



**MALAWI'S LEGISLATIVE INTEGRATION AND THE COURT'S
INTERPRETATION AND APPLICATION OF 'THE BEST INTERESTS OF THE
CHILD' PRINCIPLE VIS-À-VIS INTERNATIONAL AND REGIONAL
STANDARDS**

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Abstract

In all its Concluding Observations to Malawi, the CRC Committee has expressed its concerns against the State party's consideration of the principle of the child's best interests in its domestic law. Overall, the Committee has recommended that Malawi ensures appropriate integration of the principle in its legislative framework, as well as court decisions that impact children. As such, the paper first examined the extent to which the principle of the child's best interests is appropriately integrated into the domestic legislative framework in Malawi. Afterwards, it reviewed the extent to which domestic case law has appropriately and consistently interpreted and applied the principle in decisions concerning or impacting children. The examination of the domestic legislative framework revealed that whereas Malawi has taken great strides in ensuring appropriate integration of the principle as exemplified by the incorporation of the principle in the Constitution, the CCPJA – whose Third Schedule actually outlines factors similar to those proposed in General Comment No. 14, for determination of the child's best interests – and other statutes, there is still the need for the principle's integration in other statutes like the Adoption of Children Act. Regarding the judicial interpretation and application of the principle, while there is largely consistency and appropriateness in the principle's application, its interpretation remains inconsistent and inappropriate. This suggests that Malawi must concentrate on funding, training, and awareness to effectively implement the principle.

1. Introduction

In its Concluding Observations ("COs") to Malawi, a State party to the UN Convention on the Rights and Welfare of the Child ("UNCRC"), the Committee on the Rights of the Child ("CRC Committee") has repeatedly raised concerns against the State party regarding integration,

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interpretation, and application of the principle of the best interests of the child. In 2002, while noting that many policies considered the child's best interests and that the Constitutional Technical Review had recommended that the principle be provided for in the Constitution, the Committee was concerned that the principle was not fully considered in domestic law.¹ Thus, the Committee recommended that Malawi should take all appropriate measures to ensure appropriate integration of the principle in all legislation, as well as judicial decisions which have an impact on children.² Per the 2009 COs, the Committee, while echoing its concern raised in 2002, urged Malawi to ensure the integration of the principle in the Constitution, and repeated its recommendation to the State party.³ Then, in 2017, while noting the Constitution Amendment Act No. 11 of 2010, and in light of its General Comment No. 14 (2013),⁴ the Committee reiterated its previous recommendation and further recommended that Malawi should strengthen its efforts to ensure appropriate integration and consistent interpretation and application of the principle in, inter alia, all legislative and judicial proceedings and decisions relevant to or have an impact on children.⁵

In contrast, the African Committee of Experts on the Rights and Welfare of the Child ('ACERWC'), in its COs to Malawi, as a State party to the African Charter on the Rights and Welfare of the Child ('ACRWC'), has not really expressed similar concerns. Instead, the ACERWC noted with appreciation the incorporation of the best interest of the child principle at the constitutional level and the adoption of laws aimed at ensuring the protection of the child's

¹ UN Committee on the Rights of the Child, 'Concluding Observations on the Initial Report of Malawi' (2 April 2002) [25]

<https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F15%2FAdd.174&Lang=en> accessed 31 March 2023.

² *ibid* [26].

³ UN Committee on the Rights of the Child, 'Concluding Observations on the Second Periodic Report of Malawi' (27 March 2009) [30]

<https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FMWI%2FCO%2F2&Lang=en> accessed 31 March 2023 [31].

⁴ UN Committee on the Rights of the Child (2013), General Comment No. 14 (2013) on the right of the child to have his/her best interests taken as a primary consideration (art. 3, para. 1), CRC /C/GC/14.

⁵ UN Committee on the Rights of the Child, 'Concluding Observations on the Combined Third to Fifth Periodic Reports of Malawi' (6 March 2017) [15]

<https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FMWI%2FCO%2F3-5&Lang=en> accessed 31 March 2023.



best interest in the justice system.⁶ Its recommendations relate to funding, training, and awareness to ensure effective implementation of the principle.⁷

Nevertheless, given the CRC Committee's concerns and recommendations, this paper aims at reviewing the progress made by Malawi regarding the integration, interpretation, and application of the child's best interests. This review raises two main questions. First, to what extent are the 'best interests of the child' appropriately integrated in legislative provisions that are relevant to or have an impact on children? Second, to what extent is the 'best interests of the child' appropriately and consistently interpreted and applied in judicial proceedings and decisions that are relevant to or impact children?

To address those questions, the article first presents the relevant international and regional standards regarding the best interests of the child. Thereafter, it discusses the domestic legislative framework on the child's best interests. In the third section, the article reviews domestic case law on the interpretation and application of the best interest of the child principle, considering the domestic legislative framework as well as the international and regional standards. This will be followed by a conclusion and recommendations.

2. Applicable International and Regional Standards on The 'Best Interests of the Child'

This section looks at the UNCRC and the ACRWC as the applicable international and regional instruments, respectively, and the guidance provided thereto by the treaty monitoring bodies.

2.1. Binding Status and Applicability of the UNCRC and ACRWC in Malawi

Section 211(1) of the Republic of Malawi (Constitution) Act ('the Constitution') stipulates that international agreements entered into after the commencement of the Constitution shall form part of the law of Malawi if so provided by an Act of Parliament. According to section 211(2) of the Constitution, however, binding international agreements entered into before the commencement of the Constitution remain part of the law in Malawi unless otherwise provided by an Act of Parliament.

Malawi ratified the UNCRC and ACRWC in 1991⁸ and 1999,⁹ respectively. The Constitution entered into force in 1995. Accordingly, in line with section 211(2) of the Constitution and in the

⁶ African Committee of Experts on the Rights and Welfare of the Child, 'Concluding Observations on the Initial Report of the Republic of Malawi on the Status of Implementation of the African Charter on the Rights and Welfare of the Child (2018) [15] < <https://www.acerwc.africa/ar/states-parties/reporting/overview> > accessed 31 March 2023.

⁷ *ibid.*



absence of any statute expressly or implicitly ousting its applicability in Malawi, the UNCRC continues to be applicable in Malawi. Regarding the ACRWC, having been ratified after the commencement of the Constitution, in accordance with section 211(1) of the Constitution, it is binding on and applicable in Malawi as domesticated by the Third Schedule of the Child Care, Protection and Justice Act¹⁰ ('CCPJA'). Case law further confirms the binding status and applicability of both treaties in Malawi.¹¹

2.2. The Best Interests of the Child under the UNCRC

Article 3(1) UNCRC requires that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the child's best interests should be a primary consideration. Besides, the following articles of the Convention expressly refer to the best interests of the child: article 9(1) and (3) [separation of child from parents]; article 18(1) [parental responsibilities]; article 20(1) [child deprived of family environment]; article 21 (adoption); article 37(c) [separation from adults while in detention]; and article 40(2)(b)(iii) [procedural guarantees in relation to children in conflict with the law]. Furthermore, the best interests of the child are explicitly referred to in the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography in article 8(3) [victims of offences] and in paragraph 7 of the preamble, and articles 2 and 3(2) of the Optional Protocol to the Convention on a communications procedure.

The CRC Committee identified article 3(1) UNCRC as one of the four general principles of the Convention for purposes of interpreting and implementing all the rights of the child.¹² The Committee recognises that the best interests of the child are a dynamic concept requiring an assessment according to the specific context.¹³ As a dynamic concept, it "encompasses various issues continuously evolving."¹⁴ Hence, the child's best interests is a complex concept, and its content should be determined on a case-by-case basis.¹⁵

⁸ UN Treaty Body Database, 'Ratification Status for CRC - Convention on the Rights of the Child' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en > accessed 31 March 2023.

⁹ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), Ratifications Table: List of Countries which have signed, ratified/acceded to the African Charter on the Rights and Welfare of the Child <MALAWI | ACERWC - African Committee of Experts on the Rights and Welfare of the Child > accessed 31 March 2023.

¹⁰ Child Care, Protection and Justice Act (Cap. 26:03; Laws of Malawi).

¹¹ *Evance Moyo v The Attorney General* (Constitutional Case No. 12/2017) (High Court) (Principal Registry) (unreported) 5.

¹² CRC General Comment No. 14 (n 6) [1].

¹³ *ibid.*

¹⁴ *ibid* [11].

¹⁵ *ibid* [32].



According to the CRC Committee, the ‘best interests of the child’ is a threefold concept: (a) a substantive right; (b) a fundamental, interpretive legal principle; and (c) a rule of procedure.¹⁶ As a substantive right, children have the right to have their best interests assessed and taken as a primary consideration if various interests are under consideration to reach a decision on an issue, and the guarantee of implementation of this right.¹⁷ The child’s best interests as a fundamental, interpretive legal principle entails that where a legal provision is subject to more than one interpretation, the one which most effectively serves the child's best interests must be chosen.¹⁸ As a rule of procedure, assessment and determination of the child’s best interests should be in line with procedural guarantees, and decisions made thereto should explicitly show that in their justifications, the right has been respected.¹⁹

The CRC Committee underscored that article 3(1) UNCRC imposes an obligation on, *inter alia*, legislative bodies and courts of law. Regarding legislative bodies, the adoption of laws or regulations must be governed by the child's best interests; the principle ‘should be explicitly included in all relevant legislation, not only in laws that specifically concern children.’²⁰ In relation to courts of law, the emphasis is that the principle applies to all judicial proceedings.²¹ In criminal matters, the principle applies to children in conflict with or alleged to be with the law or in contact with the law as witnesses or victims, as well as children concerned with the circumstances of their parents in conflict with the law.²² In civil matters, the principle is also applicable broadly where a child is directly or indirectly defending their interests, in child abuse or neglect issues, paternity, as well as where a child is affected by the trial in cases such as adoption, divorce, and custody.²³ The Committee notes that the principle as captured in article 21 UNCRC “is further strengthened; it is not simply to be ‘a primary consideration’ but ‘the paramount consideration’.”²⁴

The CRC Committee compiled a non-hierarchical and non-exhaustive list of seven elements that are to be taken into account when assessing and determining the best interests of the child, as relevant to the circumstances in issue: (a) the views of the child; (b) the child’s identity; (c) family

¹⁶ *ibid* [6].

¹⁷ *ibid* [6(a)].

¹⁸ *ibid* [6(b)].

¹⁹ *ibid* [6(c)].

²⁰ *ibid* [30].

²¹ *ibid* [27].

²² *ibid* [28].

²³ *ibid* [29].

²⁴ *ibid* [38].



environment preservation and maintaining relations; (d) care, protection and safety of the child; (e) vulnerability situation; (f) the child's right to health; and (g) the child's right to education.²⁵

In addition, the Committee invites States and all persons in a position of assessing and determining the best interests of the child to have due regard to the following eight safeguards and guarantees: (a) child's right to express their views; (b) establishment of facts; (c) time perception (priority and completion in shortest time possible); (d) involvement of qualified professionals; (e) legal representation; (f) legal reasoning (decision must be motivated, justified and explained); (g) mechanisms to review or revise decisions; and (h) child-rights impact assessment.²⁶

2.3. ACRWC Best Interests of the Child Provisions

Article 4(1) ACRWC provides that in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration. The Charter also expressly provides for the best interests of the child as follows: article 9(2) [freedom of thought, conscience, and religion]; Article 19(1) [parental care and protection –separation from parents]; Article 20(1)(a) [parental responsibility]; article 24 (adoption); and article 25(2)(a) and (3) [separation from parents].

The ACERWC identified the best interests of the child [article 4(1) ACRWC] as one of the general principles for effectively implementing the Charter.²⁷ The ACERWC emphasised that application of the principle extends to 'every conceivable domain of public or private life',²⁸ encompassing short-term, medium-term, and long-term best interests.²⁹

3. DOMESTIC LEGISLATIVE FRAMEWORK ON THE 'BEST INTERESTS OF THE CHILD'

3.1. Constitution

The Constitution is the supreme law in Malawi³⁰ and deals with various issues. Regarding children, however, section 23 is most relevant because it provides for their rights. Initially, that provision omitted to incorporate the best interests of the child as advocated by the UNCRC.³¹

²⁵ *ibid* [52] – [79].

²⁶ *ibid* [88] – [99].

²⁷ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No. 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and Systems Strengthening for Child Protection (2018) 9.

²⁸ *ibid* 11-12.

²⁹ *ibid* 12.

³⁰ Section 5 Constitution

³¹ Malawi Law Commission, Report of the Law Commission on the Review of the Constitution, (Law Commission Report No. 18), Malawi Gazette Supplement No. 6D (21 September 2007) 30.



Section 23(1) of the Constitution, in its original form, simply stated that all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law. However, in the year 2007, the Special Law Commission on the Technical Review of the Constitution concluded that the ‘best interests of the child’ is a universal principle and, therefore, recommended an amendment to section 23(1) of the Constitution to insert, at its end, the words “and the best interests and welfare of children shall be a primary consideration in all decisions affecting them.”³²

The proposal was enacted into law by the Constitutional Amendment No. 11 of 2010. Consequently, the Constitution expressly incorporates the best interests of the child, particularly in its two provisions concerning general provision of the rights of children and special rights accorded to a child in conflict with the law. Section 23(1) of the Constitution provides that all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the ‘best interests and welfare’ of children shall be a primary consideration in all decisions affecting them. In relation to a person under the age of eighteen years suspected to be in conflict with the law, section 42(2)(g)(iii) Constitution states that the child has the right to be separated from adults when imprisoned unless is in his or her ‘best interest’ not to do so.

3.2. Child Care, Protection and Justice Act (‘CCPJA’)

A Special Law Commission (2001-2005) reviewed child rights related laws in Malawi with the aim of compressively reforming the laws to conform to international standards.³³ The Commission proposed legislation (i.e., the CCPJA) seeking to, inter alia, modernise the law by incorporating provisions aimed at upholding and protecting the child’s best interests.³⁴ Unsurprisingly, the best interests of the child principle is comprehensively incorporated in the CCPJA’s provisions in relation to various aspects concerning children: section 8(3) [custody or access proceedings]; section 41 (appointment of a guardian); sections 54(2) and 63 (fosterage); section 75(2) [duty to report on infringement of a child rights]; section 84(6) [extension of placement of a child in a safety place or supervision]; section 89(a) [arrest of a child]; section 91(c) [service of summons]; section 94(2) and (3) [police powers to caution and release a child]; section 96(1)(d) [places of detention before a finding against a child]; sections 100(4) and 135(1)(b) [exclusion of persons required to attend preliminary inquiry and trial]; section 103(3) [inquiry magistrate dispensing with a social inquiry report]; section 125(5) [presiding officer

³² *ibid* 31.

³³ Malawi Law Commission, Law Commission Report on the Review of the Children and Young Persons Act (23 December 2005) 6.

³⁴ *ibid*.



referring a matter to a child justice court]; section 127(1)(c) and (2) [provision of legal representation to a child as State expense]; section 137(2) [jury trial in children matters]; section 142(1) [power to order parent or guardian to pay a fine imposed instead of a child]; section 143(1) [duty of other courts to remit children to a child justice court]; section 144(13) [criminal proceedings in a child justice court] and; section 180(2) [duties arising from a probation order].

Furthermore, to realise the child's best interests, the Commission recommended creating a Schedule to the CCPJA that plainly stipulates children's rights as recognised by the UNCRC.³⁵ Thus, section 1 of the Third Schedule to the CCPJA requires the State, a court, a local authority or any person to determine any question with respect to (a) the upbringing of a child or (b) the administration of a child's property or the application of any income arising from it, to consider the "welfare of the child" as a paramount consideration. Section 2 of the Schedule provides that in the determination of any questions relating to circumstances set in 1(a) and (b), the court or any other persons must have regard to the "best interest of the child", including in particular to:

- (a) the ascertainable wishes and feelings of the child concerned considered in the light of his age and understanding;*
- (b) the physical, emotional and educational needs of the child;*
- (c) the likely effects of any changes in the child's circumstances;*
- (d) the age, sex and background of the child and any other circumstances relevant in the matter;*
- (e) any harm that the child has suffered or is at the risk of suffering;*
- (f) where relevant, the capacity of the parents, guardians or other people involved in the care of the child in meeting needs of the child.*

3.3. Adoption of Children Act

The Adoption of Children Act³⁶ provides for the adoption of children.³⁷ Section 4(b) Adoption of Children Act states that before making an adoption order, the court shall be satisfied that the order, if made, will be for the "welfare of the infant", due consideration being for this purpose given to the wishes of the infant, having regard to the age and understanding of the infant. Although the Act defines an "infant" as a person under the age of twenty-one,³⁸ it is the settled

³⁵ *ibid* 15-16.

³⁶ Adoption of Children Act (Cap. 26:01; Laws of Malawi).

³⁷ *ibid*, Long title.

³⁸ *ibid* s 2(2).



position of the courts, as elaborated later in the paper, that the “welfare of the infant” is the same as the “best interests of the child” principle as espoused in the UNCRC and the ACRWC.³⁹ It is also important to note that the Special Law Commission on the Review of the Adoption of Children Act proposed a draft legislation (i.e., Adoption of Children Bill) seeking to modernise the law on adoption of children in the country ‘by putting emphasis on the best interests of the child.’⁴⁰ The proposed bill expressly incorporates the best interests of the child in provisions relating to application for adoption; rescission of an adoption order; interim orders; social welfare officer; appointment of and duties of guardian ad litem; adoption by a person in a country which is signatory to and implemented the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption Convention; and refusal to recognise intercountry adoption. Unfortunately, this important Bill is yet to be tabled in Parliament. According to the Ministry of Gender, having finalised the paperwork on the Review of the Adoption of Children Act in October 2018, they submitted the Bill to the Cabinet of Malawi.⁴¹ As of 2019, the Law Commission report showed that the Bill was before the Cabinet.⁴² However, the Ministry of Justice, which is responsible for presenting Law Commission reports to Parliament for their adoption by the House before the line ministry processes them as Bills, recently expressed no knowledge of the real status of the proposed Bill.⁴³ This seemingly contradictory information from the responsible institutions shows that there is a lack of proper coordination to hasten the enactment of the Bill.

3.4. Other Pieces of Legislation

The best interests of the child principle are expressly provided for in other pieces of legislation. Under the Prevention of Domestic Violence Act,⁴⁴ a court shall not make an occupation order unless it is satisfied that such an order, inter alia, is in the ‘best interest of a child’ or dependent.⁴⁵ As one of the principles in cases concerning children under the Trafficking in Persons Act,⁴⁶ an adult who is trusted by the child is generally required to be present during the interview (of the

³⁹ *In the Matter of CJ and In the Matter of the Adoption of Children Act* [2009] MLR 220, 231; *In re: the Adoption of Children Act and P.S. (a male infant)* [2012] MLR 182, 188.

⁴⁰ Malawi Law Commission, Report of the Law Commission on the Review of the Adoption of Children Act, (Law Commission Report No. 27), Malawi Gazette Supplement No. 15D (23rd August 2013) 10.

⁴¹ The Nation, Govt Sit on Crucial Bills < <https://mw-nation.com/govt-sits-on-crucial-bills/> > accessed 30 October 2023.

⁴² Malawi Law Commission, Law Commission Annual Report 2019 40 < <https://www.lawcom.gov.mw/annual-report-2019> > accessed 30 October 2023.

⁴³ The Nation (n 41).

⁴⁴ Cap. 7:05; Laws of Malawi.

⁴⁵ *ibid* s 11(3)(b).

⁴⁶ Cap. 7:06; Laws of Malawi.



child) and the responsibility of this adult is to safeguard the ‘child’s best interests.’⁴⁷ The Marriage, Divorce and Family Relations Act⁴⁸ requires courts to consider the ‘best interests of the child’ in any proceedings for divorce, judicial separation, or any proceedings brought by either party to the marriage.⁴⁹ Furthermore, the Act states that where an order for the maintenance or custody of a child is made, the court must base its decision on the child's best interests.⁵⁰

3.5. An Appraisal of the ‘Best Interests of the Child’ Integration in the Domestic Legislative Framework Per the International and Regional Standards

The Constitution sets the foundation for the integration of the best interests of the child principle in the domestic legislative framework; the key provision being section 23(1) Constitution. Complementing the Constitution, the CCPJA comprehensively incorporates the child’s best interests. The CCPJA expressly provides for the child’s best interests in relation to the various children matters, and these are similar to civil and criminal cases mentioned in General Comment No. 14, as well as the UNCRC and ACWRC provisions explicitly stipulating the principle. Moreover, the CCPJA Third Schedule outlines factors to be considered in determining the child’s best interests; these factors are comparable to the seven elements drawn by the CRC Committee in General Comment No. 14.

The other pieces of legislation, as discussed above, though statutes not explicitly concerning children, contain the principle of the child’s best interests. This is in line with the CRC General Comment No. 14 recommendation that the principle must be plainly included in all relevant legislation, not only in laws principally concerning children.

However, the Adoption of Children Act, a statute explicitly concerning children, does not expressly provide for the child’s best interests and does not appropriately incorporate the principle. It is only through court decisions that the “best interests of the child” have been read into the “welfare of the infant”.

Currently, integration of the principle of the child's best interests is lacking in some pieces of legislation not principally concerning children but providing for matters impacting children. For instance, the principle is not provided for in the Deceased Estates (Wills, Inheritance and

⁴⁷ *ibid* First Schedule (Guiding Principles in Conducting Screening Interviews for the Identification of Trafficked Person), Part III, s 4.

⁴⁸ Cap. 25:01; Laws of Malawi.

⁴⁹ *ibid* s 95(2)(b).

⁵⁰ *ibid* s 97(2).



Protection) Act,⁵¹ on issues of property inheritance under a Will or principles of distribution of intestate property. Again, the principle has not been stated in the Education Act,⁵² an instrument that concerns, though not exclusively, children.

It is clear, therefore, that the State party has made great efforts to ensure the appropriate integration of the child's best interests in its legislative framework. Still, there is room for improvement to achieve appropriate integration of the principle. These improvements could be made by, for example, like tabling the Adoption of Children Bill in Parliament and enacting it into law to comprehensively incorporate the principle in matters of adoption, and expressly including the principle in other statutes not exclusively concerning children.

4. Domestic Case Law on the Interpretation and Application of The 'Best Interests of the Child'

Having presented and analysed the relevant international and regional standards, as well as the domestic legislative framework regarding the best interests of the child, this section aims to review domestic case law on the courts understanding and application of the principle. This review will focus on the following thematic areas: child custody matters; accommodation orders following a judicial separation decree; identities of children in public records; detention of children; bail; imprisonment of mothers with dependent children; and adoption.

4.1. The Best Interests of the Child in Custody Matters

4.1.1. Pre-CCJA and Constitution Amendment to Post-CCJA and Constitution Amendment

Before the enactment of the CCPJA and the Constitutional Amendment No. 11 of 2011, the determination of child custody matters was principally based on the 'welfare, happiness and interest of the child'. In *Chilingulo v Chilingulo and Another*,⁵³ the Court stated that in any application for custody of children, the paramount consideration a court must bear in mind in exercising its discretion is the welfare and happiness of the children; the court must not take into consideration whether the claim of one of the parents is superior. It is only the welfare, interest and happiness of the children which the court must consider.⁵⁴ In *Mphande v Mphande*,⁵⁵ the Court stressed that when faced with a child custody issue, "the primary consideration is the welfare

⁵¹ Cap. 10:02; Laws of Malawi.

⁵² Cap. 30:01; Laws of Malawi.

⁵³ *Chilingulo v Chilingulo and Another* [1990] 13 MLR 110.

⁵⁴ As above, p 114.

⁵⁵ *Limani Mphande v Rennie Mphande* (Matrimonial Cause No. 12/2004) (High Court) (Principal Registry) (unreported).



happiness and interest of the child.” In ascertaining that, the court must consider all the practical aspects as well as circumstances of the cases.⁵⁶

Post CCPJA and the Constitutional Amendment No. 11 of 2010, in *EA v IC and another*,⁵⁷ the High Court stated that, in custody matters, the best interest and welfare of the child, and not the interests of the disputing parties to a divorce, is the paramount or primary consideration.⁵⁸ The Court held that section 23(1) & (5) Constitution, and section 8(3) & (4) CCPJA followed and concretised the common law guideline that in determining custody proceedings, ‘all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the best interests of the child’s welfare.’⁵⁹ Evidently, the Court’s approach in this case departs from the ‘welfare, happiness and interest of the child’ principle espoused in the decisions before the enactment of the CCPJA and the Constitutional Amendment No. 11 of 2010.

While subsequent decisions have underlined the *EA v IC and another* approach,⁶⁰ some decisions still adopt the ‘welfare, happiness and interest of the child’. In *Sibale v Sibale*, the High Court, after citing the principle in *EA v IC and another*, mentioned the settled principle that children of tender years must remain with their natural mothers and that what matters is the “welfare, interest and happiness of the child.”⁶¹ The Court referred to section 8(3) CCPJA without further explication.⁶² Besides, in *Mpando v Mpando*, in considering a custody application under a divorce matter, the High Court held that the best interest and welfare of the child, and not the interests of the disputing parties, is the paramount or primary consideration.⁶³ Justice N’riva stated that in child custody applications, ‘the primary consideration is the welfare happiness and interest of the child and in considering this the court must consider all the practical aspects or circumstances of the cases.’⁶⁴

Perhaps, a comprehensive interpretation and application of the best interests of the child in custody matters can be found in *Almeida v Almeida*.⁶⁵ In its judgment on custody following a

⁵⁶ *ibid* 13. Also see: *Katimba v Gertrude Katimba* [2008] MLR 123, 136

⁵⁷ *EA v IC and another* (Matrimonial Cause No. 1/2016) (High Court) (Principal Registry) (unreported).

⁵⁸ *ibid* 2.

⁵⁹ *ibid* 3.

⁶⁰ *Juliet Sibale v Micheal Sibale* (Matrimonial Cause No. 11/2018) (High Court) (Principal Registry) (unreported), Page 7; *Towera Mpando v Jackson Mpando* (Matrimonial Cause No. 11/2019) (High Court) (Principal Registry) (unreported) p 4.

⁶¹ *Sibale v Sibale* (n 60) 7-8.

⁶² *ibid* 8.

⁶³ *Mpando v Mpando* (n 60) 4.

⁶⁴ *ibid*. Underlining supplied.

⁶⁵ *Almeida v Almeida* (Matrimonial Cause No. 8/2016) (High Court) (Lilongwe District Registry) (unreported).



dissolution of the marriage of the parties, the High Court considered section 8(3) CCPJA that a custody decision must be in the best interests of the child. The Court further considered section 23(1) of the Constitution as recognising ‘other considerations that a court faced with decisions of this nature will have to consider’, but that ‘in their ranking, the best interests of the child should be accorded primacy status and thus be accorded the [pre-eminence] it deserves as a primary consideration.’⁶⁶

Consequently, in child custody applications, the views of the child; the desirability to keep siblings together; and any other relevant factors, as provided for under section 8(4) (a), (b), and (c) CCPJA, must be considered after the best interests of the child.⁶⁷

Then, “considering that the ‘best interests of the child’ is a principle that has not been explained in our legislation” and since it is language derived from and consistent with Malawi’s treaty obligations, particularly the UNCRC, the Court referred to the CRC Committee General Comment No. 14 as providing a comprehensive interpretation of its provisions.⁶⁸ Justice Mwale concluded that clearly, the principle should be “flexible and adaptable” and that it must be ‘assessed and determined in light of the specific circumstances of the particular child.’⁶⁹

In this matter, the Court had to determine whether it was in the child’s best interests to grant sole physical custody to the petitioner or joint equal physical and legal custody to both parties. In doing so, the Court was mindful that it had to determine whether the main driver in the decision making had been the “best interests and welfare of the child” or the parents’ competing interests.⁷⁰ The Court stated there is no consensus that ‘shared and equal physical custody is always in the best interests of the child concerned.’⁷¹ Due to the conduct of the parties, the Court ruled out shared and equal custody as in the best interests of the child.⁷²

The Court further analysed the ‘best interests of the child’ in relation to parental ability; alienation; and safety of the child. Eventually, the Court granted the petitioner physical custody of the child with rights of access by the respondent, and joint legal custody to both parties. Furthermore, based on the best interests of the child, the Court issued orders regarding schedule

⁶⁶ *ibid* [13].

⁶⁷ *ibid* [14].

⁶⁸ *ibid* [14] and [17].

⁶⁹ *ibid* [18].

⁷⁰ *ibid* [15].

⁷¹ *ibid* [24].

⁷² *ibid* [30].



for access; the child's vacations with the respondent; and need for the parties' verifiable physical and mental health records to be considered by an expert.⁷³

4.1.2. Reference to the Children's Act of South Africa in Determining the Best Interests of the Child

*Makoka v Makoka*⁷⁴ is an interesting case in how the High Court referred to the Children Act of South Africa to aid its interpretation and application of the 'best interest of the child' in a child custody application. This was an appeal against the First Grade Magistrate's Court ('the lower court') dismissal of the appellant's child custody application. Instead, granting custody of the children to the respondent, the lower court stated that considering the ages of the children, "motherly care and love would be most appropriate." Hence, the lower court was 'satisfied that the best interest of both children would be better served if the children continued to stay with the respondent.'⁷⁵

Before the High Court, the appellant raised four grounds of appeal, dealing with, among others, the best interest of the child.⁷⁶ In its analysis, the Court cited section 8(3) and (4) CCPJA as requiring the court to consider, inter alia, the best interests of the child, in determining child custody.⁷⁷ On the basis that a 'sound relationship between parents fosters the best interest of the children,' it was the Court's view that the parties needed counselling to address their differences and secure a relationship that would allow the children to live and grow with both parents.⁷⁸

In its further consideration of "what is in the best interest of the child," the Court noted that the CCPJA does not define the term "the best interest of the child."⁷⁹ Then, the Court observed that several decisions of the courts attempted to define the phrase and, particularly citing *Kamangira v Kamangira*⁸⁰ for the position that 'in considering what is in the best interest of a child, the courts must examine all issues surrounding the custody of the child before deciding which party must have custody.' Interestingly, without further engagement of the said domestic jurisprudence, the High Court promptly cited section 7 of the Children Act, quoting the whole section, as being 'more informative as regards what the court can consider when determining what is in the best

⁷³ *ibid* [50].

⁷⁴ *Dr Mwai Makoka v Joyce Makoka* (Civil Appeal Cause No. 50/2020) (High Court) (Lilongwe District Registry) (unreported).

⁷⁵ *ibid* [3].

⁷⁶ *ibid* [11].

⁷⁷ *ibid* [10].

⁷⁸ *ibid* [12].

⁷⁹ *ibid* [14].

⁸⁰ *Kamangira v Kamangira* [2004] MLR 135.



interest of the child.⁸¹ The Court found that law on what is in the best interest of the child as providing better guidance and being all encompassing, adequate to assist the court in its determination.⁸²

Furthermore, the Court stated that the information needed to assist the court in its determination of the best interest of the child is holistic. Finding that the evidence “did not capture much,” the Court concluded that there was need for more evidence in line with section 7 Children Act to assist the court determine what is in the best interest of the child.⁸³ Thus, the High Court ordered the Child Justice Court to take additional evidence to assist the court’s determination of what is in the best interest of the child ‘being closely guided by section 7 of the Children Act of South Africa.’⁸⁴

4.2. Best Interests of the Child as A Basis for an Order for Accommodation Following a Decree of Judicial Separation

In *Siliya v Siliya*,⁸⁵ the High Court, as an appellate court, had to determine, among others, whether the lower court erred in law and fact in ordering the appellant to construct a house for the respondent. The Court noted that custody of children of the marriage between the parties was granted to the respondent after the lower court had considered the children’s best interests and welfare in respect of section 23(1) of the Constitution. In the absence of evidence that the respondent was not a woman of good conduct, the Court held the view that the children’s best interests and welfare would be properly taken care of by their mother. Furthermore, the Court stated that, as a matter of fact, stepmothers rarely have the best interests and welfare of their stepchildren at heart.⁸⁶ Then, citing section 3 CCPJA⁸⁷ and section 100(2) Marriage, Divorce and Family Relations Act⁸⁸, the Court held that custody of the children having been granted to the respondent, the appellant being the children's biological father, he was obligated to provide them with shelter.⁸⁹ Consequently, the Court dismissed this ground of appeal.

⁸¹ *Makoka v Makoka* (n 74) [14]

⁸² *ibid* [15].

⁸³ *ibid*.

⁸⁴ *Makoka v Makoka* (n 74) [17].

⁸⁵ *Andrew Siliya v Thokozeni Siliya* (Civil Appeal No. 111/2017) (High Court) (Principal Registry) (unreported).

⁸⁶ *ibid* 4.

⁸⁷ Section 3 CCPJA provides for duties and responsibilities of parents. Section 3(1)(b)(ii) of the Act specifically states that responsibilities of parents towards their children include the responsibility to provide, inter alia, shelter.

⁸⁸ Section 100(2) Marriage, Divorce and Family Relations Act provides “If the respondent is entitled to occupy the matrimonial home by virtue of a beneficial estate or interest or contract or any other legal entitlement but the applicant is not so entitled, the court may order the respondent to provide suitable accommodation for the applicant and any child who is entitled to be maintained.” (Underlining supplied)

⁸⁹ *Siliya v Siliya* (n 85) 4.



4.3. Masking Identities of Children in Public Records in Their Best Interests

In *Brian Shaba v Rep*⁹⁰, Justice Kapindu emphasised the significance of ensuring that the identities of child victims and child offenders are kept out of the public domain, as that is of paramount importance in the best interests of such children.⁹¹ In its written judgment, the Court used the initials of the victim and two other female pupils who were mentioned in evidence in their best interests as children.⁹²

Mbele v Rep,⁹³ though not a case involving a child, the best interests of the child principle arose in relation to identities of children in public records. The case concerned reporting *Re: CJ*. Justice Mtalimanja wondered why, in the citation of the case, being a case involving a child, her full name was published in the Malawi Law Reports as opposed to only her initials or any appropriate identifying marker to preserve her identity. The Judge suggested that, in keeping with the child's best interests, to preserve the right to privacy, the identity of the child in that case should have been masked in the Report.⁹⁴

4.4. Detention of Children and the Best Interest of the Child

The 'best interests of the child' principle has played a central role in the courts' determination or review of detention of children in prisons and police cells. For instance, *Re Children in Detention at Bvumbwe and Kachere Prisons*⁹⁵ concerned children who, for various reasons, were in detention at Bvumbwe and Kachere Prisons. The children moved the High Court to review the propriety of their detention orders. Finding in the applicants' favour, the Court stated that the best interests of the child should always be upheld and protected. Then, Justice Kalembera, having quoted section 42(2)(g) Constitution, underscored that 'the best interests of the child, and more so of those children in conflict with the law, must be upheld and protected at all times.'⁹⁶

Similarly, in *FK and 7 others v Rep*,⁹⁷ the High Court dealt with an application for review of the propriety of detention of children (the applicants) at the Limbe Police Station. The Court stated that section 23 of the Constitution demands that any decision affecting a child considers the best interests and welfare of the child. Furthermore, the Court interpreted section 88 CCPJA as

⁹⁰ *Brian Shaba v Rep* (Criminal Appeal No. 19/2014) (High Court) (Mzuzu District Registry) (unreported).

⁹¹ *ibid* [2.24].

⁹² *ibid* [1.6].

⁹³ *Joshua Chisa Mbele v Rep* (Misc. Criminal Case No. 04/2022) (High Court) (Lilongwe District Registry) (Criminal Division) (unreported).

⁹⁴ *ibid* [28].

⁹⁵ *Re Children in Detention at Bvumbwe and Kachere Prisons* (Review Case No. 21/2017) (High Court) (Principal Registry) (unreported).

⁹⁶ *ibid* 2.

⁹⁷ *FK and 7 others v Rep* (Miscellaneous Criminal Review Case No. 5/2021) (High Court) (Principal Registry) (unreported).



requiring the courts dealing with child offenders to regard the child's best interests or welfare. Regarding article 3 UNCRC, the Court held that that article makes the child's best interests a primary consideration in all actions concerning children and that it requires States Parties to ensure their care and protection.⁹⁸ Summarising those provisions as all requiring courts to uphold the best interests and welfare of the children brought before them, Justice Chirwa stated that the courts must take necessary steps to ensure that the children are removed from undesirable environments or surroundings and have them placed in suitable environments or surroundings which would allow them access to education, nutrition and training.⁹⁹

The Court found that, in ordering the applicants' detention in police custody, the lower court failed to consider their welfare and be satisfied that such a place of detention was in the best interests of the applicants as children, such as bedding, adequate nutrition, and recreation.¹⁰⁰ Therefore, the Court held that the applicants' detention breached section 23(1) of the Constitution, section 88 CCPJA and article 3 UNCRC.

4.5. The Child's Best Interests in Bail Applications

In bail determinations, the child's best interest's principle has been applied either directly to children as applicants themselves or indirectly where they are connected to adult applicants, particularly in a mother-child relationship.

The Bail (Guidelines) Act details guidelines for granting bail in criminal cases.¹⁰¹ Nevertheless, in relation to bail applications by or consideration for children, the provisions of the CCPJA precede the Bail (Guidelines) Act.¹⁰² Thus, in *Mpeketula v Rep*, having considered that in issues concerning children, the primary consideration should always be the best interest of the child, Justice Kalembera opined, 'regard being had, to all the other relevant considerations, what is in the best interest of the applicant? Is it in his best interest to continue his detention until trial?'¹⁰³ Convinced that 'the best way of dealing with the applicant and safeguarding his best interests', was to avoid further detention, the Court granted him bail.¹⁰⁴

⁹⁸ *ibid* 7.

⁹⁹ *ibid* 7-8.

¹⁰⁰ *ibid* 8.

¹⁰¹ Long title, Bail (Guidelines) Act.

¹⁰² S 98(3) CCPJA.

¹⁰³ *Joel Mpeketula v Rep* [2012] 216, 220.

¹⁰⁴ *ibid* 221.



In *Dickson and Another v Rep*¹⁰⁵, the High Court held that one compelling factor for granting bail was the plight of the baby who was in custody with the applicant as her mother and, that the best interests of the child required that the mother be released on bail.¹⁰⁶ Similarly, in *Alasoni v Rep*¹⁰⁷, in determining whether to grant bail pending confirmation of sentence, Justice Kapindu stated that considering the best interests of the applicant's child who was with her in prison, the applicant had to be released on bail.¹⁰⁸

4.6. Imprisonment of Women with Dependent Children

The courts in Malawi have also resorted to the best interests of the child principle in sentencing women with dependent children. In particular, the principle has been central in ensuring that the imprisonment of women with their children must always be the last resort for any court.¹⁰⁹ In *E.L (Female) v Rep*¹¹⁰, the High Court held that imprisonment of the appellant (a woman) with her fourteen-month child was not the best option. Justice Zion Ntaba stated that in all cases where the rights of a child are to be affected, the courts must weigh in the best interests of the child.¹¹¹ The Judge further observed that the principle has always been upheld by the courts in Malawi.¹¹²

4.7. Adoption Proceedings and the Best Interests of the Child

In terms of the interpretation and application of the best interests of the child in adoption matters, Justice Mwale's two decisions of the High Court, namely, *In re: Adoption of P.S.*¹¹³ and *In re: Adoption of K.A.Z.*¹¹⁴ contain interesting jurisprudence. It is for this reason that this section, while also presenting other cases, focuses on the said two cases.

4.7.1. In re: the Adoption of Children Act and P.S. (a male infant)

4.7.1.1. 'Welfare of the infant' in the Adoption of Children Act same as 'best interests of the child'

¹⁰⁵ *Neziyasi Dickson and Another v Rep* (Misc. Criminal Case No. 107/2007(High Court) (Lilongwe District Registry) (unreported).

¹⁰⁶ As cited in *E.L (Female) v Rep* (Criminal Case No. 36/2016) (High Court) (Zomba District Registry) (unreported) [2.25].

¹⁰⁷ *Rhoda Alasoni v Rep* (Misc. Criminal Application No. 72/2015) (High Court) (Zomba District Registry) (unreported).

¹⁰⁸ As cited in *E.L (Female) v Rep* (n 103) [2.25].

¹⁰⁹ *E.L (Female) v Rep* (n 103). Also see: *Rep v Ndalakwanji Victor* (Criminal Review Case No. 2/2020) (High Court) (Zomba District Registry) (unreported).

¹¹⁰ *E.L (Female) v Rep* (n 109).

¹¹¹ *ibid* [2.25].

¹¹² *ibid* [2.25] and [4.24].

¹¹³ *In re: the Adoption of P.S.* (n 39).

¹¹⁴ *In the Matter of the Adoption of K.A.Z. (a Male Infant) and In the Matter of a Petition for the Adoption of the said K.A.Z (a Male Infant) by A.D.F.M.E.M.D.R.* (Adoption Cause No. 13/2022) (High Court) (Lilongwe District Registry) (Family and Probate Division) (unreported).



In *In re: Adoption of P.S.*, in the Court's determination of an inter-country adoption application before it, Justice Mwale considered the "welfare" of the child in relation to section 4(b) Adoption of Children Act. The Judge observed that the Adoption of Children Act contains no definition of the term "welfare". Hence, the Court adopted the practice of the courts of referring to the UNCRC and the ACRWC with an understanding that these instruments "break the welfare of the infant down to the principle of the 'best interests of the child'."¹¹⁵ For instance, in *Re: CJ*, the Supreme Court of Appeal held:

*[W]hether you talk about the best interest of the child as is the case in the ... Conventions or you talk about the welfare of the child as is contained in the [Adoption of Children] Act, this really is a question of semantics or nomenclature. They mean the same thing, and it is this; a court of law dealing with the adoption of an infant must pay attention at all times that the welfare of the child is not compromised by secondary issues.*¹¹⁶

4.7.1.2. Nine considerations as factors in the determination of the best interests of the child in adoption applications

Now proceeding with the *In re: Adoption of P.S.*, the High Court, having adopted that practice, observed that there is no standard definition of "the best interests of the child." However, according to the Court, the cumulative effect of the UNCRC and ACRWC provisions is to direct the deliberations that courts embark on 'when deciding what type of services, actions and orders will best serve a child as well as who is best suited to take care of a child.'¹¹⁷ Therefore, the Court "relied" on the two instruments, to "distil" the following nine non-exhaustive considerations in the determination of the child's best interests in adoption application: 1) the importance of family integrity and preference for avoiding removal of the child from his/her home; 2) the health, safety, and/or protection of the child; 3) the absence of domestic violence or criminal activity in the home; 4) the assurance that a child removed from his/her home will be given care, treatment, and guidance that will assist the child in developing into a sufficient adult; 5) the emotional ties and relationships to be established between the child and his/her prospective adoptive parents, siblings, family and household members, or other caregivers; 6) the capacity of the prospective adoptive parents to provide a safe home and adequate food, clothing, and medical care; 7) the mental and physical health needs of the child; 8) the mental and physical

¹¹⁵ *In re: Adoption of P.S.* (n 39) 188.

¹¹⁶ *Re: CJ* (n 39) 231.

¹¹⁷ *In re: Adoption of P.S.* (n 39) 188.



health of the prospective adoptive parents; and 9) the importance of timely permanence decisions.¹¹⁸

4.7.2. In the Matter of the Adoption of K.A.Z.

4.7.2.1. Case background

The petitioner, a foreign national and resident in a foreign country, filed, in the High Court, a petition for the adoption of K.A.Z., a male infant. The infant's mother died in childbirth, and the infant was under the care of health workers until his placement at a childcare institution (i.e., orphanage). The infant's father, still alive, relinquished parental responsibility over the infant and gave consent for the adoption.

According to a Guardian *ad litem* ('GAL') Report, the petitioner was a bachelor who had never married. The petitioner had just flown in Malawi two days before but lied to the Court about the length of time he had been in the country. The GAL expressed doubts as to the petitioner's ability to provide care as well as his intentions.

Before the date of the second hearing and on the said date, the infant's biological father indicated his intention to revoke his earlier consent for adoption, stating his willingness to withdraw the infant from the orphanage and to, therefore, take care of the infant himself until a family consisting of a married couple was identified.

Among others, the following four issues were addressed by the Court: (a) whether the status quo in which a non-resident petitioner who is not in the country in *itinere* permits the courts adequate opportunity to assess whether the adoption would be in the best interest of the child; (b) whether and under what circumstances a biological parent can withdraw consent; (c) whether the courts can issue a direction as to whether single male applicants should be allowed to adopt or make recommendations on the requirements in such matters, as had been requested by the GAL; and (d) what is the role of a GAL in adoption proceedings?¹¹⁹

4.7.2.2. Ascertainment of the child's best interests in adoption matters vis-à-vis Guardian ad litem duties; and adoption parental consent withdraw

In ascertaining the welfare of the infant, as required under section 4(b) Adoption of Children Act, the Court affirmed that the guiding principle is whether an adoption order will be in the child's best interests.¹²⁰ Much as family care is the ideal care situation for any infant, prospective

¹¹⁸ *ibid* 182; 189-193.

¹¹⁹ *In re: Adoption of K.A.Z* (n 114) [32 (32.1, 32.2, 32.4 and 32.5)].

¹²⁰ *ibid* [113].



family must be one that has gone through the best assessment possible to assist the court determine whether that adoption is in the child's best interests.¹²¹

The Court stated that the GAL's primary role is to ensure that any care decisions and arrangements for and about children protect them, promote their welfare and are in their best interests. Faced with evidence proffered by the GAL, the court must scrutinise it; all the while prioritise the best interests of the child as a paramount consideration.¹²² With that reasoning, considering that the GAL lacked a sufficient opportunity to be satisfied with the petitioner's parenting abilities, it was the view of the Court that while it was not possible to see into the future, it would not be in the best interests of the child to make permanent decisions in the face of lingering doubts.¹²³

The Court held that though full, freely given consent, based on knowledge of all relevant facts, can be withdrawn at any stage before a final order, it cannot be arbitrarily withdrawn; whether the court will allow such consent to be withdrawn depends on the welfare and best interests of the child as a primary concern.¹²⁴ On that understanding, the Court stated that once biological parents have relinquished a child for adoption, the screening process of the prospective adoptive parents for that child must consider any legitimate wishes of the biological parents, "subject only to the [child's] best interests."¹²⁵ Therefore, the Court stated, following the biological parents' relinquishment of the infant, religion was the only precondition binding on the Department of Social Welfare in finding prospective parents for the infant; anything else, such as marital status or other factors preferences, might be respected but the department would not be bound by them if the best interests of the child require otherwise.¹²⁶

4.7.2.3. Construing the legal requirement of 'residence' in the best interests of the child

Examining the domestic jurisprudence on the legal requirement of "residence" under section 3(5) Adoption of Children Act, focusing on the Supreme Court of Appeal interpretation of the same in *Re: CJ*, the High Court observed that, based on that decision, petitioners fly into Malawi

¹²¹ *ibid* [119].

¹²² *ibid* [36].

¹²³ *ibid* [38].

¹²⁴ *ibid* [57 and 63].

¹²⁵ *ibid* [61].

¹²⁶ *ibid* [62]. Note: The Court arrived at this conclusion after its earlier observation that the right to religion of the child is only one of the rights that is protected in international law as binding on birth parents in accordance with wishes of biological parents. In particular, the Court cited Articles 5 and 14 UNCRC: [60].



with proved intention of adopting in the country and manage to prove some links to Malawi, the courts have on a case by case basis granted adoption orders in their favour.¹²⁷

Distinguishing *Re: CJ*, the High Court highlighted, inter alia, that the case before it was the first case in which GAL recommended that the Court exercised caution as he was not satisfied that the petitioner's intentions were in the best interests of the infant.¹²⁸ According to the Court, facts of the case prompted it to reflect again on the mischief behind the statutory requirement of resident, due regard to that the best interests of the child refer to not only decisions but also to decision making processes. Based on the *Re: CJ* reasoning to the effect that the requirement of residence under section 3(5) Adoption of Children Act was never intended to arbitrarily impede adoption, but as 'a beacon of protection and safety against unscrupulous aliens and therefore goes to enhance the welfare of the infant', the High Court stated that championing children's rights by that reasoning required the Court to consider whether processes the court takes to ensure the safety and protection of the child, are in themselves in the best interests of the child.¹²⁹

The High Court stated that adequate investigation enables a court to determine whether a sought adoption is in the child's best interests. The absence of adequate investigation is a sufficient basis to refuse to grant an adoption order; it is not the basis for granting an interim order.¹³⁰ Hence, prospective parents committed to adopting a child in Malawi must reside in the country long enough to enable observation to 'ensure that the courts can confirm whether the adoption is in the child's best interests or not.'¹³¹ The child's best interests must be the paramount consideration in both the substantive decision itself and the processes enabling such a decision to be made. Therefore, to avoid the danger of a case-by-case approach to determination of prospective parents' level of connection, a post-filing residence requirement as a practical measure to safeguard the best interests of a child must be seriously considered.¹³²

¹²⁷ *ibid* [71-72].

¹²⁸ *ibid* [76].

¹²⁹ *ibid* [77].

¹³⁰ *ibid* [97].

¹³¹ *ibid* [99].

¹³² *ibid* [100].



4.7.3. The best interests of the child in adoption matters as construed and applied in 'other cases'

In the Matter of AB,¹³³ the High Court, noting serious irregularities, holding that it would only be in the best interests of the child, dismissed *ex parte* summons for abridgement of time within which to hear adoption petition. Similarly, the Court ordered that the petition filed before its registry, a similar petition having been filed in another registry, be struck out from the cause list for being an abuse of the court process.¹³⁴

In the Matter of FW,¹³⁵ the petitioners, husband and wife, jointly filed a petition to adopt FW. In granting them an adoption order, the Court, having regard to the provisions of sections 2 to 4 Adoption of Children Act, found, among others, that it would be in FW's best interest that she be adopted by the petitioners because she would be under the care of her direct relations.¹³⁶

4.8. An Appraisal of the Courts' Interpretation and Application of the Best Interests of the Child

The domestic case law shows that the principle has been applied to a broad range of matters, in line with the General Comment No. 14 recommendations. The best interests of the child has been applied to criminal matters in respect of children in conflict with the law, as witnesses or victims, as well as children concerned with the situation of their parents like in bail applications of mothers with dependent children. In civil matters, the courts have applied the principle where children were affected by trial in cases such as adoption, custody, judicial separation decree, etc. Furthermore, the principle has been applied to show its supremacy over customary law practices detrimental to their best interests. Above all, the court's application of the principle has covered its substantive, interpretive and procedural aspects. Therefore, the courts have generally appropriately and consistently applied the principle in various judicial proceedings.

It is in relation to the interpretation of the child's best interests that the courts have not appropriately and consistently considered the principle. For custody matters, the courts have not consistently departed from the 'welfare, happiness and interest of the child' principle to appropriately adopt the post-CCPJA enactment and Constitutional Amendment No. 11 of 2011 'best interests of the child' which has been comprehensively explained by, among others, the

¹³³ *In the Matter of Adoption of AB (a Male Minor) and In the Matter of the Petition by DS for the Adoption of the said AB* (Adoption Cause No. 2/2017) (High Court) (Principal Registry).

¹³⁴ *ibid* 4.

¹³⁵ *In the Matter of the Adoption of Children Act and In the Matter of FW (Female Minor)* (Adoption Cause No. 10/2020) (High Court) (Lilongwe District Registry) (unreported).

¹³⁶ *ibid* [10(e)].



CRC Committee. In *Makoka v Makoka*¹³⁷ and *Almeida v Almeida*¹³⁸, disregarding the factors in the child's best interest determinations as outlined in the CCPJA Third Schedule, the courts proceeded with the wrong understanding that the principle is not explained in the Act. However, the courts' interpretations of the principle were not the same. On the one hand, in *Makoka v Makoka*, the Court proceeded to interpret the child's best interests according to the Children Act of South Africa, which is not applicable in Malawi. On the other hand, in *Almeida v Almeida*, the Court rightly sought guidance from the CRC Committee General Comment No. 14.

In *In re P.S.*, the Court attempted to demystify the principle by outlining nine considerations in determining the child's best interests, particularly in adoption applications. The Judge indicated to have "relied" on the UNCRC and ACRWC to "distil" the nine considerations. However, it is with respect to only the first consideration that further analysis of the considerations really refers to the provisions of the instruments. On that first consideration, the Court referred to article 21(b) UNCRC to highlight that, in contrast to section 2 of the Adoption of Children Act, the UNCRC requires a hierarchal preference for inter-country adoption as a last resort.¹³⁹ In essence, therefore, the Court used the provisions of the Adoption of Children Act, and not the UNCRC provisions, to support the first factor. As for the other factors, without any reference to the provisions of the UNCRC and the ACRWC, the Court's judgment falls short of justifying its alleged reliance on and distilling of the best interests of the child considerations from the two instruments in adoption proceedings. To ensure appropriate and consistent interpretation of the child's best interests, the Court should have connected the nine considerations to the factors as outlined in the CCPJA Third Schedule, as well as the considerations in the CRC Committee General Comment No. 14.

There is, however, consistency and appropriateness in the courts' interpretation of the child's best interests by encompassing its substantive and procedural aspects. *In re: Adoption of K.A.Z.*¹⁴⁰ the Court underscored that the child's best interests should be the paramount consideration in both the substantive decision itself and the processes enabling such a decision to be made. Also, *In the Matter of AB*,¹⁴¹ the Court dismissed *ex parte* summons in the best interests of the child.

¹³⁷ *Makoka v Makoka* (n 74).

¹³⁸ *Almeida v Almeida* (n 65).

¹³⁹ *In re: adoption P.S.* (n 39) 190.

¹⁴⁰ *In re: Adoption of K.A.Z* (n 114).

¹⁴¹ *In the Matter of AB* (n 133).



5. Conclusions

The principle of the child's best interests has been largely appropriately considered in the domestic law in Malawi. There is diversity in both the statutory provisions as well as the courts' interpretation and application of the child's best interests. The domestic legislative framework generally appropriately and consistently integrates the principle. The Constitution, CCPJA and other statutes expressly provide for the principle in relation to various matters. Nevertheless, the legislative framework must still integrate the best interests of the child with other various issues impacting children, such as adoption, education and health.

In terms of domestic case law, while the application part of the principle has been mostly appropriate and consistent, the interpretation of the principle has not been that appropriate and consistent. Application of the principle has extended to various matters, both civil and criminal, directly and indirectly concerning children. In interpreting the principle, the courts have not been guided by the factors as outlined in the CCPJA Third Schedule. Moreover, there has been less reference to the guidance provided by the CRC Committee on the understanding of the principle in General Comment No. 14. Nevertheless, the courts' recognition of the flexibility and adaptability of the child's best interests has enabled them to interpret the principle in such a manner as to cover several child-related matters before them.

All in all, perhaps more focus should be on the expressions by the ACERWC. It must be noted with appreciation that the 'best interests of the child' has been incorporated in the Constitution and that laws have been adopted to ensure the protection of the child's best interests in the justice system. As such, the State party's measures should concentrate on funding, training, and awareness to ensure effective implementation of the principle.



References:

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