

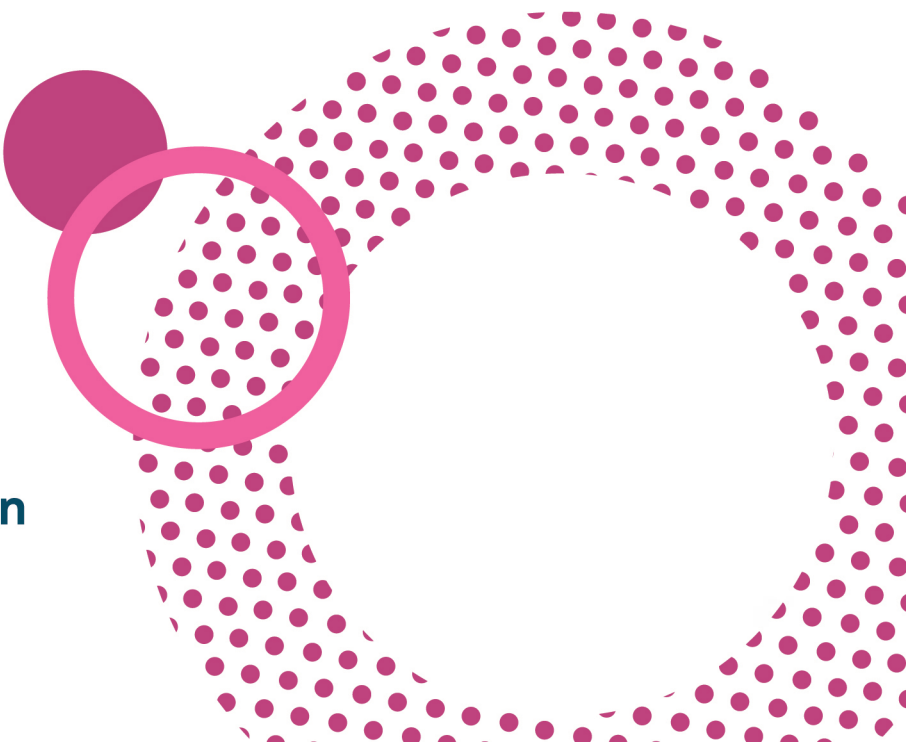


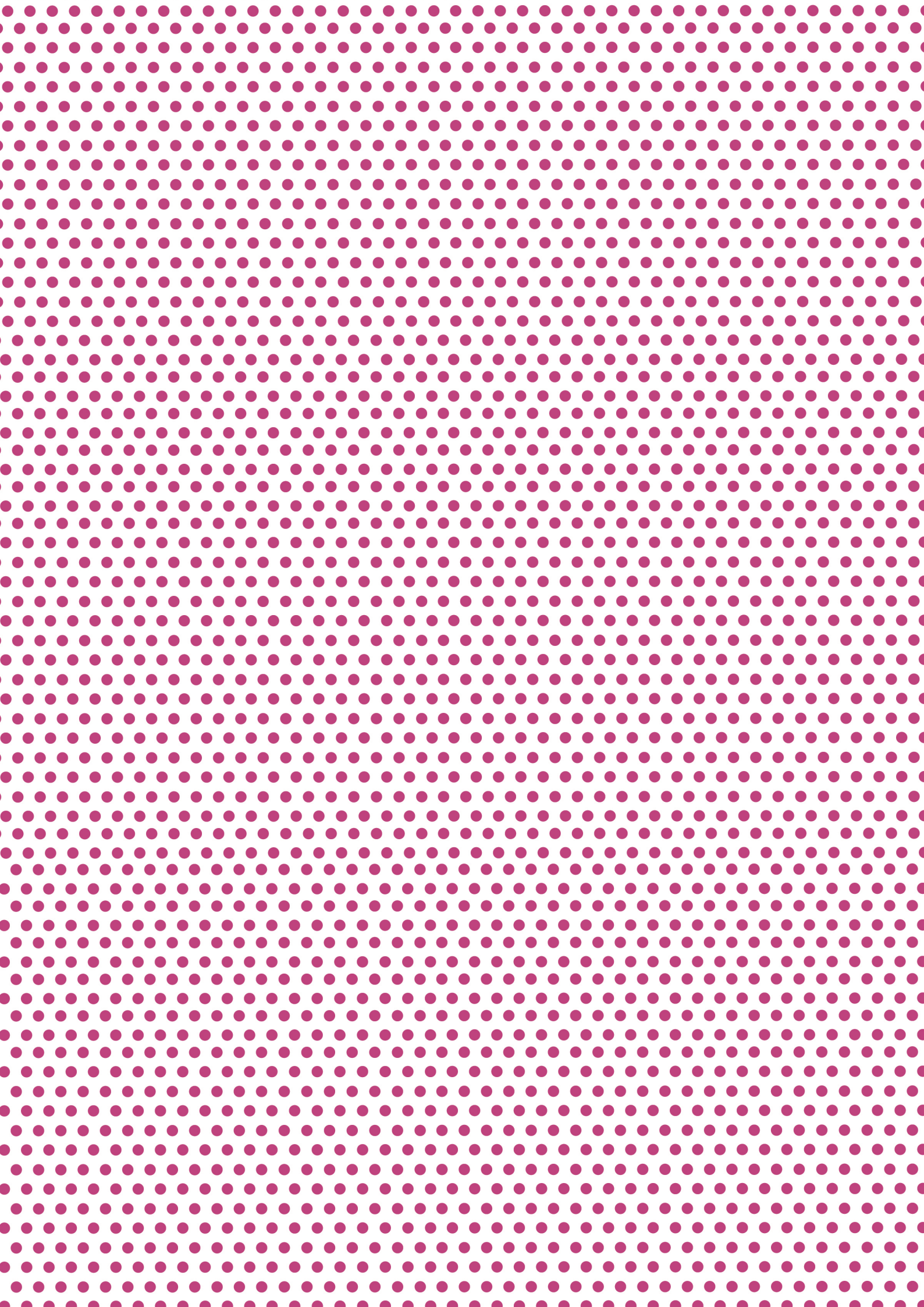
Children's Rights in Brief

#2 Best Interests of the Child



ombudsman
do leanaí
for children





Introduction

The Ombudsman for Children's Office (OCO) is an independent statutory body, which was established in 2004 under the Ombudsman for Children Act 2002 (2002 Act). Under the 2002 Act, as amended, the OCO has two core statutory functions:

- to promote the rights and welfare of children up to 18 years of age; and
- to examine and investigate complaints made by or for children about the administrative actions of public bodies, schools and voluntary hospitals that have, or may have, adversely affected a child.

This briefing is second in a series that the OCO is producing to raise awareness of children's rights under the United Nations Convention on the Rights of the Child (UNCRC).¹ We are creating this series in line with our duties:

- to encourage public bodies to develop policies, practices and procedures designed to promote the rights and welfare of children (section 7(1)(b) of the 2002 Act); and
- to collect and disseminate information on matters relating to children's rights and welfare (section 7(1)(c) of the 2002 Act).²

Three Takeaways

1. The best interests of the child is one of the four general principles of the UNCRC. The UN Committee on the Rights of the Child has identified upholding children's best interests as vital to ensuring children's full and effective enjoyment of all their rights under the UNCRC.
2. The State is obliged to ensure that the best interests of the child are treated as a primary consideration in all actions affecting children, including actions taken by public authorities, including the courts, and the private sector.
3. Under [Article 42A.4.1°](#) of the Constitution of Ireland, laws must be adopted that require proceedings relating to child protection and care, adoption, guardianship, custody and access, to treat the child's best interests as the paramount consideration.

1 Please refer to Children's Rights in Brief #1, the UN Convention on the Rights of the Child, for information on Ireland's overall children's rights obligations.

2 This briefing, and other briefings in this series, provide information on children's rights under the UNCRC. The briefings are not legal advice and should not be understood as legal advice.

The best interests of the child as a right of the child

Article 3 of the UNCRC states that every child has the right to have their best interests treated as a primary consideration in all actions concerning them. The UN Committee on the Rights of the Child (the Committee) has identified Article 3 as one of the [four general principles](#) of the UNCRC. As such, the Committee has advised that upholding children's best interests is vital to ensuring children's full and effective enjoyment of all their rights under the UNCRC. This means that children's best interests need to be considered when interpreting and implementing children's other rights.

The UNCRC also refers to the best interests of the child in other articles of the UNCRC:

- **Article 9** on separation from parents;
- **Article 10** on family reunification;
- **Article 18** on parental responsibilities;
- **Article 20** on deprivation of family environment;
- **Article 21** on adoption;
- **Article 37** on separation from adults in detention; and
- **Article 40** on juvenile justice.

Article 21 on adoption says that States should make sure that children's best interests are the paramount consideration.

What the best interests of the child means

Key concepts

The Committee has prepared a [General Comment](#), which provides guidance about how to interpret the best interests of the child and how to apply it in practice.

The Committee notes that “best interests” is a complex, yet dynamic, concept that needs to be determined on a case-by-case basis. Broadly speaking, it describes the well-being of a child. The best interests of the child is determined by a variety of individual circumstances, such as the child's age and level of maturity, the presence or absence of their parents, and their environment, experiences and needs.

The term “children” refers to individual children as well as a group of children or children in general. According to the Committee, this means the best interests of the child should be assessed on a case-by-case basis when a decision relates to an individual child. Actions that concern a group of children or children in general need to consider the best interests of those children.

The phrase “primary consideration” places a high priority on children’s best interests: their best interests should not be treated as just one of several considerations.³ According to the Committee, greater weight must be placed on what serves the child or children best. This is justified by the special situation of children: due to their dependency, stage of development, legal status and potential voicelessness, children have less possibility than adults to make a strong case for their own interests.

Three dimensions

The Committee has clarified that children’s right to have their best interests treated as a primary consideration has three dimensions:

- **A substantive right:** It entitles an individual child, a specific group of children or children in general to have their best interests treated as a primary consideration when different interests are being considered in order to reach a decision on an issue. Under Article 3, States are obliged to ensure that the best interests of the child are taken into consideration and applied by all public authorities, including the courts, and the private sector.
- **A fundamental interpretative legal principle:** If a legal provision is open to more than one interpretation, the interpretation that most effectively serves the child’s best interests should be chosen.
- **A rule of procedure:** When a decision is being made that will affect a specific child, a group of children or children in general, the decision-making process needs to include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. The practice of assessing and determining the child’s best interests needs to be guided by procedural rules to ensure the right is applied correctly. Examples of such procedural rules include:
 - informing children about the process and seeking their views;
 - putting in place a child-friendly assessment process, where assessments are carried out by qualified professionals;
 - prioritising decisions involving children to avoid prolonged delays;
 - providing legal representation for a child or children;
 - having a process in place for children and/or their representatives to request a review of a decision; and
 - providing information to clarify how a child or children’s best interests have been taken into account.

³ Ziba Vaghri, Jean Zermatten, Gerison Lansdown, Roberta Ruggiero (2022), [Monitoring State Compliance with the UN Convention on the Rights of the Child, An Analysis of Attributes](#).

Implementing the best interests of the child

Having ratified the UNCRC, Ireland is obliged under international law to respect and pursue all necessary measures to implement children's right to have their best interests assessed and treated as a primary consideration. As it currently stands, the best interests of the child has been incorporated into aspects of Irish law and policy.

Examples of Irish laws and policies relating to the best interests of the child

- [Article 42A.4.1°](#) of the Irish Constitution partially incorporates the best interests of the child principle into Irish law. It requires the State to introduce legislation to ensure that the best interests of the child is the paramount consideration in proceedings relating to child protection and care, adoption, guardianship, custody and access.
- The [Adoption Act 2010](#), as amended, and the [Guardianship of Infants Act 1964](#), as amended, require the best interests of the child to be the paramount consideration in cases about adoption, guardianship, custody and access. These laws include a list of factors that the relevant court or State body must consider when deciding what is in the best interests of the child in these cases.
- The UNCRC forms the basis for the vision set out in [Young Ireland: The National Policy Framework for Children and Young People 2023 – 2028](#). The best interests of the child is identified as one of the core principles of the UNCRC.
- [Children First: National Guidance for the Protection and Welfare of Children](#) identifies the best interests of the child as one of the key principles that inform both Government policy and best practice for those dealing with children. It also sets out that one of Tusla's key functions is to ensure that the best interests of the child guide all decisions affecting individual children.
- The [HSE National Consent Policy](#) outlines the steps that healthcare professionals must take to assess the best interests of the child if a child refuses medical treatment.

Core obligations

Under Article 3 of the UNCRC, the State has three obligations:

- an obligation to ensure that State institutions (e.g. Government departments and State agencies) consider, integrate and apply children's best interests in all actions they take, which concern children;
- an obligation to ensure that all judicial and administrative decisions concerning children demonstrate that children's best interests have been actively considered and taken into account as a primary consideration; and
- an obligation to ensure that the private sector treats the child's or children's best interests as a primary consideration in decisions and actions affecting children.

The Committee has also advised that ensuring children's best interests are a primary consideration in developing and implementing legislation and policy concerning children should involve undertaking child rights impact assessments (CRIA). The purpose of CRIA is to consider the likely impact of a proposed decision or course of action (e.g. a proposed law, policy or budgetary allocation) on children and their rights. Similarly, child rights impact evaluations (CRIE) should be undertaken to evaluate the actual impact of a particular decision or course of action on children and their rights.⁴

Recommendations to Ireland by the UN Committee on the Rights of the Child in 2023

As part of its periodic examination of Ireland's progress with implementing the UNCRC, the Committee recommended in its [Concluding Observations](#) in February 2023 that the State should:

- ensure that the best interests of the child principle is consistently applied in all programmes and legislative, administrative and judicial proceedings involving children; and
- provide guidance to all relevant persons in authority for determining the best interests of the child and for giving those interests due weight as a primary consideration.

⁴ UN Committee on the Rights of the Child (2003), [General comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child](#), CRC/GC/2003/5, para. 45.

Assessing children's best interests

Deciding what is in a child's or children's best interests should start with assessing the specific circumstances that make the child or children concerned unique.

The Committee has suggested that decision-makers who are responsible for determining a child's best interests should draw up a non-exhaustive, non-hierarchical list of elements to assess a child's best interests.⁵ This applies to situations where the best interests of an individual child need to be determined and to situations where children's best interests as a group need to be considered. The Committee's non-exhaustive list of elements includes:

- the child's views;⁶
- the child's identity, including sex, sexual orientation, national origin, religion and beliefs, cultural identity, and personality;
- the child's family environment and maintaining family relationships;
- the child's care, protection and safety;
- the child's situation of vulnerability, which may include belonging to a minority group, having a disability, being a refugee or asylum seeker, or being a victim of abuse;
- the child's right to the highest attainable standard of health; and
- the child's right to education.

The Committee acknowledges that different elements in a best interests assessment may conflict with each other when considering a specific case. For example, preserving a child's relationship with their family may conflict with the need to protect a child from the risk of violence or abuse by their parents. In such situations, the Committee advises that elements need to be weighed against each other to find a solution that is in the best interests of the child or children concerned. The Committee underlines that, in weighing the various elements, it is important to bear in mind that the purpose of assessing and determining the child's best interests is to ensure the child's enjoyment of their rights under the UNCRC, and the child's holistic development.

⁵ This applies to an individual child as well to a specific group of children or children in general.

⁶ In its [General comment No. 12 on the right of the child to be heard](#), the Committee states that decision-makers should give children the opportunity to express their views on the issues concerning them. The child's views should then be given due weight, according to their age and maturity, when assessing and determining what is in the child's best interests.

Decisions by the UN Committee on the Rights of the Child about the best interests of the child

Ireland ratified the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OPIC) in 2014. The OPIC allows children or a representative to submit an individual communication to the Committee with a claim that the State has violated any of the child's rights under the UNCRC.

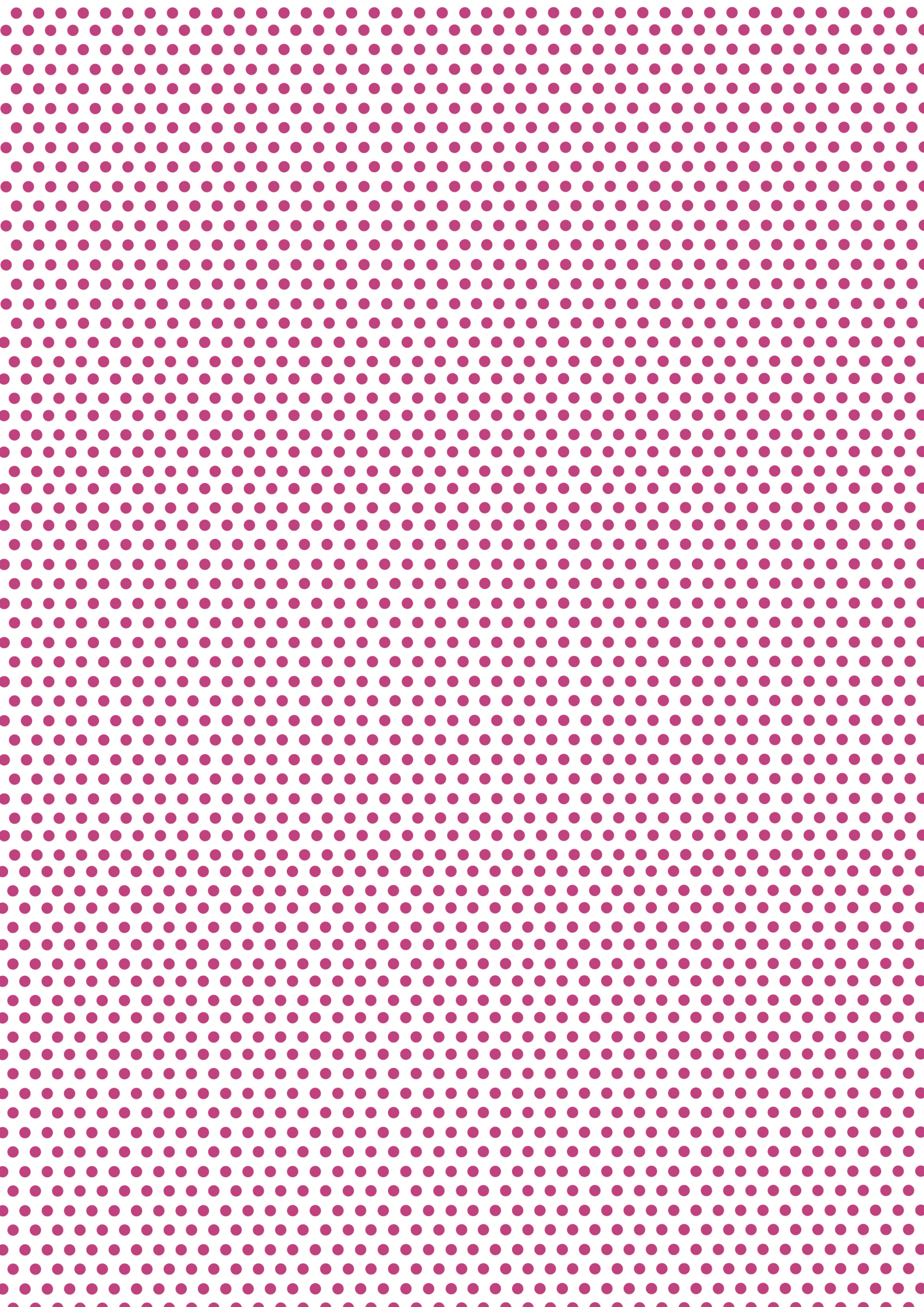
The Committee's decisions on individual communications about the best interests of the child include:

- In [I.A.M. v. Denmark](#), the Committee decided in 2018 that Denmark's decision to deport a child to Somalia without considering the child's best interests when assessing the risk that the child would be subjected to female genital mutilation on return violated Article 3 of the UNCRC.
- In [N.B.F. v. Spain](#), the Committee decided in 2018 that Spain failed to consider the best interests of separated children as a primary consideration when determining the children's age, due to using medical examinations as the only method to determine age and the absence of a representative to assist the children in the process.
- In [B.J. and P.J. v. the Czech Republic](#), the Committee decided in 2023 that the Czech Republic failed to consider the best interests of the child by deciding to remove two children from their home and place them in institutional care, without assessing:
 - other consequences of separation from their mother;
 - whether measures adopted before separation regarded children's best interests as a primary consideration; and
 - any alternatives to institutionalisation.

Best interests of the child in other international human rights standards

In addition to the UNCRC, other international human rights standards that apply to Ireland also require the best interests of the child to be considered in certain circumstances. For example:

- The [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#) requires States to ensure that the best interests of the child is a primary consideration in the criminal justice system's treatment of children who are victims of crimes covered by the Optional Protocol.
- The [UN Convention on the Elimination of Discrimination against Women](#) states that the best interests of children are paramount when it comes to parents' responsibilities relating to their children, guardianship, wardship, trusteeship and adoption.
- The [UN Convention on the Rights of Persons with Disabilities](#) requires the best interests of the child to be a primary consideration in all actions concerning children with disabilities.
- At EU level, the [Charter of Fundamental Rights of the European Union](#) requires the best interests of the child to be a primary consideration in all actions relating to children taken by EU Member States when implementing EU law.



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