Dura Lex, Sed Lex?

Rewriting the Council of State’s Judgment in Lili and Howick

Adjudicating the removal of asylum-seeking children from a children’s rights perspective

Isa Céline van Krimpen
26 August 2019

International Migration and Refugee Law

First supervisor: prof. mr. Hemme Battjes
Second supervisor: prof. mr. Betty de Hart

"The moral for any court is to think of the child as a real human being, with his or her own distinctive personality and rights, and not as an extension of the adults involved." 2

Brenda Marjorie Hale, Baroness Hale of Richmond
President of the Supreme Court of the United Kingdom

Chapter I

Introduction

On 24 August 2018, the Administrative Jurisdiction Division of the Council of State (“Council of State”) published its long-awaited judgment concerning the application for international protection lodged by the Armenian unaccompanied asylum-seeking children Lili and Howick, aged twelve and thirteen respectively. 3 Since their arrival in the Netherlands ten years ago, the mother of the children had submitted several applications for international protection and residence permits on non-asylum grounds, but to no avail. 4 When the mother was eventually deported without her children to Armenia, the children were taken into care by Foundation Nidos. 5 The Child Care and Protection Board subsequently issued a list of preconditions to be fulfilled before the return of the children to Armenia, as the children had requested to be reunited with their mother. 6 In their subsequent application for international protection, the unaccompanied children argued that the non-compliance of these preconditions prevented their deportation to Armenia, which was rejected by the State Secretary of Security and Justice.

According to the Council of State, the State Secretary of Security and Justice had on adequate grounds rejected their application for international protection. In its judgment, the Council of State provided the following principal conclusions: firstly, the unaccompanied asylum-seeking children were not eligible for subsidiary protection under the Recast Qualification Directive 7; secondly, their removal to Armenia

---

1 Available at: www.hetlichtewerk.nl.
would not result in a breach of the prohibition of refoulement under Article 3 of the European Convention on Human Rights; and, thirdly, the best interests of the child formed Article 3 of the Convention on the Rights of the Child had sufficiently been taken into account by the State Secretary of Security and Justice.

In the aftermath of the judgment, several organisations, including the non-governmental organisation Defence for Children and the Netherlands’ Ombudsman for Children, and numerous legal scholars criticised the Council of State for having failed to adopt a children’s rights approach. According to these children’s rights organisations and legal scholars, the Council of State should have placed more emphasis on the particular children’s rights of the children involved, including, among other things, granting due weight to the children’s views in accordance with their age and maturity and carrying out an adequate best interests of the child analysis. By adopting a formal and restrictive interpretation of the subsidiary protection status under the Recast Qualification Directive and the principle of non-refoulement under Article 3 of the European Convention on Human Rights, the Council of State had not sufficiently considered the list of preconditions to be fulfilled before the return of the children to Armenia, as issued by the Child Care and Protection Board.

Since the entering into force of the UNCRC in the Netherlands almost twenty-five years ago, the legislation, administrative practice and judicial decision-making concerning the assessment of applications for international protection lodged by asylum-seeking children has repeatedly been criticised for lacking a children’s rights perspective. Although considerable progress has been made

eligible for subsidiary protection, and for the content of the protection granted (recaut) [2011] NJL 3 379 (‘Recast Qualification Directive’).

8 Ibid para 10.5-10.10, 14; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950), entered into force 3 September 1953 (ECHR).


14 This has pointed out, “there are strong academic, educational, and political reasons for judgment writing as a scholarly pursuit”, including bridging the gap between legal theory and practice, allowing students to question judgments from different perspectives and challenging discussions on the importance of diversity in the judiciary.

The legal methodology of rewriting judgments has recently been extended to cases involving children. As demonstrated by Stafford, Hollingsworth and Gilmore, the judicial decision-making process not


seldom fails to adopt a children’s rights approach. In their analysis of national and international jurisprudence ranging from immigration control to the criminal justice system, the authors disclose how judges tend to inter alia disregard the specific children’s rights of the children involved, fail to give due weight to the children’s views in accordance with their age and maturity, and fail to perform an adequate best interests analysis. The rewriting project alternatively “shows how a children’s rights perspective can be used by judges to think through cases involving children in different ways” and thereby “demonstrates, on judges’ own terms, how (…) cases involving children could have been reasoned differently if they had drawn on a children’s rights perspective.”

Rewriting judicial decisions from a children’s rights perspective might be especially valuable in the context of immigration control. With respect to cases concerning (unaccompanied) asylum-seeking children, judges tend to focus on the child’s qualification for international protection (i.e. refugee or subsidiary protection status) instead of their required special protection related to their age. The Council of State’s judgment in the case of Lili and Howick has been criticized for exactly these reasons, i.e. the failure of the Council of State to recognize the children’s rights of the children involved, to take their views into account and to properly identify their best interests, while emphasising the immigration status of the children and their mother. As such, the case of Lili and Howick offers a momentous opportunity to analyse how the Council of State’s judgment “could have been reasoned differently if [it] had drawn on a children’s rights perspective.”

In order to achieve this objective, this paper has been divided into four chapters. Chapter one analyses how the Council of State has examined the best interests of the children involved, as required by Article 3 paragraph 1 of Convention on the Rights of the Child. Chapter two analyses to what extent the European Court of European Rights has adopted a child-sensitive interpretation of the prohibition of refoulement under Article 3 of the European Convention on Human Rights concerning the removal of children to poor socio-economic situations. Chapter three subsequently examines the separate issue to what extent the Court of Justice of the European Union has adopted a child-sensitive interpretation of the subsidiary protection status under the Recast Qualification Directive. Chapter four finally applies the findings of the analysis in the previous chapters in the rewritten Council of State’s judgment concerning the application for international protection from Lili and Howick.

Stalford, Hollingsworth and Gilmore have described five distinct methods to which judges can resort in order to adopt a children’s rights perspective, including relying on the Convention on the Rights of the Child, drawing on legal scholarship focussed on the interpretation of the rights of children, allowing children to participate in legal proceedings, placing the child at the heart of the judgment and drafting the judgment in a child-friendly manner. In the rewritten Council of State’s Judgment in Lili and Howick, the author will focus on the Convention on the Rights of the Child, as analysed by both legal scholars and (supra)national courts, and place Lili and Howick’s best interests at the heart of the judgment. It is thus important to note that the rewritten judgment will be subjected to the following limitations: it will adhere to the written style of the Council of State, it will refer to the applicable law at the time of the judgment, and it will make use of the facts and evidence as known to the Council of State. This rewritten Council of State’s judgment thereby aims “to increase the visibility of children within the law by ensuring that their status as rights-holders is recognized, that their voices are heard and that their interests are identified and factored into judicial decision-making.”

29 ibid 9.
30 ibid 53.
In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Article 3 paragraph 1 of the Convention on the Rights of the Child

Chapter II

The barrier of direct effect of the best interests of the child principle under Article 3 paragraph 1 of the UNCRC in judicial decision-making in the Netherlands

1. Introduction

In the last concluding observations on the fourth periodic report of the Netherlands, the United Nations Committee on the Rights of the Child voiced its concerns on the lack of adequate understanding by national courts to take the best interests of the child into account as a primary consideration throughout any court proceedings.30 The Committee in particular observed the “lack of adequate consideration for the best interests of the child in asylum cases”, and therefore called on the Netherlands to “ensure that the best interests of the child are taken as a primary consideration in all asylum cases involving children”.31 In response to this recommendation, the Government of the Netherlands stated that sufficient attention is given to the best interests of unaccompanied asylum-seeking children during their asylum procedure, thereby implying that no further measures were necessary to fully adhere to the Committee’s recommendations.32

The concluding observations were based on reports concerning the implementation and compliance with the Convention on the Rights of the Child (“UNCRC”) in the Netherlands submitted by the Dutch Ombudsman for Children and the Dutch NGO Coalition for Children’s Rights.33 According to these supporting reports, the absence of the best interests of the child principle in judicial decision-making involving asylum-seeking children was due to the Council of State’s decision on the direct effect of

32 Parliamentary Papers II 2015/16, 26 150, 147, p. 3; This is the letter from the State Secretary of Public Health, Welfare and Sport, M.J. van Rijn, on behalf of the Government of the Netherlands to the chairman of the Lower House of the Dutch Parliament, on how the Government intends to implement the recommendations of the United Nations Committee on the Rights of the Child.
Article 3 paragraph 1 of the UNCRC. According to the Council of State, Article 3 paragraph 1 of the UNCRC has direct effect to the extent that the best interests of the asylum-seeking child involved should be taken into account by Immigration and Naturalisation Service. Domestic administrative courts do not however have to assess whether these interests have been taken as a primary consideration by the Immigration and Naturalisation Service in their decision-making process. Several legal scholars have therefore argued that Article 3 paragraph 1 of the UNCRC has been reduced to a rule of procedure instead of a substantive right in asylum cases involving children. This means that, while the Immigration and Naturalisation Service has to consider the child’s best interests in their decision on the application for international protection, asylum-seeking children cannot invoke their substantive right to have their best interests “taken as a primary consideration when different interests are being considered” in front of a domestic administrative court.

In this Chapter, the aforementioned discussion on whether the best interests of the child per Article 3 paragraph 1 of the UNCRC operates as a rule of procedure instead of a substantive right due to the barrier of direct effect will be analysed in the context of the Council of State’s judgment in Lili and Howick. In order to make such an analysis, the Chapter begins by laying down the doctrine of direct effect in the constitutional legal order of the Netherlands. It will then go on to describe the assessment of the direct effect of the best interests of the child per Article 3 paragraph 1 of the UNCRC in asylum cases involving children in the Netherlands, by taking into consideration the intentions of the contracting parties, the view of the Government of the Netherlands and the position of the Council of State. The next section will briefly address the three main suggestions proposed in the legal academic literature to show how Article 3 paragraph 1 of the UNCRC can operate as a substantive right in the context of asylum law, and propose a general framework for assessing the best interests of the child in the context of asylum. To conclude this Chapter, an analysis will be conducted on the effect of the Council of State’s position on the direct effect of Article 3 paragraph 1 of the UNCRC in the Council of State’s judgment concerning Lili and Howick.

2. The influence of the UNCRC on the constitutional legal order of the Netherlands

2.1. A monist legal order: automatic internal effect versus the doctrine of direct effect

The Netherlands has a monist legal order, which entails that a legally binding international treaty forms an integral part of the constitutional legal order of the Netherlands. Since the ratification of the UNCRC by the Government of the Netherlands, the UNCRC – without having to be translated into national law – thus has automatic internal effect in the Dutch legal order. Since then, the three branches of government in the Netherlands, i.e. the legislature, the executive and the judiciary, are bound by the legal obligation to protect, respect and fulfil the provisions of the UNCRC “to each child within their jurisdiction”, including asylum-seeking children. With regard to the judiciary, this requires that national law, including migration and refugee law, should not be interpreted and applied in violation of provisions of the UNCRC, unless no other interpretation or application is possible.

The legal obligation to comply with the UNCRC is without prejudice to the question whether an asylum-seeking child can invoke a certain provision of the UNCRC in front of a domestic court in the Netherlands, also known as the doctrine of direct effect of international law. In the Netherlands, the doctrine of direct effect of international law is provided for in Article 93 of the Constitution, which states that: “Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.” A provision of the UNCRC can thus be invoked in front of a domestic court in the Netherlands, if it is binding on all persons by virtue of its content; in other words, if it has direct effect.

The legal assessment of whether a provision of the UNCRC “may be binding on all persons by virtue of [its] content” is performed by domestic courts. In their assessment of whether a provision of an
international treaty will be “binding on all persons by virtue of [its content],” domestic courts have to assess whether the invoked provision of the UNCRC is objectively applicable in the national legal order based on the content of the provision.\(^{47}\) In other terms, the legislature should not be required to adopt legislation in order to further clarify the nature and content of this provision. This depends on the nature, content, purpose and formulation of the provision.\(^{48}\) In this context, account will be taken of the travaux préparatoires underlying the negotiations and signing of the UNCRC and the reasoning for the ratification and implementation provided by the Government of the Netherlands in the explanatory memorandum.\(^{49}\) If contracting parties have agreed that a certain provision has direct effect, as can be inferred from the text of the treaty or the negotiations and the signing of the treaty, then a domestic court is obliged to grant direct effect to that provision.

2.2. The legal consequences of granting direct effect to Articles of the UNCRC in asylum cases

The granting of direct effect to provisions of the UNCRC is important for the improvement of the legal protection of asylum-seeking children in the Netherlands. If the question regarding the direct effect of a provision of the UNCRC is answered in the affirmative, an asylum-seeking child can invoke the provision in front of a domestic administrative court. This means that the administrative court will be able to assess whether the decision on the child’s application for international protection by the Immigration and Naturalisation Service is taken in accordance with the invoked provision of the UNCRC.

In this respect, it is important to underline that domestic administrative courts do not assess an asylum claim independently but assess the decision taken by the Immigration and Naturalisation Service “in terms of its lawfulness.”\(^{50}\) In this review, domestic administrative courts will review the decision on the child’s application for international protection in light of the “legal protection and procedural safeguards, in particular with regard to the requirements of due care and accuracy, its merits, and the

\(^{47}\) The Supreme Court of the Netherlands has developed these detailed guidelines for the assessment of the direct effect of international provisions. See e.g. See e.g. Supreme Court of the Netherlands 6 December 1983, NJ 1984, 557 with case note A.C. ’t Hart, Supreme Court of the Netherlands 18 February 1986, NJ 1987, 62; Supreme Court of the Netherlands 30 May 1986, NJ 1986, 688 with case note PA. Stein, Supreme Court of the Netherlands 14 April 1989, NJ 1989, 409 with case note M. Scheltema. The Council of State, the highest general administrative court in asylum cases, has adopted the same guidelines in its case law. See e.g. Michel van Emmerik, ‘Toepassing van het kinderrechtenverdrag in de Nederlandse rechtspraat’ (2005) 6 NCM-Bulletin 700, 702-703; and the reference to Council of State 13 September 2004, 2004/1178/1, ECLI:NL:RVS:2004:AR2181, para 2.5.6.


\(^{50}\) If the decision has not been taken in accordance with the invoked provision of the UNCRC, domestic administrative courts can order the Immigration and Naturalisation Service to review the decision on the application for international protection by the asylum-seeking child.\(^{52}\)

The granting of direct effect to provisions of the UNCRC is also important because, at the moment, it is not possible for children within the jurisdiction of the Netherlands to submit a complaint against the Netherlands concerning a violation of any of their rights under the UNCRC at the United Nations Committee on the Rights of the Child.\(^{53}\) This is because the Government of the Netherlands has neither signed nor ratified the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.\(^{54}\) On the basis of the latest information provided, the Minister of Foreign Affairs has suspended the ratification procedure of the Optional Protocol pending the evaluation of the international treaty body system dated 2020.\(^{55}\) Until the ratification of the Optional Protocol, the Government of the Netherlands merely has a reporting obligation to the United Nations Committee on the Rights of the Child on the implementation of UNCRC in the Netherlands.\(^{56}\) This reporting obligation includes the general situation of the children’s rights in the Netherlands, but does not contain individual cases. In the Netherlands, the full protection of children’s rights in an individual case is therefore related to the granting of direct effect to the provisions of the UNCRC.

3. The direct effect of Article 3 paragraph 1 of the UNCRC in asylum cases in the Netherlands

3.1. The legal consequences of granting direct effect to Article 3 paragraph 1 of the UNCRC in asylum cases

In its General Comment No. 14, the United Nations Committee on the Rights of the Child emphasized: “Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.”\(^{57}\) The United Nations Committee on the Rights of the Child


\(^{54}\) Minister of Foreign Affairs, Letter concerning the ratification of the optional protocol to the UN human rights treaties, 13 March 2019, DIZ:13032019: See also: https://www.zerikarnem.nl/toezegging/toezegging_brief_over_de_stand_van.

\(^{55}\) UNCRC, art 44.

\(^{56}\) United Nations Committee on the Rights of the Child (CRC) ‘General comment No. 14 (2011) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)’ (29 May 2015) CRC/C/GC/14, para 6.
considers the self-executing nature of Article 3 paragraph 1 of the UNCRC essential for the acknowledgement of the best interests of a child as a 'substantive right', which entails:

"[T]he right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general."68

In the context of asylum cases involving children, the granting of direct effect to Article 3 paragraph 1 of the UNCRC would thus allow asylum-seeking children to invoke their substantive right "to have his or her best interests assessed and taken as a primary consideration" in front of the domestic administrative court.69 The domestic administrative court would then have to review the decision on the child’s application for international protection taken by the Immigration and Naturalisation Service.

It is not up to the United Nations Committee on the Rights of the Child, however, to determine whether Article 3 paragraph 1 of the UNCRC has direct effect, as this assessment falls within the exclusive competence of the domestic administrative courts of the contracting states. In this section, the assessment of the direct effect of the best interests of the child per Article 3 paragraph 1 of the UNCRC in asylum cases involving children, as performed by the Council of State, the highest general administrative court in asylum cases in the Netherlands, will therefore be discussed. Before addressing the case law of the Council of State, the legislative history of the direct effect of Article 3 paragraph 1 of the UNCRC will be discussed.

3.2. The legislative history of the direct effect of Article 3 paragraph 1 of the UNCRC

The domestic administrative court will take account of the travaux préparatoires underlying the negotiations and signing of the UNCRC and the reasoning for the ratification and implementation provided by the Government of the Netherlands in the explanatory memorandum. While “the judge is not limited (...) either by the intentions of the contracting parties (in as far as they have not expressly excluded the possibility of the treaty being self-executing), or by the intentions of the national legislative assemblies, as demonstrated in parliaments preparatory work”, the legislative history will be used for guidance purposes.70

It does not explicitly follow from the travaux préparatoires underlying the negotiations and signing of the UNCRC to what extent the contracting parties intended to grant direct effect to the provisions of the UNCRC.61 In the legal academic literature, two opposing reasons are provided for the lack of in-depth discussion on the direct effect of the provisions of the UNCRC in the travaux préparatoires.42 On the one hand, given that the contracting parties had transposed the earlier Declarations of the Rights of the Child from 1924 and 1959 into the legally binding UNCRC, it is assumed that the contracting parties considered the provisions of the UNCRC to have direct effect.65 On the other hand, the fact that most provisions of the UNCRC address the contracting states instead of the child(ren) involved could be taken as implying that the provisions of the UNCRC were not considered to have direct effect.64 Notwithstanding these observation, legal scholars Alen and Wouters rightly observe that the nature of the provision of the UNCRC will eventually be conclusive for determining the direct effect of the invoked provision.65

In contrast to the travaux préparatoires to the UNCRC, the Government of the Netherlands did comment on the direct effect of the specific provisions of the UNCRC in the explanatory memorandum.63 This is because the Government’s analysis of the direct effect of an international provision, while not legally binding, is taken into account by domestic courts.67 After noting that the direct effect of the provisions of the UNCRC has not been discussed during the negotiations and the signing of the treaty, the Government considers that certain provisions have direct effect because they either have been included in other previously ratified treaties, such as the International Covenant on Civil and Political and the European Convention on Human Rights75, or because of the nature, content, purpose or the wording of the provisions.68

The Government does not however seem to assume the direct effect of Article 3 paragraph 1 of the UNCRC.76 In the explanatory memorandum, the Government considers Article 3 of the UNCRC a “general guideline for the interpretation and application of the UNCRC with far reaching

---


62 Ibid.


64 Ibid.180-186; See also Michel van Emmerik, ‘Toepassing van het kinderrechtenverdrag in de Nederlandse rechtspraak’ (2005) 6 NJCM-Bulletin 780, 704.


67 UNCRC, art 7 para 1, 9 para 2-4, 10 para 1-2, 13-16, 30, 37 and 40 para 2.

68 UNCRC, art 5, 8 para 1 and 12 para 1-2.

does not have direct effect. In a judgment concerning the temporary custody of a family with children dated 13 September 2005, the Council of State for instance concluded the following:

“The Articles [2, 3, 22 and 37] of the UNCRC, in view of its formulation, do not constitute norms, which are directly applicable by a judge without further elaboration in national laws and regulations. Children, whose parents have been lawfully confined to temporary custody (…) can therefore not claim exception from the temporary custody on the basis of these provisions.”

In the second line of reasoning, the Council of State does not explicitly consider the direct effect of Article 3 paragraph 1 of the UNCRC, but uses the following words: “inssofar as [Article 3 paragraph 1 of the UNCRC] constitutes a directly applicable norm.” In these judgments covering the period 2008-2011, the Council of States holds that the best interests of the child(ren) involved should be taken into account per Article 3 paragraph 1 of the UNCRC. It does however not discuss the weight that should be given to the best interests of the child(ren) involved. This is, for instance, visible in a judgment dated 15 October 2010 concerning an application for international protection from an unaccompanied asylum-seeking child. In her higher appeal, the child claimed that the Immigration and Naturalisation Service had failed to take her best interests into account in the decision on her application for international protection.

“Insofar as [Article 3 paragraph 1 of the UNCRC] constitutes a directly applicable norm, this does not extend further than that in all actions concerning children the interests of the child concerned should be considered. Other than the alien’s argument, the decision [concerning her application for international protection] dated 16 April 2009 does not show that the State Secretary has insufficiently taken the best interests of the alien into account in light of said provision.”


12 Council of State 13 September 2005, 200507132/1, ECLI:NL:RVS:2005:AU3122, JF 2005/409, Ab 2005, 429 with case note 1, Sewandono, para 2.2.2.3: “De door appellants ingevoegde bepalingen van het IVRK bevatten, gesloten op hun formulering, geen normen die zonder nadere uitwerking in nationale wet- en regelgeving door de rechter direct toepasbaar zijn. Kinderen, van wie die rechters rechtsmiddelen in verdedigingsbeperking zijn gesteld, zoals in het geval van appellants, noemen als onderwerp alleen hun rechten, die zij passend in de context van de zaak kunnen benutten. Het is echter dermate duidelijk dat de juridische invloed van deze bepalingen vrijwel alleen bestaat als zij worden aangewend en gevolgd worden. In aanzien van hun strategische betekenis is het echter onverstandig om de rechter van een officiële bepaling te verwachten, die in een vreemdelingzaak of procedure jegens het kind opgetekend is, de meest fundamentele rechten van het kind af te handelen.”


14 Ibid.


16 Ibid para 2.8.1.9: “Voor zover dit artikel al een direct toepasbare norm inhoudt, zou deze tot niet meer strekken dan dat bij alle maatregelen betreffende kinderen de belangen van het desbetreffende kind dienen te worden betreden. Anders dan de vermelding betoogt, geeft het besluit van 16 april 2009 er geen bril van dat de staatssecretaris hecht in het licht van die verdragsbeïpelling zich onvoldeende rekenschap heeft gegeven van de belangen van de vermelding.”
In the third line of reasoning, the Council of State reiterates that Article 3 paragraph 1 of the UNCRC merely constitutes a directly applicable norm to the extent that in all actions concerning children the interests of the child concerned should be considered.73 It is however added that “as regards the weight that should be accorded to the interests of the child in a specific case, the first paragraph [of Article 3 of the UNCRC], in view of its formulation, does not constitute a norm, which is directly applicable by a judge without further elaboration in national laws and regulations.”74 The Council of State adopted this line of reasoning in its first75 judgment on the direct effect of Article 3 paragraph 1 of the UNCRC in 2004, which concerned a request for a temporary regular residence permit submitted by a family with two children.76 In its judgment dated 23 September 2004, the Council of State stated the following:

“Insofar as the first paragraph [of Article 3 of the UNCRC] constitutes a directly applicable norm, this does not extend further than that in all actions concerning children the interests of the child concerned should be considered. [In the present case, it has not been argued that the interests of the child concerned have not been considered. As regards the weight that should be accorded to the interests of the child in a specific case, the first paragraph [of Article 3 of the UNCRC], in view of its formulation, does not constitute a norm, which is directly applicable by a judge without further elaboration in national laws and regulations.]”77

At first glance, it appeared that the asylum-seeking child had to demonstrate that his or her best interests had not been taken into account by the Immigration and Naturalisation Service.78 However, in subsequent judgments, the Council of State made clear that the Immigration and Naturalisation Service had to include an analysis of the best interests of the child(ren) involved in their decision-making.79 Consequently, a domestic administrative court was deemed able to assess whether the Immigration and Naturalisation Service had taken the best interests of the children into account in its decision-making.80

Nonetheless, in some cases, the Council of State did seem to a certain extent to interpret “a primary consideration” as required under Article 3 paragraph 1 of the UNCRC.81 In these cases, while acknowledging that the best interests of the child is the primary consideration, the Council of State held that other interests might prevail.82 See for instance the reasoning provided by the Council of State in a judgment dated 12 April 2007, which concerned the request by a severely handicapped child for benefits on the basis of Asylum Seekers and Other Categories of Aliens (Provisions) Regulations 2005.83

“The Council of State interprets the words “the primary consideration” under Article 3 paragraph 1 of the UNCRC, taking into account the words used in the English version – “a primary consideration” – as meaning that the interest of the child must be a first consideration, but leaves room for other interests to weight more heavily. As already considered in earlier case law (…), his treaty provision, in view of its formulation, does not constitute a norm, which is directly applicable by a judge without further elaboration in national laws and regulations.”84

In 2012, the Council of State for the first time explicitly acknowledged that Article 3 paragraph 1 of the UNCRC constituted a directly applicable norm to the extent that the interests of asylum-seeking children should be taken into account by the Immigration and Naturalisation Service.85 Most notably, the Council of State emphasized that domestic administrative courts have to assess – though with restraint – whether the administrative body has paid sufficient attention to the best interests of the child.

---

74 In nearly a decade preceding this judgment, the issue of direct effect of Article 3 paragraph 1 of the UNCRC was only dealt with by domestic administrative courts, which issued inconsistent rulings on this matter. See Gerrie A M Ruitenberg, De toepassing van het Internationaal Verdrag inzake de Rechten van het Kind in de Nederlandse rechtspraak (Vrije Universiteit 2003) 122-126.
77 Thomas P Spijkerboer, De Afdeling bestuursrechtspraak van de Raad van State en kinderrechten in het vreemdelingenrecht in Caroline Forder (ed), Rechtelijke creativiteit en de rechten van het kind (Boom Juridische uitgevers 2013) 69.
79 Ibid paras 2.5.1: “De Afdeling verstaat de woorden “de eerste overweging” in artikel 3, eerste lid, van het PVR, mede in aanmerking genomen de bewoordingen in de Engels talige versie - “a primary consideration” - zo dat het belang van het kind een eerste overweging is, maar ruimte geeft voor het zwaarder laten wegen van andere belangen. Zoals zij eerder heeft overwozen (uitspraak van 13 september 2005 in zaak no. 200507132/1, AB 2005, 429) bevat deze verspellingsbepaling, gelet op haar formulering, geen norm die rechtshandhaving voor rechterlijke toepassing door de rechter, aangezien zij niet voldoende concret is voor redenlijke toepassing en derhalve nadere uitwerking behoeft in nationale wet- en regelgeving.”
80 “The Council of State interprets the words “the primary consideration” under Article 3 paragraph 1 of the UNCRC, taking into account the words used in the English version – “a primary consideration” – as meaning that the interest of the child must be a first consideration, but leaves room for other interests to weight more heavily. As already considered in earlier case law (…), his treaty provision, in view of its formulation, does not constitute a norm, which is directly applicable by a judge without further elaboration in national laws and regulations.”
81 “The Council of State interprets the words “the primary consideration” under Article 3 paragraph 1 of the UNCRC, taking into account the words used in the English version – “a primary consideration” – as meaning that the interest of the child must be a first consideration, but leaves room for other interests to weight more heavily. As already considered in earlier case law (…), his treaty provision, in view of its formulation, does not constitute a norm, which is directly applicable by a judge without further elaboration in national laws and regulations.”
4. The child’s best interests as a primary consideration per Article 3 paragraph 1 of the UNCRC

4.1. From a rule of procedure to a substantive right

In the academic legal literature, three main suggestions have been proposed to show how the UNCRC can operate as a substantive right in the context of asylum law. First, several legal scholars have, contrary to the Council of State’s view on this matter, argued that Article 3 paragraph 1 of the UNCRC does contain a standard on the weight to be accorded to these best interests of the child in a specific case, which is directly applicable by a judge.88 Article 3 paragraph 1 of the UNCRC explicitly states that the best interests of the child shall be “a primary consideration”. The best interests of the child should thus be given primary consideration in case of a conflict of interests. This does not entail that the best interests have “absolute priority”, as other interests could be of more importance in a certain situation. Instead, if the Immigration and Naturalisation Service is of the opinion that other interests prevail, it does not entail that the best interests have “a

88 Council of State 7 February 2012, ECLI:NL:RVS:2012:IV3716, J/2012/152, JHG 2013/9 with case note P.R. Rodrigues, para 2.3.8: “Article 3 of the UNHCR has direct effect in so far as it renders the State’s function of protecting the European refugees’ human rights in the exercise of its powers. This assessment is restraint in nature.”

Since this judgment, the Immigration and Naturalisation Service thus has to consider the child’s best interests in their decision on the application for international protection. It also means however that since then asylum-seeking children cannot invoke their substantive right to have their best interests “taken as a primary consideration when different interests are being considered” in front of a domestic administrative court.89 As a result, Article 3 paragraph 1 of the UNCRC has been reduced to a rule of procedure instead of a substantive right in cases involving asylum-seeking and immigrant children.90

89 Compare, for instance, the Council of State’s judgment in Zieldt v. United Kingdom 7 February 2012, ECLI:NL:RVS:2012:BV3716, J/2012/152, JHG 2013/9 with case note P.R. Rodrigues, para 2.3.8: “Article 3 of the UNHCR has direct effect in so far as it renders the State’s function of protecting the European refugees’ human rights in the exercise of its powers. This assessment is restraint in nature.”

90 In general, the principle of the best interests of the child has not been included in the Aliens Act 2000.91 This analysis appears to be somewhat in accordance with the view of the Government of the Netherlands. In the explanatory memorandum concerning the reasoning for the ratification and implementation of the UNCRC, the Government explains that the best interests of the child involved are decisive in case of a conflict of interests, as elaborated above.92

Second, other legal scholars have therefore argued that it is now time for the Government of the Netherlands to adopt legislation, which clarifies the assessment of the best interests of the child involved in a specific case.93 The Netherlands has committed itself to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention”, as required per Article 4 paragraph 1 of the UNCRC.94 In general, the Government of the Netherlands considered the national legislation, administrative practice and jurisprudence in the Netherlands in accordance with the obligations under the CRC to respect, protect and fulfill the rights of children.95 It thus did not consider it necessary to adopt significant “legislative, administrative, and other measures for the implementation of the rights recognized in the [UNCRC]”.96

As a result, the principle of the best interests of the child has not been included in the Aliens Act 2000.97

---

88 Council of State 7 February 2012, ECLI:NL:RVS:2012:IV3716, J/2012/152, JHG 2013/9 with case note P.R. Rodrigues, para 2.3.8: “Article 3 of the UNHCR has direct effect in so far as it renders the State’s function of protecting the European refugees’ human rights in the exercise of its powers. This assessment is restraint in nature.”

89 Compare, for instance, the Council of State’s judgment in Zieldt v. United Kingdom 7 February 2012, ECLI:NL:RVS:2012:BV3716, J/2012/152, JHG 2013/9 with case note P.R. Rodrigues, para 2.3.8: “Article 3 of the UNHCR has direct effect in so far as it renders the State’s function of protecting the European refugees’ human rights in the exercise of its powers. This assessment is restraint in nature.”

90 In general, the principle of the best interests of the child has not been included in the Aliens Act 2000.

91 UNCRC, art 4 para 1.

92 See e.g. Marcelle Reneman, ‘Het Kinderrechtsverdrag krijgt tanden. Over hoe het VN Verdrag inzake de Rechten van het Kind in het gewicht van de juridische wetgeving’ in S. Maat, ‘Rechtskundige creativiteit en de rechten van het kind’ (Boom Juridische uitgevers 2013) 71; Carola Grutters and Carla van Os ‘Het belang van het kind is ver te zoeken’ (2018) 8 A&M&R 2018 384, 387. See also the following case notes: Council of State 23 September 2004, 200404485/1 with case note P.R. Rodrigues, para 3.1.8: “Article 3 of the UNHCR has direct effect in so far as it renders the State’s function of protecting the European refugees’ human rights in the exercise of its powers. This assessment is restraint in nature.”

93 See e.g. Daan Beltman and Elianne Zijlstra, ‘De doortrekkersrecht en de rechten van de kinderen’ (Boom Juridische uitgevers 2013) 71.

94 UNCRC, art 4 para 1.

95 UNCRC, art 4 para 1.

96 Compare, for instance, the Council of State’s judgment in Zieldt v. United Kingdom 7 February 2012, ECLI:NL:RVS:2012:BV3716, J/2012/152, JHG 2013/9 with case note P.R. Rodrigues, para 2.3.8: “Article 3 of the UNHCR has direct effect in so far as it renders the State’s function of protecting the European refugees’ human rights in the exercise of its powers. This assessment is restraint in nature.”

97 In general, the principle of the best interests of the child has not been included in the Aliens Act 2000.
It is to this end that a legislative proposal has been drafted to embed the principle of the best interests of the child in the Aliens Act 2000. Third, legal scholars, such as Alen and Pas, have argued that “one must not be blinded by the self-executing character of international treaties.” In their chapter on the self-executing nature of the UNCRC, Alen and Pas therefore emphasize that “treaty provisions which are not self-executing are also important. Judges can use treaty provision, which are mere declarations of intent, as guidance in the interpretation of domestic legal norms. This is the so-called interpretation “in conformity with the treaty.” Indeed, even though provisions of the UNCRC without direct effect cannot be invoked in front of a domestic court, it still has automatic internal effect in the Dutch legal order. As such, national migration and refugee law, including European Union law and the European Convention on Human Rights, should not be interpreted and applied in violation of provisions of the UNCRC, unless no other interpretation or application is possible. Legal scholar Reneman, for instance, argues that the principle on the best interests of the child is directly applicable by a judge in a specific asylum case, as European Union law and the European Convention on Human Rights should be interpreted in light of Article 3 paragraph 1 of the UNCRC.

The first suggestion, i.e. that Article 3 paragraph 1 of the UNCRC does contain a standard on the weight to be accorded to these best interests of the child in a specific case, which is directly applicable by a judge, will be further analysed below as a convincing argument to grant direct effect to Article 3 paragraph 1 of the UNCRC. This is firstly because, at the time of the judgment of the Council of State in Lili and Howick, the Government of the Netherlands had not adopted national laws and/or regulations clarifying the weight to be given to the best interests of a child in an individual case, as the legislative proposal was still being discussed. Secondly, it will be shown in the next Chapters that neither the European Court of Human Rights nor the Court of Justice of the European Union have adopted a systematic approach to interpret the European Convention on Human Rights or European Union law in light of (Article 3 paragraph 1 of) the UNCRC.

4.2. The assessment of a child’s best interests per Article 3 paragraph 1 of the UNCRC

In General comment No. 14, the United Nations Committee on the Rights of the Child emphasises that “[t]he concept of the child’s best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child.” With reference to General comment No. 5, the Committee clarifies that development should be understood as a “holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development.” As such, the best interests of child principle under Article 3 paragraph 1 of the Convention “expresses one of the fundamental values of the Convention” and “one of the four general principles of the Convention for interpreting and implementing all the rights of the child”, along with the right to non-discrimination under Article 2 of the UNCRC, the right to life, survival and development under Article 6 of the UNCRC and the right to be heard under Article 12 of the UNCRC.

In theory, Article 3 paragraph 1 of the UNCRC is thus an essential legal tool for safeguarding the best interests of children involved in legal proceedings. In practice, however, the best interests of the child principle has resulted in “ubiquity in legal and judicial parlance” as legal scholars and (supra)national courts have provided diverging interpretations of Article 3 paragraph 1 of the UNCRC. This is partly due to the flexibility of the principle necessary for the case specific analysis of the child’s best interests. At the same time, this required flexibility should not prejudice the possibility of developing general guidelines for the assessment of the best interests of the child.

Thus far, the most comprehensive framework for assessing the best interests of asylum-seeking children in the context of international protection has been developed by legal scholar Pobjoy. As a result of his in-depth analysis of (inter)national law concerning asylum-seeking children, Pobjoy had been able to construct a thorough framework for assessing Article 3 paragraph 1 of the UNCRC in asylum cases involving children. This comprehensive framework is based on the work of legal scholar Tobin, who has previously developed a more general “model of children’s rights which is grounded in the provisions of the United National Convention on the Rights of the Children.” In addition, the framework is in accordance with the detailed analysis of legal scholarship on Article 3 paragraph 1 of the UNCRC performed by Stafford, Hollingsworth and Gilmore. The author of the present paper

---

109 United Nations Committee on the Rights of the Child (CRC) ‘General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)’ (29 May 2015) CRC/C/GC/14, para 1.
111 United Nations Committee on the Rights of the Child (CRC) ‘General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)’ (29 May 2015) CRC/C/GC/14, para 12.
therefore considers Pobjoy’s framework for assessing the best interests of asylum-seeking children supported by both legal scholarship and (supra)national courts.

Phase 1: The identification of the best interests of the asylum-seeking child by the determining authority

The assessment of the best interests of (asylum-seeking) children consists of two phases. First, the best interests of the asylum-seeking children have to be determined by a decision-maker, taking into consideration their present and “future protection and development needs.” Decision-makers are under an obligation to identify the best interests of the child involved, which follows directly from the verb “shall” in Article 3 paragraph 1 of the UNCRC. This means that a decision-making cannot state in general terms that the child’s interests have been taken into account, but that a detailed analysis of the child’s best interests has to be conducted.

In this regard, Pobjoy considers the following three factors relevant. First, the asylum-seeking child “who is capable of forming his or her own views [should be provided with] the right to express those views freely in all matters affecting the child [and] the views of the child [should be] given due weight in accordance with the age and maturity of the child”, as safeguarded by Article 12 paragraph 1 of the UNCRC. To this has been added in paragraph 2 of Article 12 that “the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.” In General comment No. 12 concerning the right of the child to be heard, the United Nations Committee on the Rights of the Child emphasized that due to the vulnerability of asylum-seeking children, “it is urgent to fully implement their right to express their views on all aspects of the immigration and asylum proceedings.” Asylum-seeking children must thus be provided the opportunity to (indirectly) express their views on their request for international protection in front of the Immigration and Naturalisation Service and the domestic administrative courts.

Second, “the specific situation and circumstances of the child, including the child’s age, level of maturity and any particular vulnerabilities or needs that that child may have”, have to be taken into

other right of children including the right to be heard; giving appropriate weight to the child’s interest (...); [and] ensuring other agenda do not displace the child’s best interests.”

128 Ibid 223; See also United Nations Committee on the Rights of the Child (CRC) ‘General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)” (29 May 2013), CRC/C/GC/14, para 36.
130 Ibid 226-227, UNCRC, art 12 para 1.
131 Ibid, UNCRC, art 12 para 2.
133 See also Recast Qualification Directive, recital 18.

127 Tarakhel v Switzerland (App no 2917/12 and 2918/12) ECHR, 4 November 2014, § 45; 2014/384 with case note H. Battjes, para 99, 119; See also the reference to para 99 of Tarakhel v Switzerland in El Ghatet v Switzerland App no 597/10 (ECtHR, 8 November 2016) para 46: “The Court has further held that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount(…) (see also Tarakhel v Switzerland (GC), no. 2921/12, § 99, ECHR 2014);” Compare also Recast Qualification Directive, art 20 para 3.
129 Ibid 228-229. See also United Nations Committee on the Rights of the Child (CRC) ‘General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)” (29 May 2013), CRC/C/GC/14, para 4.
130 Ibid para 82.
decision-maker must weigh up the various factors in order to reach a determination as to what is in the child’s best interests.” 136 Pobjoy gives the following example in the context of international protection:

“If all the factors relevant to the best interests of the child determination overwhelmingly support the child remaining in the host State, then strong countervailing factors will be required to justify an outcome that is inconsistent with the child’s best interests. On the other hand, in a borderline case—where there are good arguments that support a determination that it is in the child’s best interests to return to her home State—less will be required by way of countervailing factors.” 137

**Phase 2: Balancing the child’s best interests against other interests**

The second phase concerns the balancing of the identified best interests of the child against countervailing interests. In this balancing exercise, the best interests of the child shall be “a primary consideration”. This entails that the best interests of the child must be a first consideration, while it leaves room for other interests to weigh more heavily. In the explanatory memorandum, the Government of the Netherlands voiced a similar opinion by stating that the best interests should not be given “absolute priority”, as other interests could be of more importance in a certain situation. 138 Even the Council of State has interpreted “the words “the primary consideration” under Article 3 paragraph 1 of the UNCRC, taking into account the words used in the English version – “a primary consideration” – as meaning that the interest of the child must be a first consideration, but leaves room for other interests to weight more heavily.” 139

In this context, it is important to note that the Dutch translation of Article 3 paragraph 1 of the UNCRC speaks of “the” instead of “a” primary consideration. While some legal scholars have argued that this merely constitutes a translation error in the Dutch version of the UNCRC, others have stated that the Dutch version is more restrictive than the English version. 140 In this light, it is noteworthy to mention that, as follows from the travaux préparatoires underlying the negotiations and signing of the UNCRC, the observer for the Netherlands preferred the use of the word “paramount” instead of the word “primary”. 141 In the initial proposal for the Convention on the Rights of the Child, the Polish authorities had proposed to include the following: “The best interests of the child shall be the paramount

137 Ibid.
5. The barrier of the direct effect of Article 3 paragraph 1 of the UNCRC in Lili and Howick

5.1. The Council of State: Article 3 paragraph 1 UNCRC in Lili and Howick

In the case of the unaccompanied asylum-seeking children Lily and Howick, the Council of State briefly discussed the assessment of the direct effect of Article 3 paragraph 1 of the UNCRC. With reference to earlier case law, the Council of State reiterated that the direct effect of Article 3 of the UNCRC constitutes that the best interests of the child should be taken into account in all actions concerning children. With regard to the weight to be accorded to these best interests of the child in a specific case, Article 3 paragraph 1 of the UNCRC, in view of the wording, did not contain a standard which is directly applicable by a judge without further elaboration in national laws and regulations. The administrative court should nevertheless assess whether the administrative body has paid sufficient attention to the best interests of the child and has thus remained within the limits of the law in the exercise of its powers.

In their appeal procedure, the unaccompanied asylum-seeking children had submitted that it could not be deduced from the decision dated 31 May 2018 by the Immigration and Naturalisation Service how the best interests of the children were weighted against other interests, as required by Article 3 paragraph 1 of the UNCRC. In reply to this assertion, the State Secretary of Security and Justice held that the minority of the children had been taken into consideration throughout the asylum procedure. In addition, the children were entitled to reception facilities and benefits until their expulsion to Armenia. Lastly, the Repatriation and Departure Service would only expel the unaccompanied children if adequate reception conditions were available in Armenia.

In this specific case, the State Secretary of Security and Justice had paid sufficient attention to the best interests of the children involved throughout their asylum procedure. According to the Council of State, the obligation of the State Secretary to take into account the best interests of the children did not go as far as to stop their deportation or provide them with a residence permit. By arranging for child-specific reception measures in Armenia through the assistance of the Repatriation and Departure Service, the State Secretary had done everything that could have reasonably been expected by not abandoning the children to their fate. In addition, the Council of State considers it in the interest of the children to be reunited with their mother.

5.2. The Council of State’s judgment from a child-sensitive perspective

In view of the comprehensive framework for assessing Article 3 paragraph 1 of the UNCRC, developed by legal scholar Pobjoy, in asylum cases concerning children, the author of the paper would like to make the following observations with respect to the identification of the best interests of Lili and Howick and the balancing of these best interests against other countervailing interests.

Phase 1: The identification of the best interests of Lili and Howick

In general, the Council of State’s judgment does not reveal to what extent a detailed analysis of the best interests of the unaccompanied asylum-seeking children has been conducted by the State Secretary of Security and Justice. According to the State Secretary of Security and Justice, the minority of the children had been taken into consideration throughout the asylum procedure, including their entitlement to reception facilities and benefits until their expulsion to Armenia. As such, the State Secretary of Security and Justice simply stated in general terms that the children’s interests had been taken into account. This is in breach with its obligation to precisely identify the best interests of the child involved under Article 3 paragraph 1 of the UNCRC.

This is all the more compelling in light of the report issued by the Child Care and Protection Board. The Child Care and Protection Board, a division of the Ministry of Security and Justice, has the task of protecting children, whose parents are unable or unwilling to carry their parental responsibility. As such, the Child Care and Protection Board is the appropriate institute to determine the best interests of the unaccompanied asylum-seeking children. In its report, the Child Care and Protection Board had identified the following interests of the unaccompanied asylum-seeking children: (i) the reunification with their mother, who is emotionally capable to provide sufficient safety to her children and (ii) a suitable growing-up environment, which includes adequate housing, schooling and (health)care focussed on coping with their psychological problems related to their experiences in the Netherlands.

According to the Child Care and Protection Board, the return of the children to Armenia would be contrary to their best interests under Article 3 paragraph 1 of the UNCRC without these preconditions being guaranteed. In view of this, it is noticeable that the Council of State does not comment on the failure of the State Secretary of Security and Justice’s to adequately identify the best interests of the unaccompanied asylum-seeking children.

---

158 Ibid.
159 Ibid.
More specifically, the Council of State’s judgment remains silent on the factors to be taken into account when determining the asylum-seeking child’s best interests, as established by legal scholar Pobjoy. First, it does not follow from the Council of State’s judgment to what extent the State Secretary of Security and Justice has given due weight to the views of the unaccompanied asylum-seeking children in accordance with their age and maturity, as safeguarded by Article 12 paragraph 1 of the UNCRC.161)

Throughout the asylum procedure, the unaccompanied asylum-seeking children have expressed their wish to be reunited with their mother in Armenia under the condition that the preconditions, as formulated by the Child Care and Protection Board, before their return to Armenia were guaranteed.162)

Second, it also does not follow from the judgment to what extent “the specific situation and circumstances of the child, including the child’s age, level of maturity and any particular vulnerabilities or needs that that child may have”, have been adequately taken into account by the State Secretary of Security and Justice.163) As regards the specific situation of the unaccompanied asylum-seeking children, one can think of their long-term residence in the Netherlands, their insignificant residence in Armenia and their earlier separation from their mother, as a result of which the children have been taken into care by Foundation Nidos. To this end, the State Secretary of Security and Justice has held that the minority of the children has been taken into consideration throughout the asylum procedure, including their entitlement to reception facilities and benefits until their expulsion to Armenia. These procedural guarantees throughout the asylum procedure of the children are however irrelevant, as it fails to answer the question whether it is in the best interests of the children to either remain in the Netherlands or return to Armenia. A clear indication that the State Secretary of Security and Justice understands the best interests of the child as a rule of procedure instead of a substantive right.164)

Third, the best interests of the child principle under Article 3 paragraph 1 of the UNCRC has, in the present case, not been interpreted in light of the other children’s rights as safeguarded by the UNCRC. The identified best interests of the children by the Child Care and Protection Board correspond with several children’s rights safeguarded in the UNCRC. Firstly, the first precondition concerning the reunification with their mother, who is emotionally capable to provide sufficient safety to her children, is consistent with “the protection against arbitrary interference with the family” (Article 16), the obligation to respect the responsibilities, rights and duties of parents (Article 5) and the duty of nonseparation (Article 9).165) Secondly, the second precondition concerning a suitable growing-up environment, which includes adequate housing, schooling and (health)care focussed on coping with their psychological problems related to their experiences in the Netherlands is consistent with “the right to an education (Articles 28, 29) (…) the right to the highest attainable standard of health, including access to medical care and treatment (Articles 24, 25) (…) and the right to an adequate standard of living, based, among other things, on the availability of care arrangements for the child in the country of origin (Articles 20, 27).”166)

The Council of State considers it in the interest of the children to be reunited with their mother. In the report dated 26 June 2018, the Child Care and Protection Board concluded however the following: “The Child Care and Protection Board considers it plausible that the mother will not be capable of ensuring the developmental needs of the children in Armenia. As such, the Child Care and Protection Board does not consider their return to Armenia in their best interests, especially in light of the loss of their social network in the Netherlands and the subsequent feelings of loss without any prospect of short-term improvement.”167)

As observed by legal scholar Pobjoy, the return of unaccompanied children to their country of origin to realize the reunification with their family is not in their best interests, if this return would be in violation with their children’s rights.

In addition, the Council of State is of the view that the State Secretary of Security and Justice had done everything that could have reasonably been expected by arranging for child-specific reception measures in Armenia through the assistance of the Repatriation and Departure Service. In the report dated 26 June 2018, the Child Care and Protection Board concluded that this would cause severe emotional damage to both children.168) This is based on the extreme vulnerability of both children, who experience severe emotional problems. As observed by legal scholars Grüters and Van Os, this is contrary to Article 20 of the UNCRC, which requires that children, who are temporarily deprived of their family environment, have to be placed in suitable situation taking due regard to the desirability of continuity in a child's upbringing.169)

In light of these factors, it would be in the best interests of the unaccompanied asylum-seeking children to remain in the Netherlands. As such, the Immigration and Naturalization Service should have submitted solid factors justifying an outcome contrary to the report issued by the Child Care and Protection Board. As demonstrated above, all the countervailing factors put forward by the Immigration and Naturalization Service had already been refuted by the Child Care and Protection Board.

161) UNCRC, art 12 para 1.
166) Ibid 352-352.
168) Ibid.
169) Ibid.
Phase 2: Balancing Lili and Howick’s best interests against other interests

The second phase concerns the balancing of the identified best interests of the unaccompanied asylum-seeking children, i.e. remaining in the Netherlands, against countervailing interests. According to the Council of State, Article 3 paragraph 1 of the UNCRC does not contain a standard on the weight to be accorded to the best interests of the children involved, which is directly applicable by a judge without further elaboration in national laws and regulations. A consistent application of the “partial” direct effect of Article 3 paragraph 1 of the UNCRC thus entails that a domestic court only assesses whether the State Secretary of Security and Justice has paid sufficient attention to the best interests of the children involved.

Nonetheless, in the specific case, the Council of State does seem to perform a balancing exercise by stating that the obligation of the State Secretary of Security and Justice to take into account the best interests of the children did not go as far as to stop their deportation or provide them with a residence permit. With this statement, the Council of State thus balances the best interests of the children against the interest of the Netherlands related to immigration control. This substantive assessment of the weight to be added to the best interests of the child in comparison to the countervailing interests of immigration control thus reveals that the Article 3 paragraph 1 of the UNCRC is directly applicable by a judge without further elaboration in national laws and regulations.

The Council of State should therefore have assessed whether the State Secretary of Security and Justice has considered the best interest of the unaccompanied asylum seekers in the Netherlands related to immigration control. According to the United Nations Committee on the Rights of the Child, the non-rights-based argument of immigration control cannot override best interests of Lili and Howick. Even if non-rights-based arguments would be adequate to override a child’s best interests, immigration control is considered inadequate to outweigh the best interests of the child.170 This seems to be somewhat acknowledged by the Council of State, which argues that (i) there are child-specific reception measures in Armenia and (i) it is in the best interests of the children to be reunited with their mother. Both arguments are however related to the identification of the best interests of Lili and Howick, as explained above. In light of this, neither the State Secretary of Security and Justice nor the Council of State has provided “compelling and evidence-based justification[s]” for their decision to remove the unaccompanied asylum-seeking to Armenia in contradiction with their best interests.171


Ruitenberg G C A M, De doorwerking van het VN-Verdrag inzake de Rechten van het Kind in de Nederlandse rechtspraak (Vrije Universiteit 2003).


Spijkeroor W, ’De Afdeling bestuursrechtspraak van de Raad van State en kinderrechten in het vreemdelingenrecht’ in Forder C (ed), Rechterlijke creativiteit en de rechten van het kind (Boom Juridische uitgevers 2013).


United Nations Committee on the Rights of the Child (CRC) ’General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)’ (29 May 2013) CRC/C/GC/14.


Legislation


Parliamentary Papers II 2007/08, 29 861, 3.

Parliamentary Papers II 2015/16, 26 150, 147.

Parliamentary Papers II 2015/16, 34 541, 3.

Geneva Declaration of the Rights of the Child (adopted 26 September 1924) 21 LNTS 43.


- Treaty Series 1969, 99


- Treaty Series 1969, 99

- Treaty Series 1978, 177

- Treaty Series 2012, 69


- Treaty Series 1969, 100

- Treaty Series 1978, 178


- Treaty Series 1990, 46

- Treaty Series 1990, 170

- Treaty Series 1995, 92

- Treaty Series 1996, 188

- Treaty Series 2002, 233


UNGA Res 73/162 (17 December 2018) UN Doc A/RES/73/162.

Case law
Tarakhel v Switzerland App no 29217/12 (ECHR, 4 November 2014), JV 2014/384 with case note H. Battjes.
Supreme Court of the Netherlands 24 February 1960, NJ 1960, 483 with case note B.V.A. Röling.
Supreme Court of the Netherlands 25 April 1967, NJ 1968, 63.
Supreme Court of the Netherlands 6 December 1983, NJ 1984, 557 with case note A.C. ‘t Hart.
Supreme Court of the Netherlands 18 February 1986, NJ 1987, 62.
Supreme Court of the Netherlands 30 May 1986, NJ 1986, 688 with case note P.A. Stein.
Supreme Court of the Netherlands 14 April 1989, NJ 1989, 469 with case note M. Scheltema.
Supreme Court of the Netherlands 20 April 1990, RvD W 1990, 88.

District Court of The Hague, seated in Amsterdam, 10 September 1997, AB 1998, 55.
“The protection of the children in [expulsion cases] has become clearer in recent years, and may even have increased, as a result of the Court’s reliance on other international legal instruments, in particular the UN Convention on the Rights of the Child, notably its [best interests of the child principle under] Article 3.”

Concurring opinion of judge Jebens in Nunez v Norway App no 55597/09 (ECHR, 28 June 2011)

Chapter III

A child-sensitive interpretation of the prohibition of refoulement under Article 3 of the Convention concerning the removal of children to poor socio-economic situations

1. Introduction

In the case of Lili and Howick, the Child Care and Protection Board – supported by Indigo175, the Netherlands Institute of Forensic Psychiatry and Psychology176 and the Nidos Foundation177 – had formulated inter alia the following preconditions for ensuring the adequate return of the unaccompanied asylum-seeking children to their country of origin, i.e. Armenia: (i) the reunification with their mother, who is emotionally capable to provide sufficient safety to her children and (ii) a suitable growing-up environment, which includes adequate housing, schooling and (health)care focussed on coping with their psychological problems related to their experiences in the Netherlands.178 According to the unaccompanied asylum-seeking children, they would thus face a real risk of ill-treatment within the meaning of Article 3 of the European Convention on Human Rights (“Convention”), if the preconditions before their return to Armenia were not guaranteed.179 In reply to this assertion, the State Secretary of Security and Justice held that the alleged future harm did not attain the minimum level of severity threshold to fall within the scope of Article 3 of the Convention, because the problems were merely of a socio-economic nature.180

In light of these arguments, one of the central questions for the Council of State was whether the forced return of the children to Armenia constituted a breach of the prohibition of refoulement under Article 3 of the Convention in light of the preconditions issued by the Child Care and Protection Board.181 Within this question there are two sub-questions, which can be summarised as follows: first, how does the European Court of Human Rights (“Court”) examine State responsibility under the non-refoulement obligation per Article 3 of the Convention in the context of socio-economic concerns in the country of origin and, second, whether the Court accords special protection to children in this examination.

In this Chapter, the Council of State’s judgment in the case of Lili and Howick will be discussed in light of the Court’s jurisprudence. In order to make such an analysis, the Chapter begins by laying down the two approaches developed by the Court to examine a Contracting State’s responsibility under the non-refoulement obligation per Article 3 of the Convention in the context of socio-economic concerns in a country of origin. It will then go on to describe how the Court accords special protection to children by relying on the concept of vulnerability and the United Nations Convention on the Rights of the Child in its interpretation of the prohibition of refoulement under Article 3 of the Convention. To conclude this Chapter, the aforementioned analysis of the Court’s case law will be compared with the Council of State’s reasoning in the case of Lili and Howick.

2. Article 3 of the Convention: socio-economic concerns in the context of non-refoulement

2.1. The extension of Article 3 of the Convention to the socio-economic sphere

With the adoption of the European Convention on Human Rights, “the Member States of the Council of Europe agreed to secure to their populations the civil and political rights and freedoms therein specified.”182 As the Convention is “essentially directed at the protection of civil and political rights”183 and specifically in its interpretation of the prohibition of refoulement, the Court does not have competence to examine complaints that fall exclusively “within the realm of socio-economic rights, which [are] not covered by the Convention.”184 It is however longstanding jurisprudence of the Court that “the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.”185

176 Indigo provides healthcare to individuals in the Netherlands with mental health issues. See www.indigo.nl.
177 The Netherlands Institute of Forensic Psychiatry and Psychology (“NIFP”) provides expertise in and knowledge of forensic psychiatry and psychology. See www.nifp.nl.
178 The Nidos Foundation is an independent family guardian organization, which pursuant to the law fulfils the guardianship task for Unaccompanied Minor Asylum Seekers. See www.nidos.nl.
180 Ibid para 10.
185 Balaliev v Russia App no 21786/06 (ECHR, 4 July 2013) para 33; See also e.g. Panduro v Latvia App no 40772/08 (ECHR, 26 October 1999) para 2; David Harris, Michael O'Bryen, Ed Bates and Carla Buckley, Law of the European Convention on Human Rights (Oxford University Press 2014) 95-96.
186 Jovic v Ireland App no 62897/13 (ECHR, 9 October 1979) para 26; See also e.g. Sidhu and Dianat v Lithuania App nos 55430/00 and 59338/00 (ECHR, 27 July 2004).
Pursuant to this reasoning, the Court has, under particular circumstances, extended the rights and freedoms proclaimed in the Convention to the socio-economic sphere. This is for instance visible in the context of the prohibition of torture, inhuman or degrading treatment or punishment as safeguarded by Article 3 of the Convention. In conformity with the decisions of the European Commission of Human Rights, the Court has on occasion acknowledged that socio-economic concerns "may raise an issue under Article 3 of the Convention" with respect to poor living conditions in the Contracting State and, in the context of removal, in the country of origin or a third country.

In the context of the removal of asylum seekers to either their country of origin or a third country, the Court has however been hesitant to accord considerable weight to harm of a socio-economic and humanitarian nature in its assessment of the existence of a real risk of ill-treatment within the meaning of Article 3 of the Convention. Initially, the Court thus held that "socio-economic and humanitarian considerations to the issue of forced returns of rejected asylum seekers to a particular part of their country or origin (…) do not necessarily have a bearing, and certainly not a decisive one, on the question whether the persons concerned would face a real risk of ill-treatment within the meaning of Article 3 of the Convention". By means of this wording (i.e. "not necessarily"), the Court however left open the possibility that socio-economic and humanitarian considerations could attain the minimum level of severity threshold to fall within the scope of Article 3 of the Convention.

In subsequent case law, the Court thus held that under restrictive circumstances socio-economic and humanitarian concerns might be in violation with the prohibition of refoulement under Article 3 of the Convention.

186 See e.g. Ingrid Leijten, Core Socio-Economic Rights and the European Court of Human Rights (Cambridge University Press 2018) 233-290 for a discussion on the case law of the Court in the fields of housing, health care and social security within the meaning of Articles 2, 3, and 8 of the Convention.


188 See for a decision of the Commission on the application of Article 3 of the Convention to socio-economic conditions e.g. Francine van Velsum v Belgium (App no 1464/89 (Commission Decision, 9 May 1990); Antonio Casares, "Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?" (1991) 2 European Journal of International Law 141.


190 See e.g. Budina v Russia App no 45603/05 (ECHR, 18 June 2009). M.S.S. v Belgium and Greece App no 30696/09 (ECHR, 21 January 2011).

191 See also Ingrid Leijten, Core Socio-Economic Rights and the European Court of Human Rights (Cambridge University Press 2018) 233-290 and the case law referred to.


193 See M.S.S. v Belgium and Greece App no 30696/09 (ECHR, 18 June 2009).


In the case M.S.S. v Belgium and Greece, which concerned the return of an asylum seeker from Belgium to Greece under the Dublin II Regulation, the Court clarified the circumstances under which this minimum level of severity would be reached with respect to the living conditions of asylum seekers in Greece. It is first emphasized that Contracting States are not obliged to provide asylum seekers in general with housing or financial assistance under Article 3 of the Convention. Nonetheless, asylum seekers should not be prevented from exercising their right under Greek national law, as a result of the implementation of the Reception Conditions Directive, to have access to "accommodation and decent material conditions" due to "deliberate actions or omissions" by the Greek authorities.

This is all the more cogent for asylum seekers because of their status as "a member of a particularly underprivileged economic sphere".
and vulnerable population group in need of special protection.”198 Given the obligations under Greek positive law and the vulnerability of asylum seekers, the Court holds that “State responsibility [under Article 3 of the Convention] could arise for treatment” where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity”.199 In the present case, the Court held that the asylum seeker’s living conditions in Greece, i.e. homeless without any means to provide for his “essential needs” for an indefinite period, constituted such treatment contrary to Article 3 of the Convention.200

Besides the responsibility of the Greek authorities for the applicant’s degrading treatment in violation of Article 3 of the Convention, the Belgium authorities were also found to have “knowingly” subjected the applicant to treatment contradictory to Article 3 of the Convention by returning him to these living conditions in Greece under the Dublin II Regulation.201 According to the Court, the Belgian authorities were aware of the applicant’s living conditions in Greece, as supported by numerous country of origin reports.202 Despite this awareness, the Belgian authorities had not addressed these living conditions at any moment in the legal proceedings due to the systematic application of the Dublin II Regulation.203 By removing the applicant to Greece, the Belgium had thus acted in violation of the principle of non-refoulement within the meaning of Article 3 of the Convention.204

The Court subsequently clarified in Safi and Elmi v the United Kingdom that this approach for assessing whether socio-economic and humanitarian concerns reach the minimum level of severity to fall within the scope of Article 3 of the Convention is only applicable if this future harm is the result of the intentional acts or omissions of the public authorities or non-State bodies.205 One of the questions to which the Court formulated an answer was whether “any returnee forced to seek refuge in [a refugee- or internally displaced persons] camp [in Somalia] would be at real risk of Article 3 ill-treatment on account of the dire humanitarian conditions.”206 In its assessment, the Court made a clear distinction between dire humanitarian conditions in the country of origin or third country resulting from “poverty or (...) the State’s lack of recourses to deal with a naturally occurring phenomenon” or resulting from “the direct and indirect actions” of the public authorities or non-State bodies.207 In the former case, the socio-economic conditions would reach the minimum level of severity threshold under Article 3 of the Convention “only in a very exceptional case, where the humanitarian grounds against the removal are compelling”, as laid down in the case N. v the United Kingdom.208 In the latter case, the M.S.S. v Belgium and Greece-approach would be applicable by taking account of “the applicant’s ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame.”209

In Safi and Elmi v the United Kingdom, the Court applied the M.S.S. v Belgium and Greece-approach as the humanitarian crisis in Somalia resulted from “the direct and indirect actions of the parties to the conflict”.210 The Court considered it important that the parties to the conflict used “indiscriminate methods of warfare” and, equally importantly, non-governmental organisations were denied access to the al-Shabaab’s controlled area.211 In conclusion, “any returnee forced to seek refuge in either camp would be at real risk of Article 3 ill-treatment on account of the dire humanitarian conditions” because of their inability to provide for their essential needs due to overcrowding in the camps and their vulnerability to ill-treatment without any prospect of improvement.212

2.3. Socio-economic harm due to poverty or lack of recourses to deal with natural phenomena

The second situation concerns the removal of an asylum seeker to his or her country of origin or a third country in which the poor living conditions, i.e. future harm of a socio-economic nature, are due to poverty or a State’s lack of resources to deal with a naturally occurring phenomenon.213 In this situation, the Court will assess the prohibition of refoulement under Article 3 of the Convention with the approach developed in the so-called healthcare cases, such as N. v the United Kingdom214 (since replaced by Paposhvili v Belgium).215 Under this approach, the expulsion of an asylum seeker to poor living conditions in the country of origin or third country gives rise to the responsibility of a Contracting State under Article 3 of the Convention in the very exceptional case “where the humanitarian grounds against removal are compelling”:216

The applicability of this framework is most visible in the case S.H.H. v the United Kingdom, which concerned the return of a disabled asylum seeker from the United Kingdom to Afghanistan.217 In this case, the asylum seeker had stated that the appropriate test for assessing whether the poor living

199 ibid para 253; See also Budina v Russia App no 45643/05 (ECtHR, 18 June 2009) and the case law referred to: O’Boorke v United Kingdom App no 30022/97 (ECtHR, 26 June 2001) and Nitsco v Poland App no 85853/01 (ECtHR, 21 March 2002).
200 ibid para 254-264, 366.
201 ibid para 364, 367-368.
202 ibid para 167-172.
203 ibid para 366.
204 ibid para 367-368.
205 ibid para 256.
206 ibid para 282.
207 ibid 368.
208 N. v the United Kingdom App no 26565/05 (ECtHR, 27 May 2008), JF 2008/266 with case note H. Battjes, para 42.
210 ibid para 282-283.
211 ibid para 282. The Court refers to the following paragraphs from the judgment: 82, 123, 127, 137, 139-140 and 160.
212 id para 284-292.
214 N. v the United Kingdom App no 26565/05 (ECtHR, 27 May 2008), JF 2008/266 with case note H. Battjes.
216 N. v the United Kingdom App no 26565/05 (ECtHR, 27 May 2008), JF 2008/266 with case note H. Battjes.
conditions in Afghanistan for people with disabilities attained the minimum level of severity threshold to fall within the scope of Article 3 of the Convention was laid down in M.S.S. v Belgium and Greece. According to the applicant, the living conditions in Afghanistan “were the legacy of the armed conflicts that had long affected the country”, that is to say the result of the omissions of the public authorities or non-State bodies. Similar to the living conditions of asylum seekers in Greece in the case M.S.S. v Belgium and Greece, the asylum seeker would be unable to cater for his essential needs due to his particular vulnerability as a disabled man deprived of family care without any prospect of improvement.

By contrast, the Court found the approach taken in N. v the United Kingdom applicable, for the following three reasons:

First, even though the applicant’s disability did not stem from a naturally occurring illness, “the future harm would emanate from a lack of sufficient resources to provide either medical treatment or welfare provision rather than the intentional acts or omissions of the authorities of the receiving State”. Second, unlike Greece in M.S.S. v Belgium and Greece, Afghanistan as a non-Contracting State had “no positive obligations under European legislation (…) to provide adequate welfare assistance to persons with disabilities” and, thus, could not be held accountable under Article 3 of the Convention. Third, unlike the situation in Somalia in Safi and Elmi v the United Kingdom, there was [no] clear and extensive evidence before the Court that the humanitarian crisis in [Afghanistan] was predominately due to the direct and indirect actions of all parties to the conflict who had employed indiscriminate methods of warfare and had refused to permit international aid agencies to operate.

The Court therefore needed to determine whether or not the applicant’s case was a very exceptional one where the humanitarian grounds against removal are compelling, as determined in N. v the United Kingdom. The situation in the present case was not considered exceptional and, therefore, the return of the applicant to Afghanistan did not constitute a violation of Article 3 of the Convention. According to the Court, the applicant had failed to provide evidence to demonstrate that he would not be able to receive support from any family members, if contacted. More importantly, the Court considered it relevant that the applicant had received medical care in Afghanistan after becoming disabled for a period of four years. As the applicant’s situation had remained approximately similar after his arrival in the United Kingdom, his situation in Afghanistan after his return would be comparable to those four years. The Court thus concluded that “although the quality of the applicant’s life, already severely diminished by his disabled condition, will undoubtedly be negatively affected if he is removed from the United Kingdom to Afghanistan, that fact alone cannot be decisive.”

It is not entirely surprising that the return of the disabled asylum seeker from the United Kingdom to Afghanistan was not found to be very exceptional because of compelling humanitarian grounds. Before S.I.H. v the United Kingdom, the Court had only found a violation of Article 3 of the Convention in the following two cases: (i) in the case of D. v the United Kingdom, which concerned the return of a non-national suffering from AIDS from the United Kingdom to St. Kitts, where he would have no access to medical treatment, accommodation or necessary moral and financial support from present family and (ii) in the case of Aswat v the United Kingdom, which concerned the extradition of a non-national diagnosed with paranoid schizophrenia to the United States of America, where his placement in a maximum security prison would be detrimental to his medical condition. In most other cases concerning (less) seriously ill individuals, the Court would declare the case inadmissible because the complaint based on Article 3 of the Convention was not found to be “very exceptional”. It could thus be deduced from the case law of the Court that the strict approach to determine the minimum level of severity, as developed under N. v the United Kingdom, only seemed applicable to non-nationals, who were “close to death”.

Three years after its judgment in S.I.H. v the United Kingdom, the Court however renounced the idea that only complaints submitted by non-nationals, who were close to death, would be deemed “very exceptional” because of compelling humanitarian grounds, and thus attained the minimum level of severity to fall with the scope of Article 3 of the Convention. In the landmark case Paposhvili v the United Kingdom, the Court clarified that “very exceptional cases” referred to “situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.” According to the Court, “these situations correspond to

220 Ibid para 57, 88.
221 Ibid para 58.
223 Ibid para 89, 92.
224 Ibid.
225 Ibid 90.
226 Ibid 91.
227 Ibid 93, 95.
228 Ibid para 58.
229 D. v the United Kingdom App no 30240/96 (ECHR, 2 May 1997); Aswat v the United Kingdom App no 17299/12 (ECHR, 10 April 2013).
230 Paposhvili v Belgium App no 41738/10 (ECHR, 13 December 2016), JF/2017/22 with case note B.E.P. Myjer, para 179. The Court refers to the following cases: Veb-Ekule Mouanu v Belgium App no 10886/10 (ECHR, 20 December 2011); D.O. v Italy App no 34724/10 (ECHR, 10 May 2012); S.I.H. v the United Kingdom App no 60367/10 (ECHR, 29 January 2013); Kochetova and Others v Sweden App no 75203/12 (ECHR, 30 April 2013); V.S. and Others v France App no 35226/11 (ECHR, 25 November 2014); Khasbaryan v Belgium App no 72597/10 (ECHR, 7 April 2015); Taher v Switzerland App no 60502/12 (ECHR, 14 April 2015); A.S. v Switzerland App no 39350/13 (ECHR, 30 June 2015).
231 Ibid para 183.
232 Ibid para 183.
a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness." 

The question remains as to whether this clarification of the “very exceptional case” by the Court could have altered its conclusion in S.H.H. v the United Kingdom. Until the Court applies the more precisely defined approach from Poposhvili v the United Kingdom in a case concerning the removal of an asylum seeker to poor living conditions, this question remains however hypothetical. This being said, it should be emphasized that the Court has not abandoned the “very exceptional” approach when determining the minimum level of severity threshold to fall within the scope of Article 3 of the Convention in cases concerning the removal of asylum seekers to poor living conditions due to a lack of sufficient resources in the country of origin or third country. As a result, the Court continues to apply two different approaches to examine State responsibility under the non-refoulement obligation per Article 3 of the Convention in the context of poor living conditions in a country of origin or a third country depending on whether “the alleged future harm would emanate (…) from the intentional acts or omission of public authorities or non-State bodies” or from “the lack of sufficient resources to deal with it in the receiving country.”

2.4. Special positive obligations under Article 3 of the Convention for particular vulnerable groups in the context of removal

It can be adduced from the above that the Court has not in essence deviated from its initial thought on the limited weight of socio-economic consideration in its assessment of the existence of a real risk of ill-treatment within the meaning of Article 3 of the Convention. In principle, the Court applies the high minimum level of severity threshold, as developed under N. v the United Kingdom, as the alleged future socio-economic harm is thought to be the result of a lack of sufficient resources or omission of public authorities or non-State bodies. A derogation from this is possible only if the socio-economic harm in the country of origin or third country is clearly related to the intentional acts or omission of public authorities or non-State bodies. So far, this will only be the case in the following two situations: (i) the individuals concerned belonging to a particular vulnerable group to which the country of origin or third country has specific obligations under its positive law (M.S.S. v Belgium and Greece) and (ii) State parties to the conflict use indiscriminate methods of warfare (Sufi and Elmi v the United Kingdom).

As a result, the distinction between the two approaches has raised concerns about the adequacy of the Convention as an international legal instrument in protecting asylum seekers from harm of a socio-economic nature. In the legal academic literature, this distinction between the two approaches has therefore been heavily criticized. Several academics have argued that the distinction between socio-economic harm in the country of origin or third country due to either the intentional acts or omission of public authorities or non-State bodies or poverty or lack of recourses is by no means clear cut. The absence of medical treatment for seriously ill non-nationals could for instance also be qualified as an omission of public authorities. A closer look at S.H.H. v the United Kingdom, for instance, reveals that the disabilities of the asylum seeker were the result of a rocket launch in Afghanistan. The subsequent lack of medical treatment in Afghanistan could moreover be said to be the result of the conflict in Afghanistan. As observed by the Afghan Independent Human Rights Commission, the Government of Afghanistan failed to take measures “to enable [disabled people] full participation in society and to ensure their access to social and educational services.”

In N. v the United Kingdom, the Court attempted to legitimize the distinction between these two approaches on three grounds. First, the Court emphasized that “[a]lthough many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights.” Second, “inherent in the whole of the Convention is a search
for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.246 Third, the burden on Contracting States would be too great if these States had to provide “free and unlimited health care to all aliens without a right to stay within its jurisdiction.”247 Several dissenting judges have refuted these reasons for being in conflict with the absolute nature of the prohibition of refoulement under Article 3 of the Convention, also when it concerns future harm of a socio-economic nature.248 Notwithstanding these legitimate criticisms, the reasoning provided in M.S.S. v the United Kingdom provides some degree of insight into the initial hesitation of the Court to accord considerable weight to harm of a socio-economic and humanitarian nature in its assessment of the existence of a real risk of ill-treatment within the meaning of Article 3 of the Convention.

Particularly in light of these insights, the Court’s ground-breaking M.S.S. v Belgium and Greece should not be underestimated. On the basis of the particular vulnerability of asylum seekers taken together with the legal obligations under positive law, the Court has been able to develop special positive obligations to Article 3 of the Convention in the event of the return of a particular vulnerable non-national to poor living conditions in their country of origin or a third country.249 Through the doctrine of positive obligations, the Court seems thus able to tailor the rights and freedoms under the Convention to the specific needs of vulnerable groups, including asylum seekers.250 According to Timmer, the Court has therefore been able to “legitimize the gradual extension of positive obligations into the socio-economic sphere.”251

Considered in this light, the judgment S.H.H. v the United Kingdom is inconsistent with the Court’s judgement in M.S.S. v Belgium and Greece. The author would argue that the case falls within the line of case law represented by the judgment M.S.S. v Belgium, as the applicant belonged to the particular vulnerable group of disabled people who have been granted specific rights in the positive law of Afghanistan. First, the Court failed to observe that Afghanistan had the positive obligation under its Constitution and the United Nations Convention on the Rights of Persons with Disabilities to provide adequate welfare assistance to persons with disabilities and, as such, could be held accountable under Article 3 of the Convention.252 In section V of the case S.H.H. v the United Kingdom concerning relevant information about Afghanistan, the Court referred to the Report on the Situation of Economic and Social Rights in Afghanistan from the Afghanistan Independent Human Rights Commission, which states that “Article 22 of the Afghan Constitution has emphasised the equality of all people and has outlawed all forms of discrimination among citizens. Article 53 of the Constitution requires the government of Afghanistan to take the necessary measures to ensure rehabilitation, training, and active social participation of persons with disabilities and provide them with medical and financial assistance.”253 On the 18th of September 2012, Afghanistan moreover acceded to the United Nations Convention on the Rights of Persons with Disabilities.254 Similar to the situation in M.S.S. v Belgium and Greece, the applicant thus holds that it would be impossible in practice for him to avail himself of the rights under the Constitution and the United Nations Convention on the Rights of Persons with Disabilities and provide for his essential needs, if returned to Afghanistan.255

Second, the Court failed to acknowledge that persons with disabilities belong to a particularly underprivileged and vulnerable population group in need of special protection.256 Before the Court’s judgment in S.H.H. v the United Kingdom, the Court already acknowledged the particular vulnerability of persons with (mental) disabilities in the context of the right to vote under Article 3 of Protocol No. 1 of the Convention.257 In subsequent years, the Court similarly recognized the vulnerability of persons with disabilities in the context of the prohibition of inhuman and degrading treatment under Article 3 of the Convention with respect to the conditions in detention by reference to the United Nations Convention on the Rights of Persons with Disabilities.258 According to the Court, “States have an obligation to take particular measures which provide effective protection of vulnerable [disabled]
persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.258

Thus, as the applicant belonged to the particular vulnerable group of disabled people who have been granted specific rights in the positive law of Afghanistan, the applicant’s future harm of a socio-economic nature would be the result of intentional acts or omissions of the authorities of Afghanistan. In this situation, the Court should have assessed the prohibition of refoulement under Article 3 of the Convention in accordance with the approach developed in the landmark case M.S.S. v Belgium and Greece. Under this approach, the expulsion of the applicant to Afghanistan would give rise to the responsibility of the United Kingdom under Article 3 of the Convention, when the applicant “wholly dependent on State support” would find himself “faced with official indifference in a situation of serious deprivation or want incompatible with human dignity.”259

This connection between vulnerable groups and a State’s obligations under positive law is however not without criticism.260 Legal scholar Costello is, for instance, of the opinion that the reliance on a State’s positive law “is deeply problematic as the basis for a particular obligation in human rights law.”261 This problematic connection is visible in S.H.H. v the United Kingdom, in which the Court seems to suggest that the minimum level of severity threshold to fall within the scope of Article 3 of the Convention depends on the positive law of the country of origin or third country. Unlike Greece in M.S.S. v Belgium and Greece, Afghanistan as a non-Contracting State had “no positive obligations under European legislation (…) to provide adequate welfare assistance to persons with disabilities” and, thus, could not be held accountable under Article 3 of the Convention.262 In the context of a forced return, this could therefore result in different levels of protection under Article 3 of the Convention depending on the positive law of the country of origin, which is contrary to the absolute nature of this provision.

3. Child-sensitive interpretation of the prohibition of refoulement ex Article 3 of the Convention

Contracting States are obliged to secure to everyone within their jurisdiction the rights and freedoms protected under the Convention without discrimination, as safeguarded by Article 1 of the Convention263 taken together with Article 14 of the Convention.264 In essence, the rights and freedoms protected under the Convention are thus applicable to children, including asylum-seeking children, within the jurisdiction of a Contracting State.265 Despite this, the limited explicit references to children in the Convention266 has raised concerns about the adequacy of the Convention as an international legal instrument in protecting the rights of children.267

Since the entering into force of the Convention, the Court has however adopted several approaches to interpret the Convention in a child-sensitive manner, including a reliance on the concept of vulnerability and the United Nations Convention on the Rights of the Child.268 Both interpretation methods have allowed the Court to tailor the rights and freedoms under the Convention to the specific rights and protection needs of children.269 A good example of this is the Court’s case law on the detention and removal of asylum-seeking children, where the Court has been able to legitimize special positive obligations and a lower minimum level of severity to fall within the scope of Article 3 of the Convention by relying on the concept of vulnerability and the United Nations Convention on the Rights of the Child.

The brief summary of the case law below is intended to show how the Court has gradually adopted this child-sensitive approach to the interpretation of Article 3 of the Convention first in cases concerning the detention of (un)accompanied asylum-seeking children and then in cases concerning the removal of accompanied asylum-seeking children to a third country. While these cases do not explicitly deal with a situation in which an asylum-seeking child faces removal to poor living conditions in his or her country of origin, it clearly demonstrates the Court’s general principles for determining the scope and

258 European Convention on Human Rights, art 1: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”
259 European Convention on Human Rights, art 14: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”
261 See European Convention on Human Rights, art 5 para 1 sub d and art 6 para 1; The European Convention on Human Rights also refers to children in the context of the rights of their parents, art 2 of Protocol No 1 and art 5 of Protocol No 7.
263 European Convention on Human Rights, art 1: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”
264 European Convention on Human Rights, art 14: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”
the minimum level of severity threshold under Article 3 of the Convention in cases involving asylum-seeking children. It will be shown that the Court has made “its own contribution to children’s rights through the development of an entirely new set of legal requirements and rules” by relying on concept of vulnerability and the United Nations Convention on the Rights of the Child.270

3.2. The use of the concept of vulnerability in the interpretation of Article 3 of the Convention

3.2.1. Case law on the detention, living conditions and removal of asylum-seeking children

The Court first relied on the concept of vulnerability in a case concerning the detention of an unaccompanied asylum-seeking child. In the landmark case Mulhanzila Mayeka and Kaniki Mitunga v Belgium, concerning the two-months detention of an unaccompanied asylum-seeking child in a centre intended for adults without adequate child-friendly assistance in Belgium, the Court found a violation of Belgium’s positive obligation under Article 3 of the Convention.271 According to the Court, the positive obligation of a Contracting State under Article 3 of the Convention taken together with Article 1 of the Convention entailed that reasonable measures should be taken to prevent ill-treatment of vulnerable members of society, in particular children, “of which the authorities have or ought to have knowledge”.272 In its reasoning, the Court relied on the child’s extreme vulnerability due to her very young age, status as an illegal immigrant and separation from her parents as decisive factors, which take “precedence over considerations relating to the (…) applicant’s status as an illegal immigrant.”273 According to the Court, the unaccompanied asylum-seeking child “therefore indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention.”274

In cases related to the conditions in detention of asylum-seeking children accompanied by their parents, the Court first seemed hesitant to accord the same weight to the vulnerability of the children involved in the assessment of the special positive obligations under Article 3 of the Convention.275 Initially, the Court held that a “Contracting State’s obligations regarding the treatment of minor migrants can differ depending on whether or not they are accompanied.”276 At the same time, however, the Court stated that Contracting States are not exempt “from their obligation to protect children and to adopt adequate measures in respect of the positive obligations under Article 3 of the Convention” because asylum-seeking children in detention are accompanied by their parents.277

In the landmark case Popov v France, which concerned the administrative detention of a Kazakh family with two underaged children in France, the Court explicitly revisited the position that a Contracting State could have different positive obligations under Article 3 of the Convention for unaccompanied and accompanied asylum-seeking children in detention.278 Referring to Mulhanzila Mayeka and Kaniki Mitunga v Belgium, the Court observed that Contracting States are not exempt “from their duty to protect children and take appropriate measures as part of their positive obligations under Article 3 of the Convention (…) and that it is important to bear in mind that the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant.”279

Emphasizing the children’s vulnerability in Popov v France, the Court reached the conclusion that the “living conditions inevitably created for them a situation of stress and anxiety, with particularly traumatic consequences” in violation of Article 3 of the Convention.280

In its assessment of the Contracting State’s obligations under Article 3 of the Convention, the Court referred to the obligations Contracting States have towards children under the Reception Conditions Directive and the United Nations Convention on the Rights of the Child.281 On the basis of the Reception Conditions Directive, Member States of the European Union are obliged to take into consideration the special reception needs of both accompanied and unaccompanied children.282 In the same manner, the United Nations Convention on the Rights of the Child does not differentiate between unaccompanied and accompanied children in the Contracting States’ obligation to provide asylum-seeking children with appropriate protection and humanitarian assistance.283

In the context of the prohibition of refoulement, the Court has in the same manner relied on the vulnerability of asylum-seeking children in order to determine whether their removal to inadequate living conditions in a third country attained the minimum level of severity necessary to fall within the scope of Article 3 of the Convention.284 In the landmark case Tarakhel v Switzerland, which concerned

---


271 Mulhanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECHR, 12 October 2006) para 50-59.

272 Ibid para 53. The Court refers to Osman v the United Kingdom App no 23452/94 (ECHR, 28 October 1998) para 116. 273 Ibid para 51; in para 51 the Court similarly states that the child is “dependent on adults and has no ability to look after itself so that, when separated from its parents and left to its own devices, it will be totally disoriented.”

274 Ibid.

275 Muskhadzhiyeva and Others v Belgium App no 41442/07 (ECHR, 19 January 2010), JV 2010/119 with case note G.N. Comelis, para 57-58. See also Kanagaratnam v Belgium App no 15297/09 (ECHR, 13 December 2011), JV 2012/34, para 64; Popov v France App nos 39472/07 and 39474/07 (ECHR, 19 January 2012), JV 2012/167 with case note H. Battjes, para 91.

276 Ibid.

277 Ibid para 102.

278 Ibid para 91.

279 Reception Conditions Directive, art 17; This article has been replaced by the Recast Reception Conditions Directive, art 21.

280 UNCRC, art 22.

281 Tarakhel v Switzerland App no 2012/12 (ECHR, 4 November 2014), JV 2014/384 with case note H. Battjes. See also Jessica Schild, The Internal Protection Alternative in Befugee Law. Treaty Basis and Scope of Application under the 1951
the return of an asylum-seeking family with six underaged children from Switzerland to Italy under the Dublin II Regulation, the Court most notably found that the Swiss authorities had to obtain “detailed and reliable” individual guarantees from the Italian authorities guaranteeing the unity of the family in reception conditions adapted to the needs of the children; otherwise, the return of the asylum-seeking family to Italy would constitute a violation of Article 3 of the Convention.283 Similar to M.S.S. v Belgium and Greece, the Court assessed the expulsion of the family in light of their ability to cater for their essential needs, their vulnerability to ill-treatment and the prospect of improvement, as the poor reception conditions in Italy were regarded the result of the intentional omissions of the Italian public authorities.284

Interestingly enough, the Court observed that both the overall situation of asylum seekers in Italy and the individual situation of the asylum-seeking family were not comparable to the situation in M.S.S. v Belgium and Greece.285 Notwithstanding this difference, the Court emphasized the positive obligation under Article 3 of the Convention to provide extremely vulnerable asylum-seeking children with special protection, including adequate reception conditions, preventing “a situation of stress and anxiety, with particularly traumatic consequences”.286 With reference to the Court’s earlier case law concerning the detention of (un)accompanied asylum-seeking children and the rights of these children under the United Nations Convention on the Rights of the Child to adequate protection and humanitarian assistance,287 the Court reiterated that the particular vulnerability of asylum-seeking children, i.e. their age, dependency and insecure residence status, “is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant.”288 In the wake of the cases M.S.S. v Belgium and Greece and Tarakhel v Switzerland, the Court delivered several inadmissibility decisions in similar cases, which should be briefly discussed for their clarification of the concept of group vulnerability and the detailed and reliable individual guarantees.289 As regards the concept of group vulnerability, the Court clarified in subsequent case law that different degrees of group vulnerability require different levels of care from Contracting States under its positive obligation per Article 3 of the Convention. In cases concerning the Dublin transfer of individuals, who

had been granted a residence permit for international protection in Italy, the Court held for instance that the applicants had “not demonstrated that their prospects, on return to Italy, whether considered from a material, physical or psychological perspective, disclosed a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3” of the Convention.290 According to the Court, “the situation of asylum seekers cannot be equated with the lawful stay of a recognised refugee who has been explicitly granted permission to settle in the country of refuge”.291 Beneficiaries of international protection were “entitled, inter alia, to work and to benefit under the general schemes for social assistance, health care, social housing and education provided for by Italian domestic law”.292 For this reason, beneficiaries of international protection had the same rights and obligations under Italian domestic law as Italians citizens and thus could not be compared to the particular vulnerable group of asylum seekers in need of special protection under Article 3 of the Convention.293 The Court deduced from this that, while national authorities have a special duty of care to the particular vulnerable group of asylum seekers, beneficiaries of international protection merely have a right to be treated equally to nationals of the third country.294

Concerning the detailed and reliable individual guarantees, the Court has considered “general” assurances from the Italian authorities guaranteeing the unity of the family in reception conditions adapted to the needs of the children, in the absence of any concrete indication to the contrary, sufficient under Article 3 of the Convention.295 In M.S.S. v Belgium and Greece, the Court found the assurances sought by the Belgian authorities from the Greek authorities insufficient; “it merely referred to the applicable legislation, with no relevant information about the situation in practice.”296 Some legal scholars deduced from this judgments that a situation of systemic deficiencies in the asylum system “no individual guarantees can “work” to permit transfer.”297 The Court subsequently held in Tarakhel v

283 Mohammed Hassine and Others v the Netherland and Italy App no 27725/10 (ECHR, 2 April 2013) para 78; E.T. and N.T. v Switzerland and Italy App no 79488/13 (ECHR, 30 May 2017) para 27.
284 Mohammed Hassine and Others v the Netherland and Italy App no 40524/10 (ECHR, 27 August 2013) para 179.
285 E.T. and N.T. v Switzerland and Italy App no 79480/15 (ECHR, 30 May 2017) para 26; The Court refers to Tarakhel v Switzerland App no 29217/12 (ECHR, 4 November 2016), JF 2014/384 with case note H. Batjies, para 41.
286 Mohammed Hassine and Others v the Netherlands and Italy App no 27725/10 (ECHR, 2 April 2013) para 78; Mohammed Hassine v the Netherlands and Italy App no 40524/10 (ECHR, 27 August 2013) para 179.
287 Compare para 3 and 4-4.2 of the opposing view from H. Batjies in Council of State 30 May 2018, 2017003/354/1/3, ECLI:NL:RVS/2018/1795, JF 2018/128 with case note H. Batjies, Compare the opposing conclusion of the Human Rights Committee in e.g. R.A.A. and Z. M. v Denmark No 2608/2015 (HRC, 15 December 2016) CCPR/C/113/D/2608/2015, J. A.A. and F.H.M. v Denmark No 2681/2015 (HRC, 21 April 2017) CCPR/C/119/D/2681/2015, O.T.K. v Denmark No 2770/2016 (HRC, 30 November 2017) CCPR/C/121/D/2770/2016, See also Request for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 28 August 2017 in Case C-517/17: Mõikus Addis v Bundesrepublik Deutschland; Request for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 15 September 2017 in Case C-540/17 Bundesrepublik Deutschland v Adel Hamad; Request for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 15 September 2017 in Case C-541/17 Bundesrepublik Deutschland v Adel Hamad; Request for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 15 September 2017 in Case C-541/17 Bundesrepublik Deutschland v Amor Omari.
288 See e.g. A & M v Others v the Netherlands App no 21459/14 (ECHR, 3 November 2015), M.R. and Others v Finland App no 13610/16 (ECHR, 24 May 2016), N.A. and Others v Denmark App no 15366/16 (ECHR, 28 June 2016), F.M. and Others v Denmark App no 2015/16 (ECHR, 13 September 2016), M.A.-M. and Others v Finland App no 32275/15 (ECHR, 4 October 2016).
that “detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation of the family unit” had to be obtained from the Italian authorities.106 This would seem to suggest that guarantees should include a “detailed, individualized assessment, taking into account the nature of the risk, and the concreteness of the guarantees.”107 Since Tarakhel v Switzerland, the Italian government has however issued several general circular letters, which guaranteed the reservation of a set number of accommodation places within the so-called SPRAR system reserved for asylum-seeking families with children.108 In several inadmissibility decisions, the Court has found these general guarantees sufficient, “in the absence of any concrete indication in the case file,” if the Italian were notified before the transfer to Italy by the national authorities of the sending State.109 Thus far, it has however proved rather difficult to provide such concrete indications prior to the transfer of an asylum seeker.110 For this reason, several non-governmental organizations have argued for the application of the so-called Othman-criteria, as developed in extradition cases.111 In Othman (Abu Qatada) v the United Kingdom, the Court held that Contracting States have an obligation under Article 3 of the Convention to examine whether diplomatic assurances are in practice “a sufficient guarantee that the applicant will be protected against the risk of ill-treatment.”112 Unless the general human rights situation prohibits the use of diplomatic assurances, the quality of the diplomatic assurances has to be examined and “whether, in light of the receiving State’s practices, they can be relied upon” by taking into account eleven factors.113 Pending the first judgment in which the Court applies the Othman-criteria outside the context of extradition, the quality of the individual guarantees in removal cases remains rather weak.

3.2.2. The legal implications of the use of the concept of vulnerability
While the Court has thus far not provided a clear definition of the concept of vulnerability, the following three legal implications can be drawn from the aforementioned case law.114 First, “in determining the scope of the positive obligations on the State, extreme vulnerability [requires] a greater duty of protection.”115 Through the concept of vulnerability, the Court has been able to establish special positive obligations for Contracting States under Article 3 of the Convention.116 To illustrate, in Tarakhel v Switzerland, the Court first “reiterates[d] that, as a particularly underprivileged and vulnerable population group, asylum seekers require “special protection” under Article 3 of the Convention.”117 It subsequently emphasized that “[t]his requirement of ‘special protection’ of asylum seekers is particularly important when the persons concerned are [unaccompanied or accompanied] children, in view of their specific needs and their extreme vulnerability”, which is “related in particular to their age and lack of independence, but also to their asylum-seeker status.”118 This meant that the reception conditions had to be adapted to the age of the asylum-seeking children.119

Second, “a greater degree of vulnerability [seems to justify] a lower threshold of tolerance” under Article 3 of the Convention.120 To illustrate this and for the purpose of comparison, in M.S.S. v Belgium and Greece, the Court established that the minimum level of severity threshold to fall within the scope of Article 3 of the Convention would be met, if the asylum seeker would end up in “a situation of serious deprivation or want incompatible with human dignity.”121 In Tarakhel v Switzerland, the Court highlighted that “the specific situation of the applicants in the present case is different from that of the applicant in M.S.S. Whereas the applicants in Tarakhel v Switzerland were immediately taken charge of by the Italian authorities, the applicant in M.S.S. was first placed in detention and then left to fend for himself, without any means of subsistence.”122 According to the Court, the Tarakhel family would not end up in “a situation of serious deprivation or want incompatible with human dignity” in Italy, thus suggesting that the minimum level of severity threshold to fall within the scope of Article 3 of the Convention, as developed in M.S.S. v Belgium and Greece, would not have been met. Notwithstanding

106 Tarakhel v Switzerland App no 29217/12 (ECHR, 4 November 2014), JF 2014/384 with case note H. Battjes, para 121.
109 See e.g. J.A. and Others v the Netherlands Application no 21459/14 (ECHR, 3 November 2015); M.R. and Others v Finland Application no 13650/16 (ECHR, 24 May 2016); N.A. and Others v Denmark Application no 15636/16 (ECHR, 28 June 2016); M. and Others v Denmark Application no 21459/14 (ECHR, 13 September 2016); M.A. and Others v Finland Application no 52275/15 (ECHR, 4 October 2016).
111 The AIRE Centre (Advice on Individual Rights in Europe), DCR (Dutch Council for Refugees), ECRE (European Council on Refugees and Exiles), Written submissions in M.S.S. v Belgium and Greece, 2014/384 with case note H. Battjes para 117.
112 Ibid.
114 Tarakhel v Switzerland App no 29217/12 (ECHR, 4 November 2014), JF 2014/384 with case note H. Battjes, para 118.
115 Ibid para 119.
116 See also para 3 of the dissenting opinion of judge Ranzi, joined by judges López García, Sicilianos and Lemmens in M.S.S. v Belgium and Others v Belgium Application no 60125/11 (ECHR, 17 November 2016).
117 Ibid.
119 Tarakhel v Switzerland App no 29217/12 (ECHR, 4 November 2014), JF 2014/384 with case note H. Battjes, para 118.
120 Ibid para 119.
121 Ibid para 119.
122 See para 3 of the dissenting opinion of judge Ranzi, joined by judges López García, Sicilianos and Lemmens in M.S.S. v Belgium and Others v Belgium Application no 60125/11 (ECHR, 17 November 2016).
123 M.S.S. v Belgium and Greece Application no 30696/09 (ECHR, 21 January 2011), JF 2011/48 with case note H. Battjes para 253. See also Budina v Russia Application no 45603/05 (ECHR, 18 June 2009) and the case law referred to: O’Rourke v United Kingdom Application no 30229/97 (ECHR, 26 June 2001) and Niuski v Poland Application no 6563/01 (ECHR, 21 March 2002).
124 Tarakhel v Switzerland App no 29217/12 (ECHR, 4 November 2014), JF 2014/384 with case note H. Battjes, para 117.
this difference, the reception conditions for asylum seeking children would still attain “the threshold required to come within the scope of the prohibition under Article 3 of the Convention”, if those conditions would “create ... for them a situation of stress and anxiety, with particularly traumatic consequences.”

Third, in its reliance on the concept of vulnerability, the Court should remain mindful of the risks accompanying the use of vulnerable groups in its interpretation of provisions of the Convention. With respect to asylum-seeking children, the Court should avoid paternalism when relying on the vulnerability of asylum-seeking children in order to legitimize special positive obligations under Article 3 of the Convention. In their analysis of Muskhadzhiyeva and Others v. Belgium, concerning the detention of accompanied asylum-seeking children in a centre intended for adults without adequate child-friendly assistance in Belgium, legal scholars Vandenhole and Ryngaert observe that the mere emphasis of asylum-seeking children as inherently vulnerable could be detrimental to their agency.

While Vandenhole and Ryngaert acknowledge the extreme vulnerability of the children in Muskhadzhiyeva and Others v. Belgium, the legal scholars prefer the use of the term “contextual vulnerability” as this would avoid paternalism by the Court.

In response, legal scholar Timmer however points out that the Court has been able to carefully balance the vulnerability and agency of individuals, as visible in a case concerning “the placement of a mentally disabled man in a social care home” by taking into account “the wishes of persons capable of expressing their will. Failure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of vulnerable persons.” In her analysis of the use of the individual vulnerability, Timmer thus reveals that that “the Court’s vulnerability reasoning (…) has resulted in many context-sensitive judgments” by taking into account the views of the vulnerable person concerned.

This is in accordance with Article 12 paragraph 1 of the United Nations Convention on the Rights of the Child, which provides that “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” In the context of international protection, the United Nations Committee on the Rights of the Child thus held that “[i]f children come to a country following their parents (…) as refugees are in a particularly vulnerable situation. For this reason, it is urgent to fully implement their right to express their views on all aspects of the immigration and asylum proceedings.”

In agreement with Timmer and Peroni, the Court could avoid the risk of becoming paternalizing if “(i) it is specific about why it considers [asylum-seeking children] particularly vulnerable, (ii) it demonstrates why that makes the particular [asylum-seeking child] more prone to certain types of harm or why the [asylum-seeking child] should be considered and treated as a vulnerable member of that group in the instant case” and (iii) it takes the views of the asylum-seeking children into account.

3.3. The interpretation of Article 3 of the Convention in light of the UNCRC

The second approach adopted by the Court to adhere to the special needs of children is to interpret the Convention in light of the United Nations Convention on the Rights of the Child.

In its longstanding jurisprudence, the Court has consistently held that “[t]he Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law (…) in particular the rules concerning the international protection of human rights.” In accordance with Article 53 of the Convention, the provisions of the Convention must be interpreted in harmony with international human rights treaties and other instruments to which Contracting States are a party.

In cases related to children, the rights and freedoms protected under the Convention must therefore be interpreted in harmony with the United Nations Convention on the Rights of the Child, to which all Contracting States

107 Tarakhel v. Switzerland App no. 29217/12 (ECHR, 4 November 2014), ¶ 42/43/44 with case note H. Datties, para 119.
112 ibid para 162.
are party. They through this harmonisation of international law, the Court is able to “combine the child-specific provisions of the CRC with the ECHR’s effective system of interindividual petition to maximise the potential of both instruments to advance children’s rights.”

The advancement of the rights of children through the harmonization of the Convention with the United Nations Convention on the Rights of the Child is observable in cases concerning the detention of (un)accompanied asylum-seeking children and the removal of accompanied asylum-seeking children to a third country. In these cases, the scope of the positive obligations of the Contracting State under Article 3 of the Convention is in part determined by Article 22 paragraph 1 of the UNCRC. Article 22 paragraph 1 of the UNCRC provides that “States Parties shall take appropriate measures to ensure that a child who is seeking refugee status (…) shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.” As identified by legal scholar Pobjoy, Article 22 paragraph 1 of the UNCRC “requires states to take into account any additional protection and humanitarian assistance that a refugee child or child seeking refugee status may, on account of their distinct vulnerabilities and development needs, require in order to effectively enjoy the rights guaranteed under the CRC and other international human rights instruments.”

Besides the Court’s reliance on Article 22 paragraph 1 of the UNCRC, the Court’s references to the United Nations Convention on the Rights of the Child in its reasoning remains relevant and often inconsistent. While the Court frequently refers to the relevant provisions in the introduction of a

judgment under the heading ‘Relevant International Law’, it does not consistently refer to the relevant provisions of the United Nations Convention on the Rights of the Child in its recapitulation of the general principles under, for instance, Article 3 of the Convention. With respect to the prohibition of non-refoulement per Article 3 of the Convention concerning children, the Court does not explicitly mention other relevant provisions of the United Nations Convention on the Rights of the Child, including the best interests of the child principle (Article 3), the right to family reunification (Articles 5, 9, 16), the right to life, survival and development (Article 6), the right to participation (Article 12), the right to the highest attainable standard of health (Articles 24, 25), the right to an adequate standard of living (Articles 20, 27), the right to an education (Articles 28, 29), the right to liberty and freedom from torture and cruel, inhuman or degrading treatment or punishment and (Article 37).

Against this background, it is important to note that the United Nations Committee on the Rights of the Child does not exclude the possibility that the prohibition of non-refoulement under the CRC under certain circumstances extends to the socio-economic sphere. According to the Committee, “States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.” In this regard, the Committee has highlighted that “[i]n the assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.”

The cases Y.B. and N.S. v Belgium and D.D. v Spain, which have been published after the Council of State’s judgment in Lili and Howick, are recent examples of cases in which the Committee further clarified the Articles 3, 12, 20 and 37 of the UNCRC in the context of the prohibition of refoulement. In the case D.D. v Spain, which concerned the immediate return of an unaccompanied Malian asylum-seeking child from Melilla to Morocco, the Committee found a violation of Articles 3, 20 and 37 of the
According to the Committee, States Parties are inter alia obliged to conduct an assessment of the age and vulnerability of the unaccompanied asylum-seeking child before removal. In the present case, the national authorities failed to (i) conduct a proper identification of the unaccompanied Malian asylum-seeking child and provide him with an opportunity to object to his removal in breach of Articles 3 and 20 of the UNCRC and (ii) assess both the existence of a real risk of persecution and/or irreparable harm and his best interests in breach of Articles 3 and 37 of the UNCRC. In the case Y.B. and N.S. v Belgium, the Committee found a violation of the best interests of the child principle under Article 3 of the UNCRC and the right to be heard under Article 12 of the UNCRC. The case dealt with the rejection of a humanitarian visa to a Moroccan child taken under a kafala arrangement by a Belgium-Moroccan couple by the Belgium authorities. In the present case, the Belgium authorities first failed to consider the particular circumstances of the child involved per Article 3 paragraph 1 of the UNCRC. Second, the Committee emphasized that also very young or extremely vulnerable children have the right to express their views.

In view of this recent case law of the Committee, it is interesting to observe that the Court has previously relied on the Articles 3, 20 and 37 of the UNCRC in its interpretation of the Convention in cases concerning asylum-seeking or migrant children. Even though these cases do not necessarily concern the interpretation of the prohibition of refoulement under Article 3 of the Convention, it reveals the tendency of the Court to interpret the Convention in harmony with the UNCRC. This is by no means a comprehensive overview of the case law but merely the tip of an iceberg. First, the Court has relied on Articles 3 and 37 of the UNCRC in its interpretation of Article 5 of the Convention. In Rahimi v Greece, the Court found the automatic detention of an unaccompanied asylum-seeking Afghan child in an adult detention center in Greece unlawful within the meaning of Article 5 paragraph 1, sub-paragraph f, of the Convention. In its assessment of the lawfulness of the detention, the Court explicitly refers to the failure of the national authorities (i) to consider the best interests of the child, as required by Article 3 of the UNCRC and the Reception Conditions Directive, and (ii) whether the detention was a measure of last resort, as required by Article 37 of the UNCRC. This was all the more cogent as the conditions of detention, in particular with respect to the accommodation, hygiene and infrastructure, had been so severe as to undermine the meaning of human dignity in violation of Article 3 of the Convention.

Second, the Court has clarified the assessment of Articles 3 of the UNCRC in its interpretation of Article 8 of the Convention. In the landmark case El Ghatet v Switzerland, which concerned the refusal by the Swiss authorities of the reunification of an Egyptian son with his Egyptian and Swiss father in Switzerland in light of the right to family life under Article 8 of the Convention, the Court clarified the approach to be taken by national decision-makers and national courts in determining the best interests of the child. The Court emphasized “that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount.” This does not entail that the best interests of the child should be regarded as “a trump card” which requires the admission of all children who would be better off living in a Contracting State. According to the Court, the paramountcy of the best interests of the child entails that “domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to it.” While national authorities are in principle best placed to determine the best interests of the child(en) involved, the national courts are obliged to include a “real balancing of the interests” in their judgment in order for the Court to be able to fulfill its supervisory role in accordance with the principle of subsidiarity. In the present case, the domestic courts had not placed the “applicant’s best interests sufficiently at the center of its balancing exercise and its reasoning.” Instead, the best interests of the child were examined “in a brief manner” by using “a rather summary reasoning.”

In the paragraphs in El Ghatet v Switzerland on the paramountcy of the best interests of the child principle, the Court explicitly refers to paragraph 99 of the judgment Tarakhel v Switzerland. In paragraph 99 of this judgment, the Court reiterated that the particular (group) vulnerability of the asylum-seeking children, i.e. their age, dependency and insecure residence status, “is the decisive factor

---

345 Ibid para 14.7.
348 See also United Nations Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin (1 September 2005) CRC/GC/2005/6, para 25; See also United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and the United Nations Committee on the Rights of the Child (CRC), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration (16 November 2017) CMWC/CCRC/C/CG/22, para 34-39.
350 Rahimi v Greece App no 8067/08 (ECHR, 5 April 2011), JF 2012/106, para 110.
351 Ibid para 108-109. The Court refers also to Neulingen und Schark v Switzerland App no 41615/07 (ECHR, 6 July 2010) para 135.
and takes precedence over considerations relating to the status of illegal immigrant.”

In this regard, it explicitly referred to its earlier case law concerning the detention of (un)accompanied asylum-seeking children and the right of (un)accompanied asylum-seeking children under the United Nations Convention on the Rights of the Child to adequate protection and humanitarian assistance.

Interestingly, while the Court does thus not explicitly refer to the principle of the best interests of the child in Tarakhel v Switzerland, it seems to suggest that best interests of asylum-seeking children must be paramount in the context of the prohibition of refoulement under Article 3 of the Convention.

In his dissenting opinion in the case Nîdî v the United Kingdom, judge Turković argues that a “failure to address the best interests of the child adequately should in itself constitute a procedural violation of Article 8.” It is however seldom that a domestic authorities’ failure to adequately address the best interests of the child constitutes a breach of Article 8 of the Convention.

A possible reason for this could be the Court’s adherence to principle of subsidiarity. In El Ghatet v Switzerland, the Court emphasized that “it is not the Court’s task to take the place of the competent authorities in determining the best interests of the child, but to ascertain whether the domestic courts secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child’s best interests, which must be sufficiently reflected in the reasoning of the domestic courts.”

A comprehensive analysis of the weight given to the best interests of the child in the proportionality test under Article 8 of the Convention is however beyond the scope of this paper.

Third, the Court has relied on Article 20 of the UNCRC in its interpretation of Article 3 of the Convention concerning the living conditions of unaccompanied asylum-seeking children. In the case Sh.D. and Others v Greece, which has been published after the Council of State’s judgment in Lili and Howick, the Court found a violation of Article 3 of the Convention on account of the living condition of four unaccompanied asylum-seeking children in the Idomeni camp.

In its assessment of Article 3 of the Convention, the Court held that contracting parties of the UNCRC were required under Article 20 of the UNCRC to guarantee to any child, irrespective of his or her nationality, within its jurisdiction “temporarily or permanently deprived of his or her family environment (…) special protection and assistance provided by the State”. It also followed from the Court's case law that States were obliged to protect and take care of unaccompanied asylum-seeking children, as required under the positive obligation per Article 3 of the Convention. Most importantly, in cases concerning the reception of (un)accompanied asylum-seeking children, the extreme vulnerability of the children involved is decisive and takes “precedence over considerations relating to the status of illegal immigrant.”

For this reason, the obligation to provide for and protect the unaccompanied asylum-seeking children in the present case was imposed ex officio on the domestic authorities.

In the present case, the unaccompanied asylum-seeking had voluntarily entered the Idomeni camp, which operated outside the control of the Greek authorities. Even though the applicants had not been detained at the Idomeni camp, they had lived for one month in an “environment unsuited to their status as adolescents, whether in terms of security, housing, hygiene or access to food and care, and in a precarious situation incompatible with their young age.” As such, the Greek authorities had not done “all that could reasonably be expected of them to meet the obligation of care and protection of the [unaccompanied asylum-seeking children], which affected the respondent State in the case of persons who were particularly vulnerable because of their age.”

It can be observed from the above case law that the Court had gradually interpreted the Convention in harmony with the UNCRC. In particular, the Court has relied on Articles 3, 20 and 37 of the UNCRC in its interpretation of Articles 3, 5 and 8 of the Convention in cases concerning the detention, living conditions and family reunification of asylum-seeking and migrant children. As regards the prohibition of refoulement, the Court has thus far only explicitly referred to Article 22 paragraph 1 of the UNCRC in its interpretation of Article 3 of the Convention. Though, as the Convention has to be applied in harmony with the UNCRC, it is not excluded that the Court will more and more rely on other UNCRC provisions in the interpretation of the prohibition of refoulement under Article 3 of the Convention in cases involving asylum-seeking children.

363 The Court refers to Mahnizadeh v France App no 60677/08 (ECHR, 5 November 2009), para 55.
364 See para 8 of the dissenting opinion of judge Turković in Nîdî v the United Kingdom App no 42151/14 (ECHR, 14 September 2017).
365 See id para 8.
368 See para 8 of the dissenting opinion of judge Turković in Nîdî v the United Kingdom App no 42151/14 (ECHR, 14 September 2017).
369 See id para 8.
370 See fn 13 supra.
371 See fn 14 supra.
372 See fn 15 supra.
373 See fn 16 supra.
374 See fn 4 supra.
375 See fn 3 supra.
376 See fn 2 supra.
377 See fn 1 supra.
378 See fn 9 supra.
379 See fn 12 supra.
380 See fn 19 supra.
381 See fn 20 supra.
382 See fn 16 supra.
383 Ibid paras 55 and 56.
384 Ibid para 55.
385 Ibid para 56.
386 Ibid para 57.
387 Ibid para 61.
388 Ibid para 62.
4. The assessment of Article 3 of the Convention in Lili and Howick

4.1. The Council of State: Article 3 of the Convention in Lili and Howick

The Council of State provided the following answer to the central question whether the forced return of the children to Armenia constituted a breach of the prohibition of refoulement under Article 3 of the Convention in light of the preconditions issued by the Child Care and Protection Board. At the outset, the Council of State recalled that the question whether Lili and Howick faced a real risk of ill-treatment within the meaning of Article 3 of the Convention could not be taken into consideration in the evaluation of whether they should be granted leave to reside in the Netherlands by way of subsidiary protection. Nonetheless, to ensure effective legal protection, the separate issue of whether there are substantial grounds for believing that the unaccompanied asylum-seeking children would face a real risk of ill-treatment contrary to Article 3 of the Convention in Armenia should be examined.

With reference to Mublinzila Mayeka and Kaniki Mitunga v Belgium, the Council of State reiterated that “to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim.” With reference to the inadmissibility decision Mohammed Hussein and Others v the Netherlands and Italy, the Council of State explicitly stated that a worse socio-economic situation in the country of origin compared to a Contracting State is insufficient to meet the minimum level of severity threshold under Article 3 of the Convention. Contracting States are moreover not obliged under Article 3 of the Convention to provide everyone within their jurisdiction with either a home or financial assistance.

Based on this assessment framework, the situation of the children did not attain the required minimum level of severity to fall within the scope of Article 3 of the Convention. According to the Council of State, the Repatriation and Departure Service had made concrete agreements with the Armenian authorities and the non-governmental organization Fund for Armenian Relief concerning the reception of the children after their arrival in Armenia, which was focused on the rapid reunion with their mother. In addition, the emotional (un)availability of the mother to provide her children with a suitable growing-up environment, which includes adequate housing and schooling, are not of such a nature that the children concerned would face a real risk of ill-treatment within the meaning of Article 3 of the Convention. Before her return to Armenia, the mother had been able to provide her children with adequate care. If this is no longer the case, the non-governmental organisation Caritas Yerevan would be able to provide (temporary) support consisting of (temporary) housing, education and medical, legal and social assistance.

4.2. The Council of State’s judgment from a child-sensitive perspective

In view of the framework for assessing the prohibition of refoulement under Article 3 of the Convention in asylum cases concerning (unaccompanied) children outlined above, the author of the paper would like to make the following three main observations with respect to the Council of State’s analysis in Lili and Howick. First, the Council of State failed to assess whether the alleged poor socio-economic conditions in Armenia, as determined by the Child Care and Protection Board emanate from the intentional acts or omission of the Armenian authorities or from the lack of sufficient resources to deal with in Armenia. In its reiteration of the general principles, the Council of State refers to Mublinzila Mayeka and Kaniki Mitunga v Belgium and Mohammed Hussein and Others v the Netherlands and Italy. It is remarkable that, in light of the Court’s two approaches to examine State responsibility under the non-refoulement obligation per Article 3 of the Convention in the context of poor living conditions in a country of origin, the Council of State does not refer to the cases M.S.S. v Belgium and Greece, Tarakhel v Switzerland and/or Safi and Elmi v the United Kingdom.

In its assessment of whether the children should be granted subsidiary protection, the Council of State considered the aforementioned cases irrelevant for the assessment of Article 3 of the Convention based on the facts of the cases. According to the Council of State, the cases M.S.S. v Belgium and Greece and Tarakhel v Switzerland concerned the transfer of asylum seekers to the responsible Member State of the European Union for the examination of their request for international protection under the Dublin Regulation, instead of the granting of a subsidiary protection status. Similarly, the case Safi and Elmi v the United Kingdom was not applicable as it concerned the return to a humanitarian crisis resulting from an armed conflict. By referring to the facts of these cases, the Council of State disregards the...
two approaches developed by the Court to examine State responsibility under the non-refoulement obligation per Article 3 of the Convention in the context of poor living conditions in a country of origin or a third country depending on whether “the alleged future harm would emanate (…) from the intentional acts or omission of public authorities or non-State bodies” or from “the lack of sufficient resources to deal with it in the receiving country.”

In comparison, the District Court of the Hague had stated that “a general framework for the assessment of Article 3 of the Convention can be adduced from the cases M.S.S., Safi and Elmi and Tarakhel. As such, the circumstances [in Armenia] have to be taken into account in the assessment of a risk of a breach of Article 3 of the Convention.”

In M.S.S. v Belgium and Greece, the Court explicitly held that due to the particular group vulnerability of asylum seekers taken together with the legal obligations under positive law for asylum seekers, a Contracting State has special positive obligations to provide asylum seekers with adequate care and protection under Article 3 of the Convention. On the basis of these two prerequisites, the Council of State should thus first have examined whether the children involved belong to a particular vulnerable group. In this regard, the question arises whether children as such constitute a particular vulnerable group in need of special care and protection or that other circumstances are required. On the one hand, it could well be that the Court considers children, as such, a particular vulnerable group due to their age and dependency on adults. In its case law on vulnerable groups, the Court considers dependency on either the state or other adults an important element for acknowledging group vulnerability. On the other hand, in Tarakhel v Switzerland, the Court explicitly linked the vulnerability of the children (age and dependency) to their group vulnerability (asylum seekers).

Unambiguous answer to the question whether children, as such, are considered a vulnerable group can therefore not be provided at the moment. It is however not implausible that the Court would consider the children Lili and Howick as belonging to a particular group based on the following circumstances: (i) their arrival in the Netherlands in 2008 aged two and three years; (ii) their subsequent stay in the Netherlands for over ten years; (iii) their separation from their mother after her deportation to Armenia on 14 August 2017. At the time of the Council of State’s judgment, the children were thus dependent on support from the authorities of the Netherlands. After their return to Armenia, the children would moreover be completely dependent on state-support from the authorities of Armenia. As followed from the report issued by the Child Care and Protection Board, the mother would not be capable of ensuring the developmental needs of the children in Armenia.

Hereafter, it will be necessary to determine whether the obligation to provide children with adequate socio-economic protection has entered into the positive law of Armenia. Notably, 196 States have become a Contracting Party to the United Nations Convention on the Rights of the Child by either ratification, accession, or succession. Armenia acceded to the aforementioned Convention on 23 June 1993; without having made a declaration or reservation upon accession. As a result, Armenia has an obligation to provide children with inter alia the following children’s rights: the enjoyment of the highest attainable standard of health, a standard of living adequate for the child’s physical, mental, spiritual, moral and social development and education. Similar to the applicant in M.S.S. v Belgium and Greece, the children would thus argue that it would be impossible in practice for them to avail themselves to the rights under the UNCRC and provide for their essential needs, if returned to Armenia.

In view of the above, the alleged socio-economic harm in Armenia, as defined by the Child Care and Protection Board, is related to the omissions of the Armenian authorities, as the unaccompanied asylum-seeking children belong to a particular vulnerable group to which Armenia has specific positive obligations under the UNCRC. In this situation, the Court will assess the prohibition of refoulement under Article 3 of the Convention in accordance with the approach developed in the landmark case M.S.S. v Belgium and Greece. Under this approach, the expulsion of the unaccompanied asylum-seeking children to Armenia would give rise to the responsibility of a Contracting State under Article 3 of the Convention, when the children involved “wholly dependent on State support” would find themselves “faced with official indifference in a situation of serious deprivation or want incompatible with human dignity.”

Second, as the “normal” minimum level of severity threshold to fall within the scope of Article 3 of the Convention applies, as developed by the Court in M.S.S. v Belgium and Greece, the Council of State should have interpreted Article 3 of the Convention in harmony with the United Nations Convention on the Rights of the Child, in particular the best interests of the children, taking into account the vulnerability of the children. As follows from Tarakhel v Switzerland, this entails that the Contracting State has a positive obligation under Article 3 of the Convention to provide the extremely vulnerable

99 Ibid.
100 UNCRC, art 24 and 25.
101 UNCRC, art 20 and 27.
102 UNCRC, art 28 and 29.
103 M.S.S. v Belgium and Greece App no 30696/09 (ECHR, 21 January 2011).
104 See e.g. M.S.S. v Belgium and Greece App no 30696/09 (ECHR, 21 January 2011).
unaccompanied children with special protection, including adequate reception conditions in Armenia, preventing "a situation of stress and anxiety, with particularly traumatic consequences." This has, for instance, been recognised by the District Court of The Hague in first instance. The District Court stated that "the [unaccompanied asylum-seeking children] have to be regarded as particular vulnerable individuals. It follows from the case law [from the European Court of Human Rights] that the threshold to fall within the scope of Article 3 of the Convention is lower [for particular vulnerable individuals]." In the previous Chapter, it has been argued that it would be in the best interests of the unaccompanied asylum-seeking children to remain in the Netherlands, as concluded by the Child Care and Protection Board. In this assessment, the views of the unaccompanied asylum-seeking children, their specific circumstances, including their vulnerability, and their other children’s rights under the UNCRC had been taken into account. Based on the case law of the Court, these factors should also have been taken into account when determining whether the return of the unaccompanied asylum-seeking children attained the minimum level of severity threshold to fall within the scope of Article 3 of the Convention.

In this respect, the Council of State’s consideration that the emotional (un)availability of the mother to provide her children with a suitable growing-up environment was not of such a nature that the children concerned would face a real risk of ill-treatment within the meaning of Article 3 of the Convention lacks an adequate substantiation. Moreover, the fact that the mother had previously been able to provide her children with adequate care says nothing about her current state of affairs.

Third, the Council of State has failed to assess to what extent the agreements between the Repatriation and Departure Service with the Armenian authorities and the non-governmental organizations Fund for Armenian Relief and Caritas Yerevan were adequate in light of the judgment Tarakhel v Switzerland. In the judgment Tarakhel v Switzerland, the Court held that "detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation of the family unit" had to be obtained from the Italian authorities. In view of Tarakhel v Switzerland, the authorities of the Netherlands should therefore have obtained "detailed and reliable information" concerning the compliance by the Armenian authorities with the preconditions, as formulated by the Child Care and Protection Board.

According to the Council of State, the Repatriation and Departure Service had made concrete agreements with the Armenian authorities and the non-governmental organization Fund for Armenian Relief concerning the reception of the children after their arrival in Armenia, which was focused on the rapid reunion with their mother. In the report dated 26 June 2018, the Child Care and Protection Board however found the mother incapable of ensuring the developmental needs of the children in Armenia. Subsequently, the Council of State held that the non-governmental organization Caritas Yerevan would be able to provide (temporary) support consisting of (temporary) housing, education and medical, legal and social assistance, if the mother could no longer take care of her children. In the report dated 26 June 2018, the Child Care and Protection Board concluded that this (temporary) support would cause severe emotional damage to both children based on their extreme vulnerability and severe emotional problems. As such, the agreements between the Repatriation and Departure Service with the Armenian authorities and the non-governmental organizations Fund for Armenian Relief and Caritas Yerevan cannot be said to contain "detailed and reliable information" concerning the compliance by the Armenian authorities with the preconditions, as formulated by the Child Care and Protection Board, and thereby "preventing a situation of stress, and anxiety, with particularly traumatic consequences."
and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration’ (16 November 2017) CM/W/C/GC/3-CRC/C/GC/22.


Legislation / policy documents


Circular letter of 8 June 2015 of the Ministero dell ’Interno regarding guarantees for vulnerable cases: families with minors.

Circular letter of 15 February 2016 of the Ministero dell ’Interno regarding guarantees for vulnerable cases: families with minors.

Circular letter of 12 October 2016 of the Ministero dell ’Interno regarding guarantees for vulnerable cases: families in SPRAR projects.

Circular letter of 4 July 2018 of the Ministero dell ’Interno regarding guarantees for vulnerable cases: families in SPRAR projects

Case law

Soering v the United Kingdom App no 14038/88 (ECHR, 7 July 1989).


Airey v Ireland App no 6289/73 (ECHR, 9 October 1979).

D. v the United Kingdom App no 30240/96 (ECHR, 2 May 1997).

Osman v the United Kingdom App no 23452/94 (ECHR, 28 October 1998).

Pančenko v Latvia App no 40772/98 (ECHR, 28 October 1999).

Chapman v the United Kingdom App no 27238/95 (ECHR, 18 January 2001).

O’Rourke v United Kingdom App no 39022/97 (ECHR, 26 June 2001).

Nitecki v Poland App no 65653/01 (ECHR, 21 March 2002).

Sidabras and Džiūnakas v Lithuania App nos 55480/00 and 59330/00 (ECHR, 27 July 2004).

Farbahu v Latvia App no 4672/02 (ECHR, 2 December 2004).

Miślin v Turkey App no 53566/09 (ECHR, 26 April 2005).

Mubalaniza Mayaka and Kaniki Mitanga v Belgium App no 13178/03 (ECHR, 12 October 2006), JV 2007/29 with case note H. Battjes.

Salah Sheekh v the Netherlands App no 1948/04 (11 January 2007), JV 2007/30 with case note B.P. Vermeulen.

N. v the United Kingdom App no 26565/05 (ECHR, 27 May 2008), JV 2008/266 with case note H. Battjes.

Nd. v the United Kingdom App no 25904/07 (ECHR, 17 July 2008).

Budina v Russia App no 45603/05 (ECHR, 18 June 2009).

Muskhadzhieva and Others v Belgium App no 41442/07 (ECHR, 19 January 2010), JV 2010/119 with case note G.N. Cornelisse.

Alajos Kiss v Hungary App no 38832/06 (ECHR, 20 May 2010).

Neulinger and Shuruk v Switzerland App no 41615/07 (ECHR, 6 July 2010).

Jasinski v Latvia App no 45744/08 (ECHR, 21 December 2010).


Rahimi v Greece App no 8687/08 (ECHR, 5 April 2011), JV 2012/106.


Huseini v Sweden App no 10611/09 (ECHR, 13 October 2011).

Kanagaratnam v Belgium App no 15297/09 (ECHR, 13 December 2011), JV 2012/34.

Yoh-Ekalu Mwanje v Belgium App no 10486/10 (ECHR, 20 December 2011).

Ohtman (Abu Qatada) v the United Kingdom App no 8139/09 (ECHR, 17 January 2012).

Stanov v Bulgaria App no 36760/06 (ECHR, 17 January 2012).


E.O. v Italy App no 34724/10 (ECHR, 10 May 2012).

B. v Belgium App no 4320/11 (ECHR, 10 July 2012).

Mahmundi and Others v Greece App no 14902/10 (ECHR, 31 July 2012).

Abdi Ibrahim v the United Kingdom App no 14535/10 (ECHR, 18 September 2012).

Z.H. v Hungary App no 28073/11 (ECHR, 8 November 2012).


Mohammed Hussein and Others v the Netherlands and Italy App no 27275/10 (ECHR, 2 April 2013).

Aswat v the United Kingdom App no 17299/12 (ECHR, 16 April 2013).
Kochieva and Others v Sweden App no 75203/12 (ECHR, 30 April 2013).
Balakin v Russia App no 21788/06 (ECHR, 4 July 2013).
Bershka v Switzerland App no 948/12 (ECHR, 30 July 2013).
Mohammed Hassan v the Netherlands and Italy App no 40524/10 (ECHR, 27 August 2013).
X v Latvia App no 27853/09 (ECHR, 26 November 2013).
S.J v Belgium App no 70055/10 (ECHR, 27 February 2014).
M.P.E.V. and Others v Switzerland App no 3910/13 (ECHR, 8 July 2014).
Tarakhel v Switzerland App no 29217/12 (ECHR, 4 November 2014), JV 2014/384 with case note H. Battjes.
Mohamad v Greece App no 70586/11 (ECHR, 11 December 2014).
S.J v Belgium App no 70055/10 (ECHR, 19 March 2015).
Khachatyren v Belgium App no 72597/10 (ECHR, 7 April 2015).
Tatar v Switzerland App no 65692/12 (ECHR, 14 April 2015).
A.S v Switzerland App no 39350/13 (ECHR, 30 June 2015).
J.A and Others v the Netherlands App no 21459/14 (ECHR, 3 November 2015).
Mandet v France App no 30955/12 (ECHR, 14 January 2016).
L.A.A. and Others v the United Kingdom App no 25960/13 (ECHR, 8 March 2016).
M.R. and Others v Finland App no 15630/16 (ECHR, 24 May 2016.)
N.A and Others v Denmark App no 15636/16 (ECHR, 28 June 2016).
A.B and Other v France App no 11593/12 (ECHR, 12 July 2016), JV 2016/253 with case note M. Vegter and S. Schuitemaker.
A.M. and Others v France App no 24587/12 (ECHR, 12 July 2016).
R.C. and V.C. v France App no 76491/14 (ECHR, 12 July 2016).
R.K. and Others v France App no 68264/14 (ECHR, 12 July 2016).
R.M. and Others v France App no 33201/11 (ECHR, 12 July 2016).
F.M. and Others v Denmark App no 20159/16 (ECHR, 13 September 2016).
M.A.-M. and Others v Finland App no 32275/15 (ECHR, 4 October 2016).
V.M. and Others v Belgium App no 60125/11 (ECHR, 17 November 2016).
Abdallahi Elmi and Aweys Abubakar v Malta App nos 25794/13 and 28151/13 (ECHR, 22 November 2016).
Paposhvili v Belgium App no 41738/10 (ECHR, 13 December 2016), JV 2017/22 with case note B.E.P. Myjer.
E.T. and N.T. v Switzerland and Italy App no 79480/13 (ECHR, 30 May 2017).
Näsi v the United Kingdom App no 41215/14 (ECHR, 14 September 2017).
Åbele v Latvia App no 60429/12 and 72760/12 (ECHR, 5 October 2017).
S.F. and Others v Bulgaria App no 8138/16 (ECHR, 7 December 2017).


Request for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 28 August 2017 in Case C-541/17 Millykays Addis v Bundesrepublik Deutschland.

Request for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 15 September 2017 in Case C-546/17 Bundesrepublik Deutschland v Adel Hamed.

Request for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 15 September 2017 Case C-541/17 Bundesrepublik Deutschland v Amar Omar.


Chapter IV
A child-sensitive interpretation of the subsidiary protection status under the Recast Qualification Directive concerning the removal of children to poor socio-economic situations

1. Introduction

On the 19th of July 2018, the District Court of The Hague concluded that the preconditions as formulated by the Child Care and Protection Board had to be taken into consideration by the State Secretary of Security and Justice in the assessment of Lili and Howick’s request for international protection. According to the District Court, it followed from the established case law of the European Court of Human Rights that the conditions upon return had to be taken into consideration when assessing the real risk of treatment contrary to Article 3 of the Convention. As the unaccompanied asylum-seeking children were particular vulnerable individuals due to their minority, a lower minimum level of severity threshold was moreover required to fall within the scope of the non-refoulement obligation per Article 3 of the Convention. In the subsequent higher appeal to the Council of State, the State Secretary of Security and Justice held that the preconditions as formulated by the Child Care and Protection Board were not relevant in the assessment of whether subsidiary protection should be granted to the unaccompanied asylum-seeking children under the Recast Qualification Directive. In light of this argument, the central question for the Council of State was whether the preconditions as formulated by the Child Care and Protection Board were relevant in the assessment of the unaccompanied asylum-seeking children’s eligibility for subsidiary protection status under the Recast Qualification Directive. Within this question there were two separate sub-questions, which can be summarized as follows: first, how does the Court of Justice of the European Union (hereafter: Court of Justice) examine the prohibition of refoulement under the Recast Qualification Directive subsequently be granted if the return to the country of origin would be in violation of the prohibition of refoulement under Articles 4 and 19 paragraph 2 of the Charter. In this Chapter, the Council of State’s judgment in the case of Lili and Howick will be discussed in light of the Court of Justice’s jurisprudence. In order to make such an analysis, the Chapter begins by laying down the criteria according to which applicants for subsidiary protection can qualify for subsidiary protection status under the Recast Qualification Directive. It will then go on to describe how the Court of Justice examines the prohibition of refoulement in the context of socio-economic concerns in the country of origin. This is followed by the analysis of whether a Member State of the European Union is required to grant subsidiary protection status under the Recast Qualification Directive to a third country national, who faces a real risk of serious harm of a socio-economic nature in his or her country of origin. To conclude this Chapter, the aforementioned analysis of the Court of Justice’s case law will be compared with the Council of State’s reasoning in the case of Lili and Howick.

2. The (Recast) Qualification Directive: Subsidiary Protection

Prior to the adoption of the Qualification Directive, several Member States of the European Union granted some form of protection to third-country nationals complementary to the Convention Relating to the Status of Refugees. In practice, third-country nationals, who did not qualify as a refugee under the Convention Relating to the Status of Refugees, would for instance be granted complementary protection, if their return to their country of origin would be in breach of the principle of non-refoulement under Article 3 of the Convention. At the same time, however, the legal standards for third-country nationals to qualify for subsidiary protection differed considerably between the Member States of the European Union. For this reason, it was deemed “necessary to introduce criteria on the basis of which applicants for international protection [were] to be recognised as eligible for subsidiary protection. Those criteria [were to] be drawn from international obligations under human rights instruments and practices existing in Member States.” With the adoption of the Qualification Directive, the legal standards for the qualification of third-country nationals or stateless persons as beneficiaries of subsidiary protection were for the first time...
harmonized among the Member States. In the preamble to the Qualification Directive, the importance of subsidiary protection as “complementary and additional to the refugee protection enshrined in the Geneva Convention” is emphasized. Nevertheless, as there remained “considerable disparities […] between one Member State and another concerning the grant of protection and the forms that protection takes”, the European Parliament and the Council of the European Union subsequently adopted the Recast Qualification Directive to further “ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection and […] that a minimum level of benefits is available for these persons in all Member States.”

In the Recast Qualification Directive, Article 18 provides that “Member States shall grant subsidiary protection status to a third-country national or a stateless person eligible for subsidiary protection.” Whether this is the case, will be determined on the basis of the provisions in Chapter I, II and VI of the Recast Qualification Directive. In Article 2 sub-paragraph f of the Recast Qualification Directive, a “person eligible for subsidiary protection” is defined as “a third country national […] who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin […] would face a real risk of suffering serious harm as defined in Article 15 […] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.” Article 15 of the Recast Qualification Directive provides for three different forms of serious harm: “(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”

Concerning the present case, one of the questions to be answered was whether Article 2 sub-paragraph f in conjunction with Article 15 sub-paragraph b of the Recast Qualification Directive covered a real risk of serious harm to the physical or psychological health of the unaccompanied asylum-seeking children if returned to Armenia, resulting from the non-compliance with the preconditions before return, as prescribed by the Child Care and Protection Board. In view of this, the next section will first analyze how the Court of Justice examines the prohibition of refoulement in the context of socio-economic concerns in the country of origin. It will then go to discuss the separate issue as to whether a Member State of the European Union is required to grant subsidiary protection status under the Recast Qualification Directive to a third country national, who faces a real risk of serious harm of a socio-economic nature in his or her country of origin.

3. The interpretation of Article 15(b) Recast Qualification Directive in light of the Charter

3.1. The prohibition of refoulement under Articles 1, 4 and 19 paragraph 2 of the Charter: autonomously applicable?

With the adoption of the Consolidated version of the Treaty on European Union, also referred to as the Lisbon Treaty, the “rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union” were granted “the same legal value as the Treaties.” Since then, the Member States of the European Union are thus bound by the Charter “when they are implementing Union law.” This obligation is repeated in the preamble to the Recast Qualification Directive by stating that the provisions of the Charter of Fundamental Rights of the European Union are fully respected. In particular, the Member States should implement the Recast Qualification Directive with “full respect for human dignity and the right to asylum.” It is thus established case law of the Court of Justice that the Recast Qualification Directive should be interpreted and applied in accordance with the provisions of the Charter.

In view of this, the Court of Justice has held that Article 15 sub-paragraph b of the (Recast) Qualification Directive should be interpreted and applied in accordance with the principle of non-refoulement within the meaning of Article 4 taken in conjunction with Article 19 paragraph 2 of the Charter. It should be observed that the Court of Justice interchangeably refers to Articles 4 and 19 paragraph 2 of the Charter as safeguarding the principle of non-refoulement, but the distinction between them should be explained. Article 4 of the Charter concerns the absolute prohibition of torture and inhuman or
degrading treatment or punishment." According to the Court of Justice, Article 4 of the Charter "enshrines one of the fundamental values of the Union and its Member States and is absolute in that that value is closely linked to respect for human dignity, the subject of Article 1 of the Charter". However, in addition, Article 19 paragraph 2 of the Charter explicitly contains the prohibition of *refoulement* stating that "[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." Both Article 4 and Article 19 paragraph 2 of the Charter are thus linked to the inviolable right to human dignity, which should be respected and protected, within the meaning of Article 1 of the Charter.

As follows from the above, there is a considerable overlap among the right to human dignity per Article 1 of the Charter, the prohibition of torture and inhuman or degrading treatment or punishment per Article 4 of the Charter and the prohibition of *refoulement* per Article 19 paragraph 2 of the Charter.

The question has therefore arisen if Articles 1, 4 and 19 paragraph 2 of the Charter "are applicable autonomously of one another in the case of a transfer of an asylum seeker to a Member State which is incompatible with those provisions." In the legal academic literature, it has been argued that an examination of Article 19 paragraph 2 of the Charter, as the more specific provision, should be conducted first. If the return of an asylum seeker to a country of origin or third country would be in violation with Article 19 paragraph 2 of the Charter, there would no longer be a need for a separate and in-depth examination of Article 4 of the Charter. The same applies to the examination of Article 1 of the Charter, which shall only be conducted after the return of the asylum-seeking is not found to be in violation of Article 4 of the Charter. Thus far, the Court of Justice has not however provided an unequivocal answer to the question whether Articles 1, 4 and 19 paragraph 2 of the Charter should be separately examined. In its assessment of the prohibition of *refoulement*, the Court of Justice generally focusses on the interpretation of Articles 4 and 19 paragraph 2 of the Charter and does not explicitly deal with the application and interpretation of Article 1 of the Charter separately. For instance, in *[N. S. v Secretary of State for the Home Department](https://eurunionlaw.com/150348)*.

3.2. Interpreting Articles 4 and 19(2) of the Charter in light of Article 3 of the Convention

In its assessment of the interpretation and application of Articles 4 and 19 paragraph 2 of the Charter, the Court of Justice in general begins by noting that the meaning and scope should be "the same as those laid down by Article 3 of the ECHR". In the Explanations to the Charter of Fundamental Rights, it is moreover explicitly clarified that both Articles correspond to Article 3 of the Convention, and should thus incorporate the case law of the European Court of Human Rights on the prohibition of *refoulement*. This harmonization of both human rights instruments is in accordance with Article 52 paragraph 3 of the Charter, which provides that "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention."
In the previous Chapter, it has been clarified that the European Court of Human Rights has developed two approaches to examine State responsibility under the non-refoulement obligation per Article 3 of the Convention in the context of poor living conditions in a country or a third country depending on whether “the alleged future harm would emanate (…) from the intentional acts or omission of public authorities or non-State bodies” or from “the lack of sufficient resources to deal with it in the receiving country.”445 It is thus important to examine to what extent the Court of Justice has incorporated these two approaches in its interpretation and application of the principle of non-refoulement under Articles 4 and 19 paragraph 2 of the Charter. This analysis will focus on several preliminary rulings from the Court of Justice, given in response to a request from a domestic court of any of the Member States of the European Union, on the interpretation of provisions of the Return Directive446, the Dublin II and III Regulation447 and the (Recast) Qualification Directive.448

3.2.1. Socio-economic harm due to the intentional acts or omissions of the receiving State

The first situation concerns the removal of an asylum seeker to his or her country of origin or a third country in which the poor living conditions are the result of intentional acts or omissions of the public authorities or non-State bodies. As explained in the previous Chapter, the European Court of Human Rights will then apply the “normal” minimum level of severity threshold to fall within the scope of Article 3 of the Convention, as developed in the landmark case M.S.S v Belgium and Greece.449 In this approach, the Court will determine if an asylum seeker “wholly dependent on State support, were faced with official indifference in such a way that [he or she] would find [him- or herself] in a situation of serious deprivation or need incompatible with human dignity” by taking account of “the applicant’s ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame.”450

The Court of Justice has to a certain extent incorporated this approach in the following two judgments concerning the interpretation of provisions of the Dublin II and III Regulation: N.S. and Others and the

445 S.I.H. v the United Kingdom App no 60367/10 (ECtHR, 29 January 2013), XRB/C 2013/87 with case note M. den Heijer, para 89.
453 Ibid para 75-80, 83.
454 Ibid para 81.
455 Ibid para 82.
456 Ibid para 94, 106 and 123.
458 Ibid para 94, 106 and 123.

more recent Abubacarr Jawo v Bundesrepublik Deutschland (hereafter: Jawo).451 Even though the judgment of the Court of Justice in Jawo dates from after the Council of State’s judgment in the case of Lili and Howick, it has been included in this analysis due to the Court of Justice’s reading of M.S.S v Belgium and Greece. The author will however not rely on Jawo in the rewritten Council of State’s judgment in the case of Lili and Howick.

In the case N.S. and Others, the central question for the Court of Justice was whether a Member State was precluded from transferring an asylum seeker pursuant to the Dublin II Regulation to another Member State, if this asylum seeker would run a real risk of treatment contrary to his or her fundamental rights under the Charter.452 As the Common European Asylum System was based on the principle of mutual confidence and a presumption of compliance with fundamental rights, “it [had to] be assumed that the treatment of asylum seekers in all Member States compl[ie]d with the requirements of the Charter, the Geneva Convention and the ECHR.”453 Nevertheless, an asylum system in a Member State experiencing “major operational problems” may result in treatment contrary to the fundamental rights of an asylum seeker.454 This did not mean that “any infringement of fundamental rights” precluded a Member State’s compliance with the Dublin II Regulation, nor did a “slightest infringement” of the Reception Conditions Directive, the Qualification Directive or the Asylum Procedures Directive “prevent the transfer of an asylum seeker to the Member State primarily responsible.”455 Notwithstanding these restrictions, the Court of Justice concluded that “Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of [the Dublin II Regulation] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment” within the meaning of Article 4 of the Charter.456

In its assessment of Article 4 of the Charter, the Court of Justice almost entirely affirmed the European Court of Human Rights’ assessment of Article 3 of the Convention in the case M.S.S v Belgium and Greece.457 The Court of Justice however seemed to demand a higher threshold to fall within the scope of Article 4 of the Charter by requiring “systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers”.458 According to the Court of Justice, it followed from M.S.S
v Belgium and Greece that “there existed in Greece, at the time of the transfer of the applicant M.S.S., a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers.” In the subsequent judgment Shamso Abdullahi v Bundesasylamt (hereafter: Abdullahi), the Court of Justice thus repeated that an asylum seeker could only appeal his or her Dublin transfer “by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State” contrary to Article 4 of the Charter by referring to N.S. and Others. 

In response to the case N.S. and Others, the European Court of Human Rights clarified that the principle of mutual trust between Member States of the European Union was rebuttable where there were substantial ground for believing that the asylum seekers would have a real risk of ill-treatment contrary to Article 3 of the Convention. Importantly, Contracting States were required to carry out “a thorough and individualised examination” by taking into account the “overall situation with regard to the reception arrangements for asylum seekers […] and the applicants’ specific situation”. In this regard, “the source of the risk [e.g. systemic deficiencies] [did] nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person’s removal.” With this statement, the Court thus explicitly rejected the necessity of “systemic deficiencies” to fall within the scope of Article 3 of the Convention. Since then, the Court of Justice has in the same manner rejected the argument that only systemic deficiencies in the asylum procedure and reception conditions of asylum seekers of a receiving Member State would be sufficient to challenge a Dublin transfer on the basis of the non-refoulement obligation under Article 4 of the Charter. See for example the judgment Jawo, in which Court of Justice was questioned whether a Member State was precluded from transferring an asylum seeker pursuant to the Dublin III Regulation to another Member State, if this asylum seeker would run a real risk of treatment contrary to his or her fundamental rights under the Charter “on account of the living conditions that he or she] could be expected to encounter as a beneficiary of international protection in that Member State”.

In answering this question, the Court of Justice began by reiterating the importance of the principle of mutual confidence and a presumption of compliance with fundamental rights as the basis for the effective operation of the Common European Asylum System, including the Dublin III Regulation. Nonetheless, in conformity with the case N.S. and Others, the presumption of compliance with fundamental rights by Member State was rebuttable. The Court of Justice nuanced the interpretation of Article 4 of the Charter in the case N.S. and Others by stating that a Dublin transfer “is ruled out in any situation in which there are substantial grounds for believing that the applicant runs a real risk of ill-treatment within the meaning of Article 4 of the Charter.” This followed from the absolute nature of the prohibition of refoulement as safeguarded by Article 4 of the Charter. In this respect, the Court of Justice thus considered it “immaterial” whether the asylum seeker would be subjected to a “substantial risk of suffering inhuman or degrading treatment” contrary to Article 4 of the Charter before, during or after his or her asylum procedure.

In this light, it is interesting to note that legal scholars Costello and Mouzourakis had previously argued that “systemic deficiencies” should not have been interpreted as an added threshold for invoking Article 4 of the Charter. Instead, the authors reasoned that the occurrence of systemic deficiencies in the asylum procedure and reception conditions merely alleviated the applicant’s burden of proof, meaning that Dublin transfers should not take place anyway under those circumstances. Indeed, in the case N.S. and Others, the Court of Justice held that Member States were prohibited from carrying out a Dublin transfer “where they cannot be unaware” of the risk of ill-treatment contrary to Article 4 of the Charter due to systemic deficiencies. Member States could for instance not be unaware of these deficiencies in Greece because of numerous in-depth country of origin information reports by several non-governmental organisations taken into account by the European Court of Human Rights in the case M.S.S. v Belgium and Greece and discussed by the Council of the European Union. In comparison, in the
case M.S.S. v Belgium and Greece, the European Court of Human Rights concluded in the same manner that the Belgian authorities had “knowingly” subjected the asylum seeker to treatment contradictory to Article 3 of the Convention by returning him to inhuman and degrading living conditions in Greece under the Dublin II Regulation.476 According to the European Court of Human Rights, the Belgian authorities were aware of the applicant’s living conditions in Greece, as supported by numerous country of origin reports.477 Despite this awareness, the Belgian authorities had not addressed these living conditions at any moment in the legal proceedings due to the systematic application of the Dublin II Regulation.478

However, as argued by Costello and Mouzourakis, “in the absence of systemic breaches, normal standards for assessing removal risks under Article 3 ECHR [or Article 4 of the Charter] continue to apply.”479 This is now reflected in the case of Jawo, in which the Court of Justice clarified that an asylum seeker has to provide “objective, reliable, specific and properly updated” evidence underlying his or her claim of a real risk of treatment in breach of Article 4 of the Charter.480 On the basis of this evidence, the domestic court is subsequently “obliged to assess (…) whether there are deficiencies” which may be systemic or generalised, or which may affect certain groups of people.481 A similar approach to the distribution of the burden of proof is taken by the European Court of Human Rights, which time and again reiterates that “it is in principle for the applicant to adduce evidence capable of proving that” the forced removal to his or her country of origin or a third country would be in breach of the non-refoulement obligation under Article 3 of the Convention, “and that where such evidence is adduced, it is for the Government to dispel any doubts about it.”482 The general human rights situation in a country, however, “has to be established proprio motu by the competent domestic immigration authorities.”483 This is because these authorities have complete access to this relevant information.484

After having established in Jawo that “systemic deficiencies” in the asylum system or reception conditions of asylum seekers are not a legal barrier to fall within the scope of Article 4 of the Charter, the Court of Justice continued the legal analysis of Article 4 of the Charter in light of Article 3 of the Convention.485 According to the Court of Justice, the alleged “deficiencies (…) must attain a particularly high level of severity” to fall within the scope of Article 3 of the Convention.486 This particularly high level is not attained by “a high degree of insecurity or a significant degradation of the living conditions”.487 Instead, the asylum seeker must find himself “in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity.”488 This situation must moreover be the result of the “indifferences of the authorities of a Member State” as a result of which a person “wholly dependent on State support” finds himself in this situation of extreme material poverty “irrespective of his wishes and personal choices.”489

This reading of M.S.S. v Belgium and Greece is somewhat inaccurate. First, in M.S.S. v Belgium and Greece, the European Court of Human Right did not apply a higher minimum level of severity threshold to fall within the scope of Article 3 of the Convention. As explained in the previous Chapter, the European Court of Human Right only applies a higher threshold for the application of Article 3 of the Convention in cases concerning the removal of non-nationals suffering from a serious illness.”490 As justification for requiring a particular high level of severity, the Court of Justice referred to paragraph 254 of M.S.S. v Belgium and Greece. In this paragraph, the European Court of Human Rights concluded that the applicant M.S.S. had found himself in a situation of extreme material poverty.491 As observed by legal scholar Battjes, it cannot be derived from this paragraph that a high threshold should be adopted but merely that the extreme material poverty must be severe to fall within the normal minimum level of severity threshold.492

A similar analysis of the case M.S.S. v Belgium and Greece is performed by Advocate General Wathelet in his Opinion in Jawo.493 With reference to paragraph 254 of M.S.S. v Belgium and Greece, Advocate General Wathelet is of the view that the beneficiary of international protection “must be in a particularly serious situation resulting from systemic flaws affecting them in that Member State.”494 To assess whether this is the case, it will be necessary to take into account the particular facts and circumstances of the case read in conjunction with country of information reports from international (non-) governmental organisations.495 While Advocate General Wathelet is incorrect to consider

477 Ibid para 167-172.
478 Ibid para 366.
481 Ibid.
482 See e.g. J.K. and Others v Sweden App no 59166/12 (ECHR, 23 August 2016), JF 2016/282 with case note H. Battjes, para 91-98.
483 Ibid para 98.
484 Ibid.
“systemic flaws” in the receiving Member State necessary to preclude a Dublin transfer, his wording “particularly serious situation” better suits the approach taken by the European Court of Human Rights in cases regarding the removal of non-nationals to poor socio-economic circumstances.

Second, the European Court of Human Rights regarded the applicant’s “vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame” as an integral part of the assessment of whether a case attained the minimum level of severity threshold to fall within the scope of Article 3 of the Convention. In comparison, the Court of Justice initially does not refer to the concept of vulnerability or the duration of the situation in its explanation under which circumstances the particularly high level of severity is attained under Article 4 of the Charter. Only after stating that this high level is not attained in the event of lacking “the forms of support in family structure (…) to deal with the inadequacies of that Member State’s social system (…) for beneficiaries of international protection”, the Court of Justice continues stating that an asylum seeker would be able to prevent his Dublin transfer, if “he would find himself, because of his particular vulnerability, irrespective of his wishes and personal choices, in a situation of extreme material poverty.” Although not explicitly stated by the Court of Justice, this paragraph from the judgment seems to suggest that an individual’s vulnerability has to be taken into account when determining whether the minimum level of severity threshold has been attained in accordance with the case law of the European Court of Human Rights.

Notwithstanding these inaccuracies in the Court of Justice’s reading of M.S.S. v Belgium and Greece, the Jawo judgment is particularly significant for adopting the “normal” minimum level of severity threshold to fall within the scope of Article 4 of the Charter, if the alleged socio-economic harm in the receiving State is due to the “indifferences of the authorities of a Member State” as a result of which a person “wholly dependent on State support” finds himself in this situation of extreme material poverty “irrespective of his wishes and personal choices.” This is comparable to inter alia the judgments M.S.S. v Belgium and Greece and Sufi Elmi v the United Kingdom, in which the European Court of Human Rights similarly applied the “normal” minimum level of severity threshold to fall within the scope of Article 3 of the Convention, if the future harm of a socio-economic nature is the result of the intentional acts or omissions of the public authorities or non-State bodies.

In his case note discussing the judgment Jawo, legal scholar Battjes rightly observes that it will be more difficult to establish a breach of Article 4 of the Charter with respect to beneficiaries of international protection than with respect to asylum seekers. Contrary to asylum seekers, beneficiaries of international protection are not necessarily “wholly dependent on State support” due to their legal residence status, which allows them to apply for suitable jobs and adequate housing, amongst other things. In addition, different from the obligations of Member States of the European Union to provide accommodation and decent material conditions to asylum seekers under the Reception Conditions Directive concerning the treatment of asylum seekers, the Recast Qualification Directive merely provides that beneficiaries of international protection should be treated equally as nationals of the Member State concerned with respect to inter alia access to employment and social welfare. This is visible in the judgment Jawo, in which the Court of Justice explicitly stated that the particularly high level of severity was not attained “by a high degree of insecurity or a significant degradation of the living conditions of the person concerned, where they do not entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment.”

According to the Court of Justice, the following circumstances therefore do not reach the particular high level of severity to fall within the scope of Article 4 of the Charter: lacking family structures for beneficiaries to compensate for a Member State’s inadequate social welfare system, severe shortcoming in the implementation of adequate integration programmes for beneficiaries of international protection and better social welfare systems and/or living conditions in the host Member State compared to the Member State responsible. This does not mean that “an applicant for international protection may [never] be able to demonstrate the existence of exceptional circumstances that are unique to him” but, as clearly pointed out by legal scholar Battjes, more difficult to establish a breach of Article 4 of the Charter with respect to beneficiaries of international protection.

### 3.2.2. Socio-economic harm due to poverty or lack of resources

The second situation concerns the removal of an asylum seeker to his or her country of origin or a third country in which the poor living conditions are due to poverty or a State’s lack of resources. As explained in the previous Chapter, the European Court of Human Rights will then apply the exceptional high minimum level of severity threshold to fall within the scope of Article 3 of the Convention, as

---

developed in the cases concerning the removal of serious ill non-nationals. 518 Under this approach, the expulsion of an asylum seeker to poor living conditions in the country of origin or third country gives rise to the responsibility of a Contracting State under Article 3 of the Convention in the very exceptional case “where the humanitarian grounds against removal are compelling”.519 The Court of Justice has to a certain extent incorporated this framework sequentially in the following judgments concerning the interpretation of provisions of the Dublin II and III Regulation, the Return Directive and the Qualification Directive.

In the case Mohamed M’Bodj v État belge (hereafter: M’Bodj), which concerned the scope of subsidiary protection under the Qualification Directive with respect to seriously ill third country nationals, the Court of Justice acknowledged that Article 15 sub-paragraph b of the Qualification Directive should be interpreted and applied in accordance with Article 19 paragraph 2 of the Charter “to the effect that no person may be returned to a State in which there is a serious risk that that person will be subjected to inhuman and degrading treatment, and having due regard for Article 3 of the ECHR, to which Article 15(b), in essence, corresponds.”520 It followed from the case law of the European Court of Human Rights that Contracting States are prohibited from removing a seriously ill third country national “in very exceptional cases, where the humanitarian grounds against removal are compelling”.521 In its assessment of the interpretation and application of the prohibition of refoulement under Article 19 paragraph 2 of the Charter, the Court of Justice thus literally reproduced the exceptional high minimum level of severity threshold to fall within the scope of Article 3 of the Convention, as developed by the European Court of Human Rights in N. v the United Kingdom. Following the same reasoning, the Court of Justice held in its judgment Abdala, delivered on the same day, that Member States are also precluded enforcing a return decision of a seriously ill third country national under Article 5 of the Return Directive taken in conjunction with Article 19 paragraph 2 of the Charter in the event of compelling humanitarian grounds.522

A few years later, the Court of Justice however added some nuance to this interpretation of the exceptional high minimum level of severity threshold for serious ill third-country nationals to fall within the scope of Article 4 of the Charter.523 In the case C. K. and Others, concerning the interpretation of Article 4 of the Charter in cases regarding the transfer of seriously ill asylum seekers under the Dublin III Regulation, the Court of Justice further clarified under which circumstances serious ill third country nationals would fall within the scope of Article 4 of the Charter.524 According to the Court of Justice, the Dublin transfer of an asylum seeker would be contrary to the prohibition of refoulement within the meaning of Article 4 of the Charter in the event of “a real and proven risk of a significant and permanent deterioration in his state of health.”525

In its assessment, the Court of Justice referred to the high minimum level of severity threshold for the application of Article 3 of the Convention, as clarified in Paposhvili v the United Kingdom.526 In this case, the European Court of Human Rights renounced the idea that only non-nationals close to death would attain the high minimum level of severity threshold. Instead, the forced removal of a non-national would be contrary to the prohibition of refoulement within the meaning of Article 3 of the Convention if or she “would face a real risk (…) of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy” due to unavailable or inaccessible medical treatment.527 Even though the Court of Justice adopted a slightly different wording in C. K. and Others, the case reveals that the Court of Justice no longer regards the non-refoulement obligation under Article 4 of the Charter merely applicable to third-country nationals, who are close to death, as previously suggested in M’Bodj and Abdala.528

In additional, the C. K. and Others judgment is essential for clarifying that “systemic deficiencies in the asylum procedure and the reception conditions” are not a legal requirement for successfully invoking the prohibition of refoulement under Article 4 of the Charter in the context of a Dublin transfer.529 The Court of Justice provided three reasons for this. First, the wording of the Dublin III Regulation did not state that a Dublin transfer would only be precluded in the context of systemic deficiencies.530 Second, it would have been contrary to the general and absolute prohibition of refoulement.531 Third, as regards the Abdallah judgment, the Court of Justice held that the applicant in that particular judgment had not appealed his Dublin transfer on the basis of a violation of Article 4 of the Charter.532 In C. K. and Others, for instance, there were no serious grounds for believing that there were systemic deficiencies in the asylum procedure or reception conditions for asylum seekers in the Republic of Croatia.533 Nonetheless, even without systemic deficiencies in the asylum procedure or reception conditions of asylum seekers in the responsible Member State, the Dublin transfer of an

---

519 Ibid.
521 Ibid para 59; The Court of Justice refers to N. v the United Kingdom App no 26565/05 (ECHR, 27 May 2008), J. 2008/266 with case note H. Battjes, para 42.
525 Ibid para 74.
526 Ibid para 68.
530 Ibid para 92.
531 Ibid para 93.
532 Ibid para 94.
533 Ibid para 70-73.
asylum seeker is precluded in the event of a real and proven risk of inhuman and/or degrading treatment within the meaning of Article 4 of the Charter.\textsuperscript{526}

As explained in the previous section, legal scholars Costello and Mouzourakis had previously observed that this already followed from the case \textit{N.S. and Others}.\textsuperscript{527} According to Costello and Mouzourakis, an applicant would be alleviated from its burden of proof in the event of systemic deficiencies of which the sending Member State could not have been unaware.\textsuperscript{528} In the absence of such systemic deficiencies, the normal distribution of the burden of proof in removal cases would apply.\textsuperscript{529}

This can be observed in the reasoning of the Court of Justice in the case \textit{C.K. and Others}. After having established that, even in the absence of systemic deficiencies, a Dublin transfer is precluded in case of a breach of the \textit{non-refoulement} obligation under Article 4 of the Charter, the Court of Justice stated that it is up to the asylum seeker to provide evidence that his Dublin transfer would be in violation of Article 4 of the Charter.\textsuperscript{530} The responsible authorities and national courts of the sending Member State are subsequently obliged to take this evidence into consideration when assessing the applicant’s risk of ill treatment contrary to Article 4 of the Charter.\textsuperscript{531} It is for “those authorities to eliminate any serious doubt” for instance by taking precautions as prescribed by the Dublin III Regulation.\textsuperscript{532} The national court subsequently has to determine whether those precautions are sufficient to prevent a breach of article 4 of the Charter. If this is the case, the national court has to make sure that the precautions are adhered to by the responsible national authorities.\textsuperscript{533} However, if this is not the case, the responsible national authorities have to suspend the Dublin transfer until the health of the third country national concerned permits the transfer.\textsuperscript{534}

Following on from the judgment \textit{C. K. and Others}, the Court of Justice found the high minimum level of severity threshold to fall within the scope of Article 4 or Article 19 paragraph 2 of the Charter also applicable in cases concerning the removal of victims of torture, whose lack of care in their country of origin is not “attributable to intentional acts or omissions of the receiving State.”\textsuperscript{535} In the judgment \textit{MP v Secretary of State for the Home Department} (hereafter: \textit{MP}), concerning the scope of subsidiary protection under the Recast Qualification Directive with regard to victims of torture, the Court of Justice held that “Article 4 and Article 19(2) of the Charter, as interpreted in the light of Article 3 of the ECHR, preclude a Member State from expelling a third country national where such expulsion would, in essence, result in significant and permanent deterioration of that person’s mental health disorders, particularly where, as in the present case, such deterioration would endanger his life.”\textsuperscript{536}

As regard the legal assessment framework, the Court of Justice interpreted 15 sub-paragraph b of the Recast Qualification Directive in light of the prohibition of \textit{refoulement} under Articles 4 and 19 paragraph 2 of the Charter.\textsuperscript{537} Pursuant to its earlier judgment \textit{M’Body}, these \textit{non-refoulement} obligations under the Charter had to be interpreted and applied in accordance with Article 3 of the Convention.\textsuperscript{538} It followed from the established case law from the European Court on Human Rights concerning the removal of seriously ill asylum seekers that the removal of seriously ill non-nationals attained the high minimum level of severity to fall within the scope of Article 3 of the Convention either where the person concerned would be “at risk of imminent death or where substantial grounds [had] been shown for believing that, although not at imminent risk of dying, he would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of suffering a serious, rapid and irreversible decline in his state of health resulting in intense suffering or to a significant reduction in life expectancy.”\textsuperscript{539}

In the judgment \textit{C. K. and Others}, the Court of Justice had adopted the slightly different wording by requiring “a real and demonstrable risk of significant and permanent deterioration in the state of health of the person concerned” to fall within the scope of Article 4 of the Charter, which is reiterated in the case \textit{MP} in the context of Article 19 paragraph 2 of the Charter.\textsuperscript{540} To this, the Court of Justice added that “it is necessary to consider all the significant and permanent consequences that might arise from the removal” and “particular attention must be paid to the specific vulnerabilities of persons whose psychological suffering, which is likely to be exacerbated in the event of their removal, is a consequence of torture or inhuman or degrading treatment in their country of origin.”\textsuperscript{541}

4. \textbf{Subsidiary protection under the Qualification Directive in the context of socio-economic harm}

The Court of Justice considers a separate issue as to whether a Member State is required to grant subsidiary protection status under the (Recast) Qualification Directive, if the forced return of a third country national is contrary to the prohibition of \textit{refoulement} under Articles 4 and 19 paragraph 2 of the Charter. Although the \textit{non-refoulement} obligation under the Charter and the obligation to grant subsidiary protection under the Recast Qualification Directive are intrinsically linked, the non-
removability of an asylum seeker does not necessarily engage the obligation of Member States to grant subsidiary protection. This can be inferred from the two judgments *M Bodi* and *MP*, in which the Court of Justice addressed the interpretation and application of Article 15 sub-paragraph b of the Qualification Directive in the context of the removal of a seriously ill person respectively a victim of torture.\(^{542}\)

In the case *M Bodi*, the Court of Justice clarified the scope of subsidiary protection under the Qualification Directive.\(^{543}\) As explained above, the Court of Justice acknowledged that seriously ill third country nationals should not be removed to their country of origin in the event of compelling humanitarian grounds in violation of Article 3 of the Convention and Article 19 paragraph 2 of the Charter because of a lack of adequate and available medical treatments.\(^{544}\) This prohibition against removal did not necessarily oblige Member States to subsequently grant subsidiary protection under the Qualification Directive.\(^{545}\) It followed from Article 15 sub-paragraph b of the Qualification Directive that the alleged torture or inhuman or degrading treatment or punishment should have occurred in the country of origin of the third country national.\(^{546}\) As such, Article 15 sub-paragraph b of the Qualification Directive did “not cover a situation in which inhuman or degrading treatment (…) to which an applicant suffering from a serious illness may be subjected if returned to his country of origin, is the result of the fact that appropriate treatment is not available in that country, unless such an applicant is intentionally deprived of health care.”\(^{547}\)

The Court of Justice substantiated this claim by referring to Article 6 of the Qualification Directive, which “support[ed] the view that ‘[…] harm must take the form of conduct on the part of a third party which ‘supported the view that ‘[…] harm must take the form of conduct on the part of a third party’ to which an applicant suffering from a serious illness may be subjected if returned to his country of origin is the result of the fact that appropriate treatment is not available in that country, unless such an applicant is intentionally deprived of health care.”\(^{547}\)

As explained above, the Court of Justice acknowledged that seriously ill third country nationals should not be removed to their country of origin in the event of compelling humanitarian grounds in violation of Article 3 of the Convention and Article 19 paragraph 2 of the Charter because of a lack of adequate and available medical treatments.\(^{544}\) This prohibition against removal did not necessarily oblige Member States to subsequently grant subsidiary protection under the Qualification Directive.\(^{545}\) It followed from Article 15 sub-paragraph b of the Qualification Directive that the alleged torture or inhuman or degrading treatment or punishment should have occurred in the country of origin of the third country national.\(^{546}\) As such, Article 15 sub-paragraph b of the Qualification Directive did “not cover a situation in which inhuman or degrading treatment (…) to which an applicant suffering from a serious illness may be subjected if returned to his country of origin is the result of the fact that appropriate treatment is not available in that country, unless such an applicant is intentionally deprived of health care.”\(^{547}\)

The Court of Justice substantiated this claim by referring to Article 6 of the Qualification Directive, which “support[ed] the view that ‘[…] harm must take the form of conduct on the part of a third party which ‘supported the view that ‘[…] harm must take the form of conduct on the part of a third party’ to which an applicant suffering from a serious illness may be subjected if returned to his country of origin is the result of the fact that appropriate treatment is not available in that country, unless such an applicant is intentionally deprived of health care.”\(^{547}\)

Moreover, although the obligation to grant subsidiary protection under the Qualification Directive is complementary to the Convention Relating to the Status of Refugees, it does not cover third country nationals, who have been “granted leave to reside in the territories of the Member States for other reasons, that is, on a discretionary basis on compassionate or humanitarian grounds.”\(^{546}\) This is explicitly stated in recital 9 to the Qualification Directive: “Those third-country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.”\(^{550}\)

In his Opinion, Advocate General Bot also referred to the travaux préparatoires on Article 15 sub-paragraph b of the Qualification Directive.\(^{551}\) With reference to the case law of the European Court of Human Rights concerning the removal of seriously ill third country nationals under Article 3 of the Convention,\(^{552}\) it was emphasized in the travaux préparatoires that the Qualification Directive was “never intended to cover those cases”, which “are based on humanitarian grounds”.\(^{553}\) The Presidency of the Council of the European Union therefore proposed to phrase Article 15 sub-paragraph b of the Qualification Directive with the following wording: “a real risk of torture or inhuman or degrading treatment or punishment must exist in the country of origin.”\(^{554}\) Several legal scholars criticized this proposal for creating a legal limbo; a situation in which a third country national is protected against removal on the basis of the non-refoulement obligation of Member States per Articles 4 and 19 paragraph 2 of the Charter but at the same time excluded from being eligible for subsidiary protection under the Qualification Directive.\(^{555}\) Notwithstanding this justified criticism, the interpretation of Article 15 sub-paragraph b of the Qualification Directive by the Court of Justice in *M Bodi* seems to be in accordance with both the wording and legal history of Article 15 sub-paragraph b of the Qualification Directive to exclude cases concerning the removal of serious ill third country nationals from the scope of subsidiary protection.\(^{556}\)

Four years after the judgment in *M Bodi*, the Court of Justice once more ruled on the scope of subsidiary protection under the Qualification Directive in the case *MP*.\(^{557}\) In the case at issue, the third country national had seen subjected to torture in his country of origin, i.e. Sri Lanka, and, as a consequence, suffered from post-traumatic stress syndrome, depression and suicidal thoughts.\(^{558}\) According to the

---

544 ibid para 39.
545 ibid para 40.
546 ibid para 33.
547 ibid para 41.
548 ibid para 34-36.
549 ibid para 37; The Court of Justice refers to recitals 5, 6, 9 and 24 in the preamble to the Qualification Directive.
552 The travaux préparatoires refers to *D v the United Kingdom App no 30240/96* (ECHR, 2 May 1997).
554 ibid.
third country national, he qualified for subsidiary protection under the Qualification Directive on the basis of his previously endured torture by the authorities of Sri Lanka combined with a lack of adequate and available medical treatment in Sri Lanka for his mental illness, which “cannot be regarded as a naturally occurring illness, because it was caused by torture at the hands of the Sri Lankan authorities.” As the facts of this case differed considerably from the case *M’Bodj*, the Supreme Court of the United Kingdom had requested a preliminary ruling from the Court of Justice on the following question: “Does Article 15 of the Convention against Torture, which states that “every State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for full rehabilitation as possible.” This followed from *inter alia* recital 25 in the preamble to the Qualification Directive, which states that the “criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection (…) should be drawn from international obligations under human rights instruments and practices existing in Member States.”

However, as the Convention against Torture and the Qualification Directive pursue different objectives, “it is not possible, without disregarding the distinct areas covered by those two regimes, for a third country national in a situation such as that of MP to be eligible for subsidiary protection as a result of every violation, by his State of origin, of Article 14 of the Convention against Torture.” Whereas the Convention against Torture aims “to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world, by means of prevention”, the Qualification Directive aims “to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection [and] that a minimum level of benefits is available for those persons in all Member States”.

In view of the foregoing, the Court of Justice determined that a third country national is eligible for subsidiary protection under Articles 2 sub-paragraph e and 15 sub-paragraph b of the Qualification Directive interpreted in light of Article 4 of the Charter under the following three conditions: (i) “a third country national who in the past has been tortured by the authorities of his country of origin and no longer faces a risk of being tortured if returned to that country”, (ii) his or her “physical and psychological health could, if so returned, seriously deteriorate, leading to a serious risk of him [or her] committing suicide on account of trauma resulting from the torture he [or she] was subjected to” and (iii) “there is a real risk of him [or her] being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture.” This intentional deprivation may for instance derive from the unwillingness of the authorities of the country or origin “to provide health care, to warrant that person being granted subsidiary protection.” To what extent a third country national is intentionally deprived of health care, should be interpreted in accordance with Article 14 of the Convention against Torture, which states that “[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for full rehabilitation as possible.”

As explained above, the Court of Justice had ruled in the case *M’Bodj* that subsidiary protection under the Qualification Directive is to be granted to a third country national, who faces a real risk of ill treatment in his or her country of origin inflicted by an actor of serious harm. As such, subsidiary protection under the Qualification Directive should not be granted to a seriously ill third country national, who faces deportation to a country without adequate medical treatments available. The Court of Justice however differentiated the situation of MP from *M’Bodj*. Whereas the harm in the case *M’Bodj* had been inflicted in the host Member State, the harm in the case MP, i.e. torture, had been inflicted by the authorities of his country of origin. It was due to this torture at the hands of the authorities of his country of origin that MP suffered from post-traumatic stress syndrome, depression and suicidal thoughts, which would “be significantly and permanently exacerbated, to the point of endangering his life, if he is returned to that country.” While both factors (i.e. infliction of torture by the authorities of his country of origin and the aggravation of his mental health problems caused by the suffered torture) were relevant for the interpretation of Article 15 sub-paragraph b of the Qualification Directive, “such substantial aggravation cannot, in itself, be regarded as inhuman or degrading treatment inflicted on that third country national in his country of origin, within the meaning of” Article 15 sub-paragraph b of the Qualification Directive.

As previously concluded in the case *M’Bodj*, “[t]he risk of deterioration in the health of a third country national who is suffering from a serious illness, as a result of there being no appropriate treatment in his country of origin, is not sufficient, unless that third country national is intentionally deprived of

---

564 Ibid.
565 Ibid para 47.
566 Ibid. ibid.
567 Ibid para 49.
569 The Court of Justice refers to recital 25 in the preamble to the Qualification Directive: “It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.”
for his [or her] rehabilitation” [or] from the adoption of these authorities of “a discriminatory policy as regards access to health care, thus making it more difficult for certain ethnic groups or certain groups of individuals (…) to obtain access to appropriate care for the physical and mental after-effects of the torture perpetrated by those authorities.”\(^{577}\) This is for the national courts of the Member States to determine by taking into account in particular country of origin reports published by international (non-governmental human rights) organisations.\(^{574}\)

As observed by legal scholar Peers, “[o]verall (…) [the MP] judgment has gone some way to ensuring greater protection, where necessary, for the most vulnerable migrants: torture victims and the terminally ill.”\(^{578}\) This is most notably due to the Court of Justice’s clarification of when “there is a real risk of him being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture.”\(^{576}\) Whereas the unwillingness of the authorities to provide the victim of torture with adequate rehabilitation is specific to the situation of torture victims, legal scholar Peers is of the opinion that a discriminatory health care policy in a country of origin “should arguably be relevant to any “medical cases”.\(^{577}\) Legal scholar Battjes similarly observes in his case note that several jurisdictions acknowledge the denial of health care on discriminatory grounds as an act of persecution.\(^{579}\) It should nevertheless be observed that the Court of Justice explicitly speaks of “a discriminatory policy as regards access to health care (…) to obtain access to appropriate care for the physical and mental after-effects of the torture perpetrated by those authorities.”\(^{578}\) This is in accordance with Article 14 of the Convention against Torture, which is only applicable to “victims of an act of torture.”\(^{580}\) The question therefore remains to what extent victims of inhuman or degrading treatment of punishment, who are intentionally denied access to an adequate medical treatment for the physical and mental consequences of that ill-treatment on discriminatory grounds, fall within the scope of subsidiary protection under the (Recast) Qualification Directive, as clarified in the case MP.\(^{581}\)

5. The assessment of Article 15(b) of the Recast Qualification Directive in Lili and Howick

5.1. The Council of State: Article 15(b) of the Recast Qualification Directive in Lili and Howick

The main question for the Council of State was whether the preconditions upon return as formulated by the Child Care and Protection Board were relevant in the assessment of the unaccompanied asylum-seeking children’s eligibility for subsidiary protection status under the Recast Qualification Directive. The Council of State addressed this question in two sub-parts, which can be summarised as follows: first, what constitutes a relevant element for the assessment of the application for subsidiary protection under the Recast Qualification Directive and, second, has the District Court of The Hague rightly considered compliance with the preconditions before return to Armenia, as prescribed by the Child Care and Protection Board, relevant in the assessment of the request for subsidiary protection under the Recast Qualification Directive.\(^{581}\)

As regards the first sub-question, the Council of State defined a “relevant element” as: a fact or circumstance, which touches upon at least one subject or storyline related to refugee- or subsidiary protection status.\(^{580}\) This followed from the three steps to be undertaken by the State Secretary of Security and Justice in its assessment of a request for international protection: (i) the determination of the relevant elements of the request for international protection, (ii) the credibility assessment of these relevant elements and (iii) whether these credible relevant elements can be reason to grant a temporary asylum residence permit.\(^{581}\) In this regard, the Council of State focussed the remaining analysis on subsidiary protection status instead of refugee status, as the matter of dispute concerned whether the unaccompanied asylum-seeking children should be granted a temporary asylum residence permit within the meaning of Article 29 paragraph 1 sub-paragraph b under the Aliens Act 2000, which concerned the implementation of the subsidiary protection status under Articles 2 sub-paragraph f and Article 15 of the Recast Qualification Directive.\(^{584}\)

With reference to the case M Body, the Council of State summarised that subsidiary protection under the Recast Qualification Directive could only be granted to a third country national, who faced a real risk of ill treatment in his or her country of origin inflicted by an actor of serious harm.\(^{585}\) Different from the non-refoulement obligations per Article 3 of the Convention, the Recast Qualification Directive thus required that serious harm is inflicted by the actors of serious harm, as defined in Article

\(^{577}\) Ibid para 57.

\(^{578}\) Ibid.


\(^{579}\) Ibid para 6.2.


\(^{582}\) Ibid.

\(^{583}\) Ibid para 8.


\(^{585}\) Ibid. See also para 4 of the case note from H. Battjes in Case C-353/16 MP v Secretary of State for the Home Department [2018] ECLI:EU:C:2018:276, JF 2018/107 with case note H. Battjes, para 57 [emphasis added].
6 of the Recast Qualification Directive, i.e. "(a) the State, (b) parties or organisations controlling the State or a substantial part of the territory of the State, or (c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 3." For this reason, the State Secretary of Security and Justice was not required to take into consideration facts or circumstances, which fall outside the scope of serious harm, as defined in Article 15 of the Recast Qualification Directive, i.e. serious harm not inflicted by any of these actors.\(^{597}\)

In view of the foregoing, the Council of State concluded in the second sub-part that the District Court of The Hague inaccurately considered compliance with the preconditions before return to Armenia, as prescribed by the Child Care and Protection Board, relevant in the assessment of the request for subsidiary protection under the Recast Qualification Directive.\(^{598}\) This is because the alleged serious harm was not inflicted by either the authorities of Armenia or any of the other actors of serious harm as mentioned in Article 6 of the Recast Qualification Directive.\(^{599}\) As the authorities of Armenia had moreover expressed their willingness to offer all necessary assistance, these authorities could not be said to be unable or unwilling to provide protection against the alleged serious harm.\(^{600}\)

Once again, the Council of State emphasised the difference between, on the one hand, the question of whether the unaccompanied asylum-seeking children faced a real risk of treatment contrary to Article 3 of the Convention and, on the other hand, the question of whether they faced a real risk of serious harm within the meaning of Article 29 paragraph 1 sub-paragraph 3 of the Aliens Act 2000.\(^{601}\) Only the latter question had to be answered with respect to whether the unaccompanied asylum seeking children were eligible for subsidiary protection. As such, the District Court of The Hague had erred in finding the cited case law of the European Court decisive in its analysis.\(^{602}\) According to the Council of State, the cases *M.S.S. v Belgium and Greece* and *Tarakhel v Switzerland* concerned the transfer of asylum seekers to the responsible Member State of the European Union for the examination of their request for international protection under the Dublin Regulation, instead of the granting of a subsidiary protection status to the responsible Member State of the European Union for the examination of their request for subsidiary protection under the Recast Qualification Directive.\(^{603}\) This is because the alleged serious harm was not inflicted by either the authorities of Armenia or any of the other actors of serious harm as mentioned in Article 6 of the Recast Qualification Directive.\(^{604}\) As the authorities of Armenia had moreover expressed their willingness to offer all necessary assistance, these authorities could not be said to be unable or unwilling to provide protection against the alleged serious harm.\(^{605}\)

5.2. The Council of State’s judgment from a child-sensitive perspective

In view of the framework for assessing whether a Member State of the European Union is required to grant subsidiary protection status under the Recast Qualification Directive, outlined above, the author of the paper would like to make the following three main observations with respect to the Council of State’s analysis in *Lili and Howick*.

First, the Council of State failed to recognise that the *non-refoulement* obligation under Articles 4 and 19 paragraph 2 of the Charter has to be interpreted in light of Article 3 of the Convention. In conformity with the established case law from the European Court of Human Rights, the Court of Justice has acknowledged that there are two approaches to examine State responsibility under the *non-refoulement* obligation under Articles 4 and 19 paragraph 2 of the Charter.\(^{606}\) This depends on whether “the alleged future harm would emanate (…) from the intentional acts or omission of public authorities or non-State bodies” or from “the lack of sufficient resources to deal with it in the receiving country.”\(^{607}\)

If the alleged future harm emanates from the intentional acts or omission of public authorities, the Court of Justice will assess the prohibition of *refoulement* under Articles 4 and 19 paragraph 2 of the Charter in accordance with the approach developed by the European Court of Human Rights in the case *M.S.S. v Belgium and Greece*.\(^{608}\) To attain the level of severity to fall within the scope of Articles 4 and 19 paragraph 2 of the Charter, the third country national must find himself “in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity.”\(^{609}\) This situation must be the result of the “indifferences of the authorities of a Member State” as a result of which a person “wholly dependent on State support” finds himself in this situation of extreme material poverty “irrespective of his wishes and personal choices.”\(^{610}\)

\(^{590}\) Ibid para 6.5.


\(^{592}\) Ibid para 6.7-6.13.

\(^{593}\) Ibid para 6.10.

\(^{594}\) Ibid para 6.11.

\(^{595}\) Ibid para 6.7.

\(^{596}\) Ibid para 6.8.


\(^{598}\) Ibid, *Safi and Elmi v the United Kingdom* was not applicable in the present case as it concerned the return to a humanitarian crisis resulting from an armed conflict. More importantly, the conditions upon return were merely assessed in the context of whether the asylum seekers would have an internal flight alternative.\(^{599}\)

\(^{600}\) Ibid para 5.


\(^{602}\) S.H.H. v the United Kingdom App no 60367/10 (ECR, 29 January 2013), ECHR 2013/87 with case note M. den Heijer, para 89.


\(^{604}\) Case C-163/17 *Abubacarr Jasso v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:218, JV 2019/89 with case note H. Battjes, para 92.

\(^{605}\) Ibid.
On the basis of the preceding, the Council of State erred in finding that the cases M.S.S. v Belgium and Greece, Tarakhel v Switzerland and Sufi and Elmi v the United Kingdom were not applicable in the present case on the basis of the facts. By referring to the facts of these cases, the Council of State disregards that the Court of Justice has incorporated the two approaches developed by the Court to examine State responsibility under the non-refoulement obligation per Article 3 of the Convention in the context of poor living conditions in a country of origin or a third country in its interpretation of Articles 4 and 19 paragraph 2 of the Charter.

Second, the Council of State has painted an incomplete picture of the case law from the Court of Justice concerning the interpretation of Articles Article 15 sub-paragraph b of the Recast Qualification Directive. In addition to the case ‘M’Bodj’, the Court of Justice further clarified in the case ‘MP’ when a Member State is required to grant subsidiary protection status under the Recast Qualification Directive, if the forced return of a third country national is contrary to the prohibition of refoulement under Articles 4 and 19 paragraph 2 of the Charter. In the case ‘MP’, the Court of Justice clarified that Article 15 sub-paragraph b of the Recast Qualification Directive should have been interpreted in light of Article 14 of the Convention against Torture.\(^6\) This is in accordance with recital 34 of the preamble to the Recast Qualification Directive, which states that the ‘criteria [on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection] should be drawn from international obligations under human rights instruments and practices existing in Member States.’\(^6\)

Third, following this line of reasoning, the Council of State should have interpreted Article 15 sub-paragraph b of the Recast Qualification Directive in accordance with the Convention on the Rights of the Child.\(^6\) It should be observed that asylum seeking children are not eligible for subsidiary protection “as a result of every violation” of the Convention on the Rights of the Child.\(^6\) Instead, the Council of State should have ascertained to what extent the unaccompanied asylum-seeking children faced “a risk of being intentionally deprived of appropriate care” in violation the children’s rights under the Convention on the Rights of the Child.\(^6\)

---

**Bibliography**

**Literature**


Swiss Refugee Council SFH/OSAR, *Reception conditions in Italy: Report on the current situation of asylum seekers and beneficiaries of protection, in particular Dublin returnees, in Italy* (Swiss Refugee Council SFH/OSAR 2016).

**Legislation**


Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (“Convention against Torture”).

Note from the Presidency of the Council of the European Union to the Strategic Committee on Immigration, Frontiers and Asylum of 25 September 2002, 12148/02.

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1 (“Dublin II Regulation”).


Parliamentary Papers II 2006/07, 30 925, 3.


Case law

D. v the United Kingdom App no 30240/96 (ECtHR, 2 May 1997).


Tarakhel v Switzerland App no 29217/12 (ECtHR, 4 November 2014), JV 2014/384 with case note H. Battjes.


Poposhrivi v Belgium App no 41738/10 (ECtHR, 13 December 2016), JV 2017/22 with case note B.E.P. Myjer.


Case C-468/11 MA, BT and DA v Secretary of State for the Home Department [2013] ECLI:EU:C:2013:93, Opinion of AG Cruz Villalón.


Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 Bashir Ibrahim and Other v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov [2018] ECLI:EU:C:2018:617, Opinion of Wathelet.


“We would love it for our mother to come to the Netherlands. (...) Otherwise, as a last resort, we would go there [i.e. Armenia]. But in that case, everything [i.e. housing, education and care] should be adequately organized. This is currently not the case.”

Lili and Howick

Chapter V

The rewritten Council of State’s Judgment in Lili and Howick

ADMINISTRATIVE JURISDICTION DIVISION OF THE COUNCIL OF STATE

201806190/1/V3

Date of judgment: 24 August 2018

Judgment in the higher appeal submitted by:

1. the State Secretary of Security and Justice,

2. [the foreign national 1] and [the foreign national 2], appellants,

against the judgment of the District Court of The Hague, seated in Utrecht, dated 19 July 2018 with case nos. 18/4807 and 18/4808 in the dispute between:

the foreign nationals

and

the State Secretary.

NOS Jeugdjournaal, ‘Lili en Howick mogen worden uitgezet’ (NOS Jeugdjournaal, 24 August 2018)  

As a preliminary remark, the rewritten parts of the judgment by the author are written in bold.
By decisions of 31 May 2018, the State Secretary rejected the applications for a temporary asylum residence permit of the foreign nationals.

By judgment of 19 July 2018, the District Court declared the appeal lodged against these decisions by the foreign nationals well-founded, annulled the decisions, and decided that the State Secretary had to take new decisions in accordance with the judgment of the District Court.

The State Secretary has lodged a higher appeal against this judgment. The foreign nationals have lodged provisional higher appeal.

The foreign nationals have submitted a written statement setting out the grounds of provisional higher appeal.

The foreign nationals have submitted additional documents.

The Council of State has dealt with the case by hearing dated 13 August 2018. The State Secretary, represented by M.M. van Asperen, and the foreign nationals, represented by M.F. Wijngaarden, attorney in Amsterdam, have appeared. (…)

CONSIDERATIONS

Introduction

1. The foreign nationals are siblings of Armenian nationality, aged 13 and 12 respectively. On 18 May 2008, they travelled to the Netherlands accompanied by their mother. Since then, they have remained in the Netherlands. On 14 August 2017, the mother was deported to Armenia without her children. Following the deportation of the mother, the children were taken into care by Foundation Nidos, which fulfils the guardianship task for unaccompanied asylum-seeking children in the Netherlands. The foreign nationals have expressed their wish to be reunited with their mother. The Child Care and Protection Board has issued a list of objectives to ensure the adequate reunion with their mother. The foreign nationals have labelled these objectives as “preconditions upon return”. In higher appeal, the question to be assessed is whether the State Secretary should have granted the foreign nationals a temporary asylum residence permit on the basis of these “preconditions”.

Structure of the judgment

2. (…) The Council of State will first address the first ground of higher appeal submitted by the State Secretary, which can be summarised as follows: what constitutes a relevant element for the assessment of the application for international protection. The Council of State will subsequently review whether the District Court of The Hague rightly considered the compliance with the preconditions upon return to Armenia, as prescribed by the Child Care and Protection Board, relevant in the assessment of the foreign national’s request for international protection under Directive 2011/95/EU (“Recast Qualification Directive”) [considerations 3-3.17], (…) Hereafter, the Council of State will reach a conclusion on the (provisional) higher appeal submitted by the State Secretary and the foreign nationals [consideration 5]. Following some considerations on the legal effects of a decision to reject an application for international protection, the Council of State will address whether the foreign nationals run a real risk of a violation of Article 3 of the ECHR in light of the preconditions issued by the Child Care and Protection Board [considerations 6-6.19]. Lastly, the Council of State will address the best interests of the child principle as safeguarded by Article 3 paragraph 1 of the Convention on the Rights of the Child [considerations 6.20-6.34].

2.1. The legislative framework has been included in the annex, which forms an integral part of this judgment.

The assessment of a relevant element of the asylum story

3. By its first ground of higher appeal, the State Secretary submits that the District Court has inaccurately considered that he should have designated the alleged real risk of serious harm upon return to Armenia, if the preconditions have not been met, as a relevant element in the assessment of the applications for international protection. According to the State Secretary, the alleged problems upon return, because the preconditions have not been met, are not relevant for the assessment of refugee status or serious harm as referred to in Article 29 paragraph 1 sub-paragraph b of the Aliens Act 2000. For this reason, these problems of the foreign nationals cannot be taken into consideration in the assessment of their applications for international protection.

3.1. In order to assess this first ground of higher appeal, the Council of State will first address the question what constitutes a relevant element for the assessment of the application for international protection. Hereafter, the Council of State will review whether the District Court was right in considering these preconditions a relevant element.

What constitutes a relevant element?

3.2. The District Court has rightly considered the following: in its assessment of a request for international protection, the State Secretary of Security and Justice must undertake the following three steps: (i) the determination of the relevant elements of the request for international protection, (ii) the credibility assessment of these relevant elements and (iii) whether these credible relevant elements can be reason to grant a temporary asylum residence permit. A relevant element constitutes a fact or circumstance, which touches upon at least one subject or storyline related to refugee- or subsidiary protection status.
3.3. The foreign nationals have not argued that they fear persecution within the meaning of the Convention Relating to the Status of Refugees. As a result, the matter of dispute concerns the question whether the foreign nationals should be granted a temporary asylum residence permit within the meaning of Article 29 paragraph 1 sub-paragraph b of the Aliens Act 2000. In this Article, Article 15 of the Recast Qualification Directive has been implemented. This is the subsidiary protection status. In order to qualify for subsidiary protection status, a foreign national must demonstrate that he runs a real risk of serious harm as referred to in Article 15 of the Recast Qualification Directive.

3.4. In its judgment dated 20 June 2017, ECLI:NL:RVS:2017:1733, the Council of State considered – with reference to the judgment of the Court of Justice dated 18 December 2014, M’Bodj, ECLI:EU:C:2014:2452 – that the limiting list of grounds for granting a temporary asylum residence permit, as laid down in Article 29 paragraph 1 sub-paragraph b of the Aliens Act 2000, is in accordance with the grounds as laid down in the Recast Qualification Directive. Moreover, it follows from the judgment M’Bodj that the subsidiary protection status can be granted only if the foreign national runs a real risk of serious harm as referred to in Article 15 of the Recast Qualification Directive. This means that the State Secretary is not able to grant a temporary asylum residence permit within the meaning of Article 29 paragraph 1 sub-paragraph b of the Aliens Act 2000, if the foreign national has not demonstrated that he runs a real risk of serious harm.

3.5. In addition, serious harm must be inflicted by the actors of serious harm, as defined in Article 6 of the Recast Qualification Directive, i.e. the State, parties or organisations controlling the State or non-State actors, if it can be demonstrated that the State or these parties are unable or unwilling to provide protection. This means that not every violation of Article 3 ECHR can result in granting subsidiary protection status. The fact that Article 3 ECHR, as interpreted by the ECtHR in its case law, also offers protection against deportation under certain exceptional circumstances, such as when a foreign national suffers from a serious physical or psychological illness or under compelling humanitarian reasons, does not mean that the foreign national has demonstrated that he runs a real risk of serious harm. The case law of the Court of Justice concerning serious harm and the case law of the ECtHR concerning Article 3 ECHR are divergent on this issue. According to the Court of Justice, serious harm must be inflicted by the actors of serious harm. As such, a medical situation, for instance, does in principle not fall under the definition of serious harm within the meaning of Article 15 of the Recast Qualification Directive.

3.6. However, in addition to the judgment M’Bodj, the Court of Justice clarified in the judgment dated 24 April 2018, MP, ECLI:EU:C:2018:276, that serious harm under Article 15 sub-paragraph b of the Recast Qualification Directive should – in that particular case – have been interpreted in light of Article 14 of the Convention against Torture. In MP, the Court of Justice thus concluded that a third country national is eligible for subsidiary protection under Articles 2 sub-paragraph e and 15 sub-paragraph b of the Qualification Directive in light of Article 4 of the Charter under the following three conditions: (i) “a third country national who in the past has been tortured by the authorities of his country of origin and no longer faces a risk of being tortured if returned to that country”; (ii) his or her “physical and psychological health could, if so returned, seriously deteriorate, leading to a serious risk of him [or her] committing suicide on account of trauma resulting from the torture he [or she] was subjected to” and (iii) “there is a real risk of him [or her] being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture” [MP, para 58-59]. This intentional deprivation may for instance derive from the unwillingness of the authorities of the country or origin “to provide for his [or her] rehabilitation” [or] from the adoption of these authorities of “a discriminatory policy as regards access to health care, thus making it more difficult for certain ethnic groups or certain groups of individuals (…) to obtain access to appropriate care for the physical and mental after-effects of the torture perpetrated by those authorities” [MP, para 57]. This is for the national courts of the Member States to determine by taking into account in particular country of origin reports published by international (non-governmental human rights) organisations.

3.7. To conclude, the State Secretary is thus not required to take into consideration facts or circumstances, which fall outside the scope of serious harm. In view of the judgment MP, the State Secretary should however interpret serious harm within the meaning of Article 15 sub-paragraph b of the Recast Qualification Directive in accordance with human rights treaties, including the Convention on the Rights of the Child. This does not mean that foreign nationals are eligible for subsidiary protection as a result of every violation of the invoked human rights treaty. Instead, the State Secretary should ascertain to what extent the foreign national faces “a risk of being intentionally deprived of appropriate care” in violation of the invoked human rights treaty [MP, para 57].

3.8. Contrary to the view of the foreign nationals, this assessment does not prejudice the credibility and plausibility assessment of the asylum story. The State Secretary is not required to address every element of the asylum story, but only the relevant elements. Elements, which are irrelevant for the assessment of the subsidiary protection status but relevant for the assessment of a violation of Article 3 ECHR, may therefore not be involved in a decision concerning an application for international protection. This element should be discussed in a different framework.
Are the “preconditions” a relevant element?

3.9. The District Court has inaccurately considered the foreign national’s argument that they run a real risk of ill-treatment in violation of Article 3 ECHR a relevant element in the State Secretary’s assessment of their applications for international protection. In the context of an application for international protection, as considered above (…), the question is not whether the foreign nationals run a real risk of ill-treatment in violation with Article 3 ECHR, but whether the foreign nationals run a real risk of serious harm within the meaning of Article 29 paragraph 1 sub-paragraph b of the Aliens Act 2000.

3.10. In view of this, the District Court has inaccurately regarded the case law of the ECHR decisive [the judgment dated 21 January 2011, M.S.S. v Belgium and Greece, no. 30696/09; the judgment dated 28 June 2011, Sufi and Elmi v the United Kingdom, nos. 8319/07 and 11449/07; the judgment dated 4 November 2014, Tarakhel v Switzerland, no. 29217/12]. Indeed, the Court of Justice interprets the non-refoulement obligation under Articles 4 and 19 paragraph 2 of the Charter in light of Article 3 ECHR [MP, para 36-44]. However, the present case does not concern the protection against removal deriving under Articles 4 and 19 paragraph 2 of the Charter in light of Article 3 ECHR from the prohibition on exposing a person to inhuman or degrading treatment. The Court of Justice considers a separate issue as to whether a Member State is required to grant subsidiary protection status under the Recast Qualification Directive, if the forced return of a third country national is contrary to the prohibition of refoulement under Articles 4 and 19 paragraph 2 of the Charter [MP, para 45].

3.11. The argument of the foreign nationals that the government of Armenia should be considered an actor of serious harm due to its unwillingness or inability to provide the foreign nationals adequate protection fails. Following from the judgment M’Bodj, it can indeed not be excluded that a government can be considered an actor of serious harm, if the government intentionally fails to provide the necessary assistance and support. In addition, in conformity with the judgment MP, serious harm within the meaning of Article 15 sub-paragraph b of the Recast Qualification Directive should be interpreted in accordance with the Convention on the Rights of the Child. This does not mean that the foreign nationals are eligible for subsidiary protection as a result of every violation of the Convention on the Rights of the Child. Instead, it should be ascertained to what extent the foreign nationals face “a risk of being intentionally deprived of appropriate care” in violation with the Convention on the Rights of the Child.

3.12. In the report dated 31 October 2017, the Child Care and Protection Board – supported by Indigo, the Netherlands Institute of Forensic Psychiatry and Psychology and the Nidos Foundation – has formulated inter alia the following preconditions for ensuring the adequate return of the unaccompanied asylum-seeking children to their country of origin, i.e. Armenia: (i) the reunification with their mother, who is emotionally capable to provide sufficient safety to her children and (ii) a suitable growing-up environment, which includes adequate housing, schooling and (health)care focussed on coping with their psychological problems related to their experiences in the Netherlands.

3.13. These preconditions correspond with the children’s rights under the Convention on the Rights of the Child, including the best interests of the child principle (Article 3), the right to family reunification (Articles 5, 9, 16), the right to life, survival and development (Article 6), the right to participation (Article 12), the right to the highest attainable standard of health (Articles 24, 25), the right to an adequate standard of living (Articles 20, 27), the right to an education (Articles 28, 29), the right to liberty and freedom from torture and cruel, inhuman or degrading treatment or punishment and (Article 37).

3.14. It should therefore be ascertained to what extent the foreign nationals face “a risk of being intentionally deprived of appropriate care” in violation with these children's rights under the Convention on the Rights of the Child. It follows from the submitted documents that the government of Armenia is involved with the situation of the foreign nationals. As the government of Armenia is willing to assist with the foreign national’s reception, care and upbringings after their return to Armenia, the foreign nationals do not face a risk of being intentionally deprived of appropriate care.

3.15. Other than the foreign nationals’ argument, it can moreover not be deduced from the judgment from the Council of State dated 30 May 2018, ECLI:NL:RVS:2018:1795, that the living conditions of the foreign nationals upon return to their country of origin should be considered a relevant element. In that particular case, the question at issue was whether Article 3 ECHR rested declaring the case inadmissible, because the foreign national was already granted international protection in a Member State of the European Union. As such, this judgment did not concern the issue of granting the subsidiary protection status.

3.16. In view of the above, the District Court has inaccurately held that the State Secretary should have considered the real risk, which the foreign national alleged to incur in Armenia without compliance with the preconditions formulated by the Child Care and Protection Board, a relevant element in the assessment of the applications for international protection.

3.17. The higher appeal lodged by the State Secretary is successful.
The provisional higher appeal lodged by the foreign nationals

4. The provisional higher appeal lodged by the foreign nationals (...) cannot lead to the annulment of the judgment. (...) 

Conclusion

5. The higher appeal lodged by the State Secretary is well-founded. The provisional higher appeal lodged by the foreign nationals is unfounded. The judgment under appeal should be set aside. The Council of State will therefore review the decisions dated 31 May 2018 in light of the grounds of appeal lodged by the foreign nationals in first instance, to the extent that this is still necessary in light of all the foregoing considerations.

The grounds of appeal

6. In their grounds of appeal, the foreign nationals submitted that the State Secretary had erred in his decisions concerning the rejection of their applications for international protection by not assessing whether their forced return to Armenia constituted a real risk of ill-treatment within the meaning of Article 3 ECHR in light of the preconditions issued by the Child Care and Protection Board.

6.1. (...) 

6.2. As considered above (...), the argument of the foreign nationals that they run a real risk of ill-treatment in violation of Article 3 ECHR cannot be involved in the assessment of whether they qualify for subsidiary protection status. (...) 

6.3. Nonetheless, the decisions dated 31 May 2018 provide the State Secretary the authority to expel the foreign nationals. The State Secretary has announced that he wants to expel the foreign nationals before 1 September 2018. To this end, he has made concrete arrangements with the authorities of Armenia and organisations on the ground. In these circumstances, a certain degree of legal protection should be provided to prevent that the argument of the foreign nationals concerning their risk upon return to Armenia will be reviewed by an administrative judge in proceedings against the actual expulsion for the first time. The foreign nationals may not be expelled if this is in violation with Article 3 ECHR. For this reason, the Council of State will involve this argument in the current proceedings.

6.4. While the State Secretary has expressed the view that the argument of the foreign nationals does not constitute a relevant element for the assessment of their applications of international protection, he has actually expressed a view on the alleged risk of the foreign nationals upon return in his decisions dated 31 May 2018. The Council of State will review this point of view. The Council of State will also address the points of view expressed by both parties put forward in higher appeal, including the documents submitted.

Article 3 ECHR and the “preconditions”

6.5. In the report dated 31 October 2017, the Child Care and Protection Board has formulated their concerns regarding the care of the foreign nationals in Armenia. For this reason, the Child Care and Protection Board has formulated the following preconditions for ensuring their adequate return to Armenia:

- It is clear where the children will be taken care of;
- The children are reunited with their mother;
- Their mother is emotionally available, and can offer them sufficient safety;
- The children are living in an environment, where they are able to sustain a decent standard of living. This includes the following:
  - The children have adequate housing;
  - The children attend school;
  - The children have adequate social contacts;
  - The children participate in leisure activities;
  - The children receive (health)care or assistance focused on processing the severe experiences and the above-stated (internalizing) problems.

6.6. In its established case law, the ECtHR has developed two approaches for examining State responsibility under the non-refoulement obligation per Article 3 ECHR in the context of socio-economic harm in a country of origin depending on whether “the alleged future harm would emanate (...) from the intentional acts or omission of public authorities or non-State bodies” or from “the lack of sufficient resources to deal with it in the receiving country” [see the judgment dated 21 January 2011, M.S.S. v Belgium and Greece, no. 30696/09; the judgment dated 28 June 2011, Sufi and Elmi v the United Kingdom, nos. 8319/07 and 11449/07; the judgment dated 29 January 2013, S.H.H. v the United Kingdom, no. 60367/10].

6.7. If the poor living conditions in a country of origin emanate from the intentional acts or omission of public authorities, the expulsion of the foreign national to his country of origin would give rise to the responsibility of the Netherlands under Article 3 ECHR, when the foreign national involved “wholly dependent on State support” would find himself “faced with official indifference in a situation of serious deprivation or want incompatible with human dignity” [see M.S.S. v Belgium and Greece and Sufi and Elmi v the United Kingdom]. In M.S.S. Belgium and Greece, for instance, the ECtHR explicitly held that due to the particular group vulnerability of asylum seekers taken together with
the legal obligations under positive law for asylum seekers, a Contracting State has special positive obligations to provide asylum seekers with adequate care and protection under Article 3 ECHR.

6.8. However, if the poor living conditions in a country of origin emanate from the lack of sufficient resources to deal with it in the country of origin, the expulsion of the foreign national to his country of origin would give rise to the responsibility of the Netherlands under Article 3 ECHR in the very exceptional case “where the humanitarian grounds against removal are compelling” [see S.H.H. v the United Kingdom].

6.9. In the present case, it should thus first be established whether the alleged future harm in Armenia, as established by the Child Care and Protection Board, emanates from the intentional acts or omissions of the authorities of Armenia. This will be the case if (i) the foreign nationals involved belong to a particular vulnerable group and (ii) the obligation to provide children with adequate socio-economic protection has entered into the positive law of Armenia.

6.10. The Council of State considers that the alleged socio-economic harm in Armenia, as defined by the Child Care and Protection Board, is related to the omissions of the Armenian authorities, as the foreign nationals belong to a particular vulnerable group to which Armenia has specific positive obligations. First, the foreign nationals involved belong to the particular vulnerable group of children due to their age and dependency on adults. Second, Armenia has acceded to the Convention on the Rights of the Child on 23 June 1993; without having made a declaration or reservation upon accession.

6.11. As such, the Council of State will assess the prohibition of refoulement under Article 3 ECHR in accordance with the “normal” minimum level of severity threshold to fall within the scope of Article 3 ECHR. It follows from established case law [see inter alia the judgment dated 12 October 2006, Mubilanzila Mayeka and Kamiki Mitunga v Belgium, no. 13178/03] that to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim.

6.12. It also follows from the case law of the ECtHR that Article 3 ECHR should be interpreted in harmony with the United Nations Convention on the Rights of the Child, in particular the best interests of the children, taking into account the vulnerability of the children [see inter alia the judgment dated 4 November 2014, Tarakhel v Switzerland, no. 29217/12; the judgment dated 8 November 2016, El Ghatet v Switzerland, no. 56971/10]. This entails that a Contracting State has a positive obligation under Article 3 of the Convention to provide extremely vulnerable children with special protection, including adequate reception conditions in the country of origin, preventing “a situation of stress and anxiety, with particularly traumatic consequences” [see inter alia Tarakhel v Switzerland].

6.13. It follows from the reports issued by the Child Care and Protection Board, taken together with the personal statement from the foreign nationals and other submitted documents, that the return of the foreign nationals to Armenia constitutes a severe experience for both the children and the mother in view of the young age of the children, the imposed child protection measure and their deep roots in the Netherlands. As follows from the report dated 25 June 2018, the mother does not take any action in preparation of the return of the foreign nationals to Armenia. The mother does not have a permanent home or income and does not make use of the available care available in Armenia. As a result, the Child Care and Protection Board is not convinced that the mother will be able to take care of the children, as she provided in the Netherlands. She can therefore not offer her children stability and a perspective for the future.

6.14. For this reason, the Child Care and Protection Board has formulated the above-mentioned preconditions for ensuring the adequate return of the foreign nationals to Armenia. These preconditions correspond with the children’s rights under the Convention on the Rights of the Child, including the best interests of the child principle (Article 3), the right to family reunification (Articles 5, 9, 16), the right to life, survival and development (Article 6), the right to participation (Article 12), the right to the highest attainable standard of health (Articles 24, 25), the right to an adequate standard of living (Articles 20, 27), the right to an education (Articles 28, 29), the right to liberty and freedom from torture and cruel, inhuman or degrading treatment or punishment and (Article 37). As Article 3 ECHR should be interpreted in harmony with the United Nations Convention on the Rights of the Child, the non-compliance with those preconditions would constitute a breach of the prohibition of non-refoulement under Article 3 ECHR.

6.15. It is therefore incumbent on the State Secretary to obtain assurances from the authorities of Armenia that upon their arrival in Armenia the preconditions have been
met. In the judgment Tarakhel v Switzerland, the Court held that “detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation of the family unit” had to be obtained from the Italian authorities (Tarakhel v Switzerland, para 119). In view of Tarakhel v Switzerland, the State Secretary should therefore have obtained “detailed and reliable information” concerning the compliance by the Armenian authorities with the preconditions, as formulated by the Child Care and Protection Board.

6.16. The agreements between the Repatriation and Departure Service with the Armenian authorities and the non-governmental organizations Fund for Armenian Relief and Caritas Yerevan cannot be said to contain “detailed and reliable information” concerning the compliance by the Armenian authorities with the preconditions, as formulated by the Child Care and Protection Board, and thereby “preventing a situation of stress, and anxiety, with particularly traumatic consequences” (Tarakhel v Switzerland, para 119).

6.17. Firstly, according to the State Secretary, the Repatriation and Departure Service has made concrete agreements with the Armenian authorities and the non-governmental organization Fund for Armenian Relief concerning the reception of the children after their arrival in Armenia, which is focused on the rapid reunion with their mother. In the report dated 26 June 2018, the Child Care and Protection Board however found the mother incapable of ensuring the developmental needs of the children in Armenia.

6.18. Secondly, according to the State Secretary, the non-governmental organisation Caritas Yerevan is able to provide (temporary) support consisting of (temporary) housing, education and medical, legal and social assistance, if the mother is unable to provide her children with a suitable growing-up environment, which includes adequate housing and schooling. In the report dated 26 June 2018, the Child Care and Protection Board concluded that this (temporary) support would cause severe emotional damage to both children based on their extreme vulnerability and severe emotional problems.

6.19. It follows that, were the foreign nationals to be returned to Armenia without the State authorities having first obtained “detailed and reliable information” from the Armenian authorities that the foreign nationals would be taken charge of as required by the Child Care and Protection Board, there would be a violation of Article 3 of the Convention. For these reasons, the State Secretary has inaccurately considered that the foreign nationals have failed to demonstrate that they face a real risk of ill-treatment in breach of the non-refoulement obligation under Article 3 ECHR.

The best interests of the child

6.20. To the extent that the foreign nationals have argued that it does not follow from the decisions dated 31 May 2018 in which manner the best interests of the child within the meaning of Article 3 of the Convention on the Rights of the Child have been balanced against other interests, the following is observed.

6.21. As previously held by the Council of State (judgment dated 7 February 2012, ECLI:NL:RVS:2012:BV3716), Article 3 of the UNCRC has direct effect to the extent that in all actions concerning children the interests of the child concerned should be taken into account. With regard to the weight to be accorded to these best interests of the child in a specific case, Article 3 paragraph 1 of the UNCRC, in view of the wording, does not contain a standard which is directly applicable by a judge without further elaboration in national laws and regulations. The administrative court should nevertheless assess whether the administrative body has paid sufficient attention to the best interests of the child and has thus remained within the limits of the law in the exercise of its powers. This assessment is restraint in nature.

6.22. The Council of State is of the opinion that this previous legal framework for assessing the best interests of the child should be revised. With regard to the identification of a child’s best interests, the State Secretary should in particular take the following three factors into account: (i) the views of the child(ren) involved in accordance with their age and maturity, as safeguarded by Article 12 paragraph 1 of the UNCRC; (ii) the specific situation of the child(ren) involved, including inter alia their age and particular vulnerability and (iii) other relevant children’s rights as safeguarded by the Convention on the Rights of the Child.

6.23. With regard to the weight to be accorded to these best interests of the child in a specific case, Article 3 paragraph 1 of the UNCRC, in view of the wording, does contain a standard which is directly applicable by a judge without further elaboration in national laws and regulations, i.e. “a primary consideration”. The best interests of the child should thus be given primary consideration in case of a conflict of interests. This does not entail that the best interests have absolute priority, as other interests could be of more importance in a certain situation. Instead, if the State Secretary is of the opinion that other interest should prevail in a specific case, it has a weightier obligation to state reasons.

6.24. In view of this, the Council of State will assess to what extent the State Secretary has (i) determined the best interests of the foreign nationals and (ii) balanced the foreign nationals’ best interests against other interests.
Phase 1: The identification of the best interests of the foreign nationals

6.25. In general, the decisions dated 31 May 2018 do not reveal to what extent a detailed analysis of the best interests of the foreign nationals has been conducted by the State Secretary. According to the State Secretary, the minority of the children had been taken into consideration throughout the asylum procedure, including their entitlement to reception facilities and benefits until their expulsion to Armenia. As such, the State Secretary simply stated in general terms that the children’s interests had been taken into account. This is in breach with its obligation to precisely identify the best interests of the child involved under Article 3 paragraph 1 of the Convention on the Rights of the Child.

6.26. This is all the more compelling in light of the report issued by the Child Care and Protection Board. In its report, the Child Care and Protection Board has identified the following interests of the unaccompanied asylum-seeking children: (i) the reunification with their mother, who is emotionally capable to provide sufficient safety to her children and (ii) a suitable growing-up environment, which includes adequate housing, schooling and (health)care focussed on coping with their psychological problems related to their experiences in the Netherlands. According to the Child Care and Protection Board, the return of the children to Armenia would be contrary to their best interests under Article 3 paragraph 1 of the UNCRC without these preconditions being guaranteed.

6.27. It moreover does not follow from the decisions to what extent the State Secretary has taken into consideration the three factors, as described in para. 6.22. First, it does not follow from the decisions to what extent the State Secretary has given due weight to the views of the foreign nationals in accordance with their age and maturity, as safeguarded by Article 12 paragraph 1 of the UNCRC. Throughout the asylum procedure, the foreign nationals have expressed their wish to be reunited with their mother in Armenia under the condition that the preconditions, as formulated by the Child Care and Protection Board, before their return to Armenia were guaranteed.

6.28. Second, it also does not follow from the decisions to what extent the specific circumstances of the foreign nationals, including their long-term residence in the Netherlands, their insignificant residence in Armenia and their earlier separation from their mother, as a result of which the foreign nationals have been taken into care by Foundation Nidos, have been adequately taken into account by the State Secretary. To this end, the State Secretary has held that the minority of the foreign nationals has been taken into consideration throughout the asylum procedure, including their entitlement to reception facilities and benefits until their expulsion to Armenia. These procedural guarantees throughout the asylum procedure of the foreign nationals are however irrelevant, as it fails to answer the question whether it is in the best interests of the foreign nationals to either remain in the Netherlands or return to Armenia.

6.29. Third, it also does follow from the decisions to what extent the other relevant children’s rights as safeguarded by the Convention on the Rights of the Child have been taken into account by the State Secretary. The preconditions, as formulated by the Child Care and Protection Board, correspond with the children’s rights under the Convention on the Rights of the Child, including the best interests of the child principle (Article 3), the right to family reunification (Articles 5, 9, 16), the right to life, survival and development (Article 6), the right to participation (Article 12), the right to the highest attainable standard of health (Articles 24, 25), the right to an adequate standard of living (Articles 20, 27), the right to an education (Articles 28, 29), the right to liberty and freedom from torture and cruel, inhuman or degrading treatment or punishment and (Article 37). These rights have not been taken into account by the State Secretary.

6.30. In response, the State Secretary considers it in the best interests of the children to be reunited with their mother in Armenia. In the report dated 26 June 2018, the Child Care and Protection Board concluded however that the mother would not be capable of ensuring the developmental needs of the children in Armenia. In addition, the Child Care and Protection Board concluded that other child-specific reception measures in Armenia would cause severe emotional damage to both children. This is based on the extreme vulnerability of both children, who experience severe emotional problems.

Phase 2: Balancing the foreign nationals’ best interests against other interests

6.31. It moreover does not follow from the decisions dated 31 May 2018 whether the State Secretary has considered the best interests of the foreign nationals to remain in the Netherlands as a primary consideration.

6.32. The State Secretary has held that the obligation to take into account the best interests of the children does not go as far as to stop their deportation or provide them with a residence permit. With this statement, the State Secretary balances the best interests of the foreign nationals against the interests of the Netherlands related to immigration control. According to the United Nations Committee on the Rights, the non-rights-based argument of immigration control cannot override best interests of children to remain in the host country.

6.33. In light of this, the State Secretary of Security has not provided a convincing justification based on any evidence for its decision to remove the unaccompanied asylum-seeking to Armenia in contradiction with their best interests.
6.34. In light of the above considerations, the State Secretary has not sufficiently taken into account the best interests of the foreign nationals in violation with Article 3 paragraph 1 of the Convention on the Rights of the Child.

7. The grounds of appeal lodged by the foreign nationals are well-founded. The decisions of the State Secretary of Security and Justice dated 31 May 2018 must be annulled.
8. The State Secretary will be ordered to pay the legal costs, as described below.

JUDGMENT

The Administrative Jurisdiction Division of the Council of State:
I. declares the higher appeal lodged by the State Secretary well-founded;
II. declares the provisional higher appeal lodged by the foreign nationals unfounded;
III. annuls the judgment of the District Court The Hague, seated in Utrecht, dated 19 July 2018 in 18/4807 and 18/4808;
IV. declares the appeal against the above judgment well-founded;
V. annuls the decisions of the State Secretary of Security and Justice dated 31 May 2018, V-numbers: (...)
VI. orders the State Secretary of Security and Justice to pay the legal costs and disbursements incurred by the foreign nationals in bringing the present proceedings, including appeal and higher appeal, to the amount of (...), of which the entire amount should be granted to the professional, who has provided legal aid;
VII. orders the State Secretary of Security and Justice to pay the court registry fees, incurred by the foreign nationals in bringing the present proceedings, including appeal and higher appeal, to the amount of (...).

ANNEX

European Convention on Human Rights

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Convention on the Rights of the Child

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(…)

Recast Qualification Directive 2011/95/EU

Article 6

Actors of persecution or serious harm include:

a) the State;
b) parties or organisations controlling the State or a substantial part of the territory of the State;
c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

Article 15

Serious harm consists of:

a) the death penalty or execution; or
b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Aliens Act 2000

(…)

Article 29

1. A temporary residence permit as referred to in Article 28 may be issued to a foreign national:
   a. (...)
   b. who has shown substantial grounds for believing that he, if returned to his country of origin, runs a real risk of suffering serious harm, consisting of:
      i. the death penalty or execution; or
      ii. torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
      iii. serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.
Bibliography

Literature