



The Legal Representation of Parents and Children During Placement Procedures in the Light of Article 8 ECHR

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ARTICLE

ABSTRACT

The justification of the out-of-home placement and therefore the separation of a parent and a child is assessed by the European Court of Human Rights (ECtHR) against both substantive (is the infringement provided for by law, does it serve to protect one of the interests as listed in paragraph 2 Article 8 ECHR and is it necessary in a democratic society), and procedural obligations (do have parents and children been given the opportunity to effectively participate in the decision-making process that led to the out-of-home placement) which derive from Article 8 ECHR. The distinction between substantive and procedural obligations is not always easy to make: they can overlap and influence each other. It is, however, important in each case to make sure which obligations are violated because this determines the nature of the failure of the state. This distinction will be made in this article in relation to the legal position of parents and children according to the ECtHR in procedures about the out-of-home placement of the child.

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For a long time, child protection in Europe depended on charity from religious and other civil society organizations.¹ Nowadays there is a wider understanding among European countries, created under the influence of the European Convention on Human Rights (ECHR) and the jurisprudence of its court (the European Court of Human Rights), that states are responsible for an effective child protection system in which the physical, mental and psychosocial needs of children are safeguarded.² An effective child protection system also means that states are responsible for the protection of children from violence, exploitation and abuse. If there are serious concerns about the welfare of the child, for example because of violence from parents towards a child, it may be necessary to place a child in someone else's care by the means of an out-of-home placement.

The removal of a child from its family is a complex decision with far-reaching consequences. There is broad consensus in international law in support of the idea that in all decisions, placement decisions included, children's best interests are of paramount importance.³ However, the question of which child protection system is most suitable to meet the interests of the child to be protected against harmful influences is answered fundamentally differently in Member States of the ECHR. At one end of the spectrum there are countries like Norway, where the threshold for state intervention is low and, after the placement of the child, efforts are quickly made to consolidate the child's place in foster care through adoption. At the other end of the spectrum there are countries where – at least according to official numbers – the placement of children into care rarely occurs.⁴

It seems that criticism of child protection regimes and practices has increased in many Western societies in recent decades.⁵ In the Netherlands and presumably in many other countries, the criticism focuses on the lack of legal protection for children and parents in removal procedures and because of that, an increased risk of children's rights violations.⁶ However there is also the risk of children's rights being violated when states do not take children quickly enough into care, in order to protect them against abusive or neglectful parenting.

The decision within Member States of the ECHR to remove a child from its family is normally subject to judicial review by national courts, which also means that, after having been appealed at the highest national court, the case can be referred to the European Court of Human Rights (ECtHR). Since the mid-1990s, there has been an increase of removal cases examined by the ECtHR under Article 8 ECHR: the right to respect for family life.⁷ The case law of the ECtHR has a substantial impact on the child protection practice of Member States, but the ECtHR's approach is also fragmented and can lead to a lack of clarity concerning States' responsibility. Because of abstract rulings of the ECtHR and differences between Member States it can be difficult to determine whether national practice of State Parties complies with the ECHR. In order to make the rulings of the ECtHR less abstract, this article uses the child protection system of the Netherlands as a case study to analyse what the position of the Court means for the national legislature in Member States.

The purpose of this article is therefore to investigate whether Dutch law meets the requirements set out by the ECtHR and how these requirements should be complied with. The ECtHR assesses the justification of an out-of-home placement and, therefore, the separation of a parent and a child, by both substantive obligations (is the infringement provided for by law, does it serve to protect one of the interests as listed in paragraph 2 of Article 8 ECHR and is it necessary in a

¹ M Bruning & J Doek, 'Characteristics of an Effective Child Protection System in the European and International Contexts' (2021) 4 *International Journal on Child Maltreatment: Research, Policy and Practice* 1, 3; C O'Mahony, 'Child Protection and the ECHR. Making sense of positive and procedural obligations' (2022) 27 *International Journal of Children's Rights* 660, 661–662; J Ferrer Riba, 'Principles and Prospects for a European System of Child Protection' (2010) 2 *InDret*, 2, 2.

² Bruning & Doek (n 1), 1.

³ See for example *Johansen v Norway*, App. no. 17383/90 [1996] ECtHR; *Elsholz v Germany*, App. no. 25735/94 [2000] ECtHR; *Neulinger and Shuruk v Switzerland*, App. no. 41615/07 [2010] ECtHR, para 135.

⁴ Report by O Borzova of the Council of Europe: 'Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member States' (2015), doc. nr. 13730, 9–10.

⁵ C van Nijnatten et al., 'Child Protection Victims and the Evil Institutions' (2014) 4 *Social Sciences*, 726, 726–741.

⁶ See, for example: *Kamerstukken II* 2022/23, 31839, nr. 913.

⁷ C Fenton-Glynn, *Children and the European Court of Human Rights* (OUP, 2021), 304.

democratic society), and procedural obligations (effective participation of parents and children in the decision-making process) which derive from Article 8 ECHR. The distinction between substantive and procedural obligations is not always easy to make: they can overlap and influence each other.⁸ It is, however, important in each case to make sure which obligations are violated because this determines the nature of the failure of the state.⁹

The analysis in this article is made on the basis of both a literature study as well as an analysis of case law of the ECtHR. However, it proved unfeasible to conduct an exhaustive analysis of all the case law of the ECtHR about placement procedures and legal representation in those procedures. The case law of the ECtHR on this subject is extensive.¹⁰ Therefore the choice was made to limit the analysis of the case law to the ‘landmark judgements’ as referred to in the literature.

This article starts with a brief description of the nature and scope of the legal requirements deriving from Article 8 ECHR with regard to the decision to place the child in care (substantive obligations, Section 2). Section 3 analyses the relevant provisions of the Dutch Civil Code with regard to the placement of the child in care. We conclude this section with some preliminary critical considerations about the child protection legislation in the Netherlands. In Section 4 we will answer the question concerning to what extent Article 8 ECHR entitles parents and children to the right to legal representation in placement procedures. Section 5 analyses the current legislative framework in the Netherlands concerning legal protection in the previously mentioned procedures. We will conclude with a reflection (Section 6).

The reason for choosing the Netherlands as a case study is that there have been many (legislative) developments but, at the same time many concerns, in recent years with regard to placement practices. On 1 January 2015 two laws came into effect with the shared aim of developing a more effective and efficient system of Child Protection and Youth Care. First, the Dutch Child Protection Act 2015, which aims to better protect children by prioritizing their best interests when deciding on child protection orders.¹¹ This law has created the possibility of intervening more quickly and with more far-reaching effects in the family life of the child and parents. Secondly, the Youth Act 2015 led to a transition and transformation of youth services, including the implementation of child protection measures, and the decentralization from national and provincial policies to local policy.¹² In recent years it has become clear that the revised Child Protection Act cannot be implemented as intended due to contextual factors that emanate from the Youth Act and associated problems regarding the decentralization of youth care support.¹³ These are problems such as financial shortages, tendering problems, long waiting lists and long processing times, shortages of child protection workers, a complex child protection system with different organizations and a high turnover of staff and shortages of youth care services. It is this combination of the possibility of more far-reaching interventions and a failing system of youth care and child protection that increasingly raises the question whether the Dutch state offers sufficient legal protection to parents and children in procedures regarding the placement in care or termination of parental responsibility. In this regard, the lack of free legal assistance for parents and children in Dutch child protection procedures has been identified as one of the main problems concerning the legal protection of parents and children.

2. THE JUSTIFICATION OF THE PLACEMENT IN CARE OF CHILDREN IN THE LIGHT OF ARTICLE 8 ECHR

2.1 INTRODUCTION

In recent years the ECtHR has issued a large number of guiding rulings on whether placing children in care and eventually limiting or depriving parents from access to their children, is compatible with the right to respect for private and family life under Article 8 ECHR and, if it

⁸ O'Mahony (n 1), 27; *M. and M. v Croatia*, App. no. 10161/13 [2015] ECtHR, para 136.

⁹ O'Mahony (n 1), 27.

¹⁰ For example, the combination of the terms ‘legal representation’ and ‘out-of-home-placement’ in HUDOC (the database of the case-law and documents of the European Court of Human Rights) has already led to 2,630 cases on 1 July 2024.

¹¹ The Dutch Child Protection Act 2015 (*Stb.* 2014,130).

¹² The Youth Act 2015 (*Stb.* 2014, 105).

¹³ M Bruning et al., ‘Evaluation of the Child Protection Act 2015: new thresholds for child protection orders in the context of a faltering system’ (2022) *WODC report series* 3169.

is so compatible, under what conditions it is to be done.¹⁴ An infringement of Article 8 can be justified if this is provided for by law, serves to protect one of the interests listed in paragraph 2 of Article 8 ECHR and when it is necessary in a democratic society. Usually the ECtHR only briefly considers the first two criteria. An infringement is provided by law if the law is formulated in such a way that the involved parties can foresee, to some extent, the consequences of a certain decision. In this way citizens are protected against any unjustified interference in their family life.¹⁵ The separation of a child from his or her parents by means of a placement in care is generally regarded as a legitimate aim to protect the ‘health and morals’ and/or ‘the rights and freedoms’ of the child.¹⁶ These aims are explicitly included in paragraph 2 of Article 8 ECHR.

The substantive assessment as to whether a placement in care can be justified in a specific case is primarily assessed by the ECtHR on whether the necessity of that placement has been sufficiently demonstrated. According to ECtHR case law, states have a large margin of appreciation when it comes to a decision of the placement in care of children.¹⁷ The main argument of the ECtHR is that there are major differences in perception between the contracting states under which conditions and in what way direct government intervention in family life should take place.¹⁸ In addition the ECtHR is of the opinion that, because of their direct involvement with the family, the national authorities are generally in a better position to assess whether a placement in care is necessary under national law. However, the margin of appreciation is not unlimited: the ECtHR assesses whether the measure taken, as seen in the light of the circumstances of the case, can be justified.¹⁹ In this regard two elements can be applied by the ECtHR: the reasons for the placement in care must be relevant and sufficient and/or the ECtHR conducts a general proportionality assessment.²⁰ It is important to notice that the ECtHR’s assessment of these two elements has not been very consistent so far.²¹ In child protection cases, the ECtHR usually considers if there were ‘relevant and sufficient reasons’, while in a number of other cases it tests the placement decision against the requirements of proportionality and subsidiarity.²² Both elements are therefore further elaborated on in the rest of this Section, without distinction, on the basis of the relevant case law of the ECtHR.

2.2 NECESSITY ASSESSMENT

According to the ECtHR, domestic authorities are offered a wide margin with respect to the decision to impose a child protection measure. In determining whether the reasons for the impugned measures were relevant and sufficient for the purpose of paragraph 2 of Article 8 ECHR, the ECtHR takes into account the fact that perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Member State to another, depending on such factors as traditions relating to the role of the family and to state intervention in family affairs.²³ However, the reasons relied on by the domestic authorities must be relevant and sufficient to justify an intervention like a placement of the child in care.²⁴ In general, reasons are relevant when they are directly linked to the legitimate aim of protecting children.²⁵ In answering the question whether the reasons were relevant, the ECtHR has accepted a wide range of reasons for intervention in family life. There have been very few occasions on

¹⁴ Fenton-Glynn (n 7), 304.

¹⁵ *Olsson v Sweden*, App. no. 10465/83 [1988] ECtHR; *Martinez v Spain*, App. no. 56030/07 [2014] ECtHR.

¹⁶ See for example: *K. and T. v Finland*, App. no. 25702/94 [2001] ECtHR, para 153; Fenton-Glynn (n 7), 312–313.

¹⁷ *K.T. v Finland no.* (n 16), para 154.

¹⁸ Fenton-Glynn (n 7), 313. See for example: *Olsson v Sweden*, App. no. 13441/87 [1992] ECtHR, para 90.

¹⁹ *Strand Lobben and Others v Norway*, App. no. 37283/13 [2019] ECtHR, para 210.

²⁰ *Wallova and Walla v Czech Republic*, App. no. 23848/04 [2006] ECtHR, para 68; *Kutzner v Germany*, App. no. 46544/99 [2002] ECtHR; *Haase v Germany*, App. no. 11057/02 [2004] ECtHR.

²¹ J Gerards, ‘How to improve the necessity test of the European Court of Human Rights’ (2013) 11 *International Journal of Constitutional Law*, 466, 467–468.

²² K van der Zon, ‘Foster Rights For Children: A Study on the Effective Protection of the Rights of Children Who are Placed in Foster Care on the Basis Of a Family Supervision Order’ (DPhil thesis, University of Leiden 2020), 72.

²³ *Strand Lobben and Others v Norway* (n 19), para 210.

²⁴ *R.O. v Norway*, App. no. 49452/18 [2021] ECtHR, para 29.

²⁵ *Paradiso and Campinello v Italy*, App. no. 25358/12 [2017] ECtHR, paras 196–199.

which the ECtHR has held that a reason given for the removal of a child from the family was not relevant.²⁶ In contrast with this, the ECtHR has exercised greater control in relation to the sufficiency of the reasons provided by the domestic authorities.²⁷ As for the sufficiency of the reasons, the ECtHR has dismissed the justification in the form of a more general conclusion that children are expected to grow up in better conditions in a different place:

“The fact that a child could be placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents; there must exist other circumstances pointing to the ‘necessity’ for such an interference with the parents’ right under Article 8 of the Convention to enjoy a family life with their child”.²⁸

The ECtHR has also been extra critical in cases in which there has been no visible mistreatment, abuse or other serious forms of neglect.²⁹ In these kinds of cases convincing evidence is necessary to justify the separation of the parent and the child.³⁰ From the case of *Moser v Austria* it follows that authorities have a far-reaching obligation to consider all relevant alternatives for the placement in care. In this case a mother illegally resided in Austria. The child was placed in care immediately after being born, since the lack of a residence permit was considered to endanger the well-being of the child.³¹ Subsequently the mother was deprived of parental authority and her son was placed in a foster family. The ECtHR stated that, unlike in most cases, this was not a question whether a parent lacked the necessary parental skills or had damaged the child in any other way. Therefore proper research into alternatives for the placement in care was important. Eventually the ECtHR did not agree with the mother in her complaint that no alternatives had been considered by the Austrian authorities to prevent the separation of her and her child. However, according to the ECtHR the authorities could and should have done more to keep the mother and her son together.³² This was considered to be extremely serious by the ECtHR due to the fact that, after the placement in care of the child immediately after being born, insufficient steps were taken by the authorities to maintain contact between the mother and her son. The ECtHR considered that, although the reasons relied on by the domestic courts were relevant, they were not sufficient to justify such a serious interference with the applicant’s family life. Notwithstanding the domestic authorities’ margin of appreciation, the interference was therefore not proportionate to the legitimate aims pursued.³³ Following from this and other cases, the ‘sufficiency’ of the measure rests on its proportionality, in other words, does the severity of the measure correspond to the reason given for the interference with the family? Or would lesser measures have sufficed?³⁴

Furthermore the ECtHR has, in different cases, concluded that financial problems, whether or not in combination with housing problems, may never in themselves be a reason for the placement in care of the child. In the cases of *Saviny v Ukraine* and *Soares de Melo v Portugal* the ECtHR considered that Article 8 ECHR had been violated because the placement in care of the children had primarily taken place because of the parent(s) problematic financial situation.³⁵ The national authorities should have provided support in order to overcome the family’s financial problems.³⁶ Another important conclusion of the ECtHR in this light is that, for the justification of the placement in care, there must be a connection between the identified concerns at parental level and the threat to the development of the child.³⁷

²⁶ See for example: *Soares de Melo v Portugal*, App. no. 72850/14 [2016] ECtHR.

²⁷ Fenton-Glynn (n 7), 314.

²⁸ *K.T. v Finland* (n 16), para 173.

²⁹ *Wallova and Walla v Czech Republic* (n 21).

³⁰ *Kutzner v Germany* (n 20), para 72.

³¹ *Moser v Austria*, App. no. 12643/02 [2006] ECtHR, para 10.

³² *ibid*, para 71.

³³ *ibid*, para 73.

³⁴ See also Fenton-Glynn (n 7), 316.

³⁵ *Saviny v Ukraine*, App. no. 39948/06 [2008] ECtHR, paras 56–58; *Soares de Melo v Portugal* (n 26).

³⁶ *Soares de Melo v Portugal* (n 26), para 106.

³⁷ *Kocherov and Sergeyeva v Russian Republic*, App. no. 16899/13 [2016] ECtHR.

It should also be mentioned that, since the case of *Strand Lobben v Norway*, the ECtHR seems to have extended the scope of review with regard to the relevant and sufficient reasons test.³⁸ In this case the ECtHR states that it inevitably must also be able to take into account, to a certain extent, the earlier proceedings and decisions which are not the subject of the complaint in order to be able to review the proceedings and decisions which formed the basis of the subject of the complaint, i.e. the contested decision for compulsory adoption.³⁹ This ensures that the ECtHR can verify whether the national authorities have fulfilled their positive duty to take measures to facilitate family reunification. In the more recent case of *M.L. v Norway*, the ECtHR was even more willing to assess the entire inter-connected process which ultimately led to the impugned decision.⁴⁰ In both of these cases the first decision(s) about the placement of the child proved to be decisive for the subsequent course of the case, and in both cases the ECtHR found a violation of Article 8 ECHR because the reasons provided by the national authorities were not sufficient to justify such a serious interference with the applicants' family life.

3. DUTCH LAW CONCERNING PLACEMENTS IN CARE

The most important aim of the Dutch Child Protection Act 2015 is to focus on the best interests of the child when deciding on a specific child protection order.⁴¹ When a child is being abused or neglected, legal steps can be taken to safeguard the interests of the child. The Council for Child Protection decides on which steps to take, based on information provided by the Bureau for Youth Care and the Advice and Contact Centre for Child Abuse. If the Council for Child Protection decides a child protection order is necessary to protect the child, Dutch child protection legislation offers the choice between placing a child under the supervision of a family guardian⁴² or the termination of parental responsibilities.⁴³ When the Council for Child Protection decides on an approach, a judge has to ratify the decision in court. If the court imposes a supervision order, a family supervisor from a certified agency will be assigned to the child. The supervisor will support the child, while the parents retain parental responsibility for the child. However, guidance by the supervisor is mandatory; the child and parents must accept the help and support.

According to Dutch child protection law, a supervision order can be combined with a placement of the child in care; it is meant to safeguard the interests of the child when the situation with the parents does not. Therefore the juvenile court can only grant a placement in care if a supervision order has been or will be imposed. According to Article 1:265b paragraph 1 of the Dutch Civil Code, an authorization for a placement in care can only be granted 'if this is necessary in the interest of the care and upbringing of the minor or to examine his mental or physical condition'. Although this necessity requirement implies a subsidiarity test, no further indications have been provided by the legislature on how the necessity of a placement in care must be demonstrated in a specific case. It is left almost entirely to the professional who is responsible for the child protection order to make an independent assessment in each individual case about the question as to whether a placement in care is necessary. There has been growing concern about this and the way in which decisions regarding the placement in care are taken in practice.⁴⁴ The lack of concrete legal requirements in national legislation entails the risk that decisions regarding the placement in care of children are made too quickly, too carelessly and without sufficient motivation. According to Van der Zon, at least three problems in Dutch national legislation can be identified. First of all there is no legal requirement to include the purpose of the placement in the application for the placement and the following judgement by the court. Secondly, it needs to be clarified in the laws and regulations that the

³⁸ *Strand Lobben and Others v Norway* (n 19).

³⁹ *ibid*, para 148.

⁴⁰ M Bruning, 'M.L. t. Noorwegen (EHRM, nr. 64639/16) – Recht op hereniging illusoir bij direct toewerken naar pleegouderadoptie zonder regelmatig contact' (2021) EHRC-updates, 15 maart 2021, <<https://www.ehrc-updates.nl/commentaar/211295#:~:text=M.L.,t.,naar%20pleegouderadoptie%20zonder%20regelmatig%20contact>>.

⁴¹ *Kamerstukken II* 2008/09, 32 015, nr. 3.

⁴² Art 1:255 Dutch Civil Code.

⁴³ Art 1:266 Dutch Civil Code.

⁴⁴ J Huijer, 'Learning from the past for the present. An empirical study concerning the justification of child protection in practice' (DPhil thesis, Utrecht University 2020), 164 and continuing pages.

reason for the placement must lie in the role which parents play in protecting the interests of their child. And thirdly, the legal basis for placement under national law should be adapted to broaden the subsidiarity requirement contained therein.⁴⁵

It is clear that, with regard to the duty of the authorities under Article 8 ECHR to deploy or consider all relevant alternatives to prevent the placement in care, Dutch law falls short. As stated earlier, a necessity test is required on the basis of national legislation (Article 1:265b of the Dutch Civil Code) but it is not stated how the necessity of the placement in care must be demonstrated in the decision-making process. Research has shown that in 40% of the applications for placement by the Dutch Council for Child Protection, no reasons were provided why less infringing alternatives, regarding the rights of parents and that of the child, than a placement in care would not be sufficient to safeguard the development of the child.⁴⁶ Moreover, other research showed that in some neighbouring countries like Belgium and Denmark a more explicit necessity assessment is included in their national legislative framework.⁴⁷ We believe a similar legal regime should also be included in the Dutch Civil Code to stimulate the authorities to systematically substantiate that everything has been done to prevent the separation of the child from its parents.

4. LEGAL REPRESENTATION OF PARENTS AND CHILDREN IN THE LIGHT OF ARTICLE 8 ECHR

As already mentioned in the introduction, the ECtHR has assessed, in recent years – the justification of the infringement of the right to family life of parents and children by an out-of-home placement not only on substantive grounds, but also on procedural ones.⁴⁸ With this ‘procedural approach’, Article 8 ECHR became a source of procedural rights in addition to the right to a fair trial contained in Article 6 ECHR.⁴⁹

Article 6 ECHR mainly contains defence rights in order to create a situation of ‘equality of arms’ in which both parties in a procedure have the same rights and possibilities.⁵⁰ Article 6 ECHR is of particular importance for suspects in criminal cases, but its effect is not limited to these matters. The ECtHR stated in the case of *Airey v Ireland* that states are compelled, on the basis of Article 6 ECHR, to provide legal assistance in civil law disputes, such as placement procedures, when this is necessary for an effective access to court.⁵¹

Although the rights contained in Article 6 and Article 8 ECHR overlap, the rights in Article 8 ECHR are more far-reaching – this is the reason why this article focuses on Article 8 ECHR – because of the principle of ‘sufficient involvement’ that derives from this Article.⁵² The principle of sufficient involvement means that parents should be sufficiently involved in the decision-making process that leads to, in this case, the out-of-home-placement of their child. According to the ECtHR the decision-making process should be fair and respect the interests, protected by Article 8 ECHR, of both parents and children. Parents and children should be sufficiently involved in the decision-making process in a way that their right to family life is protected. The involvement of

⁴⁵ Van der Zon (n 22), 345–351.

⁴⁶ Huijer (n 44), 264.

⁴⁷ M Bruning et al., ‘Uithuisplaatsingen in Nederland. Is het gras groener bij onze buurlanden?’ (2023) *Tijdschrift voor Familie en Jeugdrecht*, no. 9, 222, 224–226.

⁴⁸ M Bruning & K van der Zon, ‘Uithuisplaatsing van kinderen: Europese controverse en de rol van het EHRM’ (2022) *NTM/NJCM-bulletin* 3, 7–8. See: *Strand Lobben and Others v Norway* (n 19), paras 212, 213, 220; *Cincimino v Italy*, App. no. 6884/13 [2016] ECtHR, para 64; *W v The United Kingdom*, App. no. 9749/82 [1987] ECtHR, paras 62, 64.

⁴⁹ Bruning & Doek (n 1); M Sormunen, ‘Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights’ (2020) *20 Human Rights Law Review*, 745, 747–748.

⁵⁰ *P, C and S v The United Kingdom*, App. no. 56547/00 [2002] ECtHR.

⁵¹ *Airey v Ireland*, App. no. 6289/73 [1979] ECtHR and *P, C and S v The United Kingdom* (n 50), para 89. See also: A Daly, ‘The right of children to be heard in civil procedures and the emerging law of the European Court of Human Rights’ (2011) *15 International Journal of Human Rights*, 441, 444.

⁵² See: *W v The United Kingdom* (n 48); *B v The United Kingdom*, App. no. 9840/82 [1987] ECtHR; *R v The United Kingdom*, App. no. 10496/83 [1987] ECtHR. See also Ferrer Riba (n 1); U Kilkelly, ‘The CRC in Litigation Under the ECHR’, in T. Liefwaard & J. Doek (eds.) *Litigating the Rights of the Child* (Springer, 2015), 194; U Kilkelly, *The child and the European Convention on Human Rights* (Ashgate, 1999); Bruning & Van der Zon (n 48) 7.

parents and children influences because final, and possibly irreversible, decision that interferes with their family life.⁵³

During the last couple of years the involvement of parents and children has become more and more important in the case law of the ECtHR about the separation of parents and children due to an out-of-home placement.⁵⁴ According to the ECtHR, sufficient involvement of parents and children in placement procedures means that parents must be able to fully present their case, which in practice means that they should have access to legal representation.⁵⁵ If and how the procedural guarantees that derive from Article 8 ECHR and, more specifically, the principle of ‘sufficient involvement’, require the assistance of a lawyer in placement procedures, for both parents and children, will be further explored in the following subsections. The right to legal representation for parents will first be explored, because the rights of children are, as we will see, dependent on the rights of their parents.

4.1 THE RIGHT TO LEGAL REPRESENTATION FOR PARENTS

The right to legal representation has only become increasingly important in the case law of the ECtHR in the last decade. In 2003 the ECtHR still ruled, in *KA v Finland*, that there had been no violation of Article 8 ECHR despite the fact that the parents were not legally represented in the placement procedure, although the parents were, in the light of the circumstances, sufficiently involved in the placement procedure, according to the ECtHR.⁵⁶ Almost a decade later, the ECtHR found in *B v Romania* that Article 8 ECHR had been violated, because of the lack of legal aid for the mother in the placement procedure. The mother suffered from a severe mental disorder which made her unable to participate in the decision-making process. Despite this situation, the state did not assign the mother a lawyer.⁵⁷

Subsequently, the ECtHR ruled in *Soares de Melo v Portugal* that the consequences of the decisions can lead to the conclusion that a parent is entitled to the assistance of a lawyer. In this case the decision to place the children in public care with a view to adoption had such far-reaching consequences for both mother and children that the mother should have been legally represented, according to the ECtHR.⁵⁸ The ECtHR summarized in *Soares de Melo* that a parent has a right to legal representation in the situation where (1) the case is complex, (2) the decision possibly has severe consequences, (3) parents do not understand what is at stake and/or (4) parents are not able to participate effectively. Situations (2) to (4) derive from *B v Romania* and *Soares de Melo* and can be expanded further on the basis of these cases. For example, having a mental disorder, like the mother in *B v Romania*, is a situation in which a parent does not understand what is at stake. However, the ECtHR has, as yet, not specified which circumstances would cause a placement procedure to be labelled as complex, which was situation (1) mentioned in *Soares de Melo*, in which parents have a right to legal representation.

Some indications can thus be drawn from the case law of the ECtHR to decide in which situation a parent has a right to legal representation, but there is still a lot of uncertainty on this topic, mainly about the question when a case can be regarded as complex. This uncertainty is mainly due to the wide margin of appreciation that the ECtHR grants Member States regarding the right of legal representation for parents.⁵⁹ The recent rulings of *Stankūnaitė v Lithuania* and *AL and Others v Norway* have not cleared up this ambiguity. At best these judgements indicate that parents have a right to legal representation in placement procedures, because the parents in both cases were considered to be sufficiently involved in the decision-making process due to the assistance of a lawyer.⁶⁰

⁵³ See: *W v The United Kingdom* (n 48), para 62; *B v The United Kingdom* (n 53), para 63; *R v The United Kingdom* (n 53), para 67. See also Kilkelly (n 52) 194, 194; Sormunen (n 49), 748–751; K Hepping, ‘Het betrekken van ouders in de jeugdbeschermings- en de jeugdstrafprocedure’ (2022) *Tijdschrift voor Familie- en Jeugdrecht*, 4, 7.

⁵⁴ See for example *Sommerfeld v Germany*, App. no. 31871/96 [2003] ECtHR, paras 66–75; *Sahin v Germany*, App. no. 30943/96 [2003] ECtHR, paras 68–78; *B v Romania*, App. no. 1285/03 [2012] ECtHR, para 112.

⁵⁵ See for example *YC v The United Kingdom*, App. no. 4547/10 [2012] ECtHR. See also Bruning & Van der Zon (n 48) 223.

⁵⁶ *KA v Finland*, App. no. 27751/95 [2003] ECtHR, paras 115, 121.

⁵⁷ *B v Romania* (n 54), paras 108–120.

⁵⁸ *Soares de Melo v Portugal* (n 26), para 81.

⁵⁹ *W v The United Kingdom* (n 48), paras 62–65. See also Bruning & Doek (n 1).

⁶⁰ *Stankūnaitė v Lithuania*, App. no. 67068/11 [2020] ECtHR; *AL and Others v Norway*, App. no. 45889/18 [2022] ECtHR, para 45.

To conclude: the case law of the ECtHR gives some insight into the requirements that have to be met in three of the four situations in which a parent possibly has a right to legal representation in a placement procedure. However, it is, as yet, unclear which circumstances would cause a case to be labelled as complex and therefore require the assistance of a lawyer for parents. It seems from the, more recent, case law of the ECtHR that the fact that parents are legally represented leads to the conclusion that they are sufficiently involved, but this is not a firm conclusion. It would therefore contribute to legal certainty if the ECtHR would clarify the circumstances which would label a case as complex. Should maybe every placement procedure be considered complex, as some authors claim?⁶¹ We are of the opinion that it is impossible for the ECtHR to rule that all placement procedures are complex, mainly because of the role which the ECtHR plays in Europe. Member States need a margin of appreciation when it comes to granting parents a right to legal representation, otherwise the ECtHR will become too involved in the national policy of states. Nevertheless, the ECtHR could give some insights or guidelines on circumstances that would label a case as complex, as it has done for the other three situations as summed up in *Soares de Melo*. At the same time the fact that the ECtHR has given these guidelines can raise doubts about the status of the margin of appreciation: the ECtHR is becoming increasingly more precise on the requirements of the separation of parents and children due to an out-of-home placement, not only with regard to the procedural requirements but also, as we have seen before, the substantive requirements. We will elaborate on this topic further in Section 6, the reflection, after the overview of our case study of the Netherlands in Section 5. Before this case study we will now discuss the right to legal representation of children according to the ECtHR.

4.2 THE RIGHT TO LEGAL REPRESENTATION FOR CHILDREN

The ECHR does not contain a provision that directly relates to the rights of the child. Children's rights have, during the last decade, become increasingly important in the case law of the ECtHR.⁶² The ECtHR focuses more on the position and interests of the child, which focus originates in the need to protect the child, even if it means that the rights of parents are jeopardized.⁶³ After all, it is possible that the interests of parents and children clash. For example, the interests of parents and children can clash in a placement procedure if a parent wants the child to come home, but it is in the child's interests not to do so. In such cases, separate and independent legal representation of the child might be advisable.⁶⁴

The ECtHR has commented a little about the (desirability of) independent legal representation for children, mainly in placement procedures. There are only three cases worth mentioning. The ECtHR stated in *Havelka and Others v Czech Republic* that it is not desirable that a child's representative wears 'two hats': on the one hand being the children's guardian ad litem on the one hand and on the other the person asking for care measures.⁶⁵ In *M and M v Croatia* the ECtHR ruled that the considerations concerning the involvement of parents in the decision-making process apply *mutatis mutandis* to children in any judicial procedures affecting their rights under Article 8 ECHR, such as placement procedures.⁶⁶ This decision was confirmed in *N TS and Others v Georgia*. In this case the children were represented in the national procedure by the Social Services, but it remained unclear what this representation implied. The ECtHR ruled that the representation by the Social Services by drafting several reports on the children and the attending of court hearings could not be classified as adequate and meaningful. The ECtHR therefore concluded that the children were not sufficiently involved in the decision-making process.⁶⁷

⁶¹ C Forder, 'Kroniek van het personen- en familierecht' (2016) 1816 *NJB*, 2572.

⁶² Ferrer Riba (n 1) 2; R Bruning et al., *Kind in proces: van communicatie naar effectieve participatie* (Wolf Legal Publishers, 2020), 101; Daly (n 51), 441.

⁶³ See for example: *Lazoriva v Ukraine*, App. no. 6878/14 [2018] ECtHR. See also Bruning & Van der Zon (n 48).

⁶⁴ *Strand Lobben and Others v Norway* (n 19), para 206; *Abdi Ibrahim v Norway*, App. no. 15379/16 [2021] ECtHR, para 151. See also Van der Zon (n 22), 109; Sormunen (n 50).

⁶⁵ *Havelka and Others v Czech Republic*, App. no. 23499/06 [2007] ECtHR, para 62. See also C Mol, *The Child's Right to Participate in Family Law Proceedings according to International and European Human Rights Law. Represented, Heard or Silenced?* (Intersentia, 2022), 173.

⁶⁶ *M and M v Croatia* (n 8), para 181.

⁶⁷ *N TS and Others v Georgia*, App. no. 71776/12 [2016] ECtHR, para 75. See also: Bruning (n 62), 104.

Based on these three cases it cannot be concluded that children should have a separate or independent right to legal representation in placement procedures, because this right has not yet been developed by the ECtHR. Although the judgement in *M and M v Croatia* grants children the possibility to claim the same rights as their parents, it is still not entirely clear – as we have shown before – in which situations parents can claim a right to legal representation and therefore when children can.⁶⁸ However, two conclusions can be drawn from the discussed cases about the form of representation for children. First, it is desirable that a child's representative has only one function.⁶⁹ Secondly, writing reports and attending hearings by child protection agencies cannot be considered as meaningful representation for children in placement procedures.⁷⁰

In this light the question also arises as to why there are so few cases about the legal representation of children. One possible explanation could be that the first case in which a child asks the ECtHR whether Article 8 ECHR provides for a right to legal representation for children has yet to take place.⁷¹ It seems that children do not bring a case before the ECtHR on their own behalf, even though they can. In this context, Mol observed that not one of the cases she analysed, about the right of the child to participate, was brought before the ECtHR by the child itself.⁷² Another possible explanation could be that the ECtHR considers the legal representation of children a national matter, in the sense that it assumes that children are sufficiently involved in the placement procedure at the national level. A report of the European Union Agency for Fundamental Rights from 2015 about children's participation shows that seven of the ten involved jurisdictions⁷³ grant children the statutory right to (legal) representation in their own name when there are potential conflicts of interests. In the other three countries (Finland, Spain and Poland) a legal guardian can in that case be appointed, instead of a lawyer.⁷⁴

To conclude: there are some indications in the case law of the ECtHR that parents, and therefore children, should be assisted by a lawyer in placement procedures but this cannot be stated for sure, mainly because of the margin of appreciation that is accepted in that regard by the ECtHR.⁷⁵ We will further illustrate this uncertainty by discussing the situation in the Netherlands.

5. DUTCH LAW AND PRACTICE CONCERNING THE RIGHT TO LEGAL REPRESENTATION

As mentioned before, in this article we use the situation in the Netherlands as a case study. As a Member State of the ECHR, the Netherlands must commit to the case law of the ECtHR. The same goes for all other Member States of the ECHR. We will elaborate on the possible consequences of our findings in this Section for other Member States in the reflection (Section 6).

5.1 THE RIGHT TO LEGAL REPRESENTATION FOR PARENTS

Unlike other family law procedures in the Netherlands, legal representation of parents is the basis of the current Dutch law not mandatory in placement procedures: a parent can choose to be represented by a lawyer.⁷⁶ Parents only need a lawyer if they want to file a formal defence against the out-of-home placement.⁷⁷ This regulation has been criticized as potentially leading

⁶⁸ *W v The United Kingdom* (n 48). See also *Kilkelly* (n 52), 195; *Daly* (n 51).

⁶⁹ *Havelka and others v Czech Republic* (n 65), para 62.

⁷⁰ *N TS and Others v Georgia* (n 67), para 75.

⁷¹ *Kilkelly* (n 52), 199.

⁷² Mol (n 65), 143, 344, 345.

⁷³ The ten involved jurisdictions are: Bulgaria, Germany, Denmark, Estonia, Spain, Finland, France, Croatia, Poland, Romania and the United Kingdom (England & Wales and Scotland).

⁷⁴ European Union Agency for Fundamental Rights, *Child-friendly justice. Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States*. (Publications office of the European Union 2015), 41–42.

⁷⁵ K Hepping, 'Recht doen aan ouders. Een onderzoek naar de rechtspositie van ouders in de jeugdbeschermingsprocedure en de jeugdstraprocedure' (DPhil thesis, Utrecht University 2021), 240.

⁷⁶ M Bruning, 'Equality of arms bij jeugdbescherming' (2007) *Tijdschrift voor Familie- en Jeugdrecht*, 1, 1; Art 279 para 3 Dutch Code of Civil Procedure; Hepping (n 53), 8. See also *Rechtbank Noord-Nederland* 7 oktober 2022, ECLI:NL:RBNNE:2022:3660.

⁷⁷ Art 278 para 3 Dutch Code of Civil Procedure; Hepping (n 53).

to inequality if one parent is assisted by a lawyer while the other is not. It is also questionable whether this practice is in line with the case law of the ECtHR, because the ECtHR, at least under some circumstances, grants a right to legal representation to parents in placement procedures.

In view of these criticisms, the Minister decided to start in January 2023 with a trial period of 18 months in which, first, parents in procedures concerning the termination of their parental responsibilities got free legal aid, followed in October 2023 by parents in placement procedures getting free legal aid.⁷⁸ During the trial period all parents in both procedures have a right to be assisted by a lawyer, free of charge, regardless of the circumstances of the case.⁷⁹ The introduction of free legal aid for all parents is a huge change.

One note of caution must be made: the arrangement is temporary and still has no legal basis in Dutch law. The temporary character of the arrangement entails some uncertainties especially since the Dutch Government resigned in mid-2023. It is as of yet unclear what this means for the temporary arrangement and the future of the regulation is therefore uncertain. In our opinion, a new Government should aim for a change in the law to ensure free legal aid for all parents in placement procedures. Whether the same goes for free legal aid for children will be discussed in the next paragraph.

5.2 THE RIGHT TO LEGAL REPRESENTATION FOR CHILDREN

Children are legally incompetent under Dutch law and are therefore represented by their parents in all judicial procedures concerning them.⁸⁰ The same goes for placement procedures, although the child can ask the judge to terminate or shorten their placement in care and if a child is older than 12 years he or she gets the chance to be heard by the judge.⁸¹

Parents generally represent children in placement procedures. However, not all parents are suited to do so.⁸² A conflict of interests may arise if, for example, the parents want the child to come home but it is in the child's best interests not to.⁸³ In that case it is the responsibility of the Dutch Government, via child protection agencies, to represent and protect the interests of the child during the placement procedure. This policy is problematic for two reasons. First, the representation via a child protection agency in the form of writing reports and attending hearings does not enable children to be sufficiently involved in the decision-making process, according to the ECtHR.⁸⁴ Secondly, it is possible that the child does not agree with the opinion of the Government. In that situation the child is still legally incompetent and cannot enforce any actions on its own. The Dutch restrictions on the child's legal capacity are particularly problematic, according to the UN High Commissioner for Human Rights, in the described situations when the interests of the child clash with those of others, such as the parents or the Government.⁸⁵

The problems that arise with regard to the legal incompetence of a Dutch child are even more problematic, because a child has no specific right to legal representation under Dutch law. Legal representation for a child in placement procedures is not mandatory. A child can be supported or represented in a placement procedure via a guardian ad litem or lawyer.⁸⁶ Appointing a lawyer or guardian ad litem for a child has both pros and cons when it comes to legal requirements or possibilities. A guardian ad litem is appointed if the court deems that there is a conflict of interests between the parents and the child.⁸⁷ Authors disagree as to whether it is possible to appoint a guardian ad litem in placement procedures, because the procedure is regarded

⁷⁸ Staatscourant 2023 nr. 26497 (28 September 2023).

⁷⁹ *Kamerstukken II* 2022–23, 31839, nr. 913.

⁸⁰ Art 1:245, para 4 Dutch Civil Code.

⁸¹ Art 1:265d Dutch Civil Code and Art 809 Dutch Code of Civil Procedure.

⁸² Van der Zon (n 22), 194.

⁸³ M Bruning, 'Versterking van de procedurele positie van minderjarigen in het jeugdbeschermingsrecht – een brug te ver?' in van Boom et al. (eds.), *Een kwart eeuw. Privaatrechtelijke opstellen, aangeboden aan prof. mr. H.J. Snijders ter gelegenheid van zijn emeritaat* (Wolters Kluwer, 2016).

⁸⁴ *N TS and Others v Georgia* (n 67), para 75.

⁸⁵ UN Doc. A/HRC/25/25 (2013).

⁸⁶ Bruning & Van der Zon (n 48), 500; T Liefwaard, 'Access to Justice for Children: Towards a Specific Research and Implementation Agenda' [2019] 27 *International Journal of Children's Rights*, 195.

⁸⁷ Art 1:250 Dutch Civil Code.

as a conflict between parents and the Government.⁸⁸ This discussion may also be the reason for the marginal role played by the guardian ad litem in placement procedures.⁸⁹ A child is, on the other hand, only assigned a lawyer if he or she is placed in secure youth care, where it is mandatory. A lawyer can also be assigned in placement procedures but there is no legal obligation to do so, which means that there are no legal requirements for the appointment of a lawyer.⁹⁰ Therefore the threshold for appointing a lawyer may be lower than for appointing a guardian ad litem. A guardian ad litem and a lawyer also have different functions: the guardian ad litem determines the interests of the child while a lawyer works on the instruction of the child and voices his or her opinion.⁹¹ Besides, a guardian ad litem can claim procedural rights on behalf of the child, where a lawyer cannot.

As we have previously said, we consider the new Dutch policy concerning the assignment of a lawyer to all parents in placement procedures to be in line with the case law of the ECtHR, but we also believe that the temporary character of the policy entails risks. We have expressed our doubts and concerns about the temporary character of the regulation with regard to fulfilling the requirements of the case law of the ECtHR on this topic, especially since the former Dutch Minister of Legal Protection stated that there is no budget available to convert the temporary arrangement into permanent policy.⁹²

When it comes to the legal representation of children in the Netherlands, we believe that the current policy of representation via child protection agencies is not in line with the case law of the ECtHR. The representation of children via a guardian ad litem or lawyer is not common policy in the Netherlands. At the same time it is questionable whether the ECtHR grants children an independent right to legal representation.⁹³ We will reflect more extensively on our findings in Section 6.

6. REFLECTION

In this article, we have explored the case law of the ECtHR concerning the legal protection of parents and children in placement procedures. We started our analysis on the questions as to what substantive requirements the ECtHR imposes for an out-of-home placement and whether a right to legal representation for both parents and children can be derived from the case law of the ECtHR. We have also evaluated the Dutch system in the light of the case law of the ECtHR. We will now reflect on the findings of this article.

It is clear that the ECtHR leaves Member States a wide margin of appreciation for both the setting of the substantive requirements for out-of-home placements and assigning a lawyer to parents and children in placement procedures. Because of this margin of appreciation it is difficult, as we have shown in the case study of the Netherlands, to give clear answers to the question whether the policy of Member States on the substantive requirements of an out-of-home placement and on the right to legal representation comply with the case law of the ECtHR.

With regard to the substantive requirements it seems that the ECtHR has recently become less reluctant to analyse all decisions by national courts in the placement procedure. This inevitably means that the ECtHR will also rule more explicitly on the initial removal decision. When it comes to the right of legal representation, it is likely that Member States comply with the case law of the ECtHR if they assign a lawyer to all parents in placement procedures, as in the current but temporary policy in the Netherlands. It is, however, questionable if the ECtHR has such a policy in mind when it comes to legal representation for parents in placement procedures. If the ECtHR would have deemed it necessary for all parents to have a lawyer, it could or should have ruled

⁸⁸ Van der Zon (n 22), 246.

⁸⁹ M Steketee et al., *Minderjarigen als procespartij? Een onderzoek naar de bijzondere curator en een formele rechtsingang voor minderjarigen* (Verwey-Jonker Instituut, 2003); Kinderombudsman, *De bijzondere curator, een lot uit de loterij? Adviesrapport over waarborging van de stem en de belangen van kinderen in de praktijk* (Kinderombudsman, 2012); M Limbeek, 'De bijzondere curator: een volwaardig sluitstuk van rechtsbescherming?' in de Graaf et al. (eds.), *Rechten van het Kind en Waardigheid* (Ars Aequi Libri, 2013), 211–216.

⁹⁰ Art 6.1.10 para 4 Youth Act 2015.

⁹¹ A Enklaar & M van Zutphen, 'De autonomie van het kind in de rechtszaal' in de Graaf et. al. (eds.), *Rechten van het kind en de autonomie* (Ars Aequi Libri, 2010), 183–185.

⁹² Letter from the former Dutch Minister of Legal Protection F. Weerwind from 24 April 2024.

⁹³ Sormunen (n 49), 757.

so. Instead the ECtHR gives some indications when a parent needs legal representation, which does not give a lot of guidance for Member States. With regard to children, there is even less clarity. The ECtHR leaves the issue open for children and does not literally grant children a right to legal representation. It is therefore harder to draw conclusions about the Netherlands when it comes to the right to legal representation of the child. However, the current Dutch policy of the representation of children via child protection agencies should perhaps be reviewed more closely, because the ECtHR dismisses this form of representation in its case law.

Despite these conclusions, the ECtHR is in general reluctant to accept a violation of Article 8 ECHR in placement procedures, because of the already mentioned margin of appreciation. Due to this margin, it is up to Member States to decide which legal substantive requirements must be met to justify an out-of-home placement and in which situations and under which conditions a parent is assigned a lawyer in such a procedure. At the same time, it could be argued that a development can be seen in the case law of the ECtHR on both aspects. The ECtHR seems to limit the margin of appreciation of Member States more and more by issuing judgements on what is and what is not allowed regarding the substantive requirements of out-of-home placements and the legal representation of both parents and children. Norway for example has been condemned by the ECtHR multiple times because of its tendency to place children out of home too quickly. In addition, the ECtHR has formulated some circumstances, personally and connected to the case, which give parents the right to legal representation in placement procedures. These circumstances are increasingly being set out in detail by the ECtHR. However, this does not mean that the ECtHR is letting go of the margin of appreciation completely: it still plays a vital role in the case law of the ECtHR. The margin of appreciation also seems necessary, given the position of the ECtHR in Europe. Member States are in charge of their own legal systems and are better equipped to make fact-based assessments and give an opinion on the exact content of the requirements, because they are closer to the case.⁹⁴ The ECtHR has to issue rulings on a higher level, which should in theory be applicable for all of the Member States of the ECHR. The ECtHR cannot be too outspoken and has to be nuanced. So to conclude: although the margin of appreciation is still accepted, it can be argued that the ECtHR does not seem to be immune to politics, considering the developments described in this article in which the ECtHR is increasingly being more specific concerning the legal protection of parents and children in placement procedures.⁹⁵

COMPETING INTERESTS

The authors have no competing interests to declare.

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⁹⁴ *Handyside v. The United Kingdom*, App. no. 5493/72 [1976] ECtHR, para 48.

⁹⁵ See for example *Strand Lobben and others v. Norway* (n 19) in which the Chamber did not assume a violation of Art 8 ECHR and the Grand Chamber did.

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