SHOULD WE THINK ABOUT THE CHILDREN FIRST?

The best interests of the child in Dutch family migration law in the light of the UN CRC, the ECHR and EU law

Stijn Bleichrodt

Student number 2526234
Date June 2019
Master thesis International Migration and Refugee Law
Supervisor Mr. dr. Marcelle Reneman
## Contents

1. Introduction ............................................................................................................................... 4  
1.1. Limitations ............................................................................................................................. 6  
1.2. Research question & sub-questions ....................................................................................... 6  
1.3. Method & sources .................................................................................................................. 6  
1.3.1. Case selection .................................................................................................................. 7  
1.4. Outline.................................................................................................................................. 9  
2. The Convention on the Rights of the Child ............................................................................. 11  
2.1. The UNCRC and the best interests of the child ................................................................. 11  
2.1.1. Actions (‘in all actions concerning children’) ................................................................. 13  
2.1.2. Assessment & determination (‘the best interests of the child’) ..................................... 14  
2.1.3. Attached weight (‘a primary consideration’) ................................................................. 15  
2.1.3. Actors (‘courts of law, administrative authorities and legislative bodies’) ....... 16  
3. The European Convention on Human Rights ....................................................................... 18  
3.1. The ECHR & article 8 ......................................................................................................... 18  
3.2. Article 8 ECHR - case law ................................................................................................. 19  
3.2.1. Actions ............................................................................................................................. 20  
3.2.2. Assessment & determination ......................................................................................... 20  
3.2.3. Attached weight ............................................................................................................. 22  
3.2.4. Actors ............................................................................................................................. 25  
4. European Union law .................................................................................................................. 27  
4.1. The best interests of children & family migration under EU law ...................................... 27  
4.1.1. Article 21 of the TFEU & the Citizens’ Rights Directive ............................................... 27  
4.1.2. Article 20 of the TFEU and (non) ‘purely internal situations’ ....................................... 28  
4.1.3. The Family Reunification Directive .............................................................................. 28  
4.1.4. The Charter of Fundamental Rights of the European Union ...................................... 29  
4.2. Case law .............................................................................................................................. 29  
4.2.1. Actions ............................................................................................................................. 29  
4.2.2. Assessment & determination ......................................................................................... 30  
4.2.3. Attached weight ............................................................................................................. 31  
4.2.4. Actors ............................................................................................................................. 33  
5. Legal obligations arising from human rights law and EU law .............................................. 34  
5.1. Actions ................................................................................................................................ 34  
5.2. Assessment & determination ............................................................................................... 34  
5.3. Attached weight .................................................................................................................. 35  
5.4. Actors .................................................................................................................................. 36  
6. The best interests of the child in the Netherlands ................................................................. 38  
6.1. Family migration in the Netherlands .................................................................................... 38  
6.2. The best interests of the child in Dutch migration legislation & policy ......................... 39  
6.2.1. Actions ............................................................................................................................. 39  
6.2.2. Assessment and determination ....................................................................................... 40  
6.2.3. Attached weight ............................................................................................................. 41
6.2.4. Actors ................................................................................................................. 42
6.3. The best interests of the child in Dutch case law ................................................. 43
  6.3.1. Actions ............................................................................................................... 43
  6.3.2. Assessment and determination ....................................................................... 43
  6.3.3. Attached weight............................................................................................... 45
  6.3.4. Actors ............................................................................................................... 46
7. Conclusion & recommendations ............................................................................. 49
  7.1. Conclusion ........................................................................................................... 49
    7.1.1. No recognition of the differences between the three relevant frameworks (article 3 UNCRC - article 8 ECHR - the FRD & article 24 Charter) ................................. 49
    7.1.2. Continuing marginal review by Dutch courts after El Ghatet......................... 50
    7.1.3. No elaboration on the best interests of the child in legislation .................... 50
  7.2. Recommendations ............................................................................................. 51
    7.2.1. Including the best interests of the child in legislation in order to reflect the distinction between the different frameworks (UNCRC – ECHR- FRD and Charter) 51
    7.2.2. From marginal review to full review ............................................................... 53
Bibliography ............................................................................................................... 54
  Literature ................................................................................................................... 54
  Case law ..................................................................................................................... 57
    Committee on the Rights of the Child................................................................. 57
    Court of Justice of the European Communities & Court of Justice of the European Union ................................................................................................................. 57
    European Court of Human Rights ..................................................................... 58
    Dutch case law ......................................................................................................... 59
  Other documents ....................................................................................................... 61
Appendix I – case selection ECtHR ........................................................................... 63
Appendix II – case selection CJEU ............................................................................. 65
Appendix III – case selection Dutch case law ........................................................... 67
### List of abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charter</td>
<td>Charter of Fundamental Rights of the European Union</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>CMW</td>
<td>Convention on the Protection of the Rights of All Migrant Workers and Members of their Families</td>
</tr>
<tr>
<td>Council of State</td>
<td>Administrative Jurisdiction Division of the Council of State</td>
</tr>
<tr>
<td>CRC</td>
<td>Committee on the Rights of the Child</td>
</tr>
<tr>
<td>EC</td>
<td>European Commission</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EU law</td>
<td>European Union law</td>
</tr>
<tr>
<td>FRD</td>
<td>Family Reunification Directive (2003/86/EC)</td>
</tr>
<tr>
<td>GC</td>
<td>General Comment</td>
</tr>
<tr>
<td>IND</td>
<td>Dutch Immigration and Naturalisation Service</td>
</tr>
<tr>
<td>JCG</td>
<td>Joint General Comment</td>
</tr>
<tr>
<td>UNCRC</td>
<td>United Nations Convention on the Rights of the Child</td>
</tr>
</tbody>
</table>
1. Introduction

Imagine you are a six year old child with Moroccan nationality. Soon after your birth you move with your mother to the Netherlands to live together with your father, who is already lawfully residing there for almost twenty years. You start to go to school in the Netherlands and after a couple of years, two siblings are born. Suddenly, your mother's residence permit is retroactively withdrawn and her new application is rejected, because she has previously provided false information. Your parents appeal the decision at the district court and argue that this decision violates the right to respect for family life under article 8 of the European Convention on Human Rights (ECHR) and that the decision is not in line with the Family Reunification Directive (FRD), which aim is to promote family reunification. Your parents claim that the authorities insufficiently took into consideration the best interests of you and your siblings (the best interests of the child). However, the court agrees with the authorities that the decision to reject the residence permit is valid. According to the court, your family can join your mother to Morocco to live there together. Even though your father has been living in the Netherlands for nearly twenty years and you're going to school here, it's not impossible to go back, according to the court. You and your siblings are very young and are therefore of an 'adaptable' age and you are all familiar with the Moroccan language, because you speak Moroccan at home. Additionally, your family is not forced to go back to Morocco, since your parents can decide that you're mother will go back to Morocco on her own. Because the authorities have considered all these circumstances in an assessment of article 8 ECHR, the district court is of the opinion that the best interests of the child are sufficiently considered. Moreover, the executed assessment of article 8 ECHR assures that the decision does not undermine the purpose of the FRD (promoting family reunification) and that the best interests of the child have been taken into consideration, as is obliged under article 24 of the Charter of Fundamental Rights of the European Union (Charter).

The situation described above is not a fictional example, but a description of a recent case at the Administrative Jurisdiction Division of the Council of State (Council of State). I briefly described this case because it illustrates how the authorities and the Dutch courts approach the concept of the best interests of the child in some cases. Both actors are of the opinion that the best interests of the child do not necessarily obstruct the rejection of a parent's residence permit, even if the applied legal framework (FRD) promotes family unity. In the case at hand, the Council of State merely considers which circumstances are included by the authorities. It concludes that the best interests of the child are sufficiently taken into account, since all relevant circumstances are included by the authorities; the Council of State does not conduct a balancing of interests itself.

This case is one of the many examples that have led numerous academics to critically question whether the Netherlands is fulfilling its obligations with regard to the best interests

---

1 This is the highest general administrative court in the Netherlands
3 For the sake of clarity: when I speak about 'Dutch courts' in this thesis, I mean both the district court of Den Haag and the Council of State
of the child. Most likely the critiques have led the Dutch Labour Party and GreenLeft to submit a draft bill to incorporate the best interests of the child in the Dutch Aliens Act. The petitioners state that children have independent rights and interests, but that these rights and interests are at the moment insufficiently acknowledged in national migration law and do not adequately come to the fore in immigration procedures. The bulk of literature on the treatment of the concept of the best interests of the child in the Netherlands demonstrates that there are plausible indications to critically examine ‘the Dutch practice’. However, what complicates the debate is that the concept of the best interests of the child is immensely broad and ‘one of the most amorphous and least understood of legal concepts’, as strikingly formulated by Smyth. Due to the abstract nature of the concept, critiques focus on many different aspects, such as the concretization and determination of the best interests of the child, the weighing of the principle by administrative authorities or courts, the intensity of judicial review and the absence of the concept in national migration law. Based on literature, one may thus assume that there are some problems with regard to the concept in Dutch immigration procedures, but what the exact problems are, and how they are caused, is still up for question.

A clear overview is therefore needed to set out the obligations that arise from human rights law and European Union law (EU law) with regard to the best interests of the child. The central question is whether these obligations are adhered to by the Netherlands. If not, what are the exact problems with regard to the best interests of the child in the Netherlands and how can they be solved? For this assessment, it is useful to clearly distinguish the different ‘branches’ or actors that are involved in immigration procedures; (1) the legislative branch, which is responsible for legislation and the creation of national immigration policy; (2) the administrative authorities, which are responsible for the execution of Dutch immigration policy, and (3) the judiciary, which is responsible for the judicial review of individual cases. The distinction helps to localize problematic practices that are in tension with legal obligations arising from human rights law and EU law.

---

4 E.g. Beltman & Zijlstra (2013); Cardol (2013); Herweijer (2017); van Os & Rodrigues (2013); Reneman (2011); Werner (2017); Weterings (2013)
5 De Partij van de Arbeid
6 GroenLinks
7 Vreemdelingenwet
8 Voortman & Kuiken (2016a) ‘Voorstel van wet van de leden Voortman en Kuiken tot wijziging van de Vreemdelingenwet 2000 in verband met het verankeren van het belang van het kind’, Kamerstuk 34541, nr. 2
9 Voortman & Kuiken (2016b) ‘Voorstel van wet van de leden Voortman en Kuiken tot wijziging van de Vreemdelingenwet 2000 in verband met het verankeren van het belang van het kind’, Kamerstuk 34541, nr. 3
10 See for a selection of literature on this topic supra note 4
11 Smyth (2015), p. 71
12 Kalverboer, Beltman, van Os & Zijlstra (2017)
13 Van Os & Rodrigues (2013)
14 Spijkerboer (2013); Werner (2017)
15 Herweijer (2017)
16 The legislative branch consists of the government and the States General in the Netherlands. The States General is the official name of the Dutch Parliament, which consists of the Senate (Eerste Kamer der Staten-Generaal) and the House of Representatives (Tweede Kamer der Staten-Generaal)
17 In this context I mean the Dutch Immigration and Naturalisation Service (IND)
18 In this context, the district court of Den Haag and the Administrative Jurisdiction Division of the Council of State (highest administrative court in the Netherlands)
1.1. Limitations

Since the concept of the best interests of the child is very broad, I had to make choices to delineate the topic. A limited word count does not allow me to discuss the best interests of the child in relation to all forms and aspects of migration. I chose to focus on both voluntary migrants and beneficiaries of international protection, but merely in the light of family migration. Furthermore, I have made the deliberate choice to specifically focus on the best interests of the child in relation to entry and residence of migrants in family migration cases. I am mostly interested in this part, since decisions concerning entry and residence are the basis for the course of children’s lives. Consequently, these decisions have a major impact on children. This choice undoubtedly means that I will not provide the full picture and many important aspects concerning the best interests of the child will inevitably be left unspoken in this thesis.

1.2. Research question & sub-questions

To be concise, the aim of this thesis is to set out the legal obligations with regard to the best interests of the child that arise from human rights law and EU law and to subsequently assess whether the Netherlands is complying to these obligations. The findings can possibly lead to the conclusion that the Netherlands is fulfilling its obligations. However, literature on the topic indicates that there are very valid reasons to come to a different finding. If the findings confirm that assumption, it is also of particular interest to discuss how specific shortcomings can be resolved. The central research question is: *Is the Netherlands currently fulfilling its obligations arising from human rights law and EU law with regard to the best interests of the child in family migration cases and if not, what are starting points to solve this?*

In order to answer the research question, I firstly need to provide the obligations concerning the best interests of the child that arise from human rights law and EU law. I have posed three sub-questions to do this, corresponding to the three different legal ‘regimes’ that I will examine in this thesis. The sub-questions are:

1. What legal obligations arise from the United Nations Convention on the Rights of the Child with regard to the best interests of the child in family migration law?
2. What legal obligations arise from the European Convention on Human Rights with regard to the best interests of the child in family migration law?
3. What legal obligations arise from European Union law with regard to the best interests of the child in family migration law?

1.3. Method & sources

In this thesis, I will mainly rely on legal sources in order to find an answer to the research question. The legal sources are complemented by literature and other relevant documents (elaborated on below). I will therefore conduct a doctrinal research method. For chapter two, I
examined the following sources: The United Nations Convention on the Rights of the Child (UNCRC), concluding observations, a decision by the Committee on the Rights of the Child (CRC), a General Comment (GC) and a Joint General Comment (CJG). With regard to chapter three, I relied on the ECHR and case law of the European Court of Human Rights (ECtHR). For chapter four, I examined multiple sources of EU law, namely: The Treaty on the Functioning of the European Union (TFEU), the Charter, the Citizens’ Rights Directive (CRD) and the FRD. Furthermore, I analysed case law of the Court of Justice of the European Union (CJEU) and included some non-legal sources, such as reports of the European Commission (EC) and explanations relating to the Charter. With regard to the chapter on the Netherlands, I looked at the Dutch Aliens Act and lower legislation. Furthermore, I examined the work instruction 2018/11 of the Dutch Immigration and Naturalisation Service (IND) for the assessment of article 8 ECHR. Case law of the Council of State and the district court of Den Haag were included for the paragraph on Dutch case law.

All data in this thesis (case law and other documents) are analysed on the basis of four different aspects. I have identified these four aspects on the basis of the formulation of article 3(1) of the UNRCR, since this provision is the 'mother' of all provisions concerning the best interests of the child. Article 24 of the Charter is for example partly based on article 3(1) UNCRC and the approach of the ECtHR to the best interests of the child under article 8 ECHR is inspired by article 3(1) UNCRC. In my point of view, article 3(1) UNCRC can be divided in four clear aspects that together form the core of the provision. I will elaborate on these four aspects in the next chapter to explain what they mean, but I will already mention the four aspects here: 1) actions 2) assessment & determination 3) attached weight and 4) actors.

1.3.1. Case selection
To find an answer to the research question, I have examined many cases of different courts. Below, I will briefly discuss how the cases were selected and how many cases are included. For a more comprehensive description of the case selection, I would like to refer to the appendices of the thesis.20

The second chapter of the thesis focuses on the UNCRC. Since the CRC introduced the opportunity for individuals to file an individual complaint just recently, it has so far only published one decision. Even though this is an asylum case and does not really concern family migration, I did examine the case and included it in the case selection, because it is so far the only decision of the CRC and can still provide some guidance with regard to the UNCRC.

19 The Aliens Decree (Vreemdelingenbesluit), Aliens Regulation (Voorschrift Vreemdelingen) and Aliens Circular (Vreemdelingencirculaire)
20 Appendix I, II and II from page 63 onwards
For chapter three on the ECHR I analysed twenty-one cases. Firstly, I searched in the HUDOC database for article 8 ECHR migrant cases in which the best interests of the child come to the fore. This search resulted in eighteen cases, of which I excluded five cases that were, on closer inspection, rather irrelevant for this thesis. The thirteen cases that remained were complemented by ten cases. These ten cases were often cited in relevant literature or in the already selected cases. Only one of the cases concerns a non-migrant case, namely Neulinger and Shuruk. The reason I included it is that it has become one of the most important and cited cases (in both case law and literature) when it comes to the concept of the best interests of the child. In addition to the twenty-one cases that I analysed, I also refer to three other cases in the chapter. I did not really analyse these three cases in depth, but they contain some foundational (more general) phrases that have come to play an important role in later judgments of the ECtHR in article 8 cases (including many cases in the case selection).

The chapter on EU law contains fourteen cases. After searching in the CURIA database, I ended up with ten relevant cases. Four cases were later supplemented. Three of these cases were often cited in literature and turned out to be relevant. The last case is the very recent case of E. This judgment was published after I conducted my case selection. However, the case came to my attention and since it includes some very relevant paragraphs, I decided to add it to the case selection.

For the chapter on the Netherlands, I analysed 50 cases; ten cases of the Dutch Council of State and 40 cases of the district court of Den Haag. I searched via the online database of rechtspraak.nl from the date of the El Ghatet judgment of the ECtHR onwards. This is in my point of view a justifiable decision, since the judgment has been labelled by some (including myself) as a very important and far-reaching case when talking about the best interests of the child. Moreover, the case is from the end of 2016, which leads to an acceptable amount of selected cases (50). I searched for migrant cases in which the best interests of the child are mentioned. This search resulted evidently in more than 50 cases, but I deliberately excluded asylum cases and other cases that do not fall within the scope of this thesis (e.g. cases about detention or Dublin). Some cases that are discussed in the chapter did not end up in the case selection as a result of the search on rechtspraak.nl, but are included because they were referred to in other cases or literature and turned out to be relevant for the thesis.

---

21 For example the case Mubilanzjla Mayeka mainly concerns the detention of an asylum seeker. Since I focus on the entry and residence in family migration cases, this case was not included in the case selection.
22 ECtHR 6 July 2010, Neulinger and Shuruk v. Switzerland
23 ECtHR 28 May 1985, Abdulaziz, Cabales and Balkandali v. The United Kingdom; ECtHR 2 August 2001, Boultif v. Switzerland; ECtHR 21 December 2001, Sen v. The Netherlands (I did not analyse this case, since it is only published in French)
24 CJEU 13 March 2019, E.
25 ECtHR 8 November 2016, El Ghatet v. Switzerland
26 E.g. Baldinger & Hansen (2018); Herweijer (2017)
27 Please note: I did include asylum family reunification cases (‘nareis’)

8
1.4. Outline

In the following three chapters, I will set out the framework of international human rights law and EU law with regard to the best interests of the child. I will start in chapter two with discussing the UNCRC. After a general discussion about the most relevant provision of the UNCRC (article 3) and other relevant provisions, I will examine what obligations arise from the UNCRC with regard to the best interests of the child. Based on the four identified aspects, I will argue that signatory states have a duty under the UNCRC to take the best interests of the child as a primary consideration when deciding about the entry and residence of migrants in family migration cases. Although the CRC has provided guidance how to assess and determine the best interests of the child, the Netherlands is not legally obliged to precisely follow these guidelines for the assessment and determination. Lastly, I will elaborate on the weight that should be attached to the best interests of the child under article 3(1) UNCRC and the duties for administrative authorities, legislative bodies and courts of law to actively involve the best interests of the child in respectively the immigration procedure, migration legislation and court rulings.

The third chapter focuses on the obligations that arise from the ECHR. The chapter starts with a brief and more general discussion on article 8 ECHR. In the second paragraph, I will elaborate on case law of the ECtHR to demonstrate how the best interests of the child have gained a prominent place in article 8 ECHR cases. On the basis of the four identified aspects, I will argue that the Netherlands is obliged to assess the best interests of the child with the help of particular relevant elements in order to take the best interests of the child sufficiently into account. Case law of the ECtHR provides that ‘crucial weight’ must be attached to the best interests of the child and domestic courts have a duty to fully scrutinize cases to assure that the protection under article 8 ECHR is safeguarded.

In the fourth chapter, I will delve into EU law. The first paragraph is meant to provide a clear overview of the different sources of law that, depending on the facts of the case, apply to a certain case. I will discuss four different sources of law and situations: 1) Article 21 of the TFEU and the CRD 2) Article 20 of the TFEU and ‘purely internal situations’ 3) the FRD and 4) the Charter. After the first paragraph, I will turn to case law of the CJEU to examine what obligations arise from EU law with regard to the best interests of the child. It follows that EU law obliges the Netherlands to take the best interests of the child into account. By including all relevant circumstances for each individual case, the best interests of the child must be assessed and determined per individual. Due to the fundamental difference between the FRD, which purpose is to promote family reunification, and article 8 ECHR, more weight must be attached to the best interests of the child under the first framework. Lastly, legislative bodies have a duty to rightfully implement the FRD, meaning that legislation should reflect the fundamental difference between the FRD and the more restrictive article 8 ECHR framework.

This mostly concerns the nationalities of all persons concerned and the presence or absence of cross-border elements.
Chapter five briefly touches upon the most important findings of the previous three chapters. In this chapter, I will provide an overview of the identified obligations that arise from the UNCRC, ECHR and EU law. I will put the different obligations in perspective and discuss them together, to come to a clear legal framework. This chapter is also structured on the basis of the four aspects that run through this thesis as a common thread: actions, assessment & determination, attached weight and actors.

In the sixth chapter, I will examine whether the Netherlands is adhering to the identified obligations that arise from the UNCRC, the ECHR and EU law. The first paragraph provides a necessary introduction about Dutch migration policy and legislation. Thereafter, on the basis of the four identified aspects, I will discuss the best interests of the child in Dutch migration policy and legislation (§2) and in Dutch case law (§3). This will be done by looking at Dutch migration law, lower legislation and a work instruction of the IND (§2) and by examining case law of the Council of State and the district court of Den Haag (§3).

The seventh chapter will provide an answer to the central research question of the thesis. I will discuss the three most significant findings of my thesis. Most importantly this concerns the lack of recognition in Dutch migration policy and legislation of the fundamental difference between the different frameworks, most importantly between the FRD (in combination with the Charter) and article 8 ECHR. I argue that article 8 ECHR is used in the current Dutch migration system as a minimum standard to implement the FRD in a more restrictive manner than is allowed. This is of significant importance since more weight should be attached to the best interests of the child under the FRD than under article 8 ECHR. Especially for the Netherlands, which applies the FRD also to nationals and beneficiaries of subsidiary protection, this finding has major implications. Secondly, I conclude that Dutch courts still review article 8 ECHR too marginally, even though this is not in line with (my reading of) the El Ghatet judgment of the ECtHR. Thirdly, the lack of the concept of the best interests of the child in Dutch migration law leads to the problematic situation that the important phrase ‘as a primary consideration’ of article 3(1) UNCRC is ignored in practice.
2. The Convention on the Rights of the Child

The aim of this chapter is to identify which obligations concerning the best interests of the child arise from the UNCRC for the Netherlands. I will start the chapter with a brief general discussion on the UNCRC and the most important provisions of the convention. Thereafter, I will go into the most relevant provision for this thesis, which is article 3(1) UNCRC. On the basis of a GC, a JCG, a decision of the CRC, literature and concluding observations, I will present the different obligations that arise from the UNCRC with regard to the best interests of the child. In order to do this clearly, I will discuss these obligations by means of the four identified aspects. It follows that article 3(1) UNCRC obliges the Netherlands to take the best interests of the child into account as a primary consideration in family migration decisions regarding entry and residence. This necessitates an assessment and determination of the best interests of the child. However, instructions how to do this and how to subsequently weigh the best interests of the child against other interests are not legally binding, so the Netherlands has some margin of appreciation how to arrange this. Lastly, the UNCRC obliges legislative bodies to take a pro-active stance with regard to the implementation of the best interests of the child in domestic law.

2.1 The UNCRC and the best interests of the child

With the establishment of the UNCRC and its entry into force in 1990, the world for the first time explicitly codified specific children rights in international law. It was also the first time that children got legally recognized as individual right-bearers.29 The UNCRC is the most widely ratified human rights treaty of all. Its implementation is monitored by the CRC, a body consisting of 18 independent experts.30 Only since 2014, when the third Optional Protocol came into force, individual children have the ability to submit a complaint regarding supposed violations of their rights under the UNCRC. However, it should be noted here that the Netherlands has not (yet) signed the third Optional Protocol.31 Consequently, there is currently no possibility for children to submit a complaint against the Netherlands.

The rights that are laid down in the UNCRC apply to each child within the jurisdiction of the state party.32 Article 2 strictly forbids that children are treated in a discriminatory way as a result of, inter alia, the activities and status of their parents or their own status. This is of particular importance for migrants, since migrant children are often disadvantaged in treatment as a result of their status or of their parents’ actions and/or status.33 Hence, migrant children enjoy the same rights as, and are equal to, national children under the UNCRC. Having ratified the UNCRC, the Netherlands has the obligation under international law to

---

29 Pobjoy (2013), p. 104
30 Bhabha (2003), p. 305
31 Currently 41 countries are State Party to the third Optional Protocol, 20 countries only signed it and 137 countries have not taken action. Most countries that are State Party are European or South-American countries. See for the exact overview: [https://www.ohchr.org/Documents/HRBodies/CRC/OHCHR_Map_CRC-OP-IC.pdf](https://www.ohchr.org/Documents/HRBodies/CRC/OHCHR_Map_CRC-OP-IC.pdf)
32 United Nations Convention on the Rights of the Child, article 2(1)
33 E.g. Kalverboer et al. (2017); Pobjoy (2013); Werner (2015)
refrain from actions that are contrary to the aim and spirit of the UNCRC. Moreover, State Parties have the duty to put effort in the implementation of the UNCRC in national legislation. The clear formulation of article 4 of the UNCRC underpins this notion: ‘State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention’. This certainly is the case for article 3 of the UNCRC, including the best interests of the child principle, because this provision is identified as one of the four core provisions of the UNCRC. The first paragraph of article 3 UNCRC concerns the concept of the best interests of the child and is formulated as follows:

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.

As stated above, article 4 obliges the Netherlands to implement this provision concerning the best interests of the child. It is therefore essential to grasp the meaning of article 3(1). At first sight, the provision seems quite straightforward and therefore easy to implement. However, several elements are up for different interpretations. Unsurprisingly, the multi-interpretable wording has led many authors to emphasize that the provision is one of the most discussed legal concepts. According to the CRC, the concept of the best interests of the child is threefold: it is (a) a substantive right, (b) an interpretative legal principle and (c) a rule of procedure. The threefold nature of the concept is explained as follows:

a) Substantive right: when a decision is made, a child has the right to have her interests assessed and taken as a primary consideration. The CRC explicitly states that ‘Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court’.

b) An interpretative legal principle: the interpretation which best serves the child’s interests should be chosen if a legal provision is open to several interpretations.

c) A rule of procedure: in every decision that affects a child, the decision process should include an impact assessment. Furthermore, States have the duty to clarify what they consider to be in the child’s best interests. This should include the used criteria and ‘how the child’s interests have been weighed against other considerations’.

Although this threefold nature of the concept, provided by the CRC, gives some guidance how to understand the best interests of the child, it is needed to delve deeper into the meaning

---

35 The other three core provisions are: the prohibition of discrimination (article 2), the right to life and development (article 6) and the right to be heard (article 12)
37 General Comment No 14. (2013) on the right of the child to have his or her best interests taken as a primary consideration (article 3, para. 1), Chapter I
38 Ibid.
39 Ibid.
of article 3(1) UNCRC to get a clear picture of the obligations that arise from the provision. In order to thoroughly analyse article 3(1), I divided the provision in four parts, leading to four different aspects: 1) actions, 2) assessment & determination, 3) attached weight and 4) actors. I will use these four aspects to come to the obligations that arise from article 3(1) UNCRC and other legal sources (i.e. the ECHR and EU law). The first aspect (actions) focuses on when the best interests of the child should be taken into consideration; are the Dutch authorities obliged to take account of the best interests of the child in family migration cases? The second aspect (assessment & determination) focuses on the meaning of ‘the best interests of the child’. What exactly does the concept mean, how should it be determined and assessed and to what extent is it a uniform and static concept? Having looked at how the assessment and determination should be done, the third aspect (attached weight) focuses on the wording ‘a primary consideration’. What does this formulation mean for the position of the concept vis-à-vis other considerations; how much weight should be attached to the concept? Lastly, the fourth element (actors) focuses on the specific actors that are involved. Are there any ‘actor-specific’ obligations concerning the best interests of the child and if yes, what are these obligations precisely?

I will now discuss these four aspects on the basis of different sources that are relevant for the UNCRC. The most important sources are General Comment (GC) No. 14 of the CRC and Joint General Comment (JCG) No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 22 of the CRC. In these documents, the CRC has clarified the meaning of article 3(1). However, it should be noted that these documents are not legally binding, but they are ‘just’ highly authoritative. Some even argue that State Parties are ‘politically and morally bound by the content of GC No. 14’ and should take GC No. 14 as the starting point for the implementation of article 3(1) UNCRC. In addition to GC No. 4 and JCG No. 3 and No. 22, I also refer to concluding observations of the CRC on the Netherlands, a decision of the CRC and academic literature.

2.1.1. Actions (‘in all actions concerning children’)
The CRC rightfully states that nearly all state actions affect children either directly or indirectly. Consequently, the CRC recognizes that not every action requires ‘a full and formal process of assessing and determining the best interests of the child’. The CRC links the degree of consideration for the best interests of the child with the level of impact of a certain action or decision on a child: ‘... where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate’. It is hard to think of decisions that have a much bigger impact on children than

40 Herweijer (2017), p. 342
41 Kalverboer et al. (2017), p. 119
42 General Comment No 14. (2013) on the right of the child to have his or her best interests taken as a primary consideration (article 3, para. 1), Chapter IV, part A, para. 20
43 Ibid.
a decision regarding their entry or residence (or of their family). It is therefore very valid to argue that the best interests of the child should play a significant role in decisions regarding the entry and residence of migrants if children are involved. This can also be concluded from the first, and so far only, decision of the CRC. In the decision, the CRC explicitly refers to paragraph 29 of the JCG No. 3 of the CMW and No. 22 of the CRC which provides that states parties must:

'... ensure that the best interests of the child are taken fully into consideration in ... decision-making on individual cases, including in granting or refusing applications on entry to or residence in a country ...'  

2.1.2. Assessment & determination ('the best interests of the child')

GC No. 14 of the CRC clearly formulates that the concept of the best interests of the child is not static. Contrarily, it is a dynamic, flexible and adaptable concept. It is influenced by all specific and individual circumstances of the particular child and should be assessed and determined on a case-by-case basis. The importance of the individual and specific circumstances in a best interests assessment was underlined by the CRC in its decision I.A.M. & K.Y.M.; the Committee found a violation of article 3(1) due to insufficient attention for the individual and specific circumstances. In addition, the CRC emphasizes in GC No. 14 that it is needed to implement the concept in line with other provisions of the UNCRC to be able to concretely use the concept (a so-called ‘rights based approach’). The best interests assessment focuses on the identification of all relevant elements and the balancing of these elements. Relying on a rights-based approach, the CRC provides a non-exhaustive list of seven important elements that should be taken into account in order to concretize the concept and give guidance to State Parties. One of the elements is the child’s view, which requires

---

45 Ibid., para. 11.8; 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’, Chapter III, part B, para. 29  
46 General Comment No 14. (2013) on the right of the child to have his or her best interests taken as a primary consideration (article 3, para. 1), Chapter IV, part A, para. 3  
47 CRC 25 January 2018, I.A.M. & K.Y.M v. Denmark; The CRC inter alia argued that a general reference to a report about genital mutilation in the relevant area was insufficient to justify the safe return of the applicants. The authorities should have elaborated on the individual and specific circumstances of the case  
48 The importance of a rights-based approach is also emphasized in literature, see for example: Limbeek & Bruning (2015); Smyth (2015)  
49 General Comment No 14. (2013) on the right of the child to have his or her best interests taken as a primary consideration (article 3, para. 1), Chapter V, para. 47; 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’, Chapter III, part B, para. 31  
50 The CRC mentions the following elements: 1) the child’s views 2) the child’s identity 3) preservation of the family environment and maintaining relations with the family and preservation of the ties of the child in a wider sense 4) care, protection and safety of the child 5) the child’s vulnerability 6) the child’s right to health 7) the child’s right to education. See for a more elaborate discussion on the relevant elements and a so-called ‘Best Interests of the Child Model’: Beltman & Zijlstra (2013); Kalverboer et al. (2017)
the participation of the child in the assessment.\textsuperscript{51} Furthermore, the CRC states that the assessment should be conducted in the light of specific individual circumstances and characteristics. These are for example age, sex and level of maturity.\textsuperscript{52}

In addition to the nature of and relevant elements in the best interests assessment, the CRC also prescribes in JCG No. 3 & No. 22 specifically by whom the assessment should be executed in migration cases. The CRC states that the assessment should be carried out by a multidisciplinary team and by ‘actors independent of the migration authorities’.\textsuperscript{53} This is an important element, since the immigration service that decides on the entry and residence of a migrant child is in most countries in practice also responsible for the best interests assessment. A conflict of interests is consequently lurking, since the immigration service also has the duty to control immigration.\textsuperscript{54}

\textbf{2.1.3. Attached weight (‘a primary consideration’)}

After the assessment and determination of the best interests of the child, a balancing with other interests (public interest) takes place. It is important to clarify what obligations arise from article 3(1) with regard to the weight that should be attached to the best interests of the child in relation to other interests. The formulation in article 3(1) already provides guidance; the best interests should be ‘a primary consideration’. According to GC No. 14, there is a 'strong legal obligation on States' to 'not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken'.\textsuperscript{55} It clearly follows that the concept is hierarchically situated above all other considerations. However, the CRC recognizes situations in which the best interests of the child conflicts with other interests and emphasizes the need to apply the concept with a certain degree of flexibility. The CRC prescribes a careful balancing between the different interests. However, State Parties should attach a larger weight to the child's best interests, since this interest has priority over all other interests.\textsuperscript{56} If the taken decision is contrary to the best interests of the child, a clear explanation should be provided why this decision was made.

\textsuperscript{51} General Comment No 14. (2013) on the right of the child to have his or her best interests taken as a primary consideration (article 3, para. 1), Chapter V, paras. 47 & 53-54
\textsuperscript{52} Ibid., para. 48
\textsuperscript{53} Ibid., para. 47; 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’, Chapter III, part B, para. 32(c)
\textsuperscript{54} Vonkeman (2012)
\textsuperscript{55} General Comment No 14. (2013) on the right of the child to have his or her best interests taken as a primary consideration (article 3, para. 1), Chapter IV, part A, para. 36
\textsuperscript{56} Ibid.; 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’, Chapter III, part B, para. 28

15
2.1.3. Actors (‘courts of law, administrative authorities and legislative bodies’)

With regard to the duties for particular actors to take the best interests of the child into account, several actors are of relevance for this thesis: courts of law, administrative authorities and legislative bodies. The CRC explicitly states that courts of law must consider the best interests of the child in all situations concerning family reunification and residence.\(^{57}\) In so doing, courts must demonstrate that they have taken the best interests of the child into account and taken as a primary consideration. In their legal reasoning, courts must explain ‘what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child’s best interests’.\(^{58}\) If other considerations override the best interests of the child, it must be clearly explained why these considerations carry greater weight. It is important to note here that the CRC expressed its concern in its concluding observations of 2015 on the Netherlands about the ‘lack of sufficient understanding of the right of the child to have his or her best interests taken into account as a primary consideration’ by certain Dutch judges.\(^{59}\)

Administrative authorities must be guided by the best interests of the child when taking decisions in the field of immigration, according to the CRC.\(^{60}\) The concept should play an integral part in the authorities’ process of granting or refusing a residence permit. The CRC expressed its concern in the concluding observations of 2009 on the Netherlands that the concept was not ‘formalized in proceedings of the administrative arm of Government’ and repeated this worry in 2015.\(^{61}\)

Lastly, legislative bodies also have a duty under article 3(1) to take the best interests of the child as a primary consideration. This means that attention should be paid to the best interests of the child when adopting laws.\(^{62}\) More importantly, legislative bodies are under the obligation, due to article 3(1) in combination with article 4 UNCRC, to actively implement the best interests of the child as a primary consideration in relevant legislation. This is in particular of importance for the Netherlands, since the CRC explicitly stated in the concluding observations that the best interests of the child is not ‘always codified in legislation affecting children’.\(^{63}\) The CRC therefore recommends the Netherlands to integrate the concept in legal provisions and policies ‘that concern and have impact on children’.\(^{64}\) As stated before, decisions on the entry and residence of migrant children belong to the most high-impact decisions for (migrant) children. Consequently, when integrating the best interests of the child

---

\(^{57}\) General Comment No 14. (2013) on the right of the child to have his or her best interests taken as a primary consideration (article 3, para. 1), Chapter IV, part A, para. 29

\(^{58}\) Ibid., Chapter V, part B., para. 97

\(^{59}\) Concluding observations: Netherlands, 8 June 2015, para. 26

\(^{60}\) General Comment No 14. (2013) on the right of the child to have his or her best interests taken as a primary consideration (article 3, para. 1), Chapter IV, part A, para. 30

\(^{61}\) Committee on the Rights of the Child, Concluding observations: Netherlands, 27 March 2009, para. 28; Committee on the Rights of the Child, Concluding observations: Netherlands, 8 June 2015, para. 27

\(^{62}\) General Comment No 14. (2013) on the right of the child to have his or her best interests taken as a primary consideration (article 3, para. 1), Chapter IV, part A, para. 31

\(^{63}\) Concluding observations: Netherlands, 27 March 2009, para. 28

\(^{64}\) Ibid., para. 29; Concluding observations: Netherlands, 8 June 2015, para. 27
in legislation, provisions regarding entry and residence of (migrant) children should inevitably be first in line.
3. The European Convention on Human Rights

The aim of this chapter is to ascertain what legal obligations arise for the Netherlands concerning the best interests of the child from the ECHR. In the first paragraph I will provide a more general explanation about article 8 ECHR cases and how the best interests of the child come to the fore in ECtHR jurisprudence. Thereafter, I will examine which obligations arise from case law of the ECtHR with regard to the best interests of the child, on the basis of the four identified aspects. In this examination, it will become clear that the concept of the best interests of the child has gained increasing importance under article 8 ECHR. The Netherlands is under the duty under article 8 ECHR to take the best interests of the child into account. This means that all relevant individual circumstances should be included to assess the best interests of the child. Next, crucial weight should be attached to the concept in the fair balance test that has to be conducted in article 8 ECHR cases. However, the best interests of the child cannot be used as a ‘trump card’ and Contracting Parties have a margin of appreciation in balancing their own interest (immigration control) versus the applicant's interest. Lastly, the ECtHR made very clear that domestic courts must put the best interests of the child at the heart of their considerations and must fully scrutinize a case.

3.1. The ECHR & article 8

The ECHR is one of the most significant regional human rights treaties and covers all 47 members of the Council of Europe (not be confused with the Council of the European Union). Article 1 of the ECHR provides the scope of application and clarifies that States Parties ‘shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’. All individuals who claim to be the victim of a violation by a State Party can file a claim at the ECtHR. Judgments of the ECtHR are legally binding; States Parties are obliged to comply with judgments.

The ECHR does not contain a provision that mentions the best interests of the child. Even though the ECHR does not mention the best interests of the child, the concept has gained a prominent place in the interpretation of the ECHR. The concept plays an important role with regard to article 8 of the ECHR. This article concerns the right to respect for private and family life and reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

---

65 ECtHR, 8 November 2016, El Ghatet v. Switzerland, para. 46
66 European Convention on Human Rights, article 1
67 There are evidently some admissibility criteria, provided in article 35
Article 8 thus prescribes that States Parties generally may not interfere with someone's private or family life. However, the second paragraph provides circumstances that justify interference by the state. In addition to protecting individuals against arbitrary interference, the ECtHR has clarified that article 8 may also impose a positive obligation on states to facilitate private or family life. However, this is only the case in exceptional circumstances. The ECtHR made this clear in the ground-breaking case Abdulaziz, Cabales and Balkandali, in which it additionally ruled that article 8 applies to migrant cases.\(^69\) The ECtHR consistently holds in migrant cases that article 8 does not impose a general obligation on states to respect domicile choice and that states have the right 'to control the entry of aliens into its territory' and their residence there.\(^70\) The key question to answer is whether there are major impediments to continue family life somewhere else or whether the interference is justified (depending on the facts of the case). This will ultimately lead to a conclusion of the ECtHR whether the state has struck a fair balance between the interest of the applicant(s) and the general interest of the state. The fair balance test is the moment that the concept of the best interests of the child comes to the fore. When striking a fair balance, the ECtHR nowadays consistently pays attention to the best interests of the child as one of the factors to be taken into account. I will now turn to the case law of the ECtHR on article 8 to clarify the obligations that arise from the ECHR with regard to the best interests of the child.

### 3.2. Article 8 ECHR - case law

The ECtHR starts its assessment in all cases with a concise summary of relevant general principles that are developed by its previous case law.\(^71\) A number of important cases have established general principles relating to the best interests of the child that have laid the foundation for the obligations of states under article 8 ECHR with regard to the concept. Particular parts of these judgments are repeatedly mentioned by the ECtHR as general principles to outline the legal framework with regard to the best interests of the child. Moreover, the ECtHR quite precisely prescribes in some cases how Contracting States should approach the best interests of the child.\(^72\)

*Neulinger and Shuruk* is the most important case with regard to how the best interests of the child concept should be approached in the light of the ECHR.\(^73\) This is the only non-migrant case in the case selection of this thesis, but I included it in the selection precisely because of its influence on later case law with regard to the best interests of the child. The case concerns the disappearance of a boy and his mother from Israel to Switzerland, without

---

\(^69\) ECtHR 28 May 1985, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*

\(^70\) E.g. ibid., paras. 67-68; ECtHR 13 October 2011, *Husseini v. Sweden*, para. 78; ECtHR 8 July 2014, *M.P.E.V. and Others v. Switzerland*, para. 51; ECtHR 3 October 2014, *Jeunesse v. The Netherlands*, para. 100

\(^71\) Sometimes the Court explicitly lists these principles with a separate heading ('general principles' or 'general considerations'), but in other cases it lists these principles and already applies it to the case at hand under the same heading


\(^73\) ECtHR 6 July 2010, *Neulinger and Shuruk v. Switzerland*
the permission of the father. Joint guardianship between the (separated) parents meant that exiting Israel this way was not allowed. However, the ECtHR concluded that the Swiss authorities would be acting in violation of article 8 if they would enforce the return of the child and his mother to Israel. The best interests of the child played a major role in the Court's judgment. Partly relying on article 24(2) of the EU Charter, the ECtHR famously established in paragraph 135 of the judgment that 'there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount.' The ECtHR comes to this sentence after a comprehensive list of legal sources that safeguard the best interests of the child. Inter alia article 3(1) of the UNCRC and article 24 of the EU Charter are mentioned by the ECtHR. Despite the fact that the establishment of the best interests of the child as a general principle in article 8 cases is of great value, one must understand the different nature of the concept in the ECHR regime vis-à-vis the concept in article 3(1) UNCRC. Whereas the concept of the best interests of the child forms inter alia a substantive right in the light of article 3(1) UNCRC, in article 8 ECHR cases the concept is, although paramount, only one of the several factors that shall be included in a fair balance test. I will now turn to the four aspects to discuss the obligations that arise from case law of the ECtHR on article 8.

3.2.1. Actions
As described above, the ECtHR made very clear in Neulinger and Shuruk that the best interests of the child should be taken into consideration in all actions concerning children. However, as noted, that case did not concern migration, so the first question is whether the ECtHR also recognizes decisions in family migration cases as ‘all actions concerning children’. This can very easily be confirmed when examining the case law that I selected for this thesis. The cases that are included in the case law selection only concern clearly demarcated state actions, namely the decision to allow or refuse entry to migrants, expel irregularly staying migrants or expel settled migrants. The ECtHR has made clear in its case law that the best interests of the child should always be taken into account in cases concerning family migration. This necessitates the assessment and determination of the best interests of the child, which I will now turn to.

3.2.2. Assessment & determination
The ECtHR clearly established an obligation under article 8 ECHR for States Parties to assess the best interests of the child on an individual case by case basis in Neulinger and Shuruk: ‘the best interests must be assessed in each individual case’ and should primarily be done by ‘the domestic authorities, which often have the benefit of direct contact with the persons

---

74 Ibid., para. 135
75 Ibid., paras. 48-56
76 With the exception of Neulinger and Shuruk v. Switzerland
This individual assessment is explained by the fact that each child's best interests depend on various individual circumstances. Particular elements that should be taken into account are the child's age and level of maturity, the presence or absence of the child's parents and the child's environment and experiences. Even though not explicitly mentioning the best interests of the child, the ECtHR already identified in Tuquabo-Teke rather similar elements to be taken into account: 'the age of the children concerned, their situation in their country of origin and the extent to which they are dependent on their parents.' In cases of children who stayed behind in their country of origin and who want to be reunited with their parents in a European country, the ECtHR consistently repeats the three elements established in Tuquabo-Teke. In cases of an expulsion of an irregularly staying migrant, article 8 obliges States Parties to take additional elements into account when considering the best interests of the child. Domestic authorities must look at the effect of a possible expulsion in relation to the best interests of the child. Mapping the effects of a possible expulsion is necessary in order to give sufficient weight to the best interests of the child in the fair balance test. Additional elements to be taken into account in such cases are the child's ties with the host country and the country of origin and the child's state of health (both mental and physical). Lastly, there are expulsion cases of so-called settled migrants. These cases necessitate the incorporation of extra elements with regard to the best interests of the child. In the cases of Maslov and Üner, the ECtHR made clear that in addition to the previously established eight Boultif criteria, attention must be paid to the best interests of the child when expelling settled migrants: 'in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled.'

Article 8 of the ECHR thus obliges States Parties in family migration cases to assess the best interests of the child on an individual basis and to include particular relevant elements in such an assessment. However, in addition to relevant elements, the ECtHR is hesitant to formulate more precisely how this assessment and determination of the best interests of the

---

77 ECtHR 6 July 2010, Neulinger and Shuruk v. Switzerland, para. 138
78 Ibid.
79 Ibid. The Court retrieves these circumstances from the ‘Guidelines on Determining the Best Interests of the Child’ that were issued by the United Nations High Commissions for Refugees (UNHCR)
80 ECtHR 1 December 2005, Tuquabo-Teke v. The Netherlands, para. 44
81 ECtHR 30 July 2013, Berisha v. Switzerland, para. 51; ECtHR 8 November 2016, El Ghatet v. Switzerland, para. 46
83 ECtHR 3 October 2010, Jeunesse v. The Netherlands, para. 109; ECtHR 2 April 2015, Sarközi and Mahran v. Austria, para. 64
84 The child’s ties with the parents and the child’s age are also still of relevance here, but these were already mentioned before
85 ECtHR 23 June 2008, Maslov v. Austria
86 ECtHR 18 October 2006, Üner v. The Netherlands
87 ECtHR 2 August 2001, Boultif v. Switzerland
88 ECtHR 18 October 2006, Üner v. The Netherlands, para. 58
child should look like (as the CRC for example does with its GC and JCG).\textsuperscript{89} This is not surprising, since the ECtHR is built on the principle of subsidiarity and will only focus on the ultimate safeguarding of the rights and protection under the ECHR. Nevertheless, the case of \textit{Maslov} and A.A.\textsuperscript{90} indicate that the ECtHR occasionally does concretize the best interests of the child more precisely. In these two cases, the ECtHR applied a clear rights-based approach by using a particular provision of the UNCRC (i.e. article 40) to assess the best interests of the child.\textsuperscript{91} Additionally, the ECtHR implicitly referred to article 12 of the UNCRC (the child’s right to express her view and to be heard) in the \textit{Osman} case.\textsuperscript{92} However, these are the only examples in the case selection of such a rights-based approach.

3.2.3. Attached weight
As mentioned earlier in this chapter, the best interests of the child come to the fore as one of the factors in the fair balance test that the ECtHR conducts in article 8 cases. Although the concept is one of the several factors that are included in the balancing act, I would argue that case law demonstrates that the best interests concept is not hierarchically similar to all other factors. In its established general principle that the best interests of the child should be taken into consideration, the ECtHR often takes over the wording of article 3(1) UNCRC that the concept is ‘a primary consideration’.\textsuperscript{93} The ECtHR sometimes uses an even stronger formulation by stating that the best interests of the child are of ‘paramount’ importance.\textsuperscript{94} Most recently, the ECtHR explicitly stated that ‘crucial weight’ should be attached to the best interests of the child.\textsuperscript{95}

Although States Parties are obliged under article 8 ECHR to attach crucial weight to the best interests of the child, this does not exclude the possibility that other interests can override the best interests of the child. In \textit{El Ghatet}, the ECtHR repeated an earlier statement made in \textit{I.A.A. and Others}\textsuperscript{96} and \textit{Berisha}\textsuperscript{97}, that ‘the best interests of the child cannot be a “trump card” which requires the admission of all children who would be better off living in a Contracting State’.\textsuperscript{98} Moreover, it also formulated in several cases that the best interest of the

\textsuperscript{89} The ECtHR only states that ‘domestic authorities’ must assess the best interests of the child, but does not elaborate on the precise actor. Think for example about the detailed recommendation of the CRC to have an independent multidisciplinary team assessing the best interests of the child, based on inter alia participation of the child at hand, as a counter example.
\textsuperscript{90} ECtHR, 20 September 2011, A.A. v. The United Kingdom
\textsuperscript{91} Ibid., para. 60; ECtHR 23 June 2008, \textit{Maslov v. Austria}, para. 83
\textsuperscript{92} ECtHR 14 June 2011, \textit{Osman v. Denmark}, paras. 72-73; see also Nissen (2013), p. 341
\textsuperscript{93} ECtHR 6 July 2010, Neulinger and Shuruk v. Switzerland, para. 134; ECtHR 28 June 2011, \textit{Nunez v. Norway}, para. 84; ECtHR 8 July 2014, \textit{M.P.E.V. and Others v. Switzerland}, para. 52; ECtHR 2 April 2015, \textit{Sarközi and Mahran v. Austria}, para. 64
\textsuperscript{95} ECtHR 8 November 2016, \textit{El Ghatet v. Switzerland}, para. 46
\textsuperscript{96} ECtHR 31 March 2016, \textit{I.A.A. and Others v. The United Kingdom}, para. 46 (Decision on admissibility)
\textsuperscript{97} ECtHR 30 July 2014, \textit{Berisha v. Switzerland}, paras. 60-61
\textsuperscript{98} ECtHR, 8 November 2016, \textit{El Ghatet v. Switzerland}, para. 46
child cannot be the sole decisive factor.\textsuperscript{99} What is important to understand is the fact that article 8 does allow a certain margin of appreciation for the state to balance the applicant's interest against the state's interest to inter alia control immigration. This can clearly be derived from ECtHR case law, most easily by the Court's repetitive consideration that states have the right to control entry into their territory by aliens and residence rights of aliens. However, increasing importance for the child's interests can create tension with this notion, since the child's interests are often contrary to the interest of the state (immigration control). The ECtHR for example stated in \textit{Butt and Kaplan and Others} that, in light of strong immigration policy considerations, the conduct of parents can be attributed to their children to prevent the exploitation of a child's situation to ensure residence rights.\textsuperscript{100} This inevitably leads to a 'counter' interest against the best interests of the child in a fair balance test. However, I agree with the argument made by Werner, that a careful reading of the relevant paragraphs in \textit{Butt and Kaplan and Others} clarifies that the conduct of parents can only be attributed to the child in cases of an 'exceptional circumstances' test, which only applies in cases of irregularly staying migrants.\textsuperscript{101}

Based on the case law of the ECtHR, I would argue that the attached weight to the best interests of the child hinges on two factors. On the one hand, clearer best interests of the child elements (e.g. a child who has very strong ties with both parents or/and who suffered great stress in her youth) increase the attached weight to the best interests of the child in a fair balance test. On the other hand, particular factors clearly have an influence on the 'counter' interests in the fair balance test and can therefore limit the weight attached to the best interests of the child. These factors are most importantly:

- Was family life created by the parents when it was from the outset precarious, due to the immigration status of one of the parents? If yes, then there must be exceptional circumstances to find a violation of article 8.\textsuperscript{102} This 'exceptional circumstances' threshold can be met when there are very serious reasons with regard to the best interests of the child that require residence in the host state.

- Factors of immigration control.\textsuperscript{103} The applicant's attitude with regard to the country's immigration law is of great importance. Did the person concerned breach immigration


\textsuperscript{100} ECtHR 4 December 2012, \textit{Butt v. Norway}, para. 79; ECtHR 24 July 2014, \textit{Kaplan and Others v. Norway}, para. 86

\textsuperscript{101} Werner (2015): Such a test is only conducted in article 8 cases when family life was created at a time that the parents were aware of the precarious situation


law (administrative offences) or did she contrarily comply with immigration law by lawfully entering and residing in the host country (or trying to do so)? Even if a migrant did not attempt to regularise stay, it is relevant whether the migrant in fact would have complied with requirements to lawfully reside in the host country.  

- Public order considerations (in expulsion cases). When a migrant is convicted of a criminal offence, there is a stronger interest for the state to expel the person concerned. The degree of seriousness of the criminal offence is also of importance. With regard to expulsion of settled migrants, one must take into account the eight Boultif and Üner criteria (in these cases the ground for expulsion is public order considerations).

- The state's attitude towards (the unlawful residence of) the applicant; if the state tolerated a migrant's unlawful residence and did not act to execute an expulsion, less weight is attached to the state's interest to expel a person. Contrarily, if a state acted pro-actively, for example by warning a person beforehand about consequences of new criminal offences on their residence rights, this favours the state.

- The nationality of all the family members concerned. In Jeunesse, the ECtHR argued that a Surinamese woman could not be treated similar to other non-nationals, since she was a former Dutch national.

- The composition of the family concerned; this relates to the question whether family life will effectively be ruptured. When parents are divorced, expulsion of the applicant will inevitably lead to a situation in which the child is separated from one of the parents. For example, in Nunez and Rodrigues da Silva and Hoogkamer this was
one of the reasons to find a violation of article 8 ECHR. Contrarily, in *Antwi and Others*¹¹³ and *Darren Omoregie and Others*¹¹⁴ no violation was found, partly because the parents were still together and family unity could be maintained.

- The applicant's ties with the country of origin and the host state.¹¹⁵ The stronger the applicant’s ties with the country of origin, the harder it is for the applicant to demonstrate a violation of article 8 ECHR.

- Whether there are insurmountable obstacles in the way for the family to live in the country of origin.¹¹⁶

After balancing these interests, the question is answered whether the state struck a fair balance between the interest of the applicant and the interest of the state. If not, the ECtHR finds a violation of article 8 ECHR.

3.2.4. Actors
Based on the selected cases, I have identified two actor-specific duties with regard to the best interests of the child. Firstly, article 8 ECHR obliges 'national decision-making bodies'¹¹⁷ to take a pro-active attitude in mapping the foreseeable consequences of a possible expulsion of a parent. If a State Party fails to do so, the best interests of the child will not be taken into account sufficiently and article 8 ECHR will consequently be violated. The ECtHR clearly formulated this obligation in *Jeunesse*:

... national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it.¹¹⁸

This formulation requires an active attitude towards the best interests of the child. National decision-making bodies (the IND in the Netherlands) are thus obliged to carefully examine the consequences of an expulsion in relation to the best interests of the child. This duty was once again repeated by the ECtHR in *Sarközi and Mahran*.¹¹⁹

¹¹² ECtHR 31 January 2006, *Rodrigues da Silva and Hoogkamer v. The Netherlands*
¹¹³ ECtHR 14 February 2012, *Antwi and Others v. Norway*
¹¹⁴ ECtHR 31 July 2008, *Darren Omoregie and Others v. Norway*
¹¹⁷ I would say that this concerns the IND in the Netherlands
¹¹⁸ ECtHR 3 October 2010, *Jeunesse v. The Netherlands*, para. 109
¹¹⁹ ECtHR 2 April 2015, *Sarközi and Mahran v. Austria*, para. 64
The second obligation that I want to underline here is the clear obligation that arises from article 8 case law with regard to how domestic courts must deal with the best interests of the child in their reasoning. In *El Ghatet*, the ECtHR formulated that ‘domestic courts must place the best interests of the child at the heart of their considerations’. The ECtHR adds that domestic courts must sufficiently reflect the child's best interests in its reasoning by going into the individual circumstances of the case. Authors have therefore, in my point of view, rightfully claimed that the *El Ghatet* case is the most far-reaching case of the ECtHR so far with regard to the best interests of the child. The ECtHR concludes in that case:

Where the reasoning of domestic decisions is insufficient, with any real balancing of the interests in issue being absent, this would be contrary to the requirements under article 8 of the Convention.

Courts of law of States Parties consequently have the obligation under article 8 ECHR to take the best interests of the child as the centre point of their reasoning and to fully scrutinize a case; a marginal assessment is insufficient. If the concept of the best interests of the child is not clearly present in the reasoning, the obligations that arise from article 8 ECHR are not complied with.

120 ECtHR 8 November 2016, *El Ghatet v. Switzerland*, para. 46
121 Ibid., para. 47
123 ECtHR 8 November 2016, *El Ghatet v. Switzerland*, para. 47
124 See for example: Centre for Migration Law (2016), p.2
4. European Union law

In this chapter, I will reflect on the legal obligations concerning the best interests of the child that arise from EU law. In EU law the circumstances of a case determine which source of law is applicable. I will start the chapter by explaining what different situations can be identified and the corresponding legal acts or sources that are of importance. Thereafter, I will discuss case law of the CJEU on the basis of the four aspects, which I identified earlier, to formulate the obligations that arise from EU law. If EU law applies, at least the level of protection under article 8 ECHR with regard to the best interests of the child should be safeguarded. EU law obliges the authorities to take the best interests of the child into account as a primary consideration due to article 24 of the Charter. The best interests of the child should inevitably be attached more weight under the FRD than in an article 8 ECHR case as a result of the fundamentally different starting point of both frameworks. The purpose of the FRD to promote family reunification leads to a different role for the best interests of the child, which is in advantage of the child. Consequently, legislative bodies have the duty to rightfully implement the FRD, meaning that the difference with article 8 ECHR should be reflected in legislation.

4.1. The best interests of children & family migration under EU law

Family (re)unification under EU law is governed by several different legal sources. Finding the relevant legal source that applies to a particular case depends on many factors. To put it briefly, there are three different situations of importance. All of these three situations are governed by different sources of EU law, respectively: 1) article 21 of the TFEU and the CRD 2) article 20 TFEU and 3) FRD. I will start by discussing these three situations and by elaborating on the Charter. After that, I will discuss the CJEU's case law on the basis of the four aspects that I already used in the previous chapters, to come to the obligations that arise from EU law with regard to the best interests of the child.

4.1.1. Article 21 of the TFEU & the Citizens’ Rights Directive

The first situation concerns EU citizens who reside and/or work in a Member State of which they do not hold the nationality. These citizens have exercised their right of free movement and can generally rely on the CRD\textsuperscript{125} and the TFEU for their (family’s) residence rights. In part two of the TFEU, Citizenship of the Union is established. Article 21(1) provides that “every citizen of the Union shall have the right to move and reside freely within the territory of the Member States”\textsuperscript{126}. The article has come to play an important role for minor Union citizens who reside with third country national parents in a country of which they do not hold


\textsuperscript{126} Treaty on the Functioning of the European Union, article 21(1)
the nationality. The CJEU has clarified that minor Union citizens have residence rights based on article 21 TFEU and the CRD in such a situation, provided that the child has appropriate sickness insurance. Moreover, the child must be ‘in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State.‘ What follows from this explanation of the CJEU is that third-country national parents can derive residence rights based on their children's residence rights, provided that they have sufficient resources (if not, the child would also not be allowed to reside in the host country, since she would become a 'burden on the public finances').

### 4.1.2. Article 20 of the TFEU and (non) ‘purely internal situations’

The second situation concerns the family reunification of Union citizens, who have always resided in their home country and who have therefore not exercised their right of free movement, with third country national family members. There are no ‘cross border elements’ in such cases. This situation has come to be known as a 'purely internal situation' and is generally governed by national migration law. However, there are circumstances that move such a purely internal situation within the scope of the TFEU, due to article 20 TFEU. Article 20 TFEU establishes the citizenship of the Union and lists the different rights that are enjoyed by Union citizens, such as 'the right to move and reside freely within the territory of the Member States'. In certain circumstances, a derived right of residence can be enjoyed based on article 20 TFEU. One of these circumstances is when a third country national parent can derive residence rights based on her child's Union citizenship. This is merely possible when a Member State refuses residence rights to a third country national parent upon whom a minor Union citizen is dependent. The dependency hinges most importantly on the question of whether the minor Union citizen would be forced to leave the territory of the EU if the third country national parent were to be refused residence.

### 4.1.3. The Family Reunification Directive

The third situation concerns lawfully residing third country nationals who want to arrange family reunification with another third country national. This is governed by the FRD. In the Netherlands, the FRD is also applied to nationals and beneficiaries of subsidiary protection who want to arrange family reunification with third country nationals (I will elaborate on this in chapter six). Consequently, the scope of the FRD, as applied in the Netherlands, is broader and its content is therefore significantly more important. The FRD contains one

---

127 CJEC 19 October 2004, Zhu and Chen, para. 47; CJEU 10 October 2013, Alokpa and Moudoulou, paras. 29-30
128 Ibid.
129 Treaty on the Functioning of the European Union, article 20(2)(a)
130 Other circumstances that 'trigger' the invocation of article 20 of the TFEU are rather irrelevant with regard to the best interests of the child, but can for example be found in: Zwaan & Terlouw (2018), p. 211
131 CJEU 8 March 2011, Ruiz Zambrano, para. 45
132 Ibid., para. 44
specific provision concerning the best interests of the child. Article 5(5) provides: 'When examining an application, the Member States shall have due regard to the best interests of minor children'. I will elaborate on the meaning of this particular provision later on in this chapter when discussing the four identified aspects.

4.1.4. The Charter of Fundamental Rights of the European Union

When the Treaty of Lisbon came into force in 2009, the Charter became a legally binding source of EU law. Article 51 of the Charter provides that its provisions apply to Member States when they implement EU law. This means that the Charter can for example be invoked when EU asylum or migration law applies. When provisions of the Charter correspond to provisions of the ECHR, the meaning and scope of the rights are similar. However, it is specifically stated that this particular provision (article 52(3)) does not prevent EU law to provide 'more extensive protection'. The Charter lists all rights that are enjoyed by people within the EU. One of the most important provisions of the Charter is article 24, which is dedicated to the rights of the child. The explanations to the Charter clarify that article 24 is based on and encompasses multiple articles of the UNCRC. To be precise, articles 3, 9, 12 and 13 of the UNCRC form the basis for article 24 of the Charter. The principle of the best interests of the child is captured in the second paragraph of article 24: ‘In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.’ Article 24(2) is thus formulated rather similarly to article 3(1) UNCRC. With regard to family migration, the core provision is, in addition to article 24, article 7 of the Charter, which provides: ‘Everyone has the right to respect for his or her private and family life, home and communications.’ This article corresponds to article 8 of the ECHR and guarantees the same rights.

4.2. Case law

4.2.1. Actions

Member States have an obligation under EU law to take the best interests of the child into consideration in decisions regarding family migration. This clearly flows from case law of the CJEU on the FRD, article 20 TFEU and the Charter. Only in cases concerning article 21 TFEU (Union citizens residing in a Member State of which they do not hold the nationality), the CJEU did not yet explicitly mention the best interests of the child. However, in these cases the rights of the child play a central role as well and form the starting point. It seems to be a

135 Charter of Fundamental Rights of the European Union, article 52(3). As an example: article 7 of the Charter corresponds to article 8(1) of the ECHR
136 Ibid.
137 Explanations relating to the Charter of Fundamental Rights (2007)
138 Ibid.
139 CJEU 6 December 2012, O and Others, para. 76; CJEU 10 May 2017, Chavez-Vilchez and Others, para. 70; CJEU 13 March 2019, E., para. 57
matter of time, also due to the increasing importance of article 24 of the Charter, before the CJEU explicitly refers to the best interests of the child in cases concerning article 21 TFEU as well.

4.2.2. Assessment & determination
In article 21 TFEU cases, the assessment of the best interests of the child only implicitly comes to the fore by answering the question of whether the child (Union citizen) will be forced to leave the territory of the EU if the third country parent is not allowed to lawfully reside in the EU. When a child would be forced to leave the territory of the EU, this ‘would deprive the child's rights of residence of any useful effect.'\textsuperscript{140} This approach also applies to static Union citizens via article 20 TFEU, as the CJEU made clear in \textit{Ruiz Zambrano}.

However, a child is only forced to follow her parent(s) and leave the territory of the EU in exceptional circumstances, which was clarified by the CJEU in \textit{Dereci and Others}.\textsuperscript{142} Mere desire of an EU citizen to reside with her third country national family member on EU territory for economic or family unity reasons is for example not ‘sufficient in itself to support the view that the Union citizen will be forced to leave the Union territory if such a right is not granted’.\textsuperscript{143} The crucial element is to assess the dependency of the child (legally, financially and emotionally) on the concerned parent.\textsuperscript{144} In so doing, national authorities must identify the primary carer of the child and take the best interests of the child into account.\textsuperscript{145} This means that Member States are required to examine all specific individual circumstances.\textsuperscript{146} These circumstances are inter alia the child's age, physical and emotional development and ties with both parents. Lastly, the risk which separation from the third country national parent might entail for the child's equilibrium must be assessed. These requirements, provided by the CJEU in \textit{Chavez-Vilchez}\textsuperscript{147}, were reiterated one year later in \textit{K.A. & Others}\textsuperscript{148} The CJEU made clear in \textit{K.A. & Others} that a mere existence of a family link (natural or legal) is in itself insufficient to grant derived residence rights on the ground of article 20 TFEU.\textsuperscript{149}

With regard to the FRD, the CJEU very recently ruled that competent national authorities have the obligation under the FRD to examine applications for family reunification on a case-by-case basis, assessing all relevant interests, 'taking particular account of the interests of the children concerned.'\textsuperscript{150} Relevant circumstances that should at least be taken into account are the 'the age of the children concerned, their circumstances in the country of

\textsuperscript{140} CJEC 19 October 2004, \textit{Zhu and Chen}, para. 45; CJEU 8 November 2012, \textit{Iida}, para. 69; CJEU 10 October 2013, \textit{Alokpa and Moudoulou}, para. 28
\textsuperscript{141} CJEU 8 March 2011, \textit{Ruiz Zambrano}, para. 42
\textsuperscript{142} CJEU 15 November 2011, \textit{Dereci and Others}
\textsuperscript{143} Ibid., para. 68
\textsuperscript{144} CJEU 6 December 2012, \textit{O and Others}, para. 56
\textsuperscript{145} CJEU 10 May 2017, \textit{Chavez-Vilchez and Others}, para. 70
\textsuperscript{146} Ibid., para. 71
\textsuperscript{147} Ibid.
\textsuperscript{148} CJEU 8 May 2018, \textit{K.A. & Others}, paras. 71-72
\textsuperscript{149} Ibid., para. 75
\textsuperscript{150} CJEU 13 March 2019, \textit{E.}, paras. 57-59
origin and the extent to which they are dependent on relatives'.

This can be seen in line with the mentioned elements in article 20 TFEU cases. As Goeman and Werner already argued, the guidelines on the application of the FRD furthermore demonstrate the far-reaching importance of the best interests of the child under the FRD. The EC explains that article 5(5) of the FRD is a horizontal clause, meaning that the best interests of the child (based on the individual circumstances of the case) should be taken into consideration when reading all provisions of the Directive. Member States must 'make a comprehensive assessment of all relevant factors in each individual case'. Even if applicants do not meet the requirements for family reunification, Member States must assess all individual factors and 'examine the application in the interests of the child and also with a view to promoting family life, and avoiding any undermining of the objective and the effectiveness of the Directive'.

4.2.3. Attached weight
The weight that needs to be attached to the best interests of the child under EU law is still not completely clear. Whereas this is quite clear under the UNCRC and the ECHR as a result of respectively (J)GCs and extensive case law, the CJEU has not yet ruled on this in great detail. However, the starting point is that EU law guarantees at least the protection that flows from article 8 ECHR and article 3(1) UNCRC. Article 24(2) of the Charter is based on article 3(1) UNCRC and reiterates that the best interests of the child must be 'a primary consideration'. Furthermore, case law on the FRD and article 24 of the Charter indicates that the best interests of the child play a significant role when examining applications for family reunification. In case the FRD does allow a certain margin of appreciation, Member States must have due regard to the best interests of the child and must refrain from acting in a manner that undermines the objective of the FRD (promoting family reunification) and the effectiveness thereof, meaning that they must interpret provisions strictly. The explicit objective of the FRD to promote family reunification is important, since it demonstrates the fundamental difference between the FRD and article 8 ECHR. Whereas the starting point of the FRD is family reunification, the starting point of article 8 ECHR is that applicants do not have a choice of domicile and that states have a right to control immigration. This difference has clear implications for the role that the best interests of the child should play in a decision on family reunification. Since the standard in article 8 ECHR is that there is no choice of domicile, the best interests of the child work as a 'counter' interest against the

---

151 Ibid., para. 59
152 Werner & Goeman (2015), p. 54
156 Ibid., p. 28-29
157 See article 52(3) and 53 of the Charter
159 Hilbrink (2017), p. 4 & 10; Werner & Goeman (2015), p. 59
interest of the state (immigration control). In cases that fall under the FRD, the framework is
different since the starting point is to promote family reunification. The concept of the best
interests of the child therefore does not work as a 'counter' interest but contrarily strengthens
the FRD framework, as Goeman and Werner have already put it. 160

The importance and meaning of article 24 of the Charter can be grasped by looking at
the recent case of E. In this case, the CJEU strikingly ruled that provisions of the FRD must
be read in the light of fundamental rights by stating that

… the provisions of directive 2003/86 must be interpreted and applied in the light of
Article 7 and Article 24(2) and (3) of the Charter, as is moreover apparent from recital
2 and Article 5(5) of that directive, which require the Member States to examine the
applications for reunification in question in the interests of the children concerned and
with a view to promoting family life. 161

By mentioning both article 7 and 24(2) of the Charter, the CJEU emphasizes the far-reaching
importance of the best interests of the child under EU law. As mentioned before, article 7 of
the Charter corresponds to article 8 of the ECHR. As a result, the obligations concerning the
best interests of the child that arise from article 7 of the Charter are similar to those that arise
from article 8 ECHR. By additionally mentioning article 24(2), the CJEU strengthens my
belief that article 24(2) imposes additional obligations on states with regard to the weight that
should be attached to the best interests of the child in family migration cases, in any case
when the FRD applies. Arguing that article 24(2) of the Charter does not impose additional
obligations with regard to the best interests of the child in this case, would render the CJEU’s
mentioning of article 24(2) useless, since article 7 of the Charter and article 8 of the ECHR
correspond. The O. and Others 162 judgment already laid the foundation for this
argumentation, as Weterings formulated back then 163, and the recent case of E. further
strengthens it.

All these findings lead me to argue that the attached weight to the best interests of the
child under article 24 of the Charter is at the bare minimum equal to the weight that is
attached to the concept under article 8 ECHR. Due to jurisprudence of the ECtHR on article 8
ECHR, it is clear that, at least, crucial weight should be attached to the best interests of the
child under EU law. 164 However, when the FRD applies, the attached weight as in article 8
ECHR cases is insufficient. Due to the purpose of the FRD to promote family reunification,
which is fundamentally different than article 8 ECHR, the weight that should be attached to
the best interests of the child inevitably increases when the FRD, in combination with article
24 Charter, applies.

160 Ibid., p. 66
161 CJEU 13 March 2019, E., para. 56
162 CJEU 6 December 2012, O. and Others
163 Weterings (2013)
164 As mentioned, article 8 ECHR corresponds to article 7 of the Charter. Article 53 of the Charter provides that
the level of protection should be at least the same
4.2.4. Actors

The most significant duty arising from EU law on this particular topic is in my point of view the duty for both legislative bodies and courts of law to recognize the fundamental different nature of the FRD, in combination with the Charter, versus article 8 ECHR. As the recent case of E. shows, the provisions of the FRD must be applied in light of the best interests of the child and with a view to promoting family life.\(^{165}\) It is therefore essential that the FRD is rightfully implemented and national migration policy does not undermine the aim and effectiveness of the directive. The implementation should thus reflect the difference between the FRD and article 8 ECHR, which includes a different role for the concept of the best interests of the child. As Goeman and Werner already mentioned, the EC strikingly emphasized back in 2008 that a mere reference to article 8 ECHR is insufficient to rightfully implement article 5(5) of the FRD.\(^{166}\)

\(^{165}\) CJEU 13 March 2019, E., para. 56

5. Legal obligations arising from human rights law and EU law

In the previous three chapters I have discussed the obligations that arise from the UNCRC, the ECHR and EU law with regard to the best interests of the child in family migration cases. In this chapter, I will put these obligations in perspective and discuss them together, to come to a clear legal framework. I will do this on the basis of the four aspects that I have been using so far throughout the thesis: 1) actions 2) assessment & determination 3) attached weight and 4) actors.

5.1. Actions

Taking in mind the topic of this thesis, the first question to be answered is whether the best interests of the child should at all be taken into account in decisions on the entry and residence of (migrant) children and their families. The answer is very clear and simple: yes. The UNCRC\textsuperscript{167}, as well as the ECHR\textsuperscript{168} and EU law\textsuperscript{169} oblige the Netherlands to take the best interests of the child into account when deciding about a child's (or her family's) entry or residence. To take the best interests of the child into account, a certain assessment and determination should take place. I will now turn to this in further detail.

5.2. Assessment & determination

The CRC provides the most comprehensive guidelines on how to assess and determine the best interests of the child (under article 3(1) of the UNCRC). Moreover, it is the only 'legal regime' that prescribes a complete 'separated' process: the best interests of the child should first be assessed and determined, thereafter it should be balanced with other interests. The best interests of the child should be assessed and determined by a neutral actor (not the immigration service), preferably by a multidisciplinary team, to avoid conflicts of interests. Furthermore, the assessment should be done on the basis of a non-exhaustive list of seven elements of which the participation of the child is particularly important. Although the guidelines are very concrete and show how the best interests of the child would ideally be assessed and determined, it is in my point of view hard to argue that the Netherlands is legally obliged to precisely follow the guidelines. The sources (GC's and concluding observations) that prescribe the desired method are not legally binding, unlike the UNCRC itself, which is binding.

The ECHR and EU law do not oblige the Netherlands to apply a 'separated' process (assessment and determination by a neutral and multidisciplinary team before balancing the different interests). The assessment and determination of the best interests of the child is

\begin{footnotesize}
\textsuperscript{167} Under article 3(1) UNCRC
\textsuperscript{168} Under article 8 ECHR
\textsuperscript{169} When EU law applies, under article 7 and 24(2) of the Charter
\end{footnotesize}
somewhat included in the overall balancing of interests. However, the ECHR\textsuperscript{170} and EU law\textsuperscript{171} do oblige the Netherlands to follow the prescribed method of the CRC to some extent. Case law of the ECtHR and the CJEU provide that the best interests of the child must be assessed in each individual case and that particular elements should at least be taken into account when doing so. The non-exhaustive list of elements that are mentioned by the ECtHR and CJEU partly overlaps and includes (if applicable):

- The child's age and level of maturity
- The relation between the child and her parents. Are the parents present or absent in the child's life? How strong are the ties with both parents? Who is the primary caregiver? Is the child dependent on the parents (legally, financially and emotionally)?
- The child's environment and experiences
- The child's mental and physical state of health. The physical and emotional development are of importance here
- The child's situation in her country of origin
- What are the effects of an expulsion on the child?
  - The child's ties with the host country and the country of origin help to clarify this
  - What would be the consequences of a separation with one parent on the child's equilibrium?

Both the ECHR and EU law thus oblige the Netherlands to examine individual circumstances in each case to assess the best interests of the child. In so doing, the list of elements above should in any case be used to get a clearer picture of the child's best interests.

5.3. Attached weight

Both the UNCRC (article 3(1)) and EU law (article 24 of the Charter)\textsuperscript{172} provide that the best interests of the child should be 'a primary consideration'. This wording makes clear that the best interests of the child are hierarchically situated above other interests. The ECtHR as well has taken over the formulation of 'a primary consideration' and in some instances even talks about the 'paramount' importance of the best interests of the child. Nevertheless, the best interests of the child can be overridden by other interests in particular circumstances and cannot be used as a 'trump card' in article 8 ECHR cases.\textsuperscript{173}

The ECtHR provides the most extensive information on the weight that should be attached to the best interests of the child.\textsuperscript{174} It has made clear that 'crucial weight' should be attached to the concept in the balancing act under article 8 ECHR. However, the attached

\textsuperscript{170} Under article 8 ECHR
\textsuperscript{171} Under article 7 and 24(2) of the Charter
\textsuperscript{172} Article 24 of the Charter is only relevant if EU law applies
\textsuperscript{173} ECtHR, 8 November 2016, \textit{El Ghatet v. Switzerland}, para. 46
\textsuperscript{174} It should be clear that this consequently only applies if a case falls under the scope of article 8 ECHR
weight is not static and uniform, but inevitably relative. As a result, the attached weight depends on two factors. On the one hand, the weight depends on the degree of strong elements with regard to the best interests of the child (e.g. very strong ties with both parents, a child's poor state of health, etc.). On the other hand, the weight depends on the other relevant elements that influence the balancing act. These other relevant elements are most importantly:

- The moment that family life was created
- Factors of immigration control
- Public order considerations
- The state's previous attitude towards the applicant
- The nationality of all family members
- The composition of the family and whether family life will effectively be ruptured
- The ties with the country of origin and the host country
- Obstacles in the way of the family to live in another country

The CJEU is less clear about the weight that should be attached to the best interests of the child. However, crucial weight should in any case be attached to the concept, since the level of protection should at least be similar to the degree of protection provided by article 8 ECHR. Additionally, and more importantly, the role and therefore the weight of the concept of the best interests of the child are in particular circumstances (i.e. when the FRD applies) different than in article 8 ECHR cases. Due to the fundamentally different purpose of the FRD (in comparison with article 8 ECHR\textsuperscript{175}), the best interests of the child are not a 'counter' interest against the interest of the state (immigration control) in family migration cases that fall within the scope of the FRD. Contrarily, the best interests of the child strengthen the framework of promoting family reunification under the FRD. There is no room for the public interest to control immigration (which is important for article 8 ECHR) under the FRD framework, since this would directly contradict the purpose of the FRD. Due to the additional importance of article 24 of the Charter, which complements the safeguards concerning the best interest of the child from article 7 of the Charter, it is valid to argue that more weight should be attached to the best interests of the child under EU law, in any case when the FRD applies.

### 5.4. Actors

The fourth aspect focuses on additional obligations\textsuperscript{176} that specifically apply to the relevant actors that are involved: administrative authorities (IND), courts of law (Council of State and the district court of Den Haag) and legislative bodies (government and States General). I have identified the following elements:

\textsuperscript{175} Corresponds to article 7 of the Charter

\textsuperscript{176} In addition to taking the best interests of the child into account, assessing and determining the best interests of the child and attaching particular weight to the concept, as already covered by the first three aspects
• The administrative authorities are required under article 8 ECHR\textsuperscript{177} to adopt a pro-active stance in assessing evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent to give sufficient weight to the best interests of the child
• The administrative authorities are recommended by the CRC to formalize the best interests of the child in their proceedings
• Courts of law must explain in their reasoning which relevant elements have been identified with regard to the best interests of the child and why other considerations (do not) override the best interests of the child. Courts of law are obliged under article 8 ECHR\textsuperscript{178} to put the best interests of the child at the heart of their considerations and conduct a fair balance test themselves; a marginal review is insufficient.
• Legislative bodies are under article 3(1) and 4 of the UNCRC obliged to actively implement the best interests of the child in legislation which highly impacts children
• Legislative bodies are under a duty to rightfully implement the FRD in national migration legislation. The implementation should reflect the fundamental difference between the FRD and article 8 ECHR, most importantly recognizing the different role of the best interests of the child concept in both frameworks. Under the FRD framework, more weight must be attached to the best interests of the child, since it strengthens the starting point to promote family reunification.

In the previous three chapters I have identified the obligations that arise from the UNCRC, the ECHR and EU law with regard to the best interests of the child. I concisely listed these obligations in this chapter in order to turn to the next step, in the following chapter; assessing (based on Dutch migration policy, legislation and case law) whether the Netherlands is adhering to the listed obligations.

\textsuperscript{177} Thus, also under article 7 of the Charter
\textsuperscript{178} Idem supra note 177
6. The best interests of the child in the Netherlands

In this chapter, I will examine whether the Netherlands is currently adhering to the obligations that I identified in the previous chapters that arise from international human rights law and EU law. I will start this chapter with a brief introduction on the legislation and policy of the Netherlands concerning family migration, since this basic context is needed for the following discussion. Thereafter, I will discuss the Dutch legislation and policy with regard to the four aspects that run through this thesis as a common thread. In so doing, I will elaborate on the Aliens Act (and lower legislation) and the work instructions of the IND. In the second part of the chapter I will discuss Dutch case law on the basis of the four aspects.

6.1. Family migration in the Netherlands

Migration law is a special branch of administrative law in the Netherlands. In general, all provisions in the General Administrative Law Act apply in migration law, unless specific provisions are stipulated in migration law. The most important source for Dutch migration law is the Dutch Aliens Act.\(^{179}\) The provisions of the Aliens Act are further elaborated on in lower legislation: The Aliens Decree and the Aliens Regulation. Administrative guidelines to execute and apply the Aliens Act, Aliens Decree and Aliens Regulation can be found in the Aliens Circular.

The Aliens Act sets out the clear distinction in Dutch migration law between asylum and non-asylum with the corresponding asylum residence permit and the so-called 'regular' residence permit.\(^{180}\) Articles 14 and 28 of the Aliens Act form the basis for the clear distinction between these two categories in Dutch migration law.\(^{181}\) Both sets of regimes have specific conditions and requirements with regard to the granting and withdrawal of the residence permit. The regular residence permit is most importantly meant for the purpose of work, family and study. The asylum residence permit is meant for asylum seekers qualifying for international protection under the Qualification Directive and their family. As a result, this includes both refugees under the Refugee Convention and beneficiaries of subsidiary protection (article 3 ECHR). Family members of asylum residence permit holders are in principle granted an asylum permit as well, provided that they meet the requirements and provided that the application is made within three months after the sponsor is granted a residence permit.\(^{182}\)

As a result of the distinction between asylum and regular residence permits, migrants apply for either a regular residence permit for the reason of family\(^{183}\) or an asylum family

\(^{179}\) Two other important legal acts concerning migrants are the Act of the Central Agency of Reception and the Aliens Labour Act, but these are not relevant for the thesis.

\(^{180}\) Verblifvsvergunning asiel en verblifvsvergunning regulier

\(^{181}\) Article 14 concerns the regular residence permit and article 28 concerns the asylum residence permit.

\(^{182}\) Aliens Act, article 29, paras. 2 & 4. This is called ‘nareis’ in Dutch.

\(^{183}\) The application form can be found here: [https://ind.nl/Formulieren/7025.pdf](https://ind.nl/Formulieren/7025.pdf)
residence permit\textsuperscript{184}. After the application, the IND will check whether the person concerned meets the corresponding requirements.\textsuperscript{185} If an application for a regular residence permit is denied, the IND will always assess whether a final rejection is in accordance with article 8 ECHR.\textsuperscript{186} The IND will not execute such an article 8 ECHR assessment in an application for asylum family reunification.\textsuperscript{187} Due to the strict distinction between asylum and regular residence permits, one has to make a new application (for a regular residence permit) in such a case to derive residence rights based on article 8 ECHR.

6.2. The best interests of the child in Dutch migration legislation & policy

6.2.1. Actions

There is no general provision to be found in Dutch migration law that prescribes the obligatory task of taking the best interests of the child into account in all decisions relating (family) migration cases. The Dutch Aliens Act does not contain a provision that mentions the best interests of the child.\textsuperscript{188} Although the Aliens Acts does not refer to the best interests of the child, the Aliens Decree and Aliens Circular do mention the best interests of the child.\textsuperscript{189} However, in most of these provisions the concept is merely mentioned in reference to particular circumstances; there is no general provision, such as article 3(1) UNCRD or 24(2) of the Charter, which provides the obligatory task for the authorities to take the best interests of the child into account. Only paragraph B10/2(2) of the Aliens Circular is a somewhat general provision obliging the IND to take the best interests of the child into account. This provision was introduced after Chavez-Vilchez and concerns article 20 TFEU situations in which the question arises whether a Dutch child is forced to leave the territory of the EU.\textsuperscript{190} In the part below on assessment and determination, I will elaborate on how this should be done.

For most cases that do not fall under the article 20 TFEU regime, the article 8 ECHR assessment of the authorities provide the safeguard that the best interests of the child are taken into account. The work instruction 2018/11 of the IND on article 8 ECHR formulates that the best interests of the child must always be taken into account when conducting an article 8 ECHR assessment.\textsuperscript{191} As I have discussed in the previous chapters, article 8 ECHR requires the Netherlands to take the best interests of the child into account. Consequently, the work instruction also pays attention to the best interests of the child and commands civil servants of

\textsuperscript{184}The application form can be found here: https://ind.nl/Formulieren/7039.pdf
\textsuperscript{185}The requirements for asylum family reunification are more favorable than for regular family reunification. There is for example no income requirement for the former
\textsuperscript{186}In Dutch this is called ‘de resttoets’ and it is codified in article 3.6, para. 1(a) of the Aliens Decree
\textsuperscript{188}The most common term to translate the best interests of the child in Dutch is ‘het belang van het kind’, so I will generally use this term as the Dutch translation of the concept
\textsuperscript{189}Article 3.15, para. 3(c), article 3.109d, para. 6 & article 8.22, para. 3(b) of the Aliens Decree. Para. A5/5, para. B10/2(2) and para. C2/5 of the Aliens Circular
\textsuperscript{190}Den Besten, van Melle & Wegelin (2018)
\textsuperscript{191}IND Werkinstructie 2018/11 (SUA) ‘Richtlijnen voor de toepassing van artikel 8 EVRM’
the IND to take them into account. I will elaborate on how this should be done in the following part.

### 6.2.2. Assessment and determination

As mentioned above, paragraph B10/2(2) of the Aliens Circular provides that the best interests of the child should be taken into account in cases similar to *Chavez-Vilchez*.\(^{192}\) How should this be done? The provision prescribes that in the best interests of the child, attention must be paid to all relevant circumstances, in particular: the child’s age, the child’s physical and emotional development, the degree of the affective relationship with both the Dutch and non-Dutch parent as well as the risk that would arise for the child's equilibrium if she were separated from the latter.\(^{193}\) The policy change has been well received so far by some lawyers, academics and experts, who confirm the clearer assessment of the best interests of the child by the IND.\(^{194}\) So far, this is the only provision in Dutch migration legislation that obliges the authorities to assess the best interests of the child. However, as I already stated, this merely covers article 20 TFEU situations.

Although not codified in legislation, the Dutch assessment under article 8 ECHR also includes a clear part on the best interests of the child, as demonstrated by the work instruction 2018/11 that I mentioned above. In line with ECHR jurisprudence on article 8, the authorities only include the best interests of the child in a balancing act after family life has been established.\(^{195}\) The work instruction explicitly provides that the best interests of the child should be mapped and should clearly come to the fore in an official decision. Relevant elements that are listed are the child's age, the child's position in and ties with the country of origin (e.g. culturally and linguistically), the child's ties with the Netherlands (the age and the duration of stay are important here), the child's dependency on the parents and the consequences of an expulsion on the child.\(^{196}\) This overlaps with the elements that the ECHR has mentioned in article 8 ECHR cases; it therefore seems that the obligation under article 8 ECHR to assess the best interests of the child, based on individual circumstances, is adhered to, at least on paper. Since the work instructions of the IND are not formal and binding documents, it merely provides guidance to civil servants and automatically comes with a degree of flexibility. To make sure that the assessment of the best interests of the child under article 8 ECHR is being executed properly, it might be helpful and necessary to codify the relevant elements for the assessment of the best interest of the child in lower legislation, as is done with article 20 TFEU cases after *Chavez-Vilchez*.

---

\(^{192}\) As a small reminder, this concerns Dutch children with a third country national parent

\(^{193}\) Para. B10/2(2) of the Aliens Circular

\(^{194}\) Den Besten, van Melle & Wegelin (2018); Schuitemaker (2017)

\(^{195}\) IND Werkinstructie 2018/11 (SUA) ‘Richtlijnen voor de toepassing van artikel 8 EVRM’, p. 5

\(^{196}\) Ibid., p. 24-25
6.2.3. Attached weight

With a reference to both article 3(1) UNCRC and jurisprudence of the ECtHR on article 8 ECHR, work instruction 2018/11 clearly emphasizes that the best interests of the child should be a primary consideration and that the concept should be central in the fair balance test.\(^{197}\)

The best interests of the child should come to the fore in all article 8 ECHR assessments. Significant weight should be attached to the concept, but the weight partly depends on the presence or absence of best interests of the child elements.\(^{198}\) The document provides that the attached weight to all different interests varies per individual case. The work instruction furthermore lists the relevant elements with regard to the interest of the state:

- Factors of immigration control
- Public order and national security considerations
- Protection of health or morals
- Protection of rights and freedoms of others
- Economic interest of the state

In chapter 5 I only mentioned the first two elements, but the other elements can literally be derived from the formulation of article 8(2) ECHR. In addition, the work instruction sums up relevant elements with regard to the applicant’s interests:

- First-entry or previous lawful residence?
  - The nature of the previously granted permit
  - Duration of unlawful residence after expiration of previous residence permit
  - The moment that family life was created
  - Residence abroad after expiration of the previous residence permit
- Objective obstacles to reside in the country of origin (asylum aspects)
- A certain degree of hardship when returning to the country of origin
- Ties with the country of origin
- Ties with other countries
- Ties with the Netherlands
  - Dutch nationality?
- The state’s previous attitude towards the applicant (only in case of a long period of unlawful residence)
- (Composition of the family)\(^{199}\)

These elements also overlap with the elements that can be identified on the basis of ECtHR jurisprudence on article 8 ECHR. Although the best interests of the child should be a primary consideration with considerable attached weight, the work instruction emphasizes that the concept is part of a broader balancing act including other interests.

\(^{197}\) Ibid., p. 24
\(^{198}\) I.e. the child’s age, the child’s position in and ties with the country of origin and the dependency on parents
\(^{199}\) This element is not explicitly listed, but clearly comes to the fore in the example cases that are discussed in the work instruction
6.2.4. Actors

I would argue that the biggest problem concerns the lack of understanding with regard to the differences between on the one hand article 8 ECHR and on the other hand the FRD in combination with article 24 of the Charter. In 2004, the government published a transposition table to explain how the FRD is implemented in Dutch migration law. According to the government, article 5(5) of the FRD (on the best interests of the child) was already safeguarded in national migration law. The government refers to article 8 ECHR and two provisions of the General Administrative Law Act, article 3:2 and 3:4. The EC already gave the Netherlands a slap on the wrist in its 2008 report on the application of the FRD. With a reference to the Parliament-Council case, the EC stated that a mere reference to article 8 ECHR is insufficient when implementing article 5(5) of the FRD. The Netherlands is explicitly mentioned by the EC in the report. Although a provision was later added by the government with regard to the best interests of the child, this only concerns a very specific aspect (the waiting period). A clear implementation of article 5(5) FRD is still lacking. Implementation of article 5(5) FRD and article 24 of the Charter in Dutch migration legislation was recommended by the Netherlands Institute for Human Rights in 2014. However, the State Secretary for Security and Justice clarified that there is no obligation for the Netherlands to literally implement it in national migration law. According to him, the key issue is that the useful effect of the FRD is assured. I fully agree with this statement, but the useful effect of the FRD is not (yet) assured, since the current state of Dutch migration legislation and policy clearly does not reflect and acknowledge the distinction between the two different frameworks (i.e. article 8 ECHR vs. the FRD in combination with the Charter). Due to this lack of reflection in legislation, the IND currently takes the best interests of the child into account in the rather restrictive article 8 ECHR assessment (described above), instead of in a FRD assessment, which leaves less room for a restrictive application and therefore attaches more weight to the best interests of the child. Consequently, article 8 ECHR is used in the current Dutch migration system as a minimum standard to implement the FRD in a more restrictive manner than is allowed. This especially holds when one takes into account the CJEU’s clear statements in Chakroun and O. and Others that the purpose of the FRD is to promote family reunification. In my point of view, legislative bodies cannot continue to ignore the different regimes and must adjust Dutch migration legislation in order to adhere to obligations arising from EU law.

200 See the annex of ‘Besluit van 29 september 2004 tot wijziging van het Vreemdelingenbesluit 2000 in verband met de implementatie van de Richtlijn 2003/86/EG van de Raad van 22 september 2003 inzake het recht op gezinshereniging (PbEG L 251) en enkele andere onderwerpen betreffende gezinshereniging, gezinsvorming en openbare orde’

201 CJEC 27 June 2006, Parliament v. Council


203 Article 3.15, para. 3(c) of the Aliens Decree

204 College voor de Rechten van de Mens (2014)

205 As mentioned by Goeman & Werner (2015), p. 59-60

206 In the case of asylum family reunification the IND will take the best interests of the child into account as a result of article 3(1) UNCRC, since the article 8 assessment is not conducted in an application for an asylum residence permit. However, as will become clear in the next part of the chapter on case law, I am also quite critical about the assessment of article 3(1) UNCRC
6.3. The best interests of the child in Dutch case law

For this part of the chapter, I examined 50 cases of both the district court of Den Haag and the Council of State. Before delving into Dutch case law, it is important to make some remarks about the cases that were examined. In most of the cases, the applicants claimed that article 8 ECHR was violated, inter alia, because the authorities insufficiently took account of the best interests of the child (according to the applicants). In many cases, article 3 UNCRC was (also) invoked. Only a few cases concerned article 20 TFEU or (article 5(5) of) the FRD. Article 24 of the Charter was often mentioned in combination with article 8 ECHR. It is impossible to provide an explanation for the varying amounts of invocation of specific provisions, but possible relevant elements are the familiarity of both judges and lawyers with article 8 ECHR and the rather unfamiliarity with the FRD and the Charter.

6.3.1. Actions

Regardless of the invoked provision (i.e. article 8 ECHR, article 3 UNCRC, article 24 of the Charter or article 20 TFEU), the Dutch courts consistently hold that the authorities are obliged to include the best interests of the child in the statement of reasons of the decision or to express that they have taken the best interests of the child into consideration. Thus, if a decision on entry or residence is made in a case concerning a child, the best interests of that child should be taken into account.

6.3.2. Assessment and determination

Although the best interests of the child must be taken into consideration under articles 8 ECHR, 3 UNCRC, 24 Charter and 20 TFEU, there seems to be a difference in how the best interests of the child should be assessed under these different ‘regimes’, according to the courts of law. With regard to article 20 TFEU the district court for example critically assesses whether all the relevant circumstances are taken into account in the statement of reasons of the State Secretary. The authorities should conduct a concrete assessment of all circumstances concerning the child: age, physical and emotional development, degree of affective relationship with both parents and the risk of separation with one parent on the child’s equilibrium. This directly flows from the above discussed paragraph B10/2(2) of the Aliens Circular. The district court does not seem to accept a very high burden of proof for the migrant in article 20 TFEU cases to demonstrate an affective relationship between a Dutch child and her TCN parent, due to Chavez-Vilchez. The authorities thus have a clear duty

---

207 For the case selection method, I would like to refer to paragraph 1.3. of this thesis, on method and sources
208 When I use the word ‘Dutch courts’, I refer to both the Council of State and the district court of Den Haag
209 It is important to note here that the case selection was formed on the basis of search terms including the words ‘best interests of the child’. Consequently, there may be cases outside the case selection in which the best interests of the child are, incorrectly, not taken into consideration.
211 E.g. Ibid., para. 5.5.
under article 20 TFEU to investigate all relevant circumstances in each individual case. However, in some cases the district court does accept a somewhat higher burden of proof, for example in the case of a third-country national stepmother who has not been living with the Dutch child in the Netherlands before, but who claims to be involved in the daily care of the child.213

In article 8 ECHR cases, Dutch courts in general do not find a violation of article 8 ECHR with regard to the best interests of the child if the authorities have taken into account the relevant child related elements that flow from ECtHR jurisprudence and that can be found in the work instruction of the IND concerning article 8 ECHR. If all relevant circumstances are included in the assessment and in the statement of reasons of the State Secretary’s decision, Dutch courts generally accept the State Secretary’s decision.214 Sometimes the district court does not even explicitly mention the best interests of the child, but merely mentions the relevant circumstances that are included in the fair balance test by the State Secretary to conclude that the decision does not violate article 8 ECHR.215 I also found some cases in which the district court merely states that the authorities have taken into account the best interests of the child and that article 8 ECHR is therefore not violated; a clear assessment seems to lack then. Only in one of the cases, in which article 8 ECHR was invoked, the district court ruled that the authorities insufficiently mapped the best interests of the child and therefore violated article 8 ECHR.216 In any case, there seems to be a general awareness of the importance to take the best interests of the child into account, as can for example be concluded from the Council of State’s statements in some recent cases about the importance to take all circumstances with regard to the best interests of the child into account (with a reference to Jeunesse and El-Ghatet).217

The examination of case law demonstrates that Dutch courts recognize the duty under article 3 UNCRC to take the best interests of the child into account. A particular phrase (not always identically formulated) is consistently used by the courts of law to express this:

---

... according to settled case law, article 3 UNCRC only has a direct effect in so far as it concerns the obligation to take the best interests of the child into account as a primary consideration in all measures concerning children.218219

In practice this means that Dutch courts merely see an obligation under article 3 UNCRC to examine whether the authorities included best interests of the child considerations in the decision at all. Since the judiciary does not acknowledge complete direct effect of article 3 UNCRC, the district court conducts a marginal review and solely examines whether the best interests of the child are taken into consideration by the State Secretary.220

6.3.3. Attached weight

The courts of law often mention that the best interests of the child carry great weight, but that they are not decisive.221 Since the district court and the Council of State only conduct a marginal review under article 8 ECHR, it is difficult to say something additional222 about the weight that is attached to the concept of the best interests of the child by the courts. However, in some cases the district court seems to strike a fair balance itself between different interests, which necessarily means that the district court itself attaches a certain amount of weight to the best interests of the child.223

If we look at the attached weight to the best interests of the child under article 3 UNCRC, a clear and consistent reasoning by the Dutch courts can be identified. The district court often states that

With regard to the weight that should be attached to the best interests of the child in a specific case, the first paragraph of Article 3 of the UNCRC, in view of its

219 Note: since the case law is in Dutch, I translated the phrase myself. The formulation is as follows: ‘… uit vaste jurisprudentie van de Afdeling bestuursrechtspraak van de Raad van State volgt dat artikel 3 van het IVRK rechtstreekse werking heeft, in zoverre dat het artikel ertoe strekt dat bij alle maatregelen betreffende kinderen de belang van het desbetreffende kind dienen te worden betrokken.’
222 Additional to what I already discussed in paragraph 6.2.3.

45
formulation, does not contain a standard that is directly applicable without further elaboration in national laws and regulations.\footnote{224} \footnote{225}

Since the wording of article 3(1) UNCRC is indeed rather vague, this statement is maybe not surprising and one may just accept this explanation by the district court and move on. However, I argue that the district court is, although implicitly, asking for a required elaboration of the concept of the best interests of the child in Dutch migration legislation in order to fully safeguard the protection arising from article 3(1) UNCRC. As a result of a lack of elaboration of the best interests of the child in legislation, the court is only able to review whether the best interests of the child are, at all, taken into consideration. It is impossible to argue that this approach is sufficient, when taking in mind the crucial phrase in article 3(1) UNCRC ‘as a primary consideration’. Currently, the phrase ‘as a primary consideration’ does not come to the fore in practice, since it is impossible to adhere to this phrase when the weight aspect is ignored.

6.3.4. Actors
What is firstly clear from examining the cases in the case selection is the fact that the Dutch courts strictly review whether the best interests of the child are taken into consideration by the authorities. This confirms the obligation for the Dutch authorities to always take into account the best interests of the child in entry and residence cases of (migrant) children and their families. The district court and the Council of State most often scrutinize whether the authorities have paid attention to all relevant individual circumstances of the case to assess the best interests of the child. However, the Dutch courts are thereafter very hesitant with regard to the balancing of the best interests of the child versus other interests. With regard to article 8 ECHR, the district court and Council of State consistently repeat in case law that they ‘somewhat marginally review\footnote{226} whether a fair balance is struck and that they will not conduct a full fair balance test.\footnote{227} I have difficulties to see how this is in line with the \textit{El Ghatet} judgment, which in my point of view clearly obliges courts of law to fully scrutinize a case and conduct a fair balance test. Although the Dutch courts repeatedly state that they

\begin{footnotesize}
\begin{itemize}
\item \footnote{225} Note: I translated the Dutch phrase that is often used in case law: ‘Wat betreft het gewicht dat aan het belang van het kind in een concreet geval moet worden toegekend, bevat het eerste lid van artikel 3 van het IVKR, gelet op de formulering ervan, geen norm die zonder nadere uitwerking in nationale wet- en regelgeving door de rechter direct toepasbaar is.’
\item \footnote{226} The Dutch courts formulate this consistently as ‘enigszins terughoudend toetsend’
\end{itemize}
\end{footnotesize}
review only marginally, in some cases the district court and the Council of State do seem to balance the best interests of the child versus other interests themselves.\textsuperscript{228} As far as I'm concerned, these cases set a good precedent for Dutch courts on how to act in accordance with the required approach that arose from the \textit{El Ghatet} judgment.

What is, according to me, of even bigger concern is the fact that Dutch courts, just as the legislative bodies, do not acknowledge the fundamental difference between the FRD framework and article 8 ECHR. Although the purpose (promoting family reunification) and general norm (family reunification) of the FRD are recognized\textsuperscript{229}, both the district court and the Council of State worryingly seem to be blind for the different frameworks of on the one hand 8 ECHR (restrictive assessment) and on the other hand the FRD and Charter (family reunification as starting point). The judgment of the Council of State of 24 July 2017 is a very striking example to demonstrate the lack of understanding of the differences between the two frameworks.\textsuperscript{230} The Council of State refers to \textit{Dereci and Others} to rightfully mention that article 7 of the Charter corresponds to article 8 ECHR.\textsuperscript{231} Thereafter, a reference is made to \textit{O. and Others} stating that the FRD must be applied in the light of article 7 and 24 of the Charter, taking especially the best interests of the child into account.\textsuperscript{232} So far so good, one would think. However, the Council of State (deliberately?) does not include the crucial phrase ‘with a view to promoting family life’ from the \textit{O. and Others} judgment.\textsuperscript{233} Contrarily, the Council of State concludes that there is no violation of article 7 and 24 of the Charter, because the authorities have taken the best interests of the child into account in the article 8 ECHR assessment.\textsuperscript{234} Thus, what the Council of State does here is equalizing the article 8 ECHR assessment with an assessment of article 7 and article 24 of the Charter under the FRD. In so doing, the Council of State ignores the essential phrase ‘with a view to promoting family life’\textsuperscript{235} and the additional safeguards that are provided by article 24 of the Charter under the FRD.\textsuperscript{236}

In addition to putting article 24 of the Charter and article 8 ECHR on a par, article 3 UNCRC and article 24 of the Charter also seem to be equalized by the Council of State.\textsuperscript{237} In its judgment of 8 February 2016, the Council of State reasons that article 24 of the Charter

\footnotesize{
\begin{itemize}
\item Rechtbank Den Haag, seated in Middelburg, 9 January 2019, ECLI:NL:RBDHA:2019:155
\item Ibid., para. 8.1.
\item Ibid.
\item CJEU 6 December 2012, \textit{O and Others}, para. 80
\item CJEU 6 December 2012, \textit{O and Others}, para. 80
\item As provided earlier in this thesis, equalizing article 24 of the Charter in combination with article 7 of the Charter with article 8 ECHR renders the meaning of article 24 of the Charter useless
\item Raad van State, 8 February 2016, ECLI:NL:RVS:2016:416, para. 4.2.
\end{itemize}
}
must be interpreted in accordance with article 3 UNCRC. The result is that article 3 UNCRC, article 24 of the Charter and article 8 ECHR are all lumped together. In the end, this often results in a conclusion by the Dutch courts that article 3 UNCRC and/or article 24 of the Charter are not violated because the best interests of the child are already taken into consideration in the article 8 ECHR assessment. To provide an example of why this is problematic, it is useful to refer to the principle ‘family life’. The best interests of the child are under article 8 ECHR only taken into consideration in a fair balance test after family life has been established. There is a clear definition of ‘family life’ under article 8 ECHR and only when this ‘requirement’ is met, the best interests of the child will be taken into account in the fair balance test that follows. Contrarily, under article 3 UNCRC and article 24 of the Charter the best interests of the child should from the start on be taken into consideration; not only in a balancing act after family life has been established. In my point of view, this also indicates that the strictly demarcated definition of family life under article 8 ECHR should be approached with some more flexibility under article 3 UNCRC and article 24 of the Charter.

---

238 Ibid.
239 A balancing between interests will not take place under article 8 ECHR if family life is not established.
240 Obviously this does for example not mean that family life is not at all a requirement for family reunification, but the definition should be approached with some more flexibility. However, in Dutch migration legislation this is not the case, since the requirement to ‘actually belong to the family’ in a family migration case is equalized to the question of family life under article 8 ECHR (paragraph B7/3.2.1. of the Aliens Circular)
7. Conclusion & recommendations

7.1. Conclusion

In the first chapters of this thesis I have discussed what obligations arise from the UNCRC, the ECHR and EU law with regard to the best interests of the child in family migration law. Thereafter, I have examined Dutch migration policy, legislation and case law to find an answer to the central research question of this thesis: *Is the Netherlands currently fulfilling its obligations arising from human rights law and EU law with regard to the best interests of the child in family migration cases and if not, what are starting points to solve this?*

Based on four identified aspects concerning the best interests of the child (actions, assessment and determination, attached weight and actors) I conclude that the Netherlands is currently not adhering to all obligations that arise from human rights law and EU law. I will discuss my main findings below in the order of significance.

7.1.1. No recognition of the differences between the three relevant frameworks (article 3 UNCRC - article 8 ECHR - the FRD & article 24 Charter)

The most significant finding of my analysis is that Dutch migration policy, legislation and case law do not clearly reflect the differences between the three legal frameworks that I examined: the UNCRC (article 3(1)), the ECHR (article 8) and EU law (most importantly the FRD and article 24(2) of the Charter). The most pressing problem is in my point of view the lack of understanding in Dutch migration policy and legislation between the latter two. The ECHR framework entails a restrictive article 8 ECHR assessment in which the best interests of the child often only override the public interest (to control immigration) in exceptional cases. Contrarily, the FRD has a fundamentally different purpose, namely promoting family reunification. The best interests of the child therefore strengthen this framework and the concept inevitably carries greater weight than in the article 8 ECHR assessment in which it is a ‘counter’ interest against the state's interest (to control immigration). However, this essential distinction cannot be found in Dutch migration law. As a result, article 8 ECHR is used in the current Dutch migration system as a minimum standard to implement the FRD in a more restrictive manner than is allowed. In line with this, Dutch courts also do not acknowledge (yet) the fundamental difference between these two frameworks. Due to the wide application of the FRD in the Netherlands, this finding has major national implications. The vast majority of family migration cases should namely fall within this less restrictive FRD framework. These major implications may precisely be the (political) reason why the current system does not reflect the fundamental difference between article 8 ECHR and the FRD.

The best interests of the child are most often dealt with via a separate article 8 ECHR assessment, which is included in Dutch migration policy and legislation. However, no such assessment currently exists for either article 3 UNCRC or article 24 of the Charter. Dutch courts often conclude that the rights under article 3 UNCRC and article 24 of the Charter are

---

241 The Netherlands also applies the FRD to Dutch nationals and to beneficiaries of subsidiary protection.
protected if the authorities acted in accordance with article 8 ECHR when taking the best interests of the child into account. The three provisions (8 ECHR, 3 UNCRC & 24 Charter) are therefore often lumped together. However, as far as I’m concerned, this is surely incorrect due to several reasons. As I have argued, article 8 ECHR and article 24 of the Charter cannot simply be equalized, for example because article 7 of the Charter already corresponds to article 8 ECHR. Equalizing article 8 ECHR and 24 of the Charter would therefore render the meaning of the latter useless in the context of family migration. Moreover, in the article 8 ECHR assessment the best interests of the child are only included in the balancing act after family life has been established, whereas article 3 UNCRC and article 24 of the Charter require the inclusion of the best interests of the child at all time.

### 7.1.2. Continuing marginal review by Dutch courts after El Ghatet

Even though the ECtHR made clear in its judgment El Ghatet that domestic courts are under an obligation to put the best interests of children at the heart of their consideration and must fully scrutinize a case, Dutch courts remain reluctant to take up this active role. Stating that they review ’somewhat marginally’, Dutch courts most often do not fully scrutinize a case. Instead of executing a fair balance test themselves (thus balancing inter alia the best interests of the child against the interest of the state), the role of Dutch courts is mostly limited to judging whether the authorities have included all relevant circumstances to come to the taken decision. In my point of view, this practice is not in line with the obligations under article 8 ECHR that arise from the El Ghatet judgment.

### 7.1.3. No elaboration on the best interests of the child in legislation

Dutch migration legislation so far only contains a significant provision on the best interests of the child in relation to article 20 TFEU. The problem of the lack of elaboration of the concept in legislation most clearly comes to the fore in case law on article 3(1) UNCRC. Dutch courts repeatedly state that they cannot judge on the attached weight, since the article does not contain a standard and needs elaboration in national legislation. The importance of the phrase ‘as a primary consideration’ in article 3(1) UNCRC is therefore simply put aside in the Dutch practice. Legislative bodies have, in my point of view, the duty under article 4 and 3(1) UNCRC to implement and concretize the concept of the best interests of the child in national migration law in order to solve this problem.

---

242 ECtHR 8 November 2016, El Ghatet v. Switzerland, paras. 46 & 53
243 See for example: Rechtbank Den Haag, seated in Middelburg, 21 December 2017, ECLI:NL:RBDHA:2017:16285, para. 6
244 This concerns a Dutch child with one Dutch parent and one third country national parent
### 7.2. Recommendations

#### 7.2.1. Including the best interests of the child in legislation in order to reflect the distinction between the different frameworks (UNCRC – ECHR- FRD and Charter)

As mentioned above, the authorities currently implement the FRD by using the restrictive article 8 ECHR assessment. Article 3.13 of the Aliens Decree concerns the regular residence permit for the purpose of family. It provides that a residence permit will be granted if all requirements, listed in articles 3.16 up to and including 3.22a, are met.\(^{245}\) However there is no provision here which underlines that the applications must be examined ‘in the interests of the children concerned and with a view to promoting family life’\(^ {246}\), even though this is of fundamental importance to rightfully implement the directive, according to the CJEU. Therefore, it is for example possible to include a new paragraph in article 3.13 of the Aliens Decree which would prescribe that the articles 3.16 up to and including 3.22a must be applied ‘in the interests of the children concerned and with a view to promoting family life’\(^ {247}\). Such a new provision would then co-exist next to the already existing article 8 ECHR assessment\(^ {248}\) to make a clear distinction between the two frameworks. What is important to note here, is the fact that article 3.13 of the Aliens Decree only applies to ‘regular’ family migration and not to asylum family migration.\(^ {249}\) Consequently, a provision on the best interests of the child should also be included in the asylum structure of Dutch migration legislation. In my point of view, one of the possibilities is to look at paragraphs 2 and 4 of article 29 of the Aliens Act, which arranges asylum family reunification. For example, a new fifth paragraph could be included in article 29 of the Aliens Act prescribing that paragraph 2 and 4 of that same article should be applied ‘in the interests of the children concerned and with a view to promoting family life’.\(^ {250}\) Adding these proposed provisions requires elaboration in lower legislation, since the application would otherwise be impossible. A concretization of the concept of the best interests of the child must therefore be included in lower legislation.\(^ {251}\) Including the best interests of the child in lower legislation will as well solve the issue of the current lack of elaboration on the best interests of the child in Dutch migration legislation (see §7.1.3.).

---

\(^{245}\) Article 3.13, para. 1 of the Aliens Decree  
\(^{246}\) CJEU 13 March 2019, \(E\), para. 56  
\(^{247}\) This wording is based on the chosen wording of the CJEU in two very relevant cases: CJEU 6 December 2012, \(O. and Others\), para. 80; CJEU 13 March 2019, \(E\), para. 59. The word ‘best’ is not included in the wording of the CJEU. However, the absence of the word ‘best’ is not reflected in the Dutch version of the judgment, since the translation provides ‘in het belang van de betrokken kinderen’ (which would also be the translation if ‘best’ was included in the wording of the CJEU)  
\(^{248}\) Stipulated in article 3.6, para. 1a of the Aliens Decree  
\(^{249}\) This is the result of the strict division between ‘regular’ and asylum migration in Dutch migration law. As stated before, asylum family migrants will receive an asylum residence permit based on paragraph 2 or 4 of article 28 of the Aliens Act (provided that the application is made within the required period)  
\(^{250}\) This wording is similar to wording already proposed above, which is based on the chosen wording of the CJEU in two very relevant cases: CJEU 6 December 2012, \(O. and Others\), para. 80; CJEU 13 March 2019, \(E\), para. 59  
\(^{251}\) The Aliens Circular seems most suitable for this in my point of view; the provision concerning the best interests of the child that was created as a result of the \(Chavez-Vilchez\) case is for example also included in the Aliens Circular
The big question is subsequently where and how to include and concretize the best interests of the child in legislation. I think the Chavez-Vilchez judgment of the CJEU offers good inspiration how to accomplish this. As described earlier in the thesis, due to Chavez-Vilchez the Dutch Aliens Circular was adjusted. Explicit circumstances are now included in legislation in order to take the best interests of the child into account when deciding about the residence of a third country national parent of a Dutch child. However, this is limited to article 20 TFEU cases. In my point of view, similar circumstances should be included in legislation for other family migration cases, which do not fall under the scope of article 20 TFEU, as well. As discussed earlier in the thesis, the CJEU mentioned two of the ‘Chavez-Vilchez circumstances’ in the judgment of E. (a case that concerns the FRD and not article 20 TFEU): the child's age and the dependency on relatives. Additionally, the circumstances in the country of origin are mentioned by the CJEU. Paragraph B7/3.2 of the Aliens Circular provides specific policy rules on minors in ‘regular’ family migration cases. Therefore, the legislator could for example create a provision in this paragraph that would oblige the authorities to include the following circumstances, in order to take the best interests of the child into account: 1) the age of the child 2) the dependency on the relatives 3) the circumstances in the country of origin. Such a provision should then also be included in the asylum structure of the legislation. Paragraph C2/4.1 of the Aliens Circular could be suitable for this, since this paragraph elaborates on paragraph 2 of article 29 of the Aliens Act.

I want to emphasize that the recommendations above are quite concise. It must not be underestimated what it requires to change Dutch migration legislation to ensure the correct reflection of the distinction between the different frameworks (i.e. UNCRC – ECHR – FRD and Charter). Simply including new provisions regarding the best interests of the child will definitely not be sufficient; it requires a much broader reconsideration of legislation. For example, the requirement to ‘actually belong to the family’ is currently equalized to the question of family life under article 8 ECHR. As I mentioned before, there are, according to me, valid reasons to argue that this should be approached with more flexibility under the FRD. This is merely an example to demonstrate that many more provisions should be reconsidered. However, because of the topic and scope of this thesis, I limited myself here to legislative recommendations explicitly focusing on the best interests of the child.

252 I.e. the age of the child, the physical and emotional development of the child, the degree of affective relationship of the child with both parents and the risk for the child's equilibrium if the child will be separated from the third country national parent

253 For the sake of clarity: this concerns Dutch children with a third country national parent. The central question that the authorities must answer here is whether the Dutch child would be forced to leave the territory of the EU if the third country national parent is refused residence

254 CJEU 13 March 2019, E., para. 59

255 Ibid.

256 ‘Feitelijk behoren tot het gezin’ in Dutch
7.2.2. From marginal review to full review

As has become clear, Dutch courts are after the *El Ghatet* judgment of the ECtHR still quite reluctant to take an active role when it comes to reviewing a case. *El Ghatet*, in my point of view, obliges Dutch courts to fully scrutinize a case, but they consistently state that they ‘review somewhat marginally’. Solving this issue seems rather straightforward; Dutch courts must take full advantage of the opportunity that the ECtHR has offered with the *El Ghatet* judgment and must fully scrutinize a case if children are involved. Although Dutch courts continue to use this phrase of only ‘reviewing somewhat marginally’, some recent cases certainly provide a good starting point where to go. These judgments indicate that Dutch courts are incrementally willing and able to take up a more active role to strike a fair balance themselves. It would be desirable if these cases will be used as a precedent to give guidance to Dutch courts how to adopt a more active role.

---

257 ‘Full review’ is possibly not a very accurate or correct translation, but refers to ‘volle toetsing’ in Dutch (contrary to ‘marginale toetsing’)


259 It must be noted here that the courts in these cases nonetheless state that they review ‘somewhat marginally’
Bibliography

Literature

Beltman & Zijlstra (2013)

Bhabha (2003)

Cardol (2013)

Den Besten, van Melle & Wegelin (2018)

Eekelaar (2015)

Herweijer (2017)

Hilbrink (2017)

Kalverboer, Beltman, van Os & Zijlstra (2017)

Kilkelly (2011)

Klaassen & Rodrigues (2017)
Liefaard & Doek (2015)

Limbeek & Bruning (2015)

Lundy, Kilkelly & Byrne (2013)

Nissen (2013)

Van Os & Rodrigues (2013)

Pobjoy (2013)

Reneman (2011)

Schuitemaker (2017)

Smyth (2015)

Spijkerboer (2013)
Stalford (2012)

Vonkeman (2012)

Werner & Goeman (2015)

Werner (2015)
Werner, J. (2015) ’De (uitgestelde) rechtssubjectiviteit van het vreemdelingenkind: Gedrag van ouders te vaak toegerekend aan het kind’, *Asiel & Migrantenrecht, 1*, pp. 17-23

Werner (2017)

Weterings (2013)

Zwaan & Terlouw (2018)
Case law

Committee on the Rights of the Child


Court of Justice of the European Communities & Court of Justice of the European Union

- CJEC 19 October 2004, C200/02, Zhu and Chen
- CJEC 27 June 2006, C-540/03, Parliament v. Council
- CJEU 4 March 2010, C-578/08, Chakroun
- CJEU 8 March 2011, C-34/09, Ruiz Zambrano
- CJEU 15 November 2011, C-256/11, Dereci and Others
- CJEU 8 November 2012, C-40/11, Iida
- CJEU 6 December 2012, C-356/11 and C-357/11, O. and Others
- CJEU 6 July 2013, C-648/11, M.A. and Others
- CJEU 10 October 2013, C-86-12, Alokpa and Moudoulou
- CJEU 10 May 2017, C-133-15, Chavez-Vilchez
- CJEU 12 April 2018, C-550/16, A. and S.
- CJEU 8 May 2018, C-82/16, K.A. and Others
- CJEU 7 November 2018, C-380/17, K. and B.
- CJEU 13 March 2019, C-635/17, E.
European Court of Human Rights

- ECtHR 28 May 1985, App. No. 9218/80, Abdulaziz, Cabales and Balkandali v. The United Kingdom
- ECtHR 2 August 2001, App. No. 54237/00, Boulif v. Switzerland
- ECtHR 21 December 2001, App. No. 31465/95, Sen v. The Netherlands (only in French)
- ECtHR 1 December 2005, App. No. 60665/00, Tuquabo-Tekle v. The Netherlands
- ECtHR 18 October 2006, App. No. 46410/99, Üner v. The Netherlands
- ECtHR 23 June 2008, App. No. 1638/03, Maslov v. Austria
- ECtHR 6 July 2010, App. No. 41615/07, Neulinger and Shuruk v. Switzerland
- ECtHR 14 June 2011, App. No. 38058/09, Osman v. Denmark
- ECtHR, 20 September 2011, App. No. 8000/08, A.A. v. The United Kingdom
- ECtHR 13 October 2011, App. No. 10611/09, Husseini v. Sweden
- ECtHR 14 February 2012, App. No. 26940/10, Antwi and Others v. Norway
- ECtHR 4 December 2012, App. No. 47017/09, Butt v. Norway
- ECtHR 16 April 2013, App. No. 12020/09, Udeh v. Switzerland
- ECtHR 30 July 2013, App. No. 948/12, Berisha v. Switzerland
- ECtHR 8 July 2014, App. No. 3910/13, M.P.E.V. and Others v. Switzerland
- ECtHR 3 October 2014, App. No. 12738/10, Jeunesse v. The Netherlands
- ECtHR 2 April 2015, App. No. 27945/10, Sarközi and Mahran v. Austria
- ECtHR 31 March 2016, App. No. 25960-13, I.A.A. and Others v. The United Kingdom (decision on admissibility)
- ECtHR 8 November 2016, App. No. 56971/10, El Ghatet v. Switzerland
- ECtHR 14 September 2017, App. No. 41215/14, Ndidi v. The United Kingdom
Dutch case law
Council of State - Raad van State

- Raad van State 5 April 2017, ECLI:NL:RVS:2017:964
- Raad van State 21 June 2017, ECLI:NL:RVS:2017:1609
- Raad van State 5 October 2018, ECLI:NL:RVS:2018:3309
- Raad van State 10 April 2019, ECLI:NL:RVS:2019:1153

District court of Den Haag – Rechtbank Den Haag

- Rechtbank Den Haag, seated in Middelburg, 10 January 2019, ECLI:NL:RBDHA:2019:742
Other documents


Charter of Fundamental Rights of the European Union (2000) OJ C 364/1

Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families & Committee on the Rights of the Child (2017) 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

Committee on the Rights of the Child (2009) Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Netherlands

Committee on the Rights of the Child (2013) General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (article 3, para. 1)

Committee on the Rights of the Child (2015) Concluding observations on the fourth periodic report of the Netherlands


Appendix I – case selection ECtHR

The HUDOC database was used to come to a proper case selection of ECtHR case law. I used three different search terms to find relevant cases. As is explained in the thesis, the concept of the best interests of the child is primarily discussed in ECtHR cases concerning article 8. I therefore narrowed the search by only searching for cases that concerned article 8. In all three search terms I used the term 'best interests of the child'. In addition to that word, I used three different terms that are often used in migrant cases, resulting in three different search term combinations in total:

1. 'best interests of the child' AND 'into its territory'
2. 'best interests of the child' AND 'control the entry'
3. 'best interests of the child' AND 'immigration control'

The three phrases that I used in combination with 'best interests of the child' can be justified by the fact that I am merely interested in migrant cases. Since the ECtHR sometimes uses different standard sentences to contextualize article 8 in migrant cases, I used three different phrases. These three search terms resulted in 18 cases of which I excluded 5 after a consultation (in the overview below, a line is stroked through these cases):

<table>
<thead>
<tr>
<th>Search term</th>
<th>Cases</th>
<th>Amount of cases (excluding double results and irrelevant cases)</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Best interests of the child&quot; AND &quot;Into its territory&quot;</td>
<td>Maslov, Üner, De Souza Ribeiro, Jeunesse, Nunez, Antwi, El Ghate, Darren Omoregie, M.P.E.V., Berisha, Sarközi and Mahran, Levakovic</td>
<td>10</td>
</tr>
<tr>
<td>&quot;Best interests of the child&quot; AND &quot;Control the entry&quot;</td>
<td>Maslov, Üner, De Souza Ribeiro, Jeunesse, Mubilanzila Mayeka, Nunez, Antwi, El Ghate, Darren Omoregie, M.P.E.V., Berisha, Husseini, Sarközi and Mahran, Levakovic</td>
<td>1</td>
</tr>
<tr>
<td>&quot;Best interests of the child&quot; AND &quot;Immigration control&quot;</td>
<td>Jeunesse, Nunez, Antwi, Harroudj, A.A., Ndidi, Balogun</td>
<td>2</td>
</tr>
</tbody>
</table>
Thereafter, I consulted relevant literature to identify which cases are often cited in academic sources about the best interests of the child and migration. After consulting these cases, I decided to include some of these cases in the case selection as well, coming to the following case selection of twenty-one cases:

<table>
<thead>
<tr>
<th>Selection based on HUDOC search</th>
<th>Selection based on literature and reference in case law</th>
</tr>
</thead>
</table>
Appendix II – case selection CJEU

The CURIA database was used to come to a proper case selection of CJEU case law. I used two search terms to find relevant cases. I chose to search based on the relevant provisions in EU law. The first search term therefore focused on Article 24 of the Charter. The second search term focused on article 5(5) of the FRD. For both search terms I narrowed the subject-matter to the following matters, to only find migrant related cases:

- "Immigration policy",
- "Border checks",
- "asylum policy",
- "Charter of Fundamental Rights",
- "European Convention on Human Rights",
- "Fundamental rights",
- "Right of entry and residence",
- "Citizenship of the Union"

With regard to article 24 of the Charter, I found 10 cases of which I excluded 2 cases after consultation. With regard to article 5(5) of the FRD, I found 3 cases:

<table>
<thead>
<tr>
<th>Provision used in search term</th>
<th>Cases</th>
<th>Amount of cases (excluding irrelevant cases)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Alokpa and Moudoulou, M.A., Iida, MeB,</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Ruiz Zambrano</td>
<td></td>
</tr>
</tbody>
</table>

Just like for the ECtHR case selection, I supplemented these cases with three cases that are mentioned in relevant literature. Moreover, I added one very recent case that was not published when I conducted the search on the CURIA database. This leads to a total of fourteen cases:

<table>
<thead>
<tr>
<th>Selection based on CURIA search</th>
<th>Selection based on literature</th>
<th>Relevant case published after CURIA search</th>
</tr>
</thead>
</table>

260 In the thesis, I refer to this case as O. and Others
Zambrano, K. and B., O. and S.\textsuperscript{261}, Parliament v. Council

\textsuperscript{261} Idem
Appendix III – case selection Dutch case law

In order to find relevant case law of the district court of Den Haag and the Council of State, I used the database of rechtspraak.nl. The best interests of the child is generally translated as ‘het belang van het kind’ in Dutch; both interests and child are formulated in singular. However, this precise term is not always used in case law, since plural forms are sometime used. I therefore chose to search for four different terms:

1. belang van het kind
2. belangen van het kind
3. belang van de kinderen
4. belangen van de kinderen

I searched from the date of the El Ghatet judgment of the ECtHR onwards (08-11-2016) in the migration law section, selecting both cases of the district courts\(^2\) and the Council of State. The search resulted in a high number of cases (including also double results):

<table>
<thead>
<tr>
<th>Search term</th>
<th>Amount of cases (before exclusion of irrelevant cases and double results)</th>
</tr>
</thead>
<tbody>
<tr>
<td>belang van het kind</td>
<td>29</td>
</tr>
<tr>
<td>belangen van het kind</td>
<td>50</td>
</tr>
<tr>
<td>belang van de kinderen</td>
<td>10</td>
</tr>
<tr>
<td>belangen van de kinderen</td>
<td>35</td>
</tr>
</tbody>
</table>

I briefly examined all cases, mostly on which provision and precise subject were at stake in the case, to exclude irrelevant cases. I made the decision to for example exclude asylum cases (with the exception of asylum family reunification cases\(^3\), cases on Dublin, detention cases and interim measures. Cases on the entry and residence of migrants (so including expulsion cases of both irregularly staying migrants and settled migrants) in which children are involved were included. This ultimately resulted in ten cases of the Council of State and forty cases of the district court of Den Haag.

\(^2\) The district court of Den Haag is officially the only district court that rules on migration cases. In practice, other district courts also rule in these case, however under the name of the district court of Den Haag.

\(^3\) Nareis