to a legitimate expectation that decision-makers will take its provisions into account. It is also now accepted international convention may play a part in the development by the courts of the common law'.

International law however does not delve into the procedures to be followed at the dissolution of a marriage. This is left to national law. What is clear however is that whatever procedure a state takes, the principles of equality, non-discrimination and where children are involved, the best interest of the child ought to be the guiding principles.

National law

The Federal Constitution of Nigeria

The Constitution is the supreme law in Nigeria and any statute or provision inconsistent with it is invalid. The Constitution provides for equality between the sexes. It prohibits the enactment of any law that perpetuates inequality whether by direct or by necessary implication. It states at Section 42:

“ A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion, or political opinion shall not by reason only that he is such a person be discriminated against...”

Discriminatory practice in Nigeria varies. The Constitution does not discriminate in any way between men and women since it prohibits any form of discrimination on grounds of sex. Nevertheless, certain laws and practices relating to personal status and family relations carry clear discriminatory bias against women. In this case then both parents should be considered by the court equally in terms of custody of the child.

Concerning the place of international law in Nigeria, the Constitution at Article 12 of the states, in 12(1) that “no treaty between the Federation and any other country shall have the force of law [*except*] to the extent to which any such treaty has been enacted into law by the National Assembly.” However, International treaties that have not been incorporated can be used as persuasive authorities if domestic legislation is silent, ambiguous or uncertain. Article

¹¹ Article 41 of the CRC

19 of the Constitution provides that the foreign policy objectives of the Nigerian state shall include “respect for international law and treaty obligations.” On the face of it, this declaration seems to imply that is not the intention of Nigeria to renounce its international obligations merely because treaties it has ratified have not been domesticated. Under International Law, ratification by the State party is legally binding and establishes international state accountability with regard to human rights responsibilities. Nigeria is party to several international human rights instruments. The 1999 Nigerian Constitution specifically addresses the status of international law in the Nigerian domestic domain. Section 12 (1) of the Constitution states:

“No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly...”

However as stated earlier, international law does place an obligation in Nigeria to implement standards which it has ratified under various treaties.

Regarding issues concerning child custody, Nigerian law requires that the best interests of the child be considered. The Matrimonial Causes Act at section 17 of Nigeria stipulates that the court is required to regard the best interest of the child as the paramount consideration in deciding child custody.

Opinion

The summary of my opinion is that should the case proceed to trial, the applicant has a valid case under both Nigerian law and international law for her claim concerning custody of the children. Nigeria is a signatory to the UDHR and to the Convention on the Rights of the Child and is bound by these instruments to apply certain standards with regard to child custody. This case primarily concerning questions on the custody of the children, should focus on the ‘best interest of the child’ standard.

Although the application suggests the rights of a mother have been violated by the ‘kidnapping’ of her children, the Nigerian laws as with most in Africa, permit the father full custody of his children and denies the mother equal rights to move with the children without the consent of the father. Most formal systems however, have approached custody questions from a rights and best interests of the child perspective. In fact, the Nigerian High Court in *Ibe-Lamberts v. Ibe-Lamberts*¹² have ruled that a child’s best interest remains the paramount consideration in deciding child custody.

CRC defines standards for custody and support for the child irrespective of the marriage status between couples. It also adopts the ‘best interest’ approach, which can guide the Nigerian court when reaching decisions in this regard. The purpose of the Convention is to ensure that the best interests of a child whose custody is in dispute should be considered by the appropriate court.¹³

The domestic application of human rights norms is now regarded as a basis for implementing constitution values beyond the minimum requirements of the Constitution in

¹² Nigeria, High Court of Lagos State, [2001] (2) LHCR 49–57

¹³ Article 3 of the Convention on the Rights of the Child

many jurisdictions. The international human rights norms are in fact part of the constitutional expression of liberties guaranteed at the national level. It is my view that Nigerian courts can assume the task of expanding these liberties. For example commonwealth judges have expressed the opinion that they have an obligation to ensure that the domestic laws of their countries conform to the international obligations of those countries. Lord Searman in *Attorney-General v. British Broadcasting Corporation* (1981) AC 303, at page 354, HL, said:

"Yet there is a presumption, albeit rebuttable that our municipal law will be consistent with our international obligations",

and in *Schering Chemicals Ltd v. Falkman Ltd* (1982),¹⁴ Lord Denning, MR, said of the Law England that:

"I take it that our law should conform so far as possible with the provisions of the European Convention on Human Rights."

What remedies are available to W?

The courts in arriving at their decisions must exercise its function according to recognized principles and procedures of justice. The fair administration of justice requires a judge not to examine or communicate with parties or witnesses or conduct a hearing in the absence of any of the parties except in very special circumstances.

The applicant could petition the court for joint custody of the children. Joint custody is intended to establish a strong personal relationship between children and both parents. It provides parents with the opportunity to remain involved in their children's lives, and assures children that they are wanted and loved by both parents. If both parents are fit for custody, they should have an equal say in raising their children. In addition to promoting the best interests of the children, joint custody enhances gender equality. In deciding whether to grant the parties joint custody of their child, the court should regard the interests of the child as the paramount consideration. The leading risk of joint custody is the possibility of conflict between divorced parents. Even if the parents resolved their conflict, its presence would negatively impact the child's well being. The greatest benefit of a joint custody arrangement is the opportunity for the child to maintain a personal relationship with both parents.

It is important to note that the welfare of the child is of first and paramount importance in considering an application for that child's custody and each case has to be decided on its own merits and circumstances. For example in *Ibe-Lamberts v. Ibe-Lamberts*¹⁵ the court took into consideration the best interests of the child with regards to custody and it decided that it would not be in the best interests of the child to be separated from the mother. In this case, the petitioner and respondent were married with one child. The petitioner and her child had lived apart from the respondent for more than three years prior to the date

¹⁴ Q .B at 18; (1982) 2 All ER 321, CA

¹⁵ *op cit.*

on which he petition for divorce was filed. The petitioner sought a court declaration that would establish the marriage as “broken irretrievably” and grant her custody of the couple’s child. The respondent cross-petitioned for child custody and dissolution of the marriage based on the petitioner’s adultery. The respondent argued that the petitioner fled from the house without any consultation. Under section 17 of the Matrimonial Causes Act, 1979, the court is required to regard the best interest of the child as the paramount consideration in deciding child custody. At the time of the trial, the child was living in the United States with the petitioner. The petitioner was willing to grant the respondent the right of visitation with his child. The court decided that it was not in the interests of justice to move the child from the United States to Nigeria to live with the respondent’s mother and sister.

Since the court cannot directly enforce the Committee on the Rights of the Child recommendations within the *corpus juris civilis* of Nigeria, the court must be urged to read in the standards to which Nigeria has committed to under the Constitution as incorporating such recommendations. They are the best means of interpreting any ambiguity in the constitution.