

Good morning, ladies and gentlemen,

First of all, I would like to thank the CBSS and their secretariat for inviting me here. I'm honored. Also, I would like to compliment them on their choice in selecting the key-note speaker, Mrs. de Boer, who stressed so adequately the importance of fighting the root causes of, and the contributing factors to the sale and sexual exploitation of children.

Having said that, I must admit that I'm feeling somewhat out of my league, here. I'm a legal generalist in a gathering of Child Protection specialists and I fear that I have got far more to learn than to contribute. Still, if you'll bear with me, I would like to tell you a few things about the way in which judges, in particular dutch judges, control the way that administrative authorities apply the child's best interest in their decision making.

To assess the possible impact of judicial control in child protection cases, I will first make some general observations on the legal framework.

Secondly, I will discuss a case that was in the dutch Supreme Court. It's a legal case, so there isn't much „case management“ to discuss, which is just as well as I am no manager. I can barely manage my case load.

Thirdly and finally, I'll try to draw some conclusions. This will, I hope, leave us some 15 minutes for discussion.

1. Judicial control over administrative decisions

- natural limitations (judicial distance, legal blinkers, systemic party (dis)advantages), „unnatural“ limitations (judicial competence division)
- absence of constitutional review, supremacy of international law
- legal framework for testing the regularity of the decision with regard to weighing the child's interest
 - general clauses in the Administrative Code („careful consideration of all interests concerned“, „obligation to motivate“)
 - general human rights treaties (in particular article 8 European Convention on Human Rights and fundamental freedoms)
 - specific human rights treaties (UN Convention on the Rights of the Child, in particular 3 CRC: primarily consider the child's best interest in ALL [?] matters)
 - European Union law (Regulations and, in so far as suitable for direct application, Directives, Treaties, 24 EU Human Rights Charter)

2. The care for alien minors who have to return

- case history

.arrival in the Netherlands 2001, one child *Angola 1999, two *NL 2002 and 2008

.repeated requests for asylum, all denied, appeals rejected by the administrative courts

.limited detention measures for mother and children

.obligation to leave, no cooperation, active frustration of expulsory measures

.explicitly warned that reception facilities and (financial) care would end

- applied rules

.statutory provisions concerning reception facilities and financial support

.3 and 8 ECHR

.3 and 27 UNCRC

- outcome of the legal battle

District Court: rejection of claim to continue reception facilities and care; parent is primarily responsible, legal duty to cooperate with return/expulsion, with regard to the interests of the children

Appellate Court: granted the claim and ordered the State to continue granting facilities until the children have reached majority, as long as they are in the Netherlands and as long as no equivalent facilities are provided for. Not illegal to end facilities for mother, but illegal to end facilities for children under care of a mother who has no means to support or house them. State's obligation to protect and warrant rights and interests of children if parents don't and take the necessary measures. Children are not accountable for lack of cooperation by parent, children are very young and completely dependent. The State has not established that the children will be adequately cared for in succession to the intended conclusion of reception facilities. Intervention by youth protection authorities would mean that the children would be taken away from the mother. For the children's right to family life and private life under article 8-2 ECHR is conclusive whether during the limited time until their expulsion or departure it is „necessary“ for the State to deprive them of daily care, housing, medical care and schooling or to separate them from the mother. Weighing the interests of the children against those of the State leads to the conclusion that this is disproportionate and therefore not justified.

Supreme Court: upheld the decision of the Appellate Court, considering the Reception Directive and the Return Directive, article 3 par. 1 CRC as included by art. 8 ECHR

- outcome for the ministerial policy

After the final verdict the minister adopted a new policy granting leave to stay, essentially, for children and members of their family whose requests had been rejected and who had been in the country for five consecutive years

3. Conclusions

- the child's best interest should NOT be a primary consideration in ALL matters where children are concerned
- where a child's interest is **primarily** at stake, it should be the final consideration rather than a primary consideration, if it is to balance the scales
- being wealthy, organised, connected, repeat-player and powerful (to give binding decisions) will give administrative authorities a structural advantage in legal proceedings
- in testing the regularity of an administrative decision, judges will rely on rules that are specific rather than general
- when testing a decision for regularity, judges will allow the administration more space for deciding as the legal framework is less specific
- given the non-specific character of the legal framework guaranteeing children's rights, judicial intervention will tend to limit itself to only the most extreme cases
- in most individual cases concerning children's rights, judicial review will most likely NOT be an effective means of intervention
- where judicial intervention HAS occurred, policy makers most likely will be strongly inclined to make changes