



# Children first? The Significance of Child-Oriented Social Welfare Reports for Legal Decision-Making in Asylum Procedures

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## Abstract

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This study explores the impact of child-focused social welfare reports on legal decision-making in cases involving children and families seeking asylum in The Netherlands. The Best Interest of the Child Questionnaire (BIC-Q), based on the UN Convention on the Rights of the Child, was designed to assess the developmental prospects of refugee children in different places of residence. In 70 cases of asylum-seeking children, BIC-Q data was used as input for reports aimed at supporting them in the judicial process. The families' solicitors introduced the reports in the legal proceedings. In 87 per cent of the cases, these were taken into account. In those cases where a final decision was made concerning residence rights ( $n = 30$ ), analyses were made of the reports' impact using the minutes of the internal discussions. The results show the significance of these reports for decision-making in line with the UNCRC.

Key Words: UNCRC, asylum procedure, best interests of the child, children's rights, welfare reports

## Introduction

When an asylum-seeking family with children applies for asylum in The Netherlands, the situation of the parents is primarily taken into consideration by the Dutch Agency for Immigration and Naturalization Affairs (IND). This agency decides on asylum requests in The Netherlands. If the parents' claim to asylum is accepted, the children are also granted a residence permit. If the parents are refused asylum, so are their children. As a result of this policy, the children's situation and their rights are not automatically investigated. This is one of the reasons why children whose parents apply for asylum, as legal subjects, have a weak position in the asylum procedure. Another reason is that professionals such as social workers, counsellors, educationalists, psychologists or psychiatrists working with these children have no official role in the legal asylum process. The solicitors representing asylum-seeking families generally lack sufficient knowledge of child development and the influence of unfavourable rearing and social conditions. As a result, they are unable to provide solid information about the effects of a return to the home country.

This leads to such information not being included in the legal procedures. For a long period of time, it was also the general opinion amongst solicitors that this type of information would not really be of influence on the decisions made by the IND and, therefore, was rarely included in legal reports (Kalverboer & Zijlstra, 2006a, 2006b, 2008; Kalverboer, Zijlstra & Knorth, 2009). We know from several international studies that asylum-seeking children often have severe emotional problems; they are vulnerable because of their experiences in the home country, the flight and the deprivation in the host countries (Bean, 2006; Bean, Eurlings-Bontekoe & Spinhoven, 2005; Fazel & Stein, 2003; Hodes, Jagdev, Chandra & Cunniff, 2008; Montgomery & Foldsprang, 2005). Many parents suffer from severe emotional or psychiatric problems such as PTSD (post traumatic stress disorder), which undermines their ability to raise their children (Fazel & Stein, 2003; Hallas et al., 2007; Hodes et al., 2008; Kalverboer & Zijlstra, 2006a, 2006b, 2008; Kalverboer et al., 2009; Montgomery & Foldsprang, 2005).

That the situation of asylum-seeking children should be a point of consideration in the Dutch asylum procedure, as well as in the other European Union (EU) countries, is determined in the EU policy on children's rights. Several directives concerning the EU asylum policy refer to the United Nations Convention on the Rights of the Child (UNCRC). This convention contains the major international obligations regarding children (Martin & Curran, 2007). The UNCRC is legally binding on those countries which have ratified it, as have all EU member states. The convention came into force in The Netherlands on 8 March 1995.

In 2005, at the request of and in cooperation with the Dutch section of the NGO Defence for Children International, the team of authors initiated a study to examine whether case-oriented welfare reports could have an impact on decisions made by the Dutch IND. The reports focus on issues of social welfare, such as the children's development and prospects, family circumstances, and the rights of children as minor asylum seekers or refugees. The aim was to gain insight into the position of the children and to contribute to the improvement of their position by having the UNCRC taken more seriously in asylum law and policy.

In The Netherlands, no such reports were available, so reports were prepared/written by a specially trained team of social welfare specialists (i.e. a child psychologist and a remedial pedagogue, with the assistance of Master's students) who were familiar with the situation of asylum-seeking families. Although some studies about the application of social reports in asylum procedures are available in other countries (Fiske & Kenny, 2004), the impact that such reports could have on the administrative and legal decision-making has not been tested and is unknown (Tufnell, 2003). According to Hodes and Tolmac (2005), it is widely believed that well written reports may strengthen the asylum claims.

In this article, we will first address the UNCRC, especially its meaning in the context of EU legislation and the Dutch asylum policy and law. Secondly, we will present the Best Interest of the Child Questionnaire (BIC-Q). This instrument was developed to create a solid base for gathering and processing information about individual asylum cases, and to offer the specialists' team a tool for organizing their welfare reports in a consistent way. Finally, the results of preliminary research into the impact of introducing welfare reports in legal decisions-making procedures related to young asylum seekers will be described. An anonymous case study is used throughout this article as an illustration of the method.

#### **Isatu and aunt May**

Isatu and her aunt May (her mother's sister) from Sierra Leone came to The Netherlands in 2002. In Sierra Leone, Isatu was raised by her father, mother and her aunt May. When Isatu was five years old, her mother was killed by rebels. Her father disappeared during the war and was probably killed as well. Isatu's aunt took care of Isatu and brought her to The Netherlands. She applied for asylum for both Isatu and herself. Since then, she has been Isatu's only care provider and only relative. After a five-year period in The Netherlands as an asylum seeker, Isatu obtained permission from the Dutch government to stay in The Netherlands because of for the danger of circumcision in Sierra Leone. Her aunt, however, did not obtain permission and, according to the judicial authorities, had to return to Sierra Leone. Her lawyer asked the team to provide a social report, based on the BIC-Q, to support a new asylum application for aunt May in which Isatu's situation was taken into consideration.

## UNCRC and European Policy on Children's Rights, especially in Asylum Law

The way in which aspects about children's welfare should be taken into account can be derived from the UNCRC, which was adopted by the General Assembly of the United Nations on 20 November 1989. The UNCRC clusters all of the rights of children in one treaty and grants children rights which go further than those in other treaties. This is one of the main reasons why the convention has added value compared to previously existing regulations. The convention covers not only civil and political rights, but also economic, social and cultural rights. Moreover, these rights are specifically geared to children. The UN Committee on the Rights of the Child is charged with monitoring the fulfilment of obligations under the UNCRC. This Committee consists of eighteen independent experts who are elected for four years by the signatory states. The following articles are considered to be general principles of the UNCRC:

1. All the rights guaranteed by the Convention must be available to all children without discrimination of any kind (Article 2).
2. The best interests of the child must be a primary consideration in all actions concerning children (Article 3).
3. All children have the right to life, survival and development (Article 6).
4. Children's views must be considered and taken into account in all matters affecting them (Article 12).

These articles are to be considered together. Of all the general principles, the definition and the determination of the meaning of article 3 is the most unclear. The full text of article 3(1) states that "... 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".

According to Freeman (2007), it is often not clear when the best interests of the child prevail over other interests, such as the interests of society. Yet article 3 is regarded as being fundamental to the other provisions in the convention. The 'best interest' principle must be seen as both informed and constrained by the rights and the other principles provided by the convention. Although the convention does not define the 'best interest' concept in article 3(1), the view of the UN Committee on the Rights of the Child concerning specific issues makes it quite clear what is considered *not* to be in the best interests of the child (Freeman, 2007).

The Committee monitors the fulfilment of obligations under the UNCRC every five years. When last monitored in 2009, as well as in 2004, the Committee was concerned that the 'best interest' principle is not always codified in legislation affecting children and is not formalized in proceedings of the administrative arm of governments (Committee on the Rights of the Child, 2009).

Article 6 is about the right to life, survival and development of the child and is the most fundamental of all human rights of the child. The full text of article 6 UNCRC states that:

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Without regard for and adequate protection and fulfilment of the rights to life, all other rights of the convention become meaningless (Novak, 2005).

Articles specially mentioning the situation of asylum-seeking or refugee children are the articles 22 and 39. Article 22 states that children who are seeking refugee status shall receive appropriate protection and humanitarian assistance to ensure that they fully enjoy their rights under this convention and any other international conventions. Article 39 states that the host country should take measures so that children who are victims of torture or inhuman treatment can physically and mentally recover.

The EU explicitly stresses that children's rights and meeting children's basic needs is an integral part of its internal and external policy. As part of this policy, on 4 July 2006, the European Commission issued a document, entitled *Towards an EU Strategy on the Rights of the Child*. In this document, the Commission presents a long-term vision and strategy relating to children's rights, emphasizing the importance of compliance with the provisions of the UNCRC (Commission of the European Community, 2006). In 2007, the Commission presented its *Green Paper on the future Common European Asylum System (CEAS)*. Harmonization of refugee and asylum policy and the establishment of common standards for this purpose is the main topic of this green paper. The Commission stresses that several categories of asylum seekers are particularly vulnerable and therefore require extra care and attention. According to the Commission, the member states lack the capacities and expertise required to respond appropriately to the needs of vulnerable asylum seekers. The Commission explicitly refers to children as belonging to this vulnerable group and asks for attention to be paid to the development of appropriate policy (Commission of the European Community, 2007). Recently, the European parliament adopted a directive about common standards and procedures in the member states for the return of third-country nationals residing illegally in their territories. Recital 22 of this directive states that in accordance with the 1989 UNCRC article, when executing this directive the member states must put *the best interests of the child* first.

It is clear that within the EU a great deal of attention has been paid to the position of children and to children's rights. This also applies to asylum policy. However, it seems that this perspective, which gives a prominent position to the UNCRC, has not been adequately transformed into policy in several member states, including The Netherlands. The procedures on the application for asylum of children from families and unaccompanied asylum-seeking minors are still not harmonized in the various countries within the EU. In the past few years, the political climate has become more harsh and it seems to be more and more difficult to protect the rights of children who are seeking asylum in EU member states (Kalverboer & Zijlstra 2006a, 2006b; Kalverboer et al., 2008, 2009).

## Dutch Asylum Policy and Children's Rights

The Dutch IND decides on behalf of the Secretary of Justice whether an applicant receives a residence permit or not. In examining the situation of families, the children involved in the procedure are not automatically taken into consideration.

There are different grounds formulated in the Dutch Aliens Act 2000 on which an asylum application can be granted:

- A residence permit can be granted to a refugee that complies with the description in Article 1A of the Convention on the Status of Refugees (the Geneva Convention) concerning refugees who fear prosecution on account of religion, political belief, nationality, race or social group.
- A residence permit can be granted if the applicant runs a severe risk of being tortured when returned to their country of origin (Article 3 of the European Convention on Human Rights, ECHR).
- A residence permit can be granted for urgent reasons on humanitarian grounds, if the applicant was traumatized in the country of origin.
- A residence permit can be granted if return to the country of origin would constitute an exceptional hardship considering the overall situation there.
- A residence permit can be granted to the husband, wife or the children actually belonging to the family of the applicant, if they entered The Netherlands at the same time or within a period of three months after the applicant did so.

The applicant has to set out how his/her application meets these criteria. If the application is successful, a residence permit is granted by the IND. If not, the applicant can lodge an appeal to the judiciary. If the judiciary agrees with the IND, a last appeal to the Administrative Division of the Council of State is possible. If the judiciary disagrees with the IND, the IND has to take the judgement of the judiciary into account. The process of application and appeal can run anywhere from six months to many years. This is because if a permit is refused on one of the grounds mentioned in the Dutch Aliens Act 2000, a new application can be made on one of the other grounds mentioned. As a result, it is highly unpredictable how long the whole procedure will take. For children in a family this often means that when there is a final negative decision, they will have lived in The Netherlands for many years and are more or less adapted to Dutch society. The families' younger children were often born in The Netherlands.

As to EU legislation, The Netherlands has a monistic system, which means that the directives adopted by the European Parliament stressing that attention should be paid to children's rights as stated in the UNCRC are meant to be incorporated in the Dutch asylum system. According to the Dutch government, the UNCRC, including the 'best interest' principle, is applied in the asylum law and procedures. According to several NGOs, this is not the case (Defence for Children, 2006; Unicef, 2009).

## The BIC Questionnaire

The Best Interest of the Child Questionnaire (BIC-Q) has been designed for 'environmental' diagnostics. It measures the prospects of children from asylum-seeking families in different places of residence as regards the implementation of the provisions referred to in the UNCRC (Kalverboer & Zijlstra, 2006a, 2006b, 2008; Kalverboer et al., 2009). With the development and application of the BIC-Q, we have attempted to provide solicitors with a tool to include information on children's rights in the legal asylum procedure. With the BIC-Q we intend to give particular significance to the UNCRC key concepts 'Best interests of the child' (art. 3[1]) and the 'Right to life and development' (art. 6[2]). This means that it is in the child's best interests to have a healthy development into adulthood and it implies a healthy rearing environment for the child which is adapted to its developmental needs.

With the BIC-Q it is possible to describe the quality of the child-rearing situation and social context in the host country and to compare it with the expected future situation in the home country of the child. The questionnaire encompasses a list of fourteen environmental conditions concerning family and society. If the quality of several conditions in the child-rearing situation is insufficient over a longer period of time, this contributes to the vulnerability of the child (Rutter & Caprara, 1995) and frequently leads to developmental or social problems, implying that the child's best interests and rights to development could be violated. For every condition of the questionnaire, it is possible to determine which specific article of the UNCRC, in addition to articles 3 (1) and 6 (2), might be threatened if the quality of the condition in the child's rearing situation is insufficient (Kalverboer et al., 2008, 2009).

## Assessment with the BIC-Q

Since 2005, the project specialists' team receives requests from lawyers from all over the country dealing with asylum applications and appeals. Lawyers use reports produced by the team as evidence in the legal proceedings. There are several questions lawyers usually ask the team to address:

1. What effect do the prospects of the family have on the development of the child if they are sent back to their home country?
2. Will the child be able to adapt to the situation in the home country after staying in The Netherlands for so long?
3. Are there other problems that affect the prospects of the child in the home country such as family, cultural or gender problems?
4. Which children's rights will be compromised should the child and its family be sent back to their home country?

In the case of Isatu and her aunt, her lawyer asked the team how it would affect Isatu if she had to return to Sierra Leone with her aunt or if she would have to live in a foster family in The Netherlands without her aunt.

## *Assessment of Children and Families*

To answer the lawyer's questions, the team always work in twos and examines the possible presence of emotional and behavioural problems of the children involved and the conditions for development in the social environment available. The team concentrates on the assessment of developmental problems of children, the quality of the rearing situations they grow up in related to the problems of their parents and the social circumstances. If there is a suspicion that a child or its caretaker is severely traumatized, the suggestion will be that further specialist assessment and treatment is necessary.

The assessment is based on (clinical) interviews, self-report measures and reports of treatments by the various family members (Kalverboer et al., 2009). Mostly, the children and their parents are visited in their own homes or caravans at the asylum seekers' centres. The team members observe them and speak with parents and children together and separately. Seeing asylum seekers in their own environment gives extra information about their lives and circumstances. When they are at ease, there is less of a need for them to put up a façade, which often gives an un-sound impression of their circumstances. The children's teachers are also interviewed and the children are observed in their classroom. As many different views as possible on the children's and family's problems and their living circumstances are collected in order to arrive at a professional diagnosis. According to Stevens and Vollenberg (2005), this is the best way to overcome the problem related to different informants providing different views. In this way, all reports on the children and their situation provided by the lawyers are gathered and supplemented by information from psychologists, psychiatrists or counsellors who have treated the children or parents (Kalverboer et al., 2009).

To collect data, Isatu and her aunt were visited at the asylum centre they lived in at the time. The team spoke with Isatu (cf. Article 12 UNCRC) and her aunt together and separately and asked them to complete the scales. The team wanted to hear from them, and especially from Isatu, about their current living circumstances, what they expected if they returned to their home country, Sierra Leone, and which decision in the asylum law procedure concerning May should in their view be taken. Isatu's school teacher was contacted to get information about her performance and behaviour at school. Information from the lawyer about the legal procedure was received together with data from Amnesty International and the Dutch Ministry of Foreign Affairs concerning the political and social situation for women in Sierra Leone.

Often concrete information about the situation in the home country is not available. To nevertheless obtain an idea of the situation, the team uses available sources such as official country

**Table 1**  
Expected situation of Isatu according to the BIC-Q: decision alternatives

Overview per condition		Expected situation if Isatu stays in the Netherlands in a foster family and aunt May returns to Sierra Leone		Expected situation if a residence permit is granted to aunt May and both Isatu and aunt May stay in the Netherlands		Expected situation if a residence permit is refused and both Isatu and aunt May return to Sierra Leone	
	Is the quality of the condition sufficient?	Yes/No/?	Violation of UNCRC provision*	Yes/No/?	Violation of UNCRC provision	Yes/No/?	Violation of UNCRC provision
Family	Adequate physical care	Yes		Yes		No	Art. 26, 27 UNCRC
	Safe physical environment	Yes		Yes		No	
	Affective atmosphere	?		Yes		?	
	Supportive, flexible child-rearing structure, adapted to the child	Yes		Yes		No	
	Adequate examples by parents	?		Yes		?	
	Interests	Yes		Yes		No	
	Continuity and stability in upbringing conditions, future perspective	No	Art. 9 UNCRC Art. 8 ECHR	Yes		No	
	Safe wider physical environment	Yes		Yes		No	Art. 37 UNCRC
Society	Respect	Yes		Yes		No	
	Social network	No		?		No	
	Education	Yes		Yes		No	Art. 28, 29, 31 UNCRC
	Contact with peers or friends	Yes		Yes		No	Art. 31 UNCRC
	Adequate examples in society	Yes		Yes		No	
	Stability in life circumstances, future perspective	No	Art. 9 UNCRC Art. 8 ECHR	Yes		No	

\* UNCRC articles. Art. 9: right to family life; art 26: right to medical care; art. 27: right to sufficient living circumstances; art. 28: right to education; art. 29: right to suitable education; art. 31: right to leisure time; art. 37: right to protection against inhuman treatment.

ECHR articles. Art. 8: right to family life.

reports and information from Amnesty International or non-governmental children's rights organizations such as Defence for Children International and Unicef.

A professional estimation or prognosis is given based on all the collected information as input for the BIC-Q concerning the developmental prospects of a child as regards the availability of the provisions referred to in the UNCRC. Explicit attention is paid to the question as to how a child will be affected by being sent back to its home country (Kalverboer et al., 2009). Because a report based on the BIC-Q will always mention the children's and human rights that might be compromised in different situations or places of residence, lawyers can easily submit the reports in the legal procedure.

## *Decision Alternatives*

If judicial or administrative decisions concerning the developmental perspectives of the child are reached in line with the UNCRC, the environment that provides the child with the best opportunities for survival and development – this means the best conditions for upbringing – should be chosen (arts. 3(1) and 6(2) UNCRC). In addition to this, the child's opinion should be sought and considered in the decisions to be made (art. 12 UNCRC). In the decision-making procedures, children are therefore to be treated as equals (art. 2 UNCRC).

As part of the process to fulfil these conditions, a systematic comparison has to be made between different places of residence which are relevant for consideration as decision alternatives. An example, formatted according to the BIC-Q model, is given in Table 1. It shows three decision alternatives that were relevant in the case of May and Isatu. The box below offers an explanation of the alternatives.

### **Decision alternatives in the case of May and Isatu**

#### **a. Permanent residence for Isatu and her aunt in The Netherlands**

If her aunt were to receive permission to stay in The Netherlands, we could expect that most of the environmental conditions in the questionnaire sections Family and Society would be fulfilled. The threats to those conditions in the present situation mostly seem to be the result of the inadequate living circumstances in the asylum centre, including the insecurity, fear and stress experienced. They would gain a clear perspective of their future, an income to provide for their living, a house to live in, education for Isatu, and continuity and stability in their daily life. The fear of being removed again would disappear and the insecurity both have experienced since leaving Sierra Leone would finally come to an end. Isatu's aunt would be able to develop the 'emotional space' needed to relate to Isatu, and would be able to support her emotionally, allowing them to build a life together. Both Isatu and her aunt May need psychological help to overcome their experiences of insecurity and fear over the past years.

#### **b. Aunt May goes back to Sierra Leone, Isatu stays in The Netherlands**

If it were to be decided that May should return to Sierra Leone alone, Isatu and her aunt would be separated. May is Isatu's only care provider following after the death of Isatu's mother five years ago. Isatu would lose her care provider; the only person in the world she trusts and the only person who is like a mother to her. Isatu would have to live in a children's home or in a foster family. Breaking the bond between Isatu and her aunt could threaten Isatu's development (threat to conditions 3 [affective atmosphere], 7 [continuity and stability in upbringing conditions, a perspective Isatu's future] and 14 [continuity and stability in life circumstances]; threat to Article 9 and Article 8 ECHR).

#### **c. Isatu and May both go back to Sierra Leone**

Because her aunt declared that she would not return to Sierra Leone without Isatu (the b. alternative) as she had promised her sister that she would take care of Isatu, another possibility is that if she were removed from The Netherlands she would take Isatu with her. Sierra Leone is still not safe for two women without any relatives or acquaintances and without means to support themselves. Although new laws were introduced in Sierra Leone in 2006, sexual violence, gender-based violence and domestic violence occur frequently. Not much improvement is booked in the prevention of female circumcision. In trying to survive, Isatu's aunt would lack the energy and time to care for and bring up her niece. Isatu would probably have to help support the two of them and would not go to school (threat to conditions 1 [adequate physical care], 2 [safe physical environment], 3 [affective atmosphere], 6 [interest], 7 [continuity and stability in upbringing conditions, a perspective of the future], 8 [safe physical wider environment], 10 [social network] and 11 [education]; threat to Articles 26, 27, 28 and possibly 37 UNCRC).



# Preliminary Research

## Method

The BIC questionnaire was applied to 70 families with children, most of whom had lived in asylum centres in The Netherlands for a period of at least five years. The initial selection of these families was based on the recommendations of lawyers who represented them. These professionals thought that their clients would have minimal prospects of obtaining a residence permit. At the same time, they were of the opinion that these families deserved to receive a permit because of family problems, social and political aspects, developmental problems of the children and/or unfavourable prospects in the home country.

After permission from the families, the specialist team visited each family in its own environment and prepared a BIC-Q-based report. The reports were included in the documents that were presented by their solicitors to support the cases. Next, after the trial, the research team received the minutes and the ultimate rulings on the cases. A content analysis was applied to these documents, focusing on four questions (see Appendix for an example of the analyses of decisions in two case studies):

- Were the reports mentioned in the minutes of the trial?
- Were the assessments of the situation of the child and its rearing and the social circumstances accepted as valid and reliable information?
- Were these evaluative assessments taken into account in deciding on the case?
- Did the topical UNCRC articles referred to in the report have an impact on the decision made by the IND?

**Table 2**

Judgement on the quality of the upbringing conditions for Isatu and the UNCRC provisions to be violated

Upbringing conditions for Isatu to be expected:	if May returns to Sierra Leone and Isatu stays in the Netherlands	if both May and Isatu stay in the Netherlands	if both May and Isatu return to Sierra Leone
Quality level to be expected	Moderate	Good	Insufficient
UNCRC provisions that might be violated if the quality of the child's rearing situation is not provided for	Art. 3.1 Art. 6.2 Art. 9 Art. 12 (Art. 8 EHRM)		Art. 3.1 Art. 6.2 Art. 12 Art. 26 Art. 27 Art. 28 Art. 29 Art. 31 Art. 37

A report consists of accounts of the children's developmental situations, the family circumstances, the social, economic and political situation plus accompanying letters.

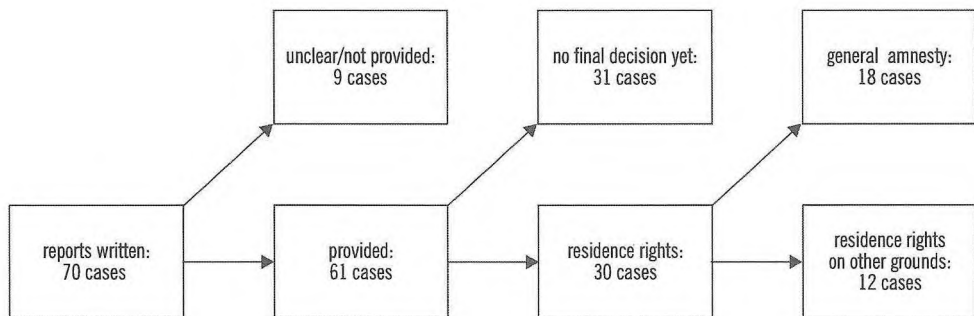
The report provides further substantiation of the conclusions and information mentioned in the accompanying letters about the developmental conditions present in the situation in which the child is growing up in The Netherlands and what the developmental conditions in the child's country of origin would be. In the report, the family circumstances as well as the social, economic and political situation in the home country are taken into account. The point of departure

is that if there is no concrete information about the direct living conditions of the child in its country of origin, it is not in the best interests of the child's development to send it back to a situation in which it is unknown whether the child would find shelter, food and drink and can go to school. The report indicates which (further) assessment and treatment of the family members is necessary and states which articles of the UNCRC and ECHR might be contravened if the child has to return involuntarily to its country of origin (Kalverboer et al., 2009). As a way of illustrating our method, we include Table 2. The table presents a comprehensive conclusion concerning the quality of three alternative situations for upbringing in the Isatu case. The box below the table offers further explanation.

Based on the interviews with May and Isatu, the background information supplied by the lawyer, the information about the educational performance and prospects at school given by Isatu's teacher and the information about the human rights situation in Sierra Leone, a report was written which was used by their lawyer in the procedure. The report stated that the development of Isatu as well as the prospects of her aunt were protected best if both she and her aunt were allowed to stay together in The Netherlands. Statements were based on the assessment that in the event of the residence permit for Isatu's aunt being rejected, there would be a violation of articles 3(1), 6(2), 9, 12, 26, 27, 28, 29, 37 of the UNCRC and article 8 of the ECHR.

## Results

Welfare reports on the future prospects of children and their families were written in 70 cases and submitted as court documents in the asylum procedure. In all cases, it was recommended that the family be granted a residence permit. Figure 1 shows the outcome of these efforts.



**Figure 1**  
Social welfare reports and the course of the procedures in question

In 61 cases (87%), the reports were taken into account in the procedure (see Figure 1). These cases were repeat applications, with the report being accepted as fresh evidence, or applications in which the reports served to provide more detailed grounds in the procedure.

In 31 cases (44%), either no final decision has been made to date or the solicitors have not yet informed the team about it. Until now, in nine cases it is still not clear whether the solicitor submitted the report in the procedure, because the solicitor in question has not given the researchers this information, in spite of repeated requests.

In 30 of these cases (43%), either temporary or permanent residence was granted. In 18 of these cases, the families' appeals were lodged under the one-off regulation of the Aliens Act. With respect to these cases, we have not yet been able to ascertain whether or how the welfare

reports had any influence on the decision to grant residence rights. However, we do know that on the basis of the reports, these cases were considered eligible for a second application. For these repeated applications were *solely* based on the existence of the reports as being 'new facts' to consider.

In the other 12 cases, residence rights were granted on other grounds. The minutes of the internal discussions of these cases by the IND were provided on request and examined.

These documents reveal that the welfare reports were a significant factor in the decision-making process. In several cases, the reports were specifically referred to in the minutes in relation to the decision made, for example, under the heading 'core considerations'. From the minutes of the cases in which the reports were not mentioned, it can also be deduced that the initial position taken by the Medical Assessment Section of the IND was influenced by the welfare reports. The recurring theme in these cases is that the reports provided leverage to review the file and reconsider the claim. A striking point is that in several cases explicit references were made to the information contained in the reports without specifically referring to it. UNCRC provisions were not mentioned in the minutes even once, although they certainly played an important role in the reports.

Our analysis suggests that when allowing a principal's claim, the IND uses the information about the children and their developmental prospects to further substantiate their decision. In the files we studied, the information was evidently a decisive factor, for example, in establishing the presence of humanitarian reasons, a distressing situation, or even in ascertaining medical grounds.

In May 2007, the specialist team reported to the lawyer representing Isatu and her aunt that based on articles 3(1) and 6(2) of the UNCRC and the other articles mentioned (articles 9, 12, 27, 28, 29, 31 and 37 UNCRC and article 8 ECHR) it would be in favour of Isatu and her aunt that May should receive permission to establish a life in The Netherlands. Such a decision would offer Isatu (also in her own view, art. 12) the best conditions for development and therefore would be in her best interests (art.3). In the same month, the lawyer started a new judicial procedure concerning Isatu's aunt and brought the welfare report into the legal procedure. In June 2009, the IND had still not decided on the case of Isatu's aunt. Isatu and her aunt still live in uncertainty. If the IND decides negatively on the case, the lawyer will take the case to a court of law for a judicial decision.

## Discussion and Conclusion

All European Union member states have ratified the UNCRC. The European Union policy on asylum law stresses that special attention should be paid to children's rights as presented by the UNCRC. Still, most European Union member states consider a restrictive asylum policy to be more important than the application of the UNCRC. As long as there is such a huge discrepancy between the European Union policy and the policies of the different member states, the ratification of the UNCRC is not being taken very seriously.

The creation of the BIC-Q constitutes an attempt to give children's rights a place in Dutch asylum policy. It gives substance to the key articles of the UNCRC, particularly Articles 3.1 and 6.2. The questionnaire also makes it possible to decide which *particular* children's right is infringed upon if a particular condition for upbringing is not met. This means that the relationships between Articles 3.1 and 6.2 and the other provisions of the convention can be clarified. Because all EU member states ratified the UNCRC and are legally bound to the European Union asylum policy and law, the questionnaire can be of use in the other member states as well.

In The Netherlands, as was pointed out, it takes several years before a final decision in the Dutch asylum procedure is made. As a result, in 31 of the 61 cases analysed, information about the significance of the reports in the procedure is still missing. In 18 of the remaining 30 cases, we do not have information on the effects of the reports because these were lodged under gen-

eral amnesty. In the other 12 cases, the reports made a positive contribution to a child-friendly decision. It should be added that the articles of the UNCRC were not mentioned in any of the IND minutes.

The EU's view that children's rights should be included in all European areas of law is not reflected in the Dutch asylum policy. By using reports (partly) based on the BIC questionnaire in the European Union it is possible to compare member states' policies on children's developmental prospects and rights in asylum procedures. We think that this may contribute to harmonizing policies on children's rights in the EU.

In The Netherlands, there is much criticism from non-governmental organisations such as Defence for Children and Unicef on how children's rights are applied in the Dutch asylum policy (Defence for Children, 2006; Unicef / Defence for Children, 2009). When families with children apply for asylum, their interests and the interests of the government in the host country have to be weighed up. Often, the living conditions of these children are far better in the host country compared with those in their home country. As a result, if decisions in the asylum procedure were based solely on article 3(1) of the UNCRC, children would almost never be returned to their home country. But this is not the purpose of an asylum policy. As the UNCRC and the restrictive asylum policy in EU member states have contradicting intentions, it is important to consider what the status of the UNCRC in the EU's asylum policy should be and how the different articles of the UNCRC should be applied.

Because applicants in the Dutch legal system may start a new procedure based on another ground found in the Aliens Act of 2000 if a residence permit is not granted, the children involved have often lived for many years in The Netherlands before a final decision is made. Most of them have adapted well to Dutch society. A return to their 'home country' is, in the children's view, returning to an unknown, unsafe country. They do not consider the social cultural norms of the 'home country' as their own.

With this we come to a complex aspect of our study. In all the cases the lawyers supplied us with, the team advised granting the families a residence permit. All families had been living in The Netherlands for over five years and the children were rooted in Dutch society. They had developed a Western way of life with Western beliefs, values and social norms. In most cases, severe family problems and social or political problems in the home country could be expected. Some of the children had developmental problems, others had favourable prospects in The Netherlands. The professional view of the specialist team is that it is not in the best interests of children who have lived in The Netherlands for over five years and who have developed a Western identity to return to a 'home country' they themselves have no memories of and to which they are not adapted.

However, to develop our method further, we would want to study cases in which it is not obvious that a residence permit is in the best interest of the child because the child is adapted to a Western society. These cases would offer an opportunity to find out under which conditions return is acceptable. Issues about family and community roles in children's development that are related to the differences in the social and cultural norms of the host and home countries would be taken into account. Nevertheless, it is questionable whether lawyers would supply the team with such cases.

We conclude that it is still worthwhile to include reports in the asylum application on the developmental interest of the child in question and on the situation regarding children's rights in its country of origin. This could influence the decision-making process with regard to the protection of rights involved in an application for residence by an asylum seeker with a child. Similarly, it could affect the situation of an asylum seeker who has since come of age – despite the fact that the articles in the UNCRC are not explicitly referred to in the IND decisions. In at least 12 of the 70 'hopeless' cases in our study, a residence permit was granted.

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# Appendix

## Analyses of Decisions in Two Case Studies

### *Case 1*

#### *Man, Woman and Nine-Year-Old Daughter from Bosnia*

##### **Course of the Procedure**

The first asylum application was submitted in February 1999 and refused in June 2000. The appeal was dismissed in November 2004. In April 2005, a repeat application was submitted. In October 2006, the district court of Assen upheld the appeal (not published). A permit was granted by virtue of Article 29.1, heading and paragraph b. The undated minutes provide no information as to the date on which the permit was granted or the grounds on which the woman and daughter were granted a permit.

##### **Welfare report**

The reports written by professionals treating the father were used to document the social welfare report. The welfare report refers to these reports, indicating that the father has very severe post-traumatic stress symptoms, is suicidal and is a threat to the development of his daughter. The mother has to protect her from the father. The father cannot be treated in The Netherlands so long as there is no certainty as to his residence permit, which is a considerable source of stress for the family. Treatment in the country of origin is impossible; the father cannot return to the place where he was traumatized. The report indicates that the best interests of the child are served only by entitlement to residence in The Netherlands. Reference is made to the core articles 3 and 5 of the Convention on the Rights of the Child and also to Articles 24, 26, 27, 28 and 31.

##### **Minutes**

In the minutes the following is to be found under 'Main reasons for upholding the appeal': 'The respondent could not have disregarded the Medical Assessment Section (bma) in connection with the assessment of this aggravated medical condition and the information provided by the five treating professionals. Therefore Article 4.6 of the General Administrative Law Act was applied wrongly. The aggravated situation should be regarded as fresh evidence'. (...) 'The file includes an extensive report about the daughter of the individuals in question, written by the Faculty of Behavioural and Social Sciences of the University of Groningen. Her development is seriously impeded by her father's medical condition (...)'. 'The ultimate ruling is that the psychological situation of the people in question can be regarded as life-threatening, and there is a real threat that the individual in question may end up in a position which contravenes Article 3 echr'.

##### **Conclusion**

The welfare report is mentioned in the minutes under the heading 'Core grounds for upholding the appeal'. This implies that the report was an important factor in granting the father residence rights. Ultimately, the residence permit was granted by virtue of Article 29.1, heading and paragraph b, of the Aliens Act. No attention was paid to the provisions of the Convention on the Rights of the Child referred to in the report. The report provided support in regard to granting the father the permit. The child received a derivative permit.



## *Case 2*

### *Unaccompanied Minor Alien from Sierra Leone, Now of Age*

#### **Course of the Procedure**

The first procedure began in April 2002. According to the policy regarding unaccompanied minor aliens, the individual in question was eligible for reception. She failed to make her identity, nationality and age plausible, and her claim was refused. A repeat application was submitted in November 2006. She was called to be heard. The bma indicated that the individual in question could not be heard and that she had to be referred to specialists. A bma inquiry was set up. Ultimately (in November 2007), the IND asked her to agree not to be heard. Residence rights were granted by virtue of Article 29.1, heading and paragraph b, of the Aliens Act.

#### **Welfare Report**

The social welfare report was added as the primary schedule in the registration of the second procedure. It states that the individual in question cannot be heard because she functions at the level of a three to six-year-old. She is therefore unable to give a plausible account of her flight. It also mentions that she is suffering from a chronic post-traumatic stress disorder and had been admitted to a psychiatric ward at the time of the inquiry. The report also discusses her medical condition. The details about this are taken from the relevant documents in the case file. The fact that the woman is intellectually disabled is mentioned for the first time in the welfare report.

#### **Minutes**

It can be concluded from the minutes that the bma's report is partly based on the welfare report. It refers to an intellectual disability, the level of a child of three to five or six years of age. This had not been mentioned before. Regarding the credibility of the account, the minutes state: 'In the first procedure there were doubts as to the origins of the individual in question; but in view of the medical condition of this individual, including the fact that she has the intellectual capacity of a 3 to 5/6-year-old, it is questionable whether she can provide relevant information; therefore the benefit of the doubt [will apply] (...). Final conclusion: application will be granted on the grounds of Article 29.1.b'.

#### **Conclusion**

This unaccompanied minor's first claim was refused on the grounds of her account of her flight, which was not deemed plausible. The welfare report in the second procedure states that no value can be attached to the woman's account in view of her intellectual development. The bma adopted this assessment. The case was reviewed in the light of this fact and a permit was granted by virtue of Paragraph b. The report provided support in the assessment of the plausibility of the account of the individual's flight.