Families constrained

An analysis of the best interests of the child in family migration policies

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FAMILIES CONSTRAINED;
AN ANALYSIS OF THE BEST INTERESTS OF THE CHILD IN FAMILY MIGRATION POLICIES

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INTRODUCTION

In the International Convention on the Rights of the Child (CRC) it is stated that children have the right not to be separated from their parents, except when this is not in their best interests (Article 9 CRC). According to Article 3 CRC the best interests of children must always be a primary consideration.

It is estimated that approximately ten thousands of children remain or become separated from their parents by governments due to the current family migration policies.

In this study the following question has been answered on the basis of desk research and a case law analysis:

In what way should the concept 'primary consideration' from Article 3 CRC be construed in the family migration policy?

The question will be answered based on the establishment of the 'best interests of the child' in the CRC, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the law of the European Union.

An analysis of the situation in The Netherlands will be provided at the end of every chapter as illustration of challenges encountered in giving the best interests of the child a prominent place in the family migration policy.

This document is a translation of the main findings from the Dutch research for which the following scientific advisory committee provided input; prof. mr. P. Boeles (emeritus professor immigration law at the University of Leiden and visiting professor of migration law at VU University Amsterdam), prof. mr. P.R. Rodrigues (professor immigration law at the University of Leiden) and mr. dr. M.H.A. Strik (researcher and teacher at the Centre for Migration Law at the Radboud University Nijmegen).

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1. THE ESTABLISHMENT AND THE WEIGHING OF THE 'BEST INTERESTS OF THE CHILD' IN THE CRC

1.1 A primary consideration?

The English text of Article 3 CRC states that the best interests of the child must be 'a primary consideration'. During the establishment of Article 3 CRC there have been discussions on the exact meaning that should be accorded to the 'best interests of the child'. There have been proposals to make the 'best interests of the child' instead of 'a primary consideration', 'the primary consideration' or 'the paramount consideration'. The latter is also in line with the Declaration of the Rights of the Child[1] and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Eventually the mentioned proposals did not make it through.[2] As a result, Article 3 CRC leaves space for a balance of interests in which the 'best interests of the child' can succumb.

What meaning does this give to the 'best interests of the child' with reference to other, competing interests? Must Article 3 CRC be assigned a restrictive meaning only? This would mean that Article 3 CRC in fact solely obligates to considering the best interests of the child, without saying anything about the weight that must be allocated to the best interests of the child in the further balance of interests. Van Bueren seems to reason in that logic by taking the position that a balance of interests beforehand is an impossible position for drafters of conventions.[3] Smyth however counters that as the word 'primary' in that way is denuded of its meaning. The use of the word 'primary' clarifies that the 'best interests of the child' are not only equal to other interests, but in principle precede these interests.[4]

This explanation seems to align best with the intentions of the contracting parties. The discussion indeed addressed 'the paramount' versus 'a primary consideration' and this gives a clear direction to the interpretation of the text. To assign a large weight to the 'best interests of the child', which can exceptionally be departed from, seems to be in line with the intentions of the convention drafters. This appears to be even more evident from the Travaux preparatoires of the CRC which state that the 'best interests of the child' can only be set aside in cases of extreme necessary circumstances; in here an example is cited that the 'best interests of the child' cannot automatically be seen as the weightiest interests in a medical emergency situation during childbirth.[5]

1.2 Vision UN Committee on the Rights of the Child

For the application of Article 3 CRC it is crucial to address how the substantial meaning of the term 'best interests of the child' must be established and how the child's interests are related to possible other interests. In order to be able to give priority to the 'best interests of the child', implementation of the article in national legislation and policy is essential.
The UN Committee on the Rights of the Child has emphasized the importance of concrete implementation in different General Comments. The Committee poses that the 'best interests of the child' principle indeed must function as a norm for the government, the parliament and the jurisdiction. Every legislative, administrative or judicial body is obliged to apply the 'best interests of the child' principle by systematically considering how the rights and interests of children are influenced by their actions and decisions, also when they are only addressed to children indirectly.[6]

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1 The Declaration of the Rights of the Child is the predecessor of the CRC.

2 Hodgkin and Newell 2007, p. 38-39; Alston 1994, p. 12-13.

3 Van Bueren 1998, p. 47-8.

4 Smyth 2012, p. 150-151.

5 See: Detrick 1992, p. 133 and Detrick, 1999, p. 91 and 98. Both of these books refer to: UN Doc. E/CN.4/L.1575, para 24 (1981).

6 UN Committee on the Rights of the Child, General Comment No. 5 General Measures of Implementation of the Convention on the Rights of the Child, 3 October 2003, para. 12.

For the Committee on the Rights of the Child the function of Article 3 paragraph 1 CRC is divided in three distinguishable functions:

1. **a substantial right:** the right of the child to have his best interests established and the acknowledgment that these interests in principle enjoy priority in the balance with other interests.
2. **a fundamental, interpretative principle:** when a provision leaves room for multiple interpretations, the interpretation that is in the best interests of the child must be chosen. The CRC offers an interpretation framework for this.
3. **a procedural rule:** in every decision that has an influence on a specific child, a certain group of children or children in general, an assessment must be made in the decision-making process of the best interests of the child involved or the children involved. In this respect, it must be motivated how the best interests of the child are established, based on which criteria and how these interests have been weighed against other interests.[7]

The term 'best interests of the child' is a flexible and adaptable term, according to the Committee. In individual decisions the best interests of the child must be applied in view of the specific circumstances of the child involved. In collective decisions – for legislators and policy-makers – the best interests of the specific group of children or the best interests of children in general must be established.[8] The Committee published a non-exhaustive list of aspects that must be taken into account with the establishment of the best interests of the child. According to the Committee, in any case the following must be taken into account:

- The own views of the child (Article 12 CRC)
- The identity of the child (Article 8 CRC)
- The maintenance of the family ties (Articles 9, 10, 18 and 20 CRC)
- Care, protection and safety of the child (Article 3 paragraph 2 CRC)
- Possible vulnerability of the child (22, 23, 30, 39 CRC)
- The right to health care (Article 24 CRC)
- The right to education (Articles 28, 29 CRC).[9]

All aspects mentioned by the Committee to take into account, are directly related to the rights adopted in the CRC. The Committee clearly demonstrates the meaning of the holistic nature of the CRC; the term 'best interests of the child' must always be determined by looking at the rights adopted in the CRC and the situation of the child or the children for the purpose of which the term is used.

The Committee also addresses the question what it means that the 'best interests of the child' must be a primary consideration, according to Article 3 CRC. For the Committee this actually very simply means that the best interests of children may not be judged as of the same value as the interests of others but must be considered as weightier. The legal position of children is stronger because they have a more dependent position than adults and are less able to stand up for themselves. The fact that the 'best interests of the child' in principle weigh more than other interests, does not mean that they must always be considered the decisive interests. Article 3 CRC is, according to the text of the article, applicable in all actions concerning children. This broad scope means that it is necessary that the article must be applied with some flexibility, according to the Committee. In summary, the Committee stresses that the term 'primary' means that the 'best interests of the child' in principle weigh heavier than other interests, but that there must be space in individual cases to acknowledge that another interest prevails after all.[10]

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7 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, para. 6.

8 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, para. 32.

9 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, para. 52-79.

10 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, para. 37 and 39.

1.3 CRC Articles on family reunification

The content of the term 'best interests of the child' depends on the circumstances in which the term must be applied and interpreted based on the rights of the CRC. A number of rights relevant with regards to family life are therefore discussed below:

Article 5 and 18 CRC

In Article 5 CRC the State Parties obligate themselves to respect the responsibilities, rights and duties of parents. The in Article 5 introduced term 'parental responsibility' is further elaborated on in Article 18 CRC.[11] In Article 18 CRC States obligate themselves to use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. According to Article 18 CRC, parents have the primary responsibility for the upbringing and development of the child; the best interests of the child is the parents' basic concern.

The term 'rights and duties of parents' from Article 5 CRC does not need to be limited to the rights of the CRC. Rights in national legislation can also be relevant in that regard. An example is parental authority, which entails both a right and a duty and which is closely related in meaning to the term 'best interests of the child.' [12]

Article 7 and 8 CRC

Article 7 and 8 CRC are often mentioned in the same breath. Article 7 is an article that entails a number of different rights. Relevant for this research is in particular that the article gives the child the right to, as far as possible, know his or her parents and be cared for by them.

Article 8 CRC gives the child the right to preserve his or her identity. According to the text of the article, this includes nationality, name and family relations. In the literature it is assumed that this is not a limitative list of aspects that can be a part of a child's identity. For example, the cultural, racial, linguistic and religious identity of children are also included.[13]

Article 8 CRC is related to the right to private life from Article 8 ECHR. According to the European Court of Human Rights the latter article entails a person's 'social identity' as well.[14] For family reunification cases it is furthermore relevant that the article makes a clear connection between a child's identity, his/her family ties and his or her nationality and/or cultural background. In family reunification cases different elements of a child's identity may be disrupted if one or more of his family members is not permitted a right of residence.

11 Bruning, Liefaard, Vlaardingerbroek 2013, p. 1434.

12 Cardol 2013, p. 376-382.

13 Detrick 1999, p. 163.

14 ECtHR 26 April 2002, Pretty v. the UK, 2346/02, par. 61.

Article 9 and 10 CRC

Based on Article 9 paragraph 1 CRC States need to ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary to respect the best interests of the child. Paragraph 3 of Article 9 CRC gives every child who lives separate from one or both parents the right to maintain personal relations and direct contact with both parents on a regular basis, unless this is contrary to the child's best interests. This is also confirmed in paragraph 3 of Article 24 of the Charter of Fundamental Rights of the European Union (hereinafter: The Charter). Paragraph 4 of Article 9 CRC states that when a separation results from any action initiated by a State Party – in which the examples of detention and deportation are named – that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child.

Article 10 CRC begins with the reference to the obligations from Article 9 paragraph 1 CRC and subsequently lays down the obligation for States to deal with applications by a child or his or her parents for family reunification in a positive, humane and expeditious manner. States shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

Article 9 and 10 CRC both address the unity of the family. It is often assumed that the articles envisage clearly distinguishable situations; Article 9 CRC then solely concerns (the prevention of) the separation of parents and children within one country and Article 10 paragraph 1 CRC concerns the reunification of parents and children who reside in different countries. Article 9 CRC would in this regard have no relevance for migration law. The interpretation about the distinguishable purposes of the mentioned articles flows from the formation history of the CRC, in which the chairman of the Working Group made a statement on the two provisions with that essence. However not all States Parties shared the opinion in this statement[15] In any case, the existence of different intermediate forms is also adopted in the literature with regards to the supposed boundary between the articles,[16] which leads to a more diffuse boundary between Article 9 and Article 10 CRC. In any event, it is remarkable that, according to the 4th paragraph of Article 9 CRC, separation also includes deportation and exile. It seems a reasonable interpretation that this also includes forced return based on unlawful residence. Because the 4th paragraph does not use a definition of separation that differs from the other paragraphs of the article, this would mean that the article can have relevance for separation of a parent and child as a result of forced return of one of them. The crucial difference between Article 9 and 10 CRC for migration law is then that the former concerns negative obligations for the State and Article 10 CRC concerns positive obligations.[17]

15 Hodgkin and Newell 2007, p. 125-126.

16 De Vries 2011, p. 107-108; Van Os 2012, p. 30-31; Hodgkin en Newell 2007, p. 125-126.

17 A negative obligation means the obligation to not do something; for example, the prohibition to withdraw a residence permit. A positive obligation means an obligation to do something; for example, granting a residence permit.

What is also relevant about Article 9 CRC is that it provides a clear image of how the Convention drafters looked at the best interests of the child in relation to living together with the parents. From the fact that Article 9 paragraph 1 CRC only allows separation of parent(s) and a child when this is explicitly in the best interests of the child, it can be assumed that it is in accordance with the CRC to assume that parents and children living together is in principle in the best interests of the child.

In the realisation of the CRC there have been discussions on the use of the term 'positive' from Article 10 CRC. The term is not meant as something that anticipates a judgment on an individual application for family reunification. The intention of the use of the word 'positive' is to reflect the obligation for the State to hold a positive attitude when dealing with an application.[18] In literature the term 'positive' is further understood in the meaning of words such as 'actual, definite and effective'.[19]

Article 16 CRC

Article 16 CRC prohibits the arbitrary or unlawful interference with a child's private and/or family life. Article 16 CRC is strongly related to Article 8 ECHR, which in practice functions as a minimum standard from a human rights perspective for State action in family migration cases (see also chapter 2). One of the considerations to adopt rights in the CRC that were already adopted in international and regional human rights treaties lies in the fact that this confirms that these rights also apply to children independently.[20]

From the above-discussed Articles 5, 7, 8, 9, 10, 16 and 18 CRC it appears that great value is attached in the CRC to the protection of the parent-child relationship. Continuity in this relationship is in the 'best interests of the child' according to the CRC. Separation of parents and children is only permitted if this is in the 'best interests of the child' for a particular reason. When parent(s) and children have already been separated, the government must hold a positive attitude with regards to requests for reunification.

1.4 Analysis CRC and Dutch migration policy

On the application of the CRC in (family) migration policy neither legislation nor policy exists in The Netherlands. The application is therefore unclear. No clear image arises from Parliamentary documents either. The former State Secretary of Security and Justice answers in Spring 2014 to Parliamentary questions that in the interpretation of child interests in family migration, he uses the two limbs of the 'best interests of the child';

1. the interests of the child to maintain ties with its family;
2. the interests of the child to ensure its development – from the Neulinger judgment[21].[22]

However, in Fall 2014 the State Secretary answers to Parliamentary questions that it is not an objective of migration policy to guarantee the development of children and that the CRC also does not oblige this.[23] How this position of the State Secretary is related to the second limb of

18 Detrick 1999, p. 192.

19 De Vries 2011, p. 110.

20 Detrick 1999, p. 2.

21 See chapter 2.

22 *Parliamentary papers II* 2013/14, 32 175, no. 52, p. 9.

23 *Parliamentary papers II* 2014/15, 19 637, no. 1926, p. 2.

the 'best interests of the child' and to Article 6 paragraph 2 CRC (States Parties shall ensure to the maximum extent possible the survival and development of the child) cited approvingly by him, therefore remains unclear.

The national case law on the CRC is furthermore very reserved and therefore does not offer clear testing frameworks. Nevertheless, a slight positive development is noticeable. The Administrative Jurisdiction Division of the Council of State (hereinafter: the Council of State) originally ruled that the provision in Article 3 CRC (best interests of the child) does not have direct effect.[24] In later case law the Council of State ruled that the question whether the best interests of the child have been looked at can be tested, but the question which weight needs to be accredited to it cannot directly be tested.[25] The last step in case law for now is that the Council of State rules that the administrative judge must examine whether the administrative body has sufficiently accounted for the best interests of the child, be it in a reserved way.[26]

The development in national case law on Article 3 CRC thus leans carefully to a few more possibilities for the judge to test to the 'best interests of the child'. The fact that these possibilities do not mean much in practice, appears from a judgment by the Council of State in the beginning of 2013 in which it is considered that a rejection in a family reunification case does not show that this has been decided in a way that shows that the administrative body has insufficiently accounted for the 'best interests of the child' now that the minority of those involved has been identified.[27] The mere awareness of a deciding civil servant of the children's minority would therefore already suggest that sufficient accountability has been given to the 'best interests of the child'.[28]

The reserved testing in the case law has been motivated by the Council of State in the same manner for a long time; the norm in Article 3 CRC has, according to the Council of State, no direct effect without further elaboration in national legislation and regulation.[29] The Council of State thus expects an elaboration of the norm in Article 3 CRC in legislation or policy. As mentioned, such an elaboration does not exist in practice. The reserved testing by the Council of State based on this can be called remarkable. First of all because the two European Courts have shown to be able to test in an insistent manner to the best interests of children and based on the same standard. Secondly, the reserved testing in anticipation of elaboration of Article 3 CRC by the legislator is also remarkable considering the text of Article 3 CRC itself. The norm in Article 3 CRC has after all (among other things) been addressed to "courts of law". The contracting parties have had the goal that the judge too views the 'best interests of the child' as a primary consideration. The fact that the norm in Article 3 CRC also applied to "administrative authorities or legislative bodies" does not mean that when these bodies do not explicate the norm in Article 3 CRC in regulation, courts of law are then exempted from the obligation in Article 3 CRC. After all, the importance of judicial supervision on the application of this obligation in individual cases has then become even bigger.

It should also be pointed out that the legislative history of the CRC shows that Article 3 CRC was initially considered to include the obligation to let the 'best interests of the child' be the decisive interests by definition. This option was ultimately not chosen, because the treaty drafters realized that exceptional situations can exist in which other interests prevail. The fact that the 'best interests of the child' must prevail in principle, is however clear from the choice that has been made in the drafting of Article 3 CRC to oblige everyone faced with the 'best interests of the child' to see these interests as a primary consideration. The judgment of the Council of State that the norm in Article 3 CRC is not concrete enough for direct application by the administrative judge appears to be a

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24 See, for example: Council of State 12 April 2007, *JV* 2007/241, para. 2.5.1.

25 See, for example: Council of State 27 November 2008, *JV* 2009/50, para. 2.6.1.

26 See, for example: Council of State 7 February 2012, *JV* 2012/152, para. 2.3.8.

27 Council of State 23 January 2013, 201200110/1/V1, para. 10.1.

28 See for critical comments on the cautious testing to Article 3 CRC by the Council of State: Beltman in his commentary in *JV* 2013/229 and Spijkerboer 2013, p. 71-72.

29 See, for example: Council of State 16 April 2013, *JV* 2013/229 with commentary Beltman, para. 2.1.

misunderstanding in this respect. With this judgment, the Council of State factually seems to make it appear as if the administrative body must make a balance of interests based on Article 3 CRC in which the administrative judge may not enter. The reality, however, is that Article 3 CRC actually limits the freedom to weigh interests; in situations where interests are balanced and children's interests are at stake, Article 3 CRC determines that the 'best interests of the child' in principle prevail and deviation from this principle requires an adequate justification.

The current practice in the jurisprudence, however, leads to a situation in which the 'best interests of the child' must in fact be considered as one of the various considerations, equal to other interests. The choice that underlies this case law is not in accordance with the CRC. The ruling that Article 3 CRC requires a further elaboration in legislation and regulation in order to be able to apply this provision, is moreover unconvincing. The down-to-earth analysis of Boeles (Emeritus Professor of Immigration Law at Leiden University) is hereby enlightening to mention:

> *"There is an individual decision in respect of a child. That decision is only in accordance with the CRC when the best interests of the child have been a primary consideration. This is therefore what you look at as a judge. If it turns out that the best interests of the child were not the primary consideration in that decision, but if they have been subordinated on disproportionate grounds with regards to other interests that seem to have been the primary consideration, Article 3 paragraph 1 CRC has not been met."*[30]

The Coalition for Children's Rights also asks attention in the NGO report on the compliance with the CRC by the Dutch government for the lack of a 'best interests of the child determination' in family reunification procedures and recommends to not set additional conditions for parents or children with the Dutch nationality or a residence permit.[31]

Concluding
Article 3 CRC poses that in all measures concerning children, the interests of the child must be a primary consideration. A 'primary consideration' means, according to the UN Committee on the Rights of the Child, that the interests of the child may not be placed on an equal value with the interests of others, but should be considered as weightier.
For the UN Committee on the Rights of the Child the purpose of Article 3 paragraph 1 can be divided into three distinguishable purposes:

1. **a substantive right:** the right of the child to let his interest(s) be established and the corresponding acknowledgement that this/these interest(s) in theory enjoy(s) priority in the weighing with other interests.
2. **a fundamental, interpretative principle:** when a clause can be interpreted in multiple ways, the interpretation that is in the interests of the child must be chosen.
3. **a procedural rule:** with every decision that influences a specific child, a certain group of children or children in general, an estimation must be made of the interests of the concerned child or the concerned children in the decision-making process. This includes the requirement to motivate how the interests of the child have been established, on which criteria these are based and how these interests have been weighed against other interests.

The concept 'best interests of the child' has to be construed depending on the individual situation. The holistic character of the CRC requires that this has to be done based on the for a specific situation most relevant CRC-articles. In General Comment 14 the UN Committee on the Rights of the Child puts forward a non-exhaustive list of aspects that should be taken into consideration. For family migration it is important that in several articles of the CRC the relationship between parent(s) and

30 See commentary Boeles in *JV* 2004/449.

31 Coalition for Children's Rights 2014, p. 71.

children is addressed. From the articles it appears that great importance is attached to the definition of the (family) environment in which the child is raised. A principal rule seems to be able to be inferred from Article 9 paragraph 1 CRC: it is in theory in the best interests of the child to be able to live together with his parent(s), unless it is explicitly proved that this is not in the best interests of the child. From Article 10 CRC it furthermore appears that the State must show a positive attitude when processing an application for family reunification.

In Dutch legislation or policy it is nowhere indicated how the CRC or the 'interests of the child' must be dealt with in (family) migration cases. As well from the case law on the CRC regarding family migration it turns out that the use of the Convention is still insufficient.

2. THE ESTABLISHMENT AND THE WEIGHING OF 'THE BEST INTERESTS OF THE CHILD' IN THE ECHR

2.1 Analysis of jurisprudence

This chapter answers, on the basis of a critical analysis of case law of the European Court of Human Rights (ECtHR), the question which testing frameworks Article 8 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) contains and in which way the best interests of the child are applied and weighed.

Based on case law of recent years of the ECtHR it appears that there is an enormous increase in cases in which the 'best interests of the child' play a defining part. The influence of the CRC within the sphere of Article 8 ECHR is therefore a fact and this naturally means an improvement of the legal position of children when it comes to their private and family life.
At the same time, however, case law shows many fluctuations and is therefore somewhat unpredictable. It seems that the Court in Article 8 ECHR cases that concern the 'best interests of the child' varies in judgments that make the 'best interests of the child' decisive, judgments acknowledging that the 'best interests of the child' are problematic but not decisive, cases in which the behaviour of parents is explicitly allocated to children and cases in which the 'best interests of the child' are hardly discussed. How must the variation in judgments be understood?

2.1.1 Testing frameworks

Article 8 ECHR entails different testing frameworks for family migration cases. The basic principle is always that there exists no right to choice of residence. Although the divisions between different testing frameworks are not fixed very precisely, in general a distinction can be made between:

- a test to Article 8 ECHR in the case of first admission[32]: a fair balance test is applied.
- a test to Article 8 ECHR for established private and/or family life in a State Party in which persons involved are aware of the uncertain residence status of one of them: a fair balance test is applied, only right of residence in 'exceptional circumstances'.[33]
- and finally a test to Article 8 ECHR in cases where there is interference with the right to private and family life (for example) because of the withdrawal of a residence permit[34]; testing to Article 8 paragraph 2 ECHR + a fair balance test.

In all cases a balance must be made between the interests of the State and the interests of the individuals involved.[35] This fair balance test obligates to balance all interests involved in the case, among them in any case the 'best interests of the child'. The influence of the CRC within the sphere of Article 8 ECHR can be found exactly in the area of the balance of interests on an individual level. Article 3 CRC requires that the 'best interests of the child' are a primary consideration in all actions concerning children. Given the fact that the content of Article 3 CRC already addresses the balance of competing interests, this article is certainly relevant for the test to Article 8 ECHR. Before the Court comes to a balance of interests, there are questions in which child rights do not play a part in practice; the question about the applicable testing framework and the interpretation of the testing framework itself.

As described the case law on Article 8 ECHR knows different testing frameworks in which the Court gives State Parties a great deal of freedom to conduct a restrictive family reunification policy,

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32 See, for example: ECtHR 21 December 2001, Sen v. the Netherlands, *JV* 2002/30 with commentary Van Walsum and ECtHR 1 December 2005, Tuquabo-Tekle v. the Netherlands, *JV* 2006/34 with commentary Van Walsum.

33 See, for example: ECtHR 31 January 2006, Rodrigues da Silva v. the Netherlands, *JV* 2006/90 with commentary Boeles and ECtHR 28 June 2011, Nunez v. Norway, *JV* 2011/402 with commentary Van Walsum.

34 See, for example: ECtHR 2 August 2001, Boultif v. Switzerland, *JV* 2001/254 with commentary Boeles; ECtHR 18 October 2006, Uner v. the Netherlands, *JV* 2006/417 with commentary Boeles and ECtHR 23 June 2008, Maslov v. Austria, *JV* 2008/267 with commentary Boeles.

35 ECtHR 29 November 1996, 21702/93, Ahmut v. the Netherlands, para. 63.

especially in cases regarding first admission and cases regarding formed private or family life at the time of an uncertain residence status. The, in the case law of the Court, developed testing frameworks all contain a test to concrete individual interests. What is neglected in this, however, is that the testing frameworks themselves already entail a balance of interests on a general level. Child rights do not play a part at this stage. The question is how this is related to the CRC. It is first of all important that Article 3 CRC focuses not only on decision-making about children in individual cases, but also on situations in which the 'best interests of the child' are discussed in a more abstract sense. The testing frameworks themselves must therefore in abstracto consider the 'best interests of the child'.

Especially for the testing framework of the 'exceptional circumstances' the ECtHR leaves a great deal of freedom to the State. This testing framework is applicable to situations in which private and/or family life is formed during a period in which the persons involved were aware of the uncertain residence status of one of them. From the perspective of the child it is problematic that (young) children will in fact often be unaware of their own or their family members' uncertain residence status.[36] But even if children are aware of this, they will often not have an influence on this situation.

The Court explicitly considers in two cases – Butt[37] and Kaplan[38] – that strong immigration policy consideration would in principle militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that parents exploit the situation of their children in order to secure a residence permit for themselves and for the children. What does the Court exactly do here? The *'exceptional circumstances'* test can in fact itself be perceived as an allocation of behaviour of parents to children as a condition of this test is that persons involved must be aware of their uncertain residence status when forming family life and children can in principle not be aware of this. Does the Court now allocate the parents' behaviour to children twice or does the Court only explain in Butt and Kaplan what it has already done more often in the context of the *'exceptional circumstances'* test? There is no consensus about this in literature. In her commentary on the Butt judgment Brink marks it as a breaking point with earlier case law of the Court in which the 'best interests of the child' were central.[39] In Stronks's commentary, however, it seems to be assumed without this further being very specifically argued, that the allocating of parent(s)' behaviour to children is part of the legitimacy of the *'exceptional circumstances'* test in situations involving children. Stronks's position seems to be the most persuasive. It is surely remarkable that the consideration in Butt about the allocation of parent(s)' behaviour to children follows directly from the cited section from the Nunez judgment on the *'exceptional circumstances'* test and that this consideration is also directly linked to the applicability of the *'exceptional circumstances'* test.[40] In Kaplan the consideration about the allocation of parent(s)' behaviour to children is also linked to the awareness of the uncertain character of the residence status of involved persons; the aspect on which the Court bases whether the *'exceptional circumstances'* test is applicable.[41] The Court first considers that the children were born and raised in Turkey, which shows that they were unaware of the uncertain residence status at the moment the family life was formed. The Court then repeats the argument from Butt and states that the parents in the Kaplan case were aware of the uncertain residence status while having continued their family life in Norway. This behaviour is allocated to the children and the Court apparently uses that as a legitimacy to apply the *'exceptional circumstances'* test. In both Kaplan and Butt the Court thus only provides an explicit justification for the attribution of awareness of the parents to the children in relation to the uncertain residence status, like it implicitly does in *'exceptional circumstances'* cases again and again.[42]

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36 Boeles, Heijer, Lodder and Wouters 2014, p. 213.

37 ECtHR 4 December 2012, Butt v. Norway, *JV* 2013/85 with commentary Stronks, RV 2012/21 with commentary Brink.

38 ECtHR 24 July 2014, Kaplan and others v. Norway, *JV* 2014/320, with commentary Werner.

39 See note Brink, RV 2012/21.

40 ECtHR 4 December 2012, Butt v. Norway, *JV* 2013/85 with commentary Stronks, RV 2012/21 with commentary Brink, para. 79.

41 ECtHR 24 July 2014, Kaplan and others v. Norway, *JV* 2014/320, with commentary Werner, para. 86.

42 Werner 2015, p. 19-21.

The great deal of freedom left to States when testing to Article 8 ECHR is at odds with the intention of the CRC. This firstly appears from the fact that Article 3 CRC does not only focus on decision-making about children in individual cases, but also on situations in which the 'best interests of the child' are discussed in a more abstract sense. The testing frameworks themselves thus already must take into account the 'best interests of the child'. When it comes to family life and family reunification the CRC includes a number of relevant provisions: Article 8 CRC entails the right to preserve a child's identity, which includes his/her family ties and nationality; Article 9 CRC determines that children and their parents may only be separated to protect the 'best interests of the child'; Article 10 CRC requires a positive attitude towards family reunification and Article 16 CRC contains a provision that has a strong similarity with Article 8 ECHR.[43] What is the relevance of these articles when weighing the interests on a more abstract level?

Identity, family ties and nationality

Firstly, Articles 8 and 16 CRC can be viewed as a concrete expression of the term 'best interests of the child'. And there are more concrete consequences to mention; because of the combination of nationality and family ties as aspects of identity these must be weighed as special interests in the general testing frameworks of the Court. Such a consideration is now absent in the testing to Article 8 ECHR; in the case Jeunesse[44] it is included in the individual weighing of interests, but it does not yet have a clear general place in the testing framework.

Stronger protection by CRC

Article 9 CRC knows an evidently stronger protection for situations in which the right of residence of one of the family members is terminated; in Article 8 ECHR that question is controlled by the second paragraph (in which exceptions on the right to family life are adopted) in combination with a fair balance test. Based on the fourth paragraph of Article 9 CRC it appears that the forced return of a family member is included in the definition of separation and based on paragraph 1 of Article 9 CRC it appears that separation of parent(s) and children is only allowed when this is in the 'best interests of the child' (see chapter 1). In situations in which a residence permit of one of the family members is withdrawn, testing to paragraph 2 of Article 8 ECHR is in fact a too flexible framework for situations involving children. The legitimacy of such a decision can in accordance with Article 9 CRC only lie in serving the 'best interests of the child'.

Positive basic attitude

Article 10 CRC includes a very important general starting point; the basic attitude towards family reunification must be positive. This is a fundamentally different position than the Court shows in its case law on Article 8 ECHR. To a greater or lesser degree – depending on the different testing frameworks that the Court uses – the State is given the freedom to conduct a restrictive policy. The basic idea is that Article 8 ECHR does not include a right to choice of residence. This is correct and the CRC also does not include such a right. Article 10 CRC, however, does

43 See chapter 1.3.

44 ECtHR 3 October 2013, *Jeunesse v. the Netherlands*, *JV* 2014/343.

limit the consequences that can be drawn; the basic attitude towards family reunification must be positive. Especially in the already discussed *'exceptional circumstances'* cases there is no question of a positive basic attitude. The starting point of the testing surely has a pronounced negative character; the formed family life is only a reason for the right of residence when the forming of this family life should be pardoned because of an exceptional situation.

Prohibition of discrimination based on behaviour of parents
Finally Article 2 paragraph 2 CRC must be mentioned. The article prohibits the discrimination of children based on the behaviour or status of their parent(s) or other family members. Allocating the parent(s)' behaviour to children because of the applicability of the *'exceptional circumstances'* test does discriminate and is therefore in conflict with Article 2 CRC.[45]

The question can be raised whether applying the CRC rights on the level of the general testing frameworks even fits within the general systematics of the ECtHR case law because the cases are per definition casuistic. The fact is that the Court gives much freedom to States on the abstract level of the testing framework of Article 8 ECHR and has to compensate that freedom again in situations involving children via an individually cut 'best interests of the child' test. The case law following from this, gives both States that conduct a restrictive migration policy and families with children the impression that law is on their side. It is clear that neither the CRC nor the ECHR entail a subjective right to family reunification. However, it is good to argue that influence of the CRC must lead to the fact that in situations concerning children there must never be application to the strictest testing framework of the ECtHR; the 'exceptional circumstances' test. This test is surely in abstracto only regarded as applicable on those situations in which all persons concerned at the moment of starting the family life were already aware of the uncertain residence status of one of them.[46] In the practical application, however, the requirement of awareness is regularly allocated to the concerned children. This allocation is a legal trick that is not only at odds with the independent legal position of the child, but also with the applicability requirement for the 'exceptional circumstances' test as the Court itself has stated repeatedly.

2.1.2 The best interests of the child and the individual balance of interests

Although the testing frameworks of the ECtHR are in abstracto strict, the Court knows an escape route in the balance of interests on an individual level in the form of the test to the 'best interests of the child'. It appears that the Court pays attention in an increasing number of cases to the 'best interests of the child' and from the terminology used by the Court it can be derived that the Court views the 'best interests of the child' principle as an important aspect in the broader balance of interests. However, the ECtHR still does not apply the term 'best interests of the child' in all cases and when it does apply this term, it is not used in a consequent manner.

The ratio between the strict general testing frameworks of the ECtHR and the often weighty test to the 'best interests of the child' makes it difficult to predict how a case will be decided. This leads to a situation in which States tend to lean to the general restrictive testing frameworks and in which the families with children have justified hope based on the 'best interests of the child' test. The result is a lack of legal certainty.

45 Werner 2015, p. 17-21.

46 See, for example: ECtHR 31 January 2006, Rodrigues da Silva v. the Netherlands, *JV* 2006/90 with commentary Boeles, para. 39; ECtHR 31 July 2008, Darren Omoregie v. Norway, *JV* 2008/330 with commentary Boeles, para. 57, ECtHR 3 November 2011, Arvelo Aponte v. the Netherlands, *JV* 2012/3, para. 55; ECtHR 12 February 2012, Antwi v. Norway, *JV* 2012/170 with commentary Van Walsum and RV 2012/18 with commentary Werner, para. 89; ECtHR 24 July 2014, Kaplan and others v. Norway, *JV* 2014/320, with commentary Werner, para. 81; ECtHR 3 October 2014, *Jeunesse v. the Netherlands*, *JV* 2014/343 with commentary P. Boeles, para. 108.

Spijkerboer, followed by Klaassen and Lodder[47], states in an article from 2009 that different competing tendencies can be seen in case law of the ECtHR about Article 8 ECHR and the position of children. Tendencies that can each be argued for on the basis of legal valid argumentation and that alternatively prevail in jurisprudence. These are tendencies that see a larger or even smaller role for international law in the domestic sphere and tendencies that emphasize a more progressive or a more conservative view on migration.[48] According to Spijkerboer, both lines of argumentation are legally valid. In other words, legal arguments do have an influence on the outcome of a case, but are not per definition decisive. Spijkerboer's conception is interesting because it shows that, based on a pure legal analysis of the jurisprudence, no clear conclusion can be drawn on the place that the 'best interests of the child' takes in the balance of interests with regards to Article 8 ECHR. The way in which the ECtHR weighs interests therefore appears to be very casuistic. This is in fact also in line with a consideration often repeated by the Court since 1996 in which the Court states that the scope of the obligations of the State to admit family members of admitted aliens always varies depending on the circumstances of the directly involved persons and the general interest.[49]

2.1.3 Objectifying the 'best interests of the child'

The concrete way in which the Court judges the best interests of children is difficult to generalize. The Court mentions circumstances that are remarkable and which are then decisive or not. A constant factor, however, is that the Court often allocates a great meaning to the age of the children involved. Which meaning is allocated to the age however differs. In the case of Arvelo Aponte, for example, the seven-year-old son of the family is considered to be *"of a young and adaptable age."*[50] The children of the Jeunesse family are also called *"relatively young"*.[51] The Jeunesse family has three children with the age of three, eight and fifteen years old. The ages of the Jeunesse children include in fact almost all phases of childhood; nevertheless the Court views them all as *"relatively young"*. Moreover, the meaning that the Court in Jeunesse allocates to the age is that there is admittedly no objective impediment to return, but that return will go hand in hand with a *"degree of hardship"*. Finally, regarding the factor age the case Rodrigues da Silva & Hoogkamer cannot remain unmentioned. Rachael, Mrs. Rodrigues' daughter, is at the moment of the judgment almost ten years old. A report by the Child Care and Protection Board that was written when Rachael was one year old and in which it was factually concluded that she – already at this evidently young age – is rooted in the Dutch society, is of big influence for the outcome of the case.[52] An expert report is here thus determining for the extent to which a child has an interest to – in this case – reside in The Netherlands and this creates a very different picture than in the cases in which the Court seems to give an estimate itself of the consequences that can be related to the age of a child.

In his commentary on the Rodrigues da Silva & Hoogkamer judgment prof. Boeles criticizes the rather coincidental influence of the Child Protection Board's report on the judgment. That the report of the Child Protection Board was there, was indeed the result of the procedures on the parental authority between the parents. Had that procedure not been there, the migration law procedure on Article 8 ECHR might have been completely different.[53] The cause of the report may indeed be somewhat coincidental, the objectification of the 'best interests of the child' by means of an expert report is exceedingly relevant. What reference points does case law further offer for that?

The Neulinger case

The ECtHR substantive interpretation of the concept 'best interests of the child' cannot directly be derived from case law of the Court on family reunification. In several family reunification cases the

47 Klaassen and Lodder 2014 p. 115-117.

48 Spijkerboer 2009, p. 271-293.

49 ECtHR 19 February 1996, Gül v. Switzerland, RV 1996/23, para. 38.

50 ECtHR 3 November 2001, Arvelo Aponte v. the Netherlands, *JV* 2012/3, para. 60. The ECtHR concluded that there was no violation of Article 8 ECHR in this case. In the Jeunesse case the Court concluded that there was a violaton of Article 8 ECHR.

51 ECtHR 3 October 2013, *Jeunesse v. the Netherlands, JV* 2014/343 with commentary P. Boeles, para. 117.

52 ECtHR 31 January 2006, Rodrigues da Silva v. the Netherlands, *JV* 2006/90 with commentary Boeles, para. 12.

53 Commentary Boeles in *JV* 2006/90.

Court has referred when testing to the 'best interests of the child' to an earlier child abduction case dealt with by the ECtHR.[54] It concerns the Neulinger case and in this case the Court extensively discusses the substantial meaning of the 'best interests of the child' and how this term must be determined in individual cases. Although Neulinger is not a migration law case, the Neulinger case refers to earlier judgments on the expulsion of aliens [55] and as mentioned the ECtHR refers in later migration law cases to Neulinger. The ECtHR outlines a clear methodology in the Neulinger case on how in individual procedures the best interests of the child have to be dealt with. After first establishing that the best interests of the child comprises two limbs[56] – the interest to maintain the ties with his/her family, except in cases where the family has proved particularly unfit; 2) the interest to ensure a child's development in a sound environment– the ECtHR indicates that it is required for the determination of the best interests of the child that the developmental perspective of the child is looked at on an individual level. Important factors are age, level of maturity, the presence or absence of the parents and the environment and experiences.[57] In the national procedure an in-depth examination of the entire family situation, including in particular factual, emotional, psychological, material and medical factors, must be conducted in the balance of interests.[58] Regarding the balance of interests the Court notes in the Neulinger judgment that there is an international consensus that the best interests of the child "must be paramount in all actions concerning children." [59]

The approach the ECtHR gives here on the 'best interests of the child' shows clear signs of different CRC articles. The ECtHR seems to, like the UN Committee on the Rights of the Child, assume a holistic view of the CRC. The explanation of the first limb clearly aligns with Article 9 CRC (prohibition of the separation of parents and children, unless in the child's best interests) and the second limb aligns with the right to development from Article 6 paragraph 2 CRC. The approach from the Neulinger judgment provides clear opportunities for objectifying the 'best interests of the child'. The emphasis the Court places on the responsibility of the State to actively gather information, makes it advisable for States in 8 ECHR cases that involve children to turn by default to experts to investigate the 'best interests of the child'. This expert report must be explicitly included in the further balance of interests. In this regard, particularly the paragraph from the *Jeunesse case* is relevant in which it is decided that, when assessing delivered evidence on the position of the child, the practicality, feasibility and the proportionality of a negative decision must be examined and researched.

This leaves the question what weight the 'best interests of the child' must get in the balance of interests. When talking about the 'best interests of the child', the Court alternatively talks about *'a primary consideration'* and about *'paramount'*. The weight that the 'best interests of the child' gets has therefore long been unclear, especially in relation to the strict testing frameworks the Court uses. In the Jeunesse case[60] the Court provides more clarity; the Court states that the 'best interests of the child' are the most weighty interests, but that the 'best interests of the child' alone cannot be decisive. In short, the 'best interests of the child' precedes other interests in weight, but in the balance of interests the interests of the alien(s) is too light if the 'best interests of the child' are the only interests that are in his/her favour.

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54 ECtHR 28 June 2011, Nunez v. Norway, *JV* 2011/402 with commentary Van Walsum, RV 2011/20 with commentary Ismaili, para. 78; ECtHR 30 July 2013, Berisha v. Switzerland, *JV* 2013/302, para. 51; ECtHR 8 July 2014, M.P.E.V. and others v. Switzerland, 3910/13, para. 57; ECtHR 3 October 2014, *Jeunesse v. the Netherlands*, *JV* 2014/343 with commentary P. Boeles, para. 75, 109 and 118.

55 ECtHR 6 July 2010, Neulinger and Shuruk v. Switzerland, RV 2010/98 with commentary Ruitenberg, para. 146.

56 ECtHR 6 July 2010, Neulinger and Shuruk v. Switzerland, RV 2010/98 with commentary Ruitenberg, para. 136.

57 ECtHR 6 July 2010, Neulinger and Shuruk v. Switzerland, RV 2010/98 with commentary Ruitenberg, para. 138.

58 ECtHR 6 July 2010, Neulinger and Shuruk v. Switzerland, RV 2010/98 with commentary Ruitenberg, para. 139.

59 ECtHR 6 July 2010, Neulinger and Shuruk v. Switzerland, RV 2010/98 with commentary Ruitenberg, para. 135.

60 ECtHR 3 October 2013, Jeunesse v. the Netherlands, JV 2014/343 with commentary P. Boeles, para. 117.

2.2 Analysis Article 8 ECHR and the Dutch family migration policy

The policy rules on Article 8 ECHR are limited in The Netherlands. In B3/3.8.1 Aliens Circular (Ac) 2000 a broad definition for the term family life has been adopted. In B3/3.8.2 Ac it is laid down that interference in the right to family life is assumed when a permit is withdrawn, when an entry ban has been imposed and when an alien is declared unwanted. In B3/3.8.3 Ac it is determined that, for the judgment whether refusal of (continued) residence is in violation of Article 8 ECHR, a balance of interests must be made, in which all relevant facts and circumstances must be taken into account. Which interests must be considered, is not mentioned in a general sense. This depends on the individual case. In policy it is noted that when someone has had a right of residence, his position is stronger than at first admission. Finally it is assumed that, also when there is no interference, a balance of interests must always take place.

No words are included in Dutch policy on Article 8 ECHR and the position of children. It must be assumed that, depending on the individual case, the specific interests of the children concerned can be considered but there is no specific and transparent policy.

In national case law on Article 8 ECHR it is assumed that the judge must fully test whether the State Secretary has included all relevant facts and circumstances in his balance of interests. If the judge decides that this is the case, the judge must only test the results of the balance of interests in a reserved way.[61] This testing methodology fundamentally differs from the testing by the ECtHR in these kinds of cases. A judgment by the Council of State on 18 November 2014 can serve as an example. It concerns a judgment on the higher appeal by the State Secretary of Security and Justice against a judgment by the Regional Court of Amsterdam. In the latter judgment it had been ruled that the State Secretary had not sufficiently justified why the balance of interests was a disadvantage for the alien. The Council of State rules that, different from what has been considered in appeal, the State Secretary rightfully included in the balance of interests that the alien does not possess sufficient means of existence. The Council of State also rules that the State Secretary rightfully included in the balance of interests that the family life between the alien and the child arose and has been developed during unlawful residence of the alien in The Netherlands, that the alien has no social ties with The Netherlands, that he lived in Ghana for 34 years before coming to The Netherlands, that he has not acknowledged the child and has no legal custody over him, that he has not applied in the past for a regular residence permit based on residence with the child and that there are no insurmountable obstacles to exercise his family life in Ghana. Opposing these facts the State Secretary had furthermore considered that the alien was intensively involved in the raising of his child as a father and that the child and his mother have the Dutch nationality. Given these facts and circumstances, the Council of State ultimately rules that the Regional Court has unrightfully not recognized that the State Secretary is not of the wrong opinion to conclude that the balance of interests in the context of Article 8 of the ECHR is in the disadvantage of the alien.

In short, the Council of State is already satisfied with the fact that the position of the child has been included in the balance of interests, while the ECtHR according to the Jeunesse case expects that the practicality, feasibility and proportionality of the deportation of a foreign parent are looked at in order to enable an effective protection of the 'best interests of the child'.[62] In a discussion about the Jeunesse judgment Emeritus Professor of Sociology of Law Groenendijk writes: *"I read the Jeunesse judgment mainly as an incentive for national judges to use the available tools to verifiably ensure that the interests of the children are actually granted the required great weight."*[63]

For now, the Council of State appears to see no reason for adjusting the intensity of the judicial testing to Article 8 ECHR in its established jurisprudence.[64]

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61 See, for example: Council of State 18 October 2013, 201208082/1/V1, para. 6.2 and Council of State 25 March 2015, ECLI:NL:RVS:2015:1044, para. 3.2.

62 ECtHR 3 October 2014, *Jeunesse v. the Netherlands*, *JV* 2014/343 with commentary P. Boeles, para. 109.

63 Groenendijk 2014, p. 368.

64 Council of State 25 March 2015, ECLI:NL:RVS:2015:1044, para. 3.2.

Another aspect in the Dutch testing to Article 8 ECHR that must not be left unmentioned, is that in the case of an appeal to a judgment in which the meaning of the 'best interests of the child' test had a great weight, the relevance of such a judgment is often reduced to cases that entail virtually the same casuistry. The more general fact that the best interests of the child have a great weight in the balance of interests, is often not acknowledged.[65]

Response from the State Secretary of Security and Justice to the Jeunesse judgment

Given the above-mentioned, it is relevant to see how the State Secretary of Security and Justice has responded on behalf of The Netherlands to the Dutch violation of Article 8 ECHR in the Jeunesse judgment.

In the written response of the State Secretary on the Jeunesse judgment it is put central that the judgment does not mean a renewal of case law of the ECtHR on Article 8 ECHR and the fact that The Netherlands has been convicted of a violation of Article 8 ECHR can be explained based on the exceptional casuistry of the case. The State Secretary therefore sees no reason to change his policy, he writes:

"The ECtHR follows the fixed case law on Article 8 ECHR in its judgment. This means that family life formed during illegal residence is not entitled to protection under Article 8 ECHR, except in highly exceptional circumstances. The ECtHR concludes that this individual case includes elements that are cumulative and exceptional in context. The ECtHR continues the reasoning which already applies to the admission policy. For this reason, no need for a change in policy follows from the judgment."[66]

According to the State Secretary the case is thus declared eligible by the ECtHR because of the exceptional individual circumstances and not because of a renewal in the Court jurisprudence. This raises the question why the Dutch government and the judges who have ruled on the case have not noticed the exceptional casuistry. In the procedure at the Court, the Dutch government has surely taken the position that there were no exceptional circumstances.[67] This raises the question how it is possible that the Dutch authorities have given the Jeunesse case such a different assessment than the ECtHR. According to the State Secretary this is not because of the judgment, because it only follows established jurisprudence. Apparently the defects then lie somewhere else; either in the application of Article 8 ECHR by the administrative organ or by the reserved judicial assessment of it.

It is also remarkable that the State Secretary often uses the term 'highly exceptional circumstances' both in his position at the Court and in his analysis of the judgment afterwards. The term can be traced back to case law of the Court. It is well-established in case law of the ECtHR that family life formed during a period in which those involved were aware of the unlawful residence of one of them is only worthy of protection under Article 8 ECHR in 'exceptional circumstances'.[68] It is remarkable that while the Court talks about 'exceptional circumstances, the State Secretary changes this into '**highly** exceptional circumstances'. Perhaps this is an innocent translation error, but it also seems to say something about the very restrictive testing the Immigration and Naturalisation Service applies in practice. In practice, for example, it often means[69] that no 'exceptional circumstances' are assumed for the sole fact that there are no 'insurmountable obstacles' to exercise the family life in another country or in another manner. From various cases it appears, however, that these two aspects

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65 See for an example of such a judgment: Council of State 20 December 2012, *JV* 2013/89 with commentary Nissen.

66 *Parliamentary papers II* 2014/15, 32 317, no. 254, p. 1.

67 ECtHR 3 October 2014, *Jeunesse v. the Netherlands*, *JV* 2014/343 with commentary P. Boeles, para. 90 and 92.

68 ECtHR 31 January 2006, *Rodrigues da Silva v. the Netherlands, JV* 2006/90 with commentary Boeles, para. 39; ECtHR 31 July 2008, *Darren Omoregie v. Norway, JV* 2008/330 with commentary Boeles, para. 57; ECtHR 3 November 2011, *Arvelo Aponte v. the Netherlands, JV* 2012/3, para. 55; ECtHR 12 February 2012, *Antwi v. Norway, JV* 2012/170 with commentary Van Walsum and RV 2012/18 with commentary Werner, para. 89; ECtHR 24 July 2014, *Kaplan and others v. Norway, JV* 2014/320, with commentary Werner, para. 81; ECtHR 3 October 2014, *Jeunesse v. the Netherlands, JV* 2014/343 with commentary P. Boeles para. 108.

69 ECtHR 3 October 2014, *Jeunesse v. the Netherlands, JV* 2014/343 with commentary P. Boeles, para. 90.

do not coincide for the ECtHR.[70]

Different from what the State Secretary states in his letter, two new elements can be discovered in the Jeunesse case.

1. **The role of nationality.** The State Secretary notes that nationality is weighed heavily in the Jeunesse case. As far as known the Court has never done that in this manner in similar cases. In the case Genovese v. Malta[71], in which the Court rules on the refusal by Malta to grant someone the Maltese nationality, the Court admittedly assumes that nationality is part of someone's 'social identity' and that 'social identity' is protected under the right to private life in Article 8 ECHR, but this has not had any consequences to date in family migration cases.[72] The role of nationality in the Jeunesse case is thus certainly a renewal. Even the former Dutch nationality of the mother is weighed and the fact that she lost this involuntarily with the independence of Suriname.[73]

2. The second element is the **extensive testing to the 'best interests of the child'.** The testing to the 'best interests of the child' is derived from Article 3 CRC. This is in itself not new, although it has never enjoyed much compliance in Dutch practice. What is innovatory is the explanation the ECtHR gives to the weight accredited to the interests and what it expects on a national level in the treatment of child interests.

With regards to the weight accredited to the 'best interests of the child', the ECtHR on the one hand states that this weight is 'paramount' and on the other hand that the 'interests cannot be decisive whilst alone'.74 In his letter of 30 October 2014 the State Secretary gives his own explanation of this. He writes: "it is a part [of the balance of interests], not decisive ("paramount but not decisive)." In other words: the 'best interests of the child' must be weighed in the balance of interests just like other interests. By reasoning in this manner, the State Secretary seems to completely miss the added value of the Jeunesse judgment for the testing to the 'best interests of the child'. The ECtHR admittedly does not exclude that other interests are decisive, but considers the 'best interests of the child' as the weightiest interests in principle.

The ECtHR notes that evidence on the position of children must be judged by looking at the practicality, feasibility and proportionality of the deportation of a foreign parent. Such a particular proportionality testing for one aspect of the total balance of interests, is unique. All interests are in principle weighed equally, only the 'best interests of the child' has its own specific proportionality test. Such a test would have consequences for the national judicial testing. The earlier described testing of the Council of State, where the emphasis lies on testing whether all interests have been considered and it is only tested in a reserved manner how the interests have been weighed against each other, cannot be maintained given the judgment of the ECtHR.

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70 See, for example: ECtHR 4 December 2012, *Butt v. Norway*, 47017/19, *JV* 2013/85 with commentary M. Stronks, para. 88; ECtHR 24 July 2014, *Kaplan and others v. Norway*, 32504/11, *JV* 2014/320 with commentary J. Werner para. 86; ECtHR 3 October 2014, *Jeunesse v. the Netherlands*, 12738/10, *JV* 2014/343 with commentary Boeles, para. 117.

71 ECtHR 11 October 2011, 53124/09, *JV* 2012/107

72 Sarah van Walsum writes in 2012 in her commentary on the Antwi case similar to the Jeunesse case, (ECtHR 14 February 2012, Antwi v. Norway, 26940/10, *JV* 2012/170): *"What is also remarkable is that the ECtHR, in its comparison of Antwi to Nunez, does not give meaning to the given that Antwi's child does have the nationality of a member state in which she resides, while this was not the case for Nunez's children. Even more so, assuming that the right of residence of the children was dependent on that of their mother, it seems probable that these children did not even have a right to residence. In its judgment in the case Genovese v. Malta on 11 October 2011 (no. 53124/09, JV 2012/107, ve12000225), the ECtHR ruled that nationality, as part of a person's social identity, concerns their private life and therefore falls within the scope of Article 8 ECHR. Considering this, I have a question whether the private life that a child with the nationality of a member state forms within the society of that member state, must not be weighed more explicitly within the proportionality test than has been the case so far."* Whereas Van Walsum in response to Antwi still criticizes the Court for not weighing the nationality of those involved, the Court does this in Jeunesse.

73 The meaning of nationality could have gone much further potentially, but this is a step the Court was not willing to take. Boeles criticizes this in his commentary on the Jeunesse judgment (*JV* 2014/343): *"The Court does not give any attention to the right of children to reside in their own country as has been safeguarded in Article 3 Protocol No. 4 to the ECHR."*

74 ECtHR 3 October 2014, *Jeunesse v. the Netherlands, JV* 2014/343 with commentary P. Boeles, para. 109.

For the testing to the 'best interests of the child' it would be helpful for all parties involved if the testing to the 'best interests of the child' would be adopted more concretely in legislation and/or policy.

As mentioned before in this document, the State Secretary takes the position in his letter to the Parliament that the Jeunesse case does not give a reason to adjust the policy. A number of possible modifications have been suggested above on a number of points. The State Secretary addresses, despite his general position, two points he wants to change. He wil expand the involvement of the Repatriation and Departure Service and he will adjust the work instruction Article 8 ECHR will be adjusted accordingly (despite the fact that he does not see a reason for making adjustments in the family reunification policy).

It is remarkable that the State Secretary sees little reason to make changes, but that he does see a reason in the judgment to expand the activities of the Repatriation and Departure Service. The Jeunesse judgment of the ECtHR does not contain anything new in relation to the government in the relation of an active role of the government in the return procedure.[75]

On 22 May 2015, seven months after the Jeunesse judgment, the changed work instruction Article 8 ECHR was published.[76] What is positive is that in this work instruction it is acknowledged explicitly for the first time that a long-term lack of effort by the government to promote return must be weighed in the balance of interests in the disadvantage of the government. It is furthermore acknowledged that when no insurmountable obstacles exist to exercise the family life elsewhere, there can be other circumstances that make this exercise difficult ('subjective obstacles'[77]) and there is more attention for the ties that children have built up in The Netherlands. It is a promising development that in the rewritten work instruction published on 1 July 2015[78], a chapter is added about the 'best interests of the child'. The work instruction however does not provide a clear instruction on the weight that must be attached to the best interests of the child. While the Court has acknowledged the 'best interests of the child' in Jeunesse as the in principle weightiest interests (moreover without saying that they are alone decisive in each balance of interests).

Finally, the Jeunesse judgment entails a new criterion: national authorities must always pay attention to and judge evidence on the *practicality, feasibility and proportionality* of the deportation of a parent in the context of the best interests of the child. It is remarkable that exactly this criterion, addressed to national authorities, has not been adopted in the work instruction.

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75 In several cases the ECtHR has already judged similarly to the Jeunesse case when it comes to the role of the government in the long-term tolerating of unlawfully residing persons (compare the cases: ECtHR 28 June 2011, *Nunez v. Norway, JV* 2011/402 with commentary Van Walsum, para. 82; ECtHR 20 September 2011, *A.A. v. the UK*, no. 8000/08, *JV* 2011/484 with commentary van Walsum, para. 61; ECtHR 4 December 2012, *Butt v. Norway*, 47017/19, *JV* 2013/85 with commentary M. Stronks, para. 84; ECtHR 24 July 2014, *Kaplan and others v. Norway*, 32504/11, *JV* 2014/320 with commentary J. Werner, para. 96.

76 Attachment to *Parliamentary papers II*, 2014/15, 32 317, no. 282.

77 The term 'subjective obstacles' wrongfully show these circumstances against objective obstacles. In fact it is about circumstances that are not per se an obstacle, but which can hamper the exercise of family life outside of the Netherlands. This does not exclude by definition that these circumstances can be objectifiable.

78 Attachment to Parliamentary papers II, 2014/15, 19637, no. 2020.

3. THE ESTABLISHMENT AND THE WEIGHING OF THE 'BEST INTERESTS OF THE CHILD' IN THE EUROPEAN UNION

3.1 Children's rights within the EU

Traditionally the EU and its predecessors have little relevance for the application of children's rights. The attention focused on topics related to the economy. Although within the EU rights were given to children, their legal position was often dependent on their parents or family.[79] Over the years the influence of the EU has however become larger and more attention is being paid to children's rights.[80]

In Article 3 paragraph 3 of the Treaty on European Union from 1992 it is included that the European Union promotes the protection of the rights of the child. In 2006 the European Commission (EC) published the communication *'Towards an EU Strategy on the Rights of the Child'.* In this strategy the EC stresses the importance of children's rights for the work of the EU and refers thereby directly to the CRC.[81] Also in 2006, the Court of Justice of the European Union (hereinafter: CJEU) acknowledges that although the Union is not a party to the CRC, the Court does give recognition and protection to fundamental rights in the form of general principles of EU law. For the question which fundamental rights are included, the Court is guided by the joint constitutional traditions of the Member States and by international legal instruments on human rights in which Member States are involved or which they are affiliated to.[82] The Court recognizes in this manner that the provisions of the CRC are part of the fundamental rights that are protected by the Court as general principles of EU law.[83]

In various parts in EU legislation provisions can be found on the 'best interests of the child'. In the Directives on asylum and migration child-specific provisions are also included. Although this is chronologically not entirely correct, Article 24 of the Charter of Fundamental Rights of the EU (hereinafter: the Charter) must be seen as the hierarchical foundation of the child-legal provisions of the European Union. The Charter was adopted in 2000, but became a legally binding document only with the Lisbon Treaty in 2009. Based on Article 51 paragraph 1 Charter Member States are only bound to the Charter if they execute the law of the European Union.

Article 24 Charter reads as follows:

1. *Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
2. *In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
3. *Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.*

According to the official explanations Article 24 Charter is based on the CRC, in particular Articles 3 (the best interests of the child as primary consideration), 9 (right to direct contact with parents and personal relations on a regular basis), 12 (right to be heard) and 13 (right to freedom of expression) CRC. No explanation is given as to why precisely these CRC Articles have been chosen and not others. After all, the CRC could have also been summarized by adopting the core principles of the convention; the Articles 2, 3, 6 and 12 CRC.[84] But evidently a different choice was made.[85]

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79 McGlynn 2002, p. 389-390.

80 Stalford 2012, p. 5-7.

81 COM(2006) 367 definite.

82 Although the EU is thus not a party itself, all the EU member states have indeed ratified the CRC.

83 Boeles, Den Heijer, Lodder and Wouters 2014, p. 45.

84 See chapter 1 for more on these core principles.

85 McGlynn, 2002, p. 394.

In the Explanations relating to the Charter Article 24 paragraph 3 Charter is mainly associated with the right to visitation in cross-border civil cases.[86]

The Explanations raise more questions. Paragraph 3 of Article 24 Charter is based on Article 9 CRC, but does not go as far as the latter Article. Article 9 not only gives the right to *"maintain personal relations and direct contact with both parents on a regular basis"*, but also prohibits the separation of parents and children. The remark that Article 24 Charter is generally based on the CRC and on the mentioned articles specifically, raises the question on how the relation is between the general inspiration from the CRC and the special inspiration for Article 24 Charter. More specifically, the question is which meaning is attributed to the CRC Articles not mentioned and what the purpose is to grant a somewhat limited relevance to Article 9 CRC. For the implementation of the CRC within the sphere of the Union it would also have been more useful if provisions from the CRC had been linked to related provisions within the Charter; by clustering Article 9 and 10 CRC with Article 7 Charter (right to family life), for example.[87]

Although the somewhat arbitrary choices that underlie Article 24 Charter can be criticized and this article might also create uncertainty, the fact is that the article gives children's rights a central position within the EU. It furthermore follows from case law of the CJEU that the Charter must be seen as a text that reflects the general principles of Union law.[88] Even if these principles in the Charter are incomplete or addressed in a limited way, they still fully apply as a Union law principle.[89]

With the Lisbon Treaty entering into force, the Charter has become a legally binding document. Concretisation of Article 24 Charter will for an important part depend on the application of children's rights in the sphere of specific policy areas.[90]

A number of judgments of the Court of Justice of the EU show at least the great significance the Court allocates to Article 24 Charter. The CJEU considers in the judgment Deticek [91] for example that the right of the child to maintain a personal relationship and direct contact with both his or her parents from paragraph 3 of Article 24 Charter is an indisputable right of every child. Provisions of Union Law cannot be explained in a way that would violate this fundamental right, according to the CJEU. The best interests of the child to maintain a personal relationship with both his or her parents can only be waived according to the Court if such contact would be contrary to the child's best interests. The Court of Justice applies the Charter in the Deticek judgment in the context of Article 20 Regulation 2201/2003 (on matrimonial matters and the matters of parental responsibility).[92] Given the hierarchical position of the Charter the judgment of the Court on the meaning of Article 24 has a larger reach and is for example also applicable to the Family Reunification Directive.

Other judgments also show that the Court of Justice is willing to assign a great weight to the 'best interests of the child'. The Court has on 6 June 2013 for example acknowledged the importance of fast and short procedures for unaccompanied minors based on Article 24 paragraph 2 Charter.[93] This importance applies especially to unaccompanied minor asylum seekers because they are a vulnerable group. But this importance also applies to minors in family reunification procedures. This is illustrated for example by the prerequisite of 'expeditious' that Article 10 CRC requires in dealing with applications for family reunification. The expectation is therefore that the Court of Justice will also

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86 Explanations Relating to the Charter of the Fundamental Rights (2007/C 303/02).

87 See for similar critique: Stalford 2012, p. 42-43.

88 CJEU 26 June 2006, Parliament v. the Council, *JV* 2006/313 with commentary Boeles, point 38. See also: Boeles, den Heijer, Lodder and Wouters 2014, p. 45.

89 CJEU 11 December 2014, Boudjlida, ECLI:EU:C:2014:2431, para. 30-35.

90 See for an overview of the relations between different areas of EU law and children's rights: http://www.connectproject.eu/detailed_table.html

91 CJEU 23 December 2009, C-403/09 Deticek.

92 Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

93 CJEU 6 June 2013, C-648/11, *JV* 2013/250, para. 61.

derive the importance of fast and short procedures from Article 24 Charter when it comes to procedures of children who are separated from their parent(s) or who are in danger of becoming separated by a similar procedure.

The above-mentioned cases show that the CJEU dares to give the relatively young Charter a firm position. Provisions from EU law cannot be explained in a way that is in violation with the children's rights that have been adopted in Article 24 Charter. It cannot be precisely derived yet from the mentioned case law how the term 'primary consideration' is weighed exactly by the Court of Justice. What is clear is that the Court finds a balance in favour of the 'best interests of the child' to be important if the interests of the child are evidently harmed by a specific explanation of a provision of EU law.

3.2 From Green Paper discussion to Guidelines

In 2011 the European Commission (EC) published a Green Paper[94] on the Family Reunification Directive. The goal was to bring about a public debate based on a number of questions about the Directive on the necessity to adjust the Directive. Following from this discussion the EC concluded that the Family Reunification Directive does not need to be adjusted, but that there is a need for more clarity on the application and the interpretation of the Directive. To achieve this the EC presented Guidelines on 3 April 2014 to clarify the Family Reunification Directive.[95] The Guidelines reflect the current views of the EC and can change. The positions are in part based on judgments of the CJEU on the Family Reunification Directive, on the other hand they are analogously applicable to judgements of the CJEU about other EU law and finally the Guidelines contain recommendations from the EC without a legal basis.

The Guidelines specifically address the position of children several times. The EC emphasizes in multiple places that, in accordance with Article 5 paragraph 5 Family Reunification Directive, the 'best interests of the child' must be taken into account and based on Article 17 Family Reunification Directive that in case of a rejection of an application for family reunification the individual circumstances of the case must be taken into account. According to the EC Article 5 paragraph 5 Family Reunification Directive contains the duty to take into account the well-being of the child and the situation of the family. Here, the EC refers to the principle of respect for family life, as enshrined in the CRC and the Charter of Fundamental Rights of the EU. The EC further refers to jurisdiction of the CJEU in which it is decided that when determining whether in an individual case the criteria for family reunification have been met, this question always must be answered in the light of the right to private and family life and the rights of the child.[96]

The CJEU having acknowledged that children must grow up in a family environment for a full and harmonious development of their personality is also referred to. The EC states that, for this reason, that when Member States deal with a request for family reunification, they must ensure that a child is not separated from his parents against his will. This is for the Commission only different when the best interests of children require such a separation.[97]

Although the Family Reunification Directive allows Member States to establish a limited number of conditions for family reunification, the EC constantly emphasizes in the discussion on the topic that this does not affect that in cases of rejections based on those conditions the interests of the involved children must still be looked at. Finally, it is remarkable that the EC encourages Member States not to charge administrative costs for family reunification applications submitted by children based on the promotion of the 'best interests of the child'.

94 COM(2011) 735 final.

95 COM(2014) 2010 final.

96 COM(2014) 210 final, p. 26.

97 COM(2014) 210 final, p. 9.

The Guidelines of the EC are an important and useful interpretation of the Family Reunification Directive. In several places the obligation to involve individual interests in the case is emphasized (the horizontal provisions) and the meaning of the 'best interests of the child' is thus firmly established by the EC. In the Green Paper discussion Defence for Children had aimed to coming to separate guidelines that express the meaning and the method of testing to the 'best interests of the child' in individual family reunification procedures.[98] The EC has however not yet been willing to go this far. Even though the Guidelines of the EC are useful, it remains unsatisfactory that there has not yet been given a further clarification on the concept 'best interests of the child', in this case, on the weight that is allocated to these interests compared to other interests. From the case law of the Court of Justice and from various manifestations of the EC it appears that there is increasing attention to the 'best interests of the child' and a growing acknowledgment of the relevance of this child-legal principle. Within the sphere of the EU and within the sphere of the Family Reunification Directive there remains a need to more authoritative interpretations of how the child-legal EU principles must be applied in practice.

3.3 Analysis EU law in the Dutch family migration policy

EU law is not automatically applicable to all family reunification requests and also not always in the same manner. Therefore, the Dutch application of the Family Reunification Directive will first be addressed below, followed by the Zambrano criterion.

3.3.1 The Family Reunification Directive

The Family Reunification Directive addresses family reunification requests from third country nationals. The Family Reunification Directive was implemented in Dutch regulation in 2004.[99] An important starting point for the Dutch government was that the Directive would not bring major changes to the Dutch family migration policy.[100] As a result, the Dutch practice knows no distinction in situations in which the Directive is applicable and situations in which it is not. The conditions imposed on Family reunification are the same for third country nationals and for national citizens. Those who do not meet these conditions, may rely on Article 8 ECHR.

This practice seems to ignore the fact that the Directive has a completely different angle than Article 8 ECHR. The Directive's goal is to promote family reunification, whereas Article 8 ECHR in principle does not entail a right to choice of residence and only in specific situations calls for granting a right to residence. The Directive admittedly allows Member States to impose a limited number of conditions to family reunification, but if someone cannot meet these conditions, an individual balance of interests must take place that does not devalue the mentioned purpose of the Directive. This means that the balance of interests has a much more favourable perspective than the test to Article 8 ECHR. Dutch practice is not in line with this; typical articles of the Directive that oblige to an individual balance of interests, such as Article 5 paragraph 5 Directive and Article 17 Directive, have not been incorporated in Dutch legislation or regulation. The Dutch government has implemented these provisions by referring to the existing provisions Article 3:2 of the General Administrative Law Act and Article 8 ECHR.[101]

The European Commission has criticized this way of implementation of the Directive in 2008 by referring to case law of the Court of Justice. The Netherlands is explicitly mentioned as a country where implementation falls short.[102] Since then The Netherlands admittedly has implemented the provisions from Article 5 paragraph 5 Directive and Article 17 Directive in a few places[103], but these provisions are thereby now only applicable to specific situations and not in general to all family

98 http://www.defenceforchildren.nl/images/69/1835.pdf.

99 Government Gazette 2004, no. 496.

100 Government Gazette 2004, no. 496, p. 6.

101 Government Gazette 2004, no. 496, p. 24-25.

102 (COM2008) 610), p. 12.

103 Article 3.77 paragraph 4 and 3.86 paragraph 12 Alien Decision 2000 with regard to public order and Article 3.15 paragraph 3 sub C with regard to the waiting period of one year.

migration cases to which the Directive is applicable. The implementation therefore still does not suffice.

The Dutch family migration policy has been criticized by The Netherlands Institute for Human Rights on exactly this point; the Institute has thereby done a recommendation to adopt and further elaborate Article 5 paragraph 5 and Article 17 of the Directive in legislation. In addition, the Institute recommends that Article 24 Charter gets an independent and prominent place in legislation.[104] The State Secretary of Security and Justice has responded to this recommendation. He indicates that there is no obligation to always transpose a Directive through legislation, but that it is ultimately about the effectiveness of the Directive having been reached. More substantially, the State Secretary poses that a transposition in legislation is not necessary because Article 5 paragraph 5 and 17 Directive are materially in line with Article 3 CRC and Article 8 ECHR. This is in itself naturally correct. However, the State Secretary does not address the fact that from case law of the Court of Justice it can be derived that the testing to Article 5 paragraph 5, 17 Directive and Article 24 Charter based on the purpose of the Directive has a much more positive starting point than a test to Article 8 ECHR, in which the State is accorded relatively much freedom to make its own considerations. The material norms may thus be related, the testing is very different.

In The Netherlands, the Administrative Jurisdiction Division of the Council of State recently ruled that the income requirement from the Dutch family migration regulation is applied in the same manner to Dutch and third country nationals and that the Directive is therefore also applicable to national citizens.[105] This reasoning seems to leave space for a broader application of the Directive to national citizens. A broader application of the Directive and related Union-legal frameworks on family reunification with national citizens raises the question whether the testing to Article 8 ECHR should not be changed fundamentally. The position of Article 8 ECHR is indeed restrictive in nature and does not entail a right to choose residence, while the position of the Directive is that family reunification must be promoted.

Finally it is important to consider the testing by the Council of State to Article 24 Charter. This testing has initially been equated by the Council of State to its own reserved case law on Article 3 CRC.[106] In later case law the Council of State provides an extensive explanation for the manner in which it executes the testing to Article 24 Charter. By referring to, amongst others, the Kraaijeveld judgment[107] the Council of State rules that also a Union-legal provision that leaves a certain margin of appreciation, is directly applicably by the judge.[108] The manner of testing seems ultimately, however, completely equal to the testing by the Council of State to Article 3 CRC; this means a very reserved test whether the administrative body has been sufficiently aware of the 'best interests of the child'. The Council of State misses the crucial point here that Article 3 CRC and Article 24 Charter actually limit the margin of appreciation of the State.

3.3.2. Zambrano criterion

The Zambrano criterion reads: *Article 20 Treaty of the functioning of the EU (TFEU) is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attached to the status of European Union citizen.*

In B10/2.2 Ac2000 the following conditions for a right of residence based on the Zambrano criterion have been adopted: It must concern a parent of an underage child with the Dutch nationality;

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104 Netherlands Institute for Human Rights 2014, p. 86.

105 Council of State 17 December 2014, *JV* 2015/60 with commentary Groenendijk.

106 See: Council of State 7 February 2012, *JV* 2012/152.

107 CJEU 24 October 1996, C-72/95, para. 47 and further.

108 Council of State 9 October 2014, *JV* 2015/25, para. 1.3.

this child must be dependent on the parent and live with this alien. The dependent relationship that is distinctive for the Zambrano criterion has been expressed in the Vc as follows: *"This child must, in the refusal of a right of residence to the alien, follow the alien and leave the territory of the EU."*

The policy furthermore determines that the Immigration and Naturalisation Service does not assume that the child must follow the alien across the borders of the EU when there is another parent with lawful residence, who can factually take care of the child. According to the policy, another parent can take care of the other child in any case if he/she has the parental authority or can receive this or if the other parent can make use of help and support for the care and upbringing of the child provided by governmental or civil society organizations, which also includes benefits paid by general funds. The Immigration and Naturalisation Service in any case assumes that the other parent cannot factually take care of the child if this parent is detained or proves that the authority cannot be attributed to him.

The above-summarized policy rules on the application of the Zambrano criterion are in fact a representation of case law on this criterion of the Administrative Jurisdiction Division of the Council of State. In a series of judgments on 7 March 2012 the Council of State gave a very limited explanation of the Zambrano criterion, leaning heavily on the Dereci judgment.[109] Central to this is the idea that if the other parent is traceable, only in very exceptional situations it can still be assumed that there is a dependent relationship between the third country parent and the child. Posing that the other parent cannot take care of the child because of psychological problems is not sufficient; the problems that arise from this in the upbringing of the child could be faced with help of home care organisations or the Youth Care Office.[110]

The meaning accredited to the parental authority is also remarkable. For the Council of State the current division of the parental authority is not a relevant aspect in the judgment of a Zambrano situation. The Council of State rules in several cases that it is in fact about the potential division of the authority.[111] The Council of State rules, for example, on 17 October 2012 that the alien, by posing that she has single parental authority, has not proved that she is the only one who can take care of the child. She has surely not yet proved that the father cannot – also – be given the authority over the child.[112] The judgment O.S. and L. of the CJEU shows that the authority is a relevant aspect in the judgment of the Zambrano criterion.[113] The CJEU however does not clarify in which way the parental authority must be involved in the judgment. What is difficult about the term 'parental authority' is that it is not an autonomous Union-legal term and it is therefore unclear which influence the CJEU accredits to the parental authority in the determination of the dependent relationship between parent and child. It seems, however, unlikely that the CJEU meant to stipulate that the treatment of a Zambrano application itself influences the interpretation or adjustment of the parental authority; the CJEU has surely considered that the parental authority can be relevant for the judgment whether in an individual case a dependent right of residence follows from Article 20 TFEU and thus did not rule that Article 20 TFEU is relevant for the interpretation of the civil-legal relationship between a child and his parents.

From the previous cited policy it furthermore follows that the Immigration and Naturalisation Service assumes per definition that with having parental authority, that parent can thereby take care of the child. A parent can have the authority, but can in fact never have taken care of the child or has not done this in years. The case is imaginable that a third-country parent has factually been taking care of the child for years and that the other parent (with Dutch nationality or right of residence) also has parental authority, but in fact is not or limited involved with the child. According to the

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109 Council of State 7 March 2012, 201102780/1/V1, Council of State 7 March 2012, 20115729/1/V1, Council of State 7 March 2012, 201011743/1/V1, Council of State 7 March 2012, 201108763/1/V2.

110 Council of State 7 March 2012, 201108763/1/V2, para. 2.5.7, Council of State 7 March 2012 201011743/1/V1, para. 2.3.7.

111 See, for example: Council of State 17 October 2012, ECLI:NL:RVS:2012:BY0833 and Council of State 3 April 2013, ECLI:NL:RVS:2013:BZ8706.

112 Council of State 17 October 2012, ECLI:NL:RVS:2012:BY0833, para. 5.5-5.6.

113 CJEU 6 December 2012, C-356/11 and C-357/11, para. 51.

Immigration and Naturalisation Service policy, the child is in such a situation not forced to leave the territory of the Union in the deportation of his care-taking parent. The sole fact that there is a parent residing on the territory who has the parental authority over the child would already guarantee this. Defence for Children does not find this persuasive as a general rule. Nothing has surely been said about the will and factual availability of the in The Netherlands residing parent; is this parent willing and suitable to take care of this child? The factual situation of that parent can make this very difficult or even impossible. But the policy assumes that the parental authority resting on this parent guarantees the factual care. When information is provided that this is not the case the authorities should take the information into account.

What is remarkable in the Council of State's case law and in the Immigration and Naturalisation Service's policy rules, is the instrumental dealing with the parental authority for the purpose of State interests in the context of alien law. This is remarkable because the term parental authority in the case law of the European Court of Human Rights (ECtHR) on the right to respect for private and family life (Article 8 ECHR) is seen as an authority accredited to parents for the purpose of the 'best interests of the child'.[114] Parental authority is also seen in Dutch family and youth law as a legal construction that primarily serves the best interests of the child.[115] The Central Appeals Tribunal has asked the CJEU prejudicial questions on the concrete meaning of parental authority and the way in which Dutch policy handles it in Zambrano cases.[116]

In cases in which an appeal on the Zambrano criterion is rejected, a remaining test to Article 8 ECHR often takes place. The testing frameworks to Article 8 ECHR and Zambrano are different and it is therefore in principle understandable that this testing takes place separately. However, this often leads to very remarkable results that raise the question whether the testing should not be combined in part. A judgment of the Council of State on 28 June 2013 can serve as an example; the Council of State considers in the context of the test to the Zambrano criterion that the mother has not proved that the father of the child, potentially with the help of third parties, would not be able to take care of the child so she can stay in The Netherlands. In the same judgment on the same persons the Council of State rules, however, that there is in fact no family life anymore between the child and the father, that the father does not give a factual interpretation to the established visitation rights, that he does not contribute to the costs of living expenses and that the raising of the child and that the mother can therefore continue the family life in Canada.[117] The result of the test to the Zambrano criterion is that the child is not forced to leave The Netherlands because she can stay with her father; the result of the 8 ECHR test is that there is no more family life between her and her father and that she can go with her mother. The testing frameworks may be different, the difference in outcome cannot be completely justified. It seems to be crucial that the Council of State finds the most hypothetical possibility that a child in The Netherlands can remain with the other parent sufficient to reject an appeal on the Zambrano criterion. This however only relates to the implicit acknowledgment that has been given in the Zambrano judgment to the dependence of the child on his or her caring parent. Continuity in the caring relationship is in the 'best interests of the child' and these interests make the child dependent on the caring parent.

It is problematic that the Council of State also ruled that the Charter of Fundamental Rights of the EU is not applicable to these kinds of cases.[118] The CJEU leaves it up to the national judge whether the Charter is applicable or not. It is still a problem that the Council of State does not apply the Charter here. Whilst it is surely about the question whether the child is deprived of effective enjoyment of his rights drawn from Union citizenship. That question is a Union-legal question. The way in which the CJEU interprets Article 24 Charter shows that this provision is (partly) used to interpret Union-legal

114 Bruning, Liefaard and Vlaardingerbroek 2013, p. 1571.

115 See about this: Cardol 2013, p. 378-380.

116 Central Appeals Tribunal 16 March 2015, ECLI:NL:CRVB:2015:665.

117 Council of State 28 June 2013, *JV* 2013/289 with commentary Weterings, para. 4.4 and 6.3.

118 Council of State 17 October 2012, LJN: BY0833, para. 9.1.

provisions in the 'best interests of the child'.[119] When this would happen in the application of the Zambrano criterion it would probably be able to solve the uneasy difference in result between the test to the Zambrano criterion and 8 ECHR; making the 'best interests of the child' a primary consideration as mentioned in Article 24 paragraph 2 Charter indeed emphasizes the necessity to maintain the relation between the child and his caring parent.[120]

119 CJEU 23 December 2009, C-403/09 Deticek.

120 Moreover, the Central Appeals Tribunal has, in a recent judgment in which prejudicial questions on the Zambrano criterion were asked, accredited relevance to Article 24 Charter. See Central Appeals Tribunal 16 March 2015, ECLI:NL:CRVB:2015:665, para. 4.7.

Recommendations

With the research outcomes Defence for Children aims to inspire authorities to give primary consideration to the best interests of the child in individual family migration cases and on a macro level in policy and legislation. In the national report recommendations are provided to the Dutch State authorities and Courts.

With this English translation Defence for Children aims to inform every person working with family migration cases and to inspire the Committee on the Rights of the Child, the EU and Council of Europe to guarantee that the best interests of the child is not just a principle on paper but a practical right.

We call upon:

The **Committee on the Rights of the Child** to:
- Monitor the impact of General Comment No. 14 in country reports and encourage the incorporation in national practice, policy and legislation.

The **European Commission** to:
- Create a clear review framework for the aspects that are taken into account in the establishment of the best interests of the child and the degree of weighing of these aspects. This framework should also be applied in Zambrano- cases. Within the sphere of the EU and within the sphere of the Family Reunification Directive there remains a need for more authoritative interpretations of how the child-legal EU principles must be applied in practice. With the interpretation of the framework General Comment 14 of the UN Committee on the Rights of the Child deems to be guiding.
- Urge Member States to implement article 5 paragraph 5 and article 17 of the Family Reunification Directive in national legislation.
- Monitor if and how State authorities interpret the Family Reunification Directive in line with the Guidelines (COM(2014) 2010 final) in relation to children.

The **Council of Europe**:
- Research family migration policies and how they are taking into account the best interests of the child as a primary consideration in the Member States of the Council of Europe.
- Incorporate in reports and recommendations that, in line with the Jeunesse case by the European Court of Human Rights (ECtHR), national authorities must always pay attention to and judge evidence on the practicality, feasibility and proportionality of the deportation of a parent in the context of the best interests of the child.
- Restrictive testing frameworks like the exceptional circumstances test of the ECtHR should not be applied to children based on article 10 of the Convention on the Rights of the Child which includes a positive starting point for family reunification applications.
- During a hearing at the PACE Committee on Migration, Refugees and Displaced persons attention should be paid to current family migration policies and what the consequences for children are.
- Draw up proposals for the harmonisation and implementation of family reunification policies in Member States. Follow up on the Position paper on family reunification (2 February 2012)[121], the positions by the Council of Europe Commissioner for Human Rights on the rights of minor migrants in an irregular situation (25 June 2010)[122] and the report 'Human mobility and the right to family reunion'[123].

121 http://www.assembly.coe.int/Communication/amdoc012012FamilyReunificationFinalE.pdf.

122 https://wcd.coe.int/ViewDoc.jsp?id=1654377.

123 Doc. 10123 1 April 2004.

BIBLIOGRAPHY

Alston 1994
P. Alston (red.), *The best interests of the child. Reconciling Culture and Human Rights,* Oxford: Clarendon Press 1994.

Beltman 2013
Beltman in *JV* 2013/229.

Boeles 2004
Boeles in *JV* 2004/449.

Boeles, Den Heijer, Lodder and Wouters 2014
P. Boeles, M. den Heijer, G. Lodder and K. Wouters, *European Migration Law*, Cambridge/Antwerp/Portland: Intersentia 2014.

Bruning, Liefaard and Vlaardingerbroek 2013
M.R. Bruning, T. Liefaard and P. Vlaardingerbroek, *Sdu Commentaar Jeugdrecht* (= commentary Youth law), The Hague: Sdu Uitgevers 2013.

Van Bueren 1998
G. van Bueren, *The International Law on the Rights of the Child*, The Hague/Boston/London: Martinus Nijhoff Publishers 1998.

Cardol 2013
G. Cardol, 'Ruiz Zambrano vanuit familie- en jeugdrechtelijk perspectief' (= Ruiz Zambrano from a family and youth-legal perspective), *Asiel & Migrantenrecht (A&MR)* 2013-08.

Coalition for Children's Rights 2014
Coalition for Children's Rights, *Kinderrechten in Nederland, 4de NGO rapportage van het Kinderrechtencollectief* (= Children's rights in the Netherlands, 4th NGO report of the Coalition for Children's Rights), Leiden 2014.

Detrick 1992
S. Detrick (red.), *The United Nations Convention on the Rights of the Child. A Guide to the "Travaux Préparatoires"*, Dordrecht/Bostan/London: Martinus Nijhoff Publishers 1992.

Detrick 1999
S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, The Hague: Martinus Nijhoff Publishers/Kluwer Law International 1999.

Groenendijk 2014
C.A. Groenendijk, 'Gezinshereniging met Nederlanders uit immigrantengroepen – Straatsburg uit kritiek op Nederlandse toetsing van de belangen van kinderen' (= Family reunification with Dutchmen from immigrant groups – Strasbourg expresses critique on Dutch testing to the interests of children), *Asiel & Migrantenrecht (A&MR)* 2014- 08-09.

Hodgkin and Newell 2007
R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF 2007.

Klaassen and Lodder 2014
M.A.K. Klaassen and G.G. Lodder, 'Kroniek Gezinshereniging II. Artikel 8 EVRM' (= Chronicle Family Reunification II. Article 8 ECHR), *Asiel & Migrantenrecht (A&MR)* 2014-02.

McGlynn 2002
C. McGlynn, 'Rights for Children?: The Potential Impact of the European Charter of Fundamental Rights', *European Public Law* 2002-08.

Netherlands Institute for Human Rights 2014
Gezinnen Gezien? *Onderzoek naar Nederlandse regelgeving en uitvoeringspraktijk in het licht van de Europese Gezinsherenigingsrichtlijn* (= Seen families? Research on Dutch regulation and executive practice in light of the European Family Reunification Directive), Netherlands Institute for Human Rights, 2014.

Van Os 2012
E.C.C. van Os, 'Het kind in het migratierecht. Het hele Kinderrechtenverdrag voor minderjarige migranten en asielzoekers' (= The child in migration law. The whole Convention on the Rights of the Child for underage migrants and asylum seekers), in: G.G. Lodder and P.R. Rodrigues (red.), *Het kind in het immigratierecht* (= The child in immigration law), The Hague: Sdu Uitgevers 2012.

Smyth 2012
C. Smyth, 'The Best Interests of the Immigrant Child in the European Courts: Problems and Prospects', in: G.G. Lodder and P.R. Rodrigues, *Het kind in het immigratierecht* (= The child in immigration law), The Hague: Sdu Uitgevers 2012.

Spijkerboer 2009
T. Spijkerboer, Structural Instability: 'Strasbourg Case Law on Children's Family Reunion', *European Journal of Migration and Law* 2009-11.

Spijkerboer 2013
T.P. Spijkerboer, 'De Afdeling bestuursrechtspraak van de Raad van State en kinderrechten in het vreemdelingenrecht' (= The Administrative Jurisdiction Division of the Council of State and children's rights in alien law), in: C.J. Forder, *Rechterlijke creativiteit en de rechten van het kind* (= Judicial creativity and the rights of the child), The Hague: Boom Juridische Uitgevers 2013.

Spijkerboer 2014a
T.P. Spijkerboer, *De Nederlandse rechter in het vreemdelingenrecht* (The Dutch judge in alien law), The Hague: Sdu Uitgevers 2014.

Spijkerboer 2014b
T. Spijkerboer, 'De Afdeling bestuursrechtspraak is helemaal niet formalistisch' (= The Administrative Jurisdiction Division is not formalistic at all), *Journaal Vreemdelingenrecht* 2014-04.

Stalford 2012
H. Stalford, *Children and the European Union. Rights, welfare and accountability*, Oxford: Hart Publishing 2012.

De Vries 2011
K.M. de Vries, Intergration at the border. *The Dutch Act on Integration Abroad in relation to International Immigration Law*, Amsterdam: VU University 2011.

Werner 2015
J. Werner, 'De (uitgestelde) rechtssubjectiviteit van het vreemdelingenkind' (= The (postponed) legal subjectivity of the alien child), *Asiel & Migrantenrecht (A&MR)* 2015-01.

Jurisprudence:
Administrative Jurisdiction Division of the Council of State

Council of State 12 April 2007, *JV* 2007/241

Council of State 27 November 2008, *JV* 2009/50

Council of State 7 February 2012, *JV* 2012/152

Council of State 7 March 2012, 201102780/1/V1

Council of State 7 March 2012, 20115729/1/V1

Council of State 7 March 2012, 201011743/1/V1

Council of State 7 March 2012, 201108763/1/V2

Council of State 17 October 2012, ECLI:NL:RVS:2012:BY0833

Council of State 20 December 2012, *JV* 2013/89 with commentary Nissen

Council of State 23 January 2013, 201200110/1/V1

Council of State 3 April 2013, ECLI:NL:RVS:2013:BZ8706

Council of State 16 April 2013, *JV* 2013/229

Council of State 28 June 2013, *JV* 2013/289 with commentary Weterings

Council of State 18 October 2013, 201208082/1/V1

Council of State 9 October 2014, *JV* 2015/25

Council of State 17 December 2014, *JV* 2015/60 with commentary Groenendijk

Council of State 25 March 2015, ECLI:NL:RVS:2015:1044

European Court of Human Rights

ECtHR 19 February 1996, Gül v. Switzerland, RV 1996/23

ECtHR 29 November 1996, 21702/93, Ahmut v. the Netherlands

ECtHR 2 August 2001, Boultif v. Switzerland, *JV* 2001/254 with commentary Boeles

ECtHR 21 December 2001, Sen v. the Netherlands, *JV* 2002/30 with commentary Van Walsum

ECtHR 26 April 2002, Pretty v. the UK, 2346/02

ECtHR 1 December 2005, Tuquabo-Tekle v. the Netherlands, *JV* 2006/34 with commentary Van Walsum

ECtHR 31 January 2006, Rodrigues da Silva v. the Netherlands, *JV* 2006/90 with commentary Boeles

ECtHR 18 October 2006, Uner v. the Netherlands, *JV* 2006/417 with commentary Boeles

ECtHR 23 June 2008, Maslov v. Austria, *JV* 2008/267 with commentary Boeles

ECtHR 31 July 2008, Darren Omoregie v. Norway, *JV* 2008/330 with commentary Boeles

ECtHR 6 July 2010, Neulinger and Shuruk v. Switzerland, RV 2010/98 with commentary Ruitenberg

ECtHR 28 June 2011, Nunez v. Norway, *JV* 2011/402 with commentary Van Walsum

ECtHR 3 November 2011, Arvelo Aponte v. the Netherlands, *JV* 2012/3

ECtHR 12 February 2012, Antwi v. Norway, *JV* 2012/170 with commentary Van Walsum and RV 2012/18 with commentary Werner

ECtHR 4 December 2012, Butt v. Norway, *JV* 2013/85 with commentary Stronks, RV 2012/21 with commentary Brink

ECtHR 30 July 2013, Berisha v. Switzerland, *JV* 2013/302

ECtHR 8 July 2014, M.P.E.V. and others v. Switzerland, 3910/13

ECtHR 24 July 2014, Kaplan and others v. Norway, *JV* 2014/320, with commentary Werner

ECtHR 3 October 2014, *Jeunesse v. the Netherlands*, *JV* 2014/343 with commentary P. Boeles

Court of Justice of the European Union

CJEU 24 October 1996, C-72/95

CJEU 26 June 2006, Parliament v. the Council, *JV* 2006/313 with commentary Boeles

CJEU 23 December 2009, c-403/09 Deticek

CJEU 6 December 2012, O, S & L, *JV* 2013/87

CJEU 6 June 2013, C-648/11, *JV* 2013/250

CJEU 11 December 2014, Boudjlida, ECLI:EU:C:2014:2431

Central Appeals Tribunal

Central Appeals Tribunal 16 March 2015, ECLI:NL:CRVB:2015:665

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