

Alternative report presented to the attention of the Committee on the Rights of the Children in its 77 session:

THE ASSESSMENT AND DETERMINATION OF THE BEST INTERESTS OF THE CHILD IN THE SPANISH CRIMINAL, ADMINISTRATIVE AND CIVIL COURTS

Spain

Convention on the rights of the child (article 3, paragraph 1)

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Report in Spanish:

La evaluación y determinación del interés superior del niño en la jurisprudencia española de carácter penal, administrativa y civil

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INTRODUCTION

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This report is one of the results of the research project "*El interés superior del niño como derecho, principio y regla de procedimiento: la adaptación del derecho español y europeo: análisis de jurisprudencia*" DER 2013-47866-C3-2-P, Ministry of Economy and Competitiveness, Spanish Government, led by Professor Susana Sanz-Caballero. The researchers involved in the drafting of the report are Mar Molina, Elena Juaristi, Beatriz Hermida and Elena Goñi. The report evidences the need for Spanish judges to become acquainted with the content of the General Comment No. 14 of the Committee on the Rights of the Children, regardless of their jurisdiction order. The report also shows the need for certain changes in the Spanish judicial structure, for judicial proceedings concerning children to be expedited, and for the children involved in the proceedings to be interviewed, so as to better meet the best interests of the child.

THE ASSESSMENT AND DETERMINATION OF THE BEST INTERESTS OF CHILDREN IN CONFLICT WITH THE LAW

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CURRENT SITUATION

The Convention on the Rights of the Child of 1989 states, in article 3, paragraph 1, that: "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." In 2013, the United Nations' Committee on the Rights of the Child (henceforth "the Committee") issued General Comment No. 14, on the right of the child to have his or her best interests taken as a primary consideration, henceforth GC14.

PROGRESS

In Spain, the best interests of the child (BIC) are of particular importance with regard to criminal law concerning minors, where these interests constitute an organizing principle for the system. Thus, the Preliminary Recital of Organic Law 5/2000 of 12th January, on the Regulation of the Criminal Responsibility of Minors, states that “in criminal law concerning minors, the best interests of the child must be the determining factor in the proceedings and any measures which are taken. This interest must be assessed according to technical rather than formal criteria by teams of specialized professionals from non-legal scientific fields.”

In order to examine how the Spanish courts assess the BIC when deciding upon measures to be imposed on minors who are in conflict with the law, fifty judgments, issued between January 2000 and June 2015, have been closely studied.

The result of this shows that on many occasions the BIC is not a primary consideration and that not even half of these judgments (42%) seek to justify and make clear the grounds upon which the measures taken have been chosen.

With regard to the assessment and determination of the BIC and the recommendations of GC14, the majority of these judgments do not follow the Committee’s recommendations, neither with regard to the procedural guarantees called for by the GC14 when a decision is taken which affects a child, nor as to the considerations which must be taken into account and duly deliberated on when such a decision is taken.

RECOMMENDATIONS

1. Improvements could be made with regard to these issues if GC14 were more widely publicized. There is very wide variation in the assessment and determination of the BIC amongst the different courts. This should not be the case, as all judges should take the same factors into account for this assessment and use the same criteria when deliberating on the measures to be taken, regardless of the specific importance each factor may have within the individual circumstances of each child. It would be desirable for experts in this area to provide training to judges, prosecutors and those involved in psychological assessment, so that the GC14 recommendations are observed as far as possible and that the BIC are interpreted in a consistent fashion.

2. It is also our position that appeals made against judgments and rulings made by a *Juzgado de Menores* (youth court) should not be heard in an *Audiencia Provincial* (provincial court of appeals), but by a specific court to hear appeals involving children. Although this seems very ambitious, entailing the need to modify numerous laws, it would be the most effective way of providing better protection for children’s rights and of ensuring that the BIC is a primary consideration. We take this view because we have seen that the *Audiencias*

Provinciales often rule on such cases using the criteria of criminal law pertaining to adults, seeming to forget that the accused are adolescents, and that, where minors are concerned, re-education and rehabilitation are much more important than punishment. Moreover, the establishment of such courts would serve to reduce the excessive delay between appeal submissions and rulings on them. The latter is essential, as prompt intervention can provide enormous benefits for the adolescent and inappropriate precautionary measures, can be equally damaging.

THE ASSESSMENT AND DETERMINATION OF THE BEST INTERESTS OF THE CHILD IN THE CASE LAW OF THE SUPREME COURT'S CHAMBER FOR CONTENTIOUS ADMINISTRATIVE PROCEEDINGS

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CURRENT SITUATION

After the close study of the judgments issued by *the Sala de lo Contencioso-Administrativo del Tribunal Supremo* (Supreme Court's Chamber for Contentious Administrative Proceedings), from 2000 to the present day and which in some way concern the best interests of the child, understood as "*the right of to have his or her best interests [...] taken into account as a primary consideration in all actions or decisions that concern him or her*",¹ the following can be said:

1. During the period in question, the Supreme Court's Chamber for Contentious Administrative Proceedings has mentioned the best interests of the child (with phrases such as "interés del menor", "interés superior del menor" or the "interés superior del niño") in only eighteen judgments.² This demonstrates that the concept is little used (as a principle, as a subjective right, or a procedural rule).

¹ Article 3.1 of the Convention on the Rights of the Child: "*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.*"

Paragraph 1 of GC14 (2013) on the right of the child to have his or her best interests taken as a primary consideration: "*Article 3, paragraph 1, of the Convention on the Rights of the Child gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere.*"

² STS (Judgement of the Supreme Court) 3651/2015 of 21st July; STS 807/2015 of 10th February; STS 3186/2013 of 17th June; STS 8395/2012 of 28th November; STS 7397/2012 of 12th November; STS 5258/2012 of 24th July; STS 5491/2011 of 20th July; STS 5477/2011 of 19th July; STS 1860/2011 of 22nd March; STS 6084/2009 of 30th September; STS 1332/2009 of 3rd March; STS 488/2007 of 8th January; STS 8657/2006 of 27th December; STS 6826/2006 of 16th November; STS 7206/2006 of 10th November; 782/2007 of 10th January; STS 324/2005 of 26th January; STS 2485/2000 of 28th March.

2. In the vast majority of cases, the best interests of the child are mentioned by the Court either in passing or because the appellant cites legislation referring to them.
3. The cases in which the concept is superficially referred to concern (in order of frequency): educational matters, immigration, asylum, the criminal responsibility of minors, and fostering.
4. Few judgments spend much time considering the best interests of the child, weighing these against other interests or setting out valid criteria for the interpretation of this indeterminate legal concept.
5. None of the judgments refer to the Committee on the Rights of the Child's GC14 as a key text for the assessment and determination of these interests by means of objective criteria.
6. In the majority of cases the citing or referring to the best interests of the child has not necessarily led to the protection of these or their being considered of primary importance.
7. Law 29/1998, of 13th July, regulating the jurisdiction of contentious administrative proceedings, does not recognize the particular nature of proceedings affecting the interests of minors.

PROGRESS

The case law examined does not suggest that the Supreme Court is moving in a given direction with regard to the treatment of the best interests of the child. There is no pattern to the court's judgments in this sense.

RECOMMENDATIONS

1. Regarding those judgments which may directly or indirectly affect a minor, it should be mandatory for the Supreme Court to take into account the best interests of the child and explicitly make reference to this in the ruling in order to establish case law and set criteria for the interpretation and application of the concept.
2. The Supreme Court should take into account the Committee on the Rights of the Child's GC14 when assessing and determining the best interests of the child. This would provide objective criteria for this process and thereby prevent any arbitrary decisions.
3. The first two recommendations can be extended to all of the activities of the Supreme Court which may in some way affect the interests of minors.

4. Proceedings affecting the interests of minors should be expedited due to the different perception of time that children have and the fact that the decision adopted will directly or indirectly affect their future. Afterwards, it may be too late to revert certain consequences.

THE ASSESSMENT AND DETERMINATION OF THE BEST INTERESTS OF THE CHILD IN SURROGACY IN SPAIN

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CURRENT SITUATION

The fundamental problem of this issue is the fact that Spanish law has little to say about it. Only article 10 of Law 14/2006 on the Techniques of Assisted Human Reproduction touches on the issue. This article prohibits surrogacy in any form – commercial or altruistic – with surrogacy contracts being unenforceable; the surrogate mother is the mother for all legal purposes and the biological father may claim his parental rights via the appropriate legal channels.

This situation has caused certain more affluent Spanish citizens to travel to countries with more permissive legal systems which allow surrogacy agreements to be made. Problems occur when, having made such an agreement in a country where this is legal, the intended parents attempt to implement it in Spain by registering the children born abroad by means of surrogacy on the Spanish Civil Register, naming themselves as the parents.

The Spanish authorities' attitude in such situations has been inconsistent. Thus, the Supreme Court, in its Judgment of 6th February 2014, prohibited the direct registration children born via surrogacy, applying article 10 of the above-mentioned law. This is contradicted by the Instruction issued by the Directorate-General of Registries and Notaries of 5th October 2010, and the application of this was subsequently confirmed by the Circular from the same organization on 11th June 2014 (after the Supreme Court Judgment referred to above), making reference to the best interests of the child and the uncertain situation which children born in this way may find themselves in. The Instruction takes the view that Spanish law is inapplicable to such international cases and it lays down a series of directives for the direct registration of these children on the Civil Register, with the named parents being those whose names appear on the official document issued by the country in which the birth took place, ignoring the prohibition of article 10.

PROGRESS

There have been no recent modifications to the Law on the Techniques of Assisted Human Reproduction, but articles 44ff. of the more recent Law 20/2011 of 21st July on the Civil Register recognize the possibility that a mother may renounce parentage (*filación*) at the time of birth. There is a considerable amount of uncertainty surrounding the legal interpretation of this, as it might be seen as entailing a revolution in Spanish law on parentage: in particular, it raises the question of whether article 10 of Law 14/2006 on the Techniques of Assisted Human Reproduction has been tacitly abrogated, along with other articles of the Spanish legal framework which apply the axiom of *mater semper certa est*. These have until now prevented citizens from renouncing parentage, taking this to be a matter of public order which affects citizens' civil status, making it unrenounceable.

RECOMMENDATIONS

1. The latest Concluding Observations issued by the Committee on the Rights of the Child to the Spanish Government does not make any recommendation with regard to surrogacy in Spain. Therefore, we recommend that this issue be considered.
2. The Spanish State should clarify the interpretation of articles 44ff. of the Law 20/2011 of 21st July on the Civil Register, with regard to renouncing parentage.
3. The Spanish State should resolve the discrepancy between the Supreme Court and Directorate-General of Registries and Notaries with regard to surrogacy.
4. The Spanish State should clarify what the best interests of the child are in such cases.
5. The Spanish State should clarify its position with regard to the discrimination caused by the Instruction issued by the Directorate-General of Registries and Notaries, as it permits children born abroad via surrogacy to be registered while disregarding those born in Spain in this fashion.

ASSESSMENT AND DETERMINATION OF THE BEST INTERESTS OF THE CHILD IN JOINT CUSTODY CASES

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CURRENT SITUATION

At the present time, joint custody arrangements following the breakdown of a relationship are on the rise. According to the Spanish Statistical Office (INE), in 2015 joint custody was awarded in 24.7% of cases, as opposed to 21.2% in the

previous year.³ However, there has also been an increase in the number of appeals to the Spanish Supreme Court arguing that a joint custody arrangement was not in the best interests of the child.⁴

PROGRESS: REMARKS ON THE REPORT BY THE SPANISH STATE

It is true that, at the legislative level, respect for the child's views has been bolstered by the amendment to Article 9 of the Organic Law 1/1996 of 15th January on the Legal Protection of Minors, which states that the child is afforded the right to be heard without discrimination based on age, disability or any other circumstance, both within his or her family and in any administrative, judicial or mediation proceedings that affect him or her, and which may lead to a decision impacting upon his or her personal, family or social situation. The child's opinions shall be duly taken into account, in accordance with his or her age and level of maturity. To this end, he or she shall be provided with sufficient information to exercise this right, in a format suitable to the child's circumstances and in a language that is appropriate to his or her level of understanding.

However, it can be surmised from case law on joint custody cases that the Spanish Supreme Court and Provincial Courts rarely take into consideration interviews in which minors express their views and wishes. There can be only two reasons for this:

1. The minors are not interviewed. Spain is infringing Article 12 of the Convention on the Rights of the Child, as well as Article 9 of Organic Law 1/1996.

2. The minors are interviewed, but their views are not given due weight when deciding whether or not to award joint custody. Spain is infringing Article 2 of Organic Law 1/1996 ("All minors are afforded the right to have their best interests assessed and taken into account as a primary consideration"), as well as GC14 of the Committee.⁵

³ <http://www.ine.es/prensa/np990.pdf>

⁴ 45 court orders in 2016; 34 court orders in 2015; 28 court orders in 2014.

<http://www.poderjudicial.es/search/indexAN.jsp>

⁵ Examples of both cases can be found. For example, a court order issued by the Spanish Supreme Court on 14th September 2016: "the minor was not interviewed in view of the fact that neither of his parents requested this"; a court order issued by the Spanish Supreme Court on 14th September 2016: "Due to the fact that the minors are five and eight years old, the Court determines that only the eldest shall be interviewed"; a court order issued by the Spanish Supreme Court on 6th July 2016: "despite the minor having expressed her unawareness of her parents' conflict and her wish for everything to continue as before, it must be noted that the child was seven years old at the time of the interview"; a court order issued by the Spanish Supreme Court on 22nd June 2016: allocation of custody to the mother was maintained, "disregarding the wishes of the eldest son, who in his interview expressed his wish to see his father more." It should be noted that appeals to the Supreme Court are only possible when the judge has failed to apply the principle of the best interests of the child correctly, and that this was not the case, given that the mother's qualities and the compatibility of her work schedule as opposed to the father's had been assessed. However, the views of the child were not taken into account at all.

RECOMMENDATIONS

The views of minors cannot be the determining factor when deciding whether or not to award joint custody, as they may not be compatible with the protection of their best interests. However, this does not mean that they should not be taken into consideration.

If Organic Law 1/1996, the Convention on the Rights of the Child and GC14 are to be upheld, any court decision regarding joint custody should give due consideration to interviews with the minors in question.