



OPEN Summary of EMN Ad-Hoc Query No. 2019.63

Interpretation of Article 3 from the Convention on the Rights of the Child in migration policy

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KEY POINTS TO NOTE

- ★ In almost all of the 20 countries that provided information, article 3 of the Convention on the Rights of the Child (CRC) or its content has been implemented into national (migration) legislation, or national (migration) law has been modified in the light of the best interest of the child. Only **the Netherlands** stated that article 3 has not been implemented in national legislation or policy.
- ★ A few countries (**Finland, Norway, Sweden** and the **United Kingdom**) provide internal guidelines and quality standards regarding the application of article 3.
- ★ In most countries there is no national policy regarding TCN parents which apply for residence with a legally residing child.
- ★ Regarding the best interest of the child almost every Member State carries out individual case-by-case-assessments balancing the interest of the child and the interest of the state.
- ★ In almost every Member State the interest of the child does not automatically prevail over the interest of the state.

BACKGROUND AND CONTEXT

In the Netherlands the question was raised to what extent Article 3 of the Convention on the Rights of the Child (CRC) is or should be leading in decisions regarding the right of residence for minor children. Article 3 states the following "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."

The Dutch interpretation of the first paragraph of article 3 of the CRC is that this article has direct effect in the sense that all decisions about residence permits in which children are involved must take the interests of the child concerned into account as a primary consideration. With regard to the weight given to the best interests of a child in a specific case, according to Dutch case law, Article 3 of the CRC does not contain a standard that can be directly applied by the court without further elaboration in national migration laws and regulations. The court must, however, assess whether the Immigration- and Naturalisation Service (IND) has sufficiently taken into account the interests of the child. This means that the judge only assesses whether the IND has taken the child's interest into account in the reasons for the decision.

Therefore, the Netherlands is interested in how other Member States deal with the best interests of the child within the meaning of Article 3 CRC during applications where children are involved. The Netherlands wants to know what weight other countries apply to the best interests of the child in proceedings under immigration law in comparison to, for example, the economic interests of the State or public order. Information about the way in which other Member States deal with this can be helpful to provide guidance to Article 3 CRC.

MAIN FINDINGS

Question 1. Besides ratification of the CRC, has Article 3 CRC (or the content of Article 3) been implemented in the national (migration) legislation of your (Member) State? Yes/No. If yes, how did your Member State implement Article 3 (or the content of Article 3) of the CRC?

Question 2. Has Article 3 CRC (or the content of Article 3) been implemented in your Member State's (migration) policy/practice? Yes/No. If yes, how did your Member State implement Article 3 (or the content of Article 3) of the CRC?

20 countries (**BE, BG, HR, CY, EE, ES, FI, FR, DE, HU, IT, LT, LU, LV, NL, PL, SE, SK, UK and NO**) provided comparable data that is analysed in the following summary.

In most countries article 3 or its content has been implemented into national (migration) legislation or national (migration) law has been modified in the light of the best interest of the child. Only **the Netherlands** did not implement article 3 or its content into national legislation. However, according to its national constitutional legislation it is bound by the treaty provisions nevertheless.

The content of article 3 can be found in several national acts such as the constitution and various immigration acts. **Bulgaria, Hungary, Latvia and Spain** introduced specific child protection acts in which the principles of article 3 have been laid down. **Italy** introduced a new legal framework focused on the best interest of the child, in particular with regard to unaccompanied minors. In **Belgium** the central principles of the convention have been inserted in the constitution to emphasise the position of the child in society

In **France** the Council of State considered that article 3 of this Convention is directly applicable, not only in regard to decisions that have the purpose of governing the personal situation of minors, but also those that affect their situation in a sufficiently direct or certain way.

Finland, Norway, Sweden and the United Kingdom provide various internal guidelines and quality standards in regard to handling and decision making in cases in which children are concerned. **Sweden** stated that they have also conducted internal evaluations of the guidelines and that new guidelines have been issued as a result of the evaluations. Furthermore, in **Sweden** training programmes are provided to support case officers. The **Finnish** Immigration Service has an internal guideline document

covering all aspects of the migration processes with the best interest of the child as the guiding factor.

3. Does your (Member) State provide national policy for TCN parents which apply for residence with a legally residing child (instead of and/or supplementing international agreements and established jurisprudence of the ECJ or ECHR)? Yes/No. Please explain.

4. If your answer for question 3 is affirmative: has Article 3 of the CRC had any impact (i.e. has it led to any changes) on the development of this national policy? Yes/No. If yes, please briefly describe the changes brought about by the influence of Art. 3 of the CRC.

Most Member States do not have national policy regarding TCN parents who apply for residence with a legally residing child. However in some Member States (**Belgium, Cyprus and Latvia**) TCN's can apply for a residence permit for humanitarian reasons. It is up to the relevant authorities to approve the application.

However, **Croatia, Italy, Lithuania, Sweden and Norway** do provide national policy regarding TCN parents which apply for residence with a legally residing child. However, in **Lithuania and Norway** a resident permit will only be issued when the child of the migrant resides in, and is a citizen of, respectively Lithuania and Norway.

In **Sweden** specific provisions regarding children were included in the Swedish Aliens Act due to the implementation of the CRC. For example it was stipulated in the law that in principle all children in immigration cases should be heard. Moreover, each child's right to a residence permit must be assessed individually.

In **Norway** an individual assessment takes place where the best interests of the child should be a fundamental consideration. Weight should be given to the child's need to be reunited based on his/her age. A younger child will have a greater need for family reunification, than a child close to the age of maturity. Furthermore, the preparatory work emphasizes that applications for family reunification should be dealt with in a positive, humane and expeditious manner.

5. *How is the best interest of the child (in accordance with Article 3 of the CRC) weighed against other interests from the State (for example, the economic interests of the State or public order) during an application procedure of a TCN involving one or more children that wants to reside in your Member State (for example, the interest of the child is considered to weigh heavier than the interests of the State)?*

6. *Does the best interests of the child (according to Article 3 of the CRC) have a prevailing impact in your (Member) State if the best interests of the child are weighed against those of the State (for example, the economic interests of the State or public order) during procedures involving one or more children? Yes/No. Please elaborate.*

Almost every Member State carries out individual case-by-case-assessments balancing the interest of the child and the interest of the state. Although most of the Member States consider the interest of the child to be very important, all circumstances of the case will be taken into account including national security, public order or migration control. For example, in **Italy** the best interest of the child is a guiding principle in the Italian regulation about minors. However, the prevalence is not automatic, in fact also in cases in which a minor should be expelled, the Juvenile Court shall evaluate the concrete case: so, the court can adopt an expulsion order only if there is not a danger of serious damages for the minor.

In almost every Member State the interest of the child does not automatically prevail over the interest of the state, however there are some exceptions. In **Luxembourg** the interests of the child will prevail in most cases except when there is a threat to national security or public order. **Estonia** stated that the interest of the child is not weighed against other interests from the State. Thus the best interest of the child generally prevails over other interest. Thereby, as a principle, a child in Estonia is never considered to be a danger to national security.

In **Bulgaria** however, in cases where children are accompanied by their parents, the national migration legislation does not obligate the migration authorities to make an assessment of the best interests of the child when a right of residence is granted.

EMN NCPs participating: Responses from Austria, Belgium, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Germany, Hungary, Italy, Latvia Lithuania, Luxembourg, Netherlands, Poland, Slovakia, Spain, Sweden, United Kingdom plus Norway (21 in Total). Austria has requested that their answers are not disseminated further. Therefore, their answers are not included in this summary.

Disclaimer: The responses of the Member States regarding this ad-hoc query have been provided primarily for the purpose of information exchange among the EMN National Contact Points (NCPs) in the framework of the EMN. The contributing EMN NCPs have provided information that is to the best of their knowledge up-to-date, objective and reliable. However, the information provided in the present summary is produced under the exclusive responsibility of the EMN The Netherlands and does not necessarily represent the official policy of an EMN NCPs' Member State. The responses are interpreted by EMN The Netherlands to write this summary.