Child (protection) law and migration law
A legal-empirical analysis

English Summary

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Summary

Introduction

This investigation originates from the tensions which can exist between child (protection) law and migration law, as exemplified in the events surrounding the case of the Armenian children.[1] The study comprises two parts: 1) the general legal and policy framework and 2) difficulties in practice, with a further analysis of legal and policy norms applicable to a selection of these difficulties.

This research aims to provide insight into the convergence of child (protection) law and migration law regarding minors by investigating where tensions or difficulties arise between the two fields of law, at both the legal and policy levels as well as in practice, including whether and to what extent legal norms from one area of law prevail over those from the other. Where the supremacy of legal norms cannot clearly be derived from laws and regulations, other, more practical, solutions are explored. The primary research question has been formulated as follows:

> *Which aspects of the laws and regulations for child protection law and migration law regarding minors hold potential for conflict, regarding both the level of laws and regulations and their implementation in practice, and to what extent does it become clear from the laws and regulations which law prevails? How can conflicts and tensions be resolved in situations where it is not clear from laws and regulations which law prevails, and what is needed to solve these conflicts and tensions?*

This report is based on various research methods. In addition to studying relevant laws and regulations, as well as case law, we conducted empirical research to identify difficulties and tensions occurring in practice by conducting interviews with staff of the organisations involved in these cases (DT&V, IND, Stichting Nidos, Raad voor de Kinderbescherming), other child protection agencies (*gecertificeerde instellingen* or *GIs*), judges, lawyers and experts. In addition, we performed a systematic case law review to gain as complete an overview as possible of possible situations where tensions arise between child (protection) law and migration law.

Part 1: Relevant laws and regulations in child (protection) law and migration law

The first part comprises four chapters, in which the relevant laws and regulations in the areas of child (protection) law and migration law are identified and analysed. The analysis focusses on the questions of to what extent the legal frameworks regarding the powers and duties of the various actors involved are clear, where room for interpretation exists, and where such frameworks are absent. The analysis aims, where possible, to illuminate areas of tension.

Chapter 2: Child (protection) law: Relevant laws and regulations and the role of child protection authorities

The second chapter of this report aims to provide an accessible overview of the most critical subjects of child (protection) law, with a focus on those parts which are relevant for minors in situations with migration law aspects. Such aspects can concern the children themselves or their

[1] *Kamerstukken II* 2019/20 19344, 136, p. 4-5; *Kamerstukken II* 2019/20 29344, 136

parents, for example, when a child with Dutch citizenship has a parent without a valid residence status.

The starting point in child (protection) law is that the assessment of the best interest of the child should occur independently of the migration law status of that child. However, the case law analysis has revealed that in some cases, it is impossible to assess the child's best interest without considering migration law. For example, when a so-called "parental authority vacuum situation" exists, it can be deemed in the best interest of a child to appoint a family member – rather than a representative of a child protection agency – as a temporary guardian. However, if a child does not have a valid residence status and the situation does not meet the standards of the foster children policy in migration law, a family member guardian is not necessarily a sustainable solution. In such cases, it may be better for the child to appoint a child protection agency in the role of guardian which can attempt to locate family members in the country of origin.

To adequately supervise a child without a valid residence status, as well as to anticipate possible migration law decisions, child protection agencies which hold guardianship should be informed about both a child's residence status and current migration laws and policies. In practice, this can cause difficulties, not just because complex and specialist migration law policies require a great deal from the employees of child protection agencies, but also because migration law as a field of law is constantly developing and changing, both due to the influences of EU law and because of the political forces this field of law is subject to. Furthermore, from the perspective of migration law, granting residence on the basis of the best interests of children is generally regarded as a favour rather than an obligation (i.e. a right following international legal standards). As such, the grounds used to grant legal residence to children are often not laid down in the law and can therefore be changed easily and quickly. This can be observed, for example, in the developments regarding the *kinderpardon* and the abolition of the discretionary powers of the Minister for Migration to grant legal residence in particularly distressing situations.

The speed with which migration law policies develop – especially regarding the residence rights of children – makes it difficult for actors in the field of child (protection) law, such as child protection agencies and children's judges, to anticipate decisions by migration authorities. A stable, clear and transparent framework of norms based on laws and regulations could contribute to lessening difficulties based in uncertainty over migration laws and regulations applicable to children. In this manner, actors in the field of child (protection) law would be enabled to better protect the best interests of the child, taking the migration law framework as the point of departure.

Chapter 3: The position of children in migration law

The third chapter explores the position of children across migration law, which is primarily determined by the type of migration procedure and whether the child in question resides in the Netherlands with their parents. In child (protection) law, minors are considered a vulnerable group. In migration law, however, minors are not necessarily treated differently from adults. In those areas where migration law's approaches and assumptions fundamentally differ from those of child (protection) law, tensions can arise between the two fields. Some of these assumptions and approaches are outlined below.

Asylum-related residence grounds

In asylum law, there is generally – especially in a material sense – little consideration for the minority of a person requesting asylum. Nevertheless, the case law of the ECHR, specifically regarding Article 3 ECHR, increasingly tends to consider the vulnerability of the persons involved in a case. This does not necessarily entail the benchmarks being shifted in a child-specific manner, but rather that it is deemed relevant whether, in situations concerning minors, a substantive risk

of serious harm can be established more easily because of vulnerabilities caused by minority and personal circumstances. This assessment requires a child-specific approach.

Due to influence from EU law, increasing attention is being directed towards the specific situation of children in Dutch migration law cases. In the context of asylum, this is particularly apparent in the recent case law of the ABRvS (Council of State) regarding the Dublin Regulation and the Asylum Procedures Directive. The recent TQ judgement of the CJEU fits with this pattern. This increased attention for the special position and interests of children has, in some migration law contexts, led to higher standards for the obligation of state reasons, as well as the duty to investigate of the Minister of Migration for cases regarding minors. Such developments require changes in the systematics of migration law. Although these developments pose challenges for migration law authorities, they also offer an opportunity to lessen the tensions between migration law and child protection law.

Non-asylum residence grounds

Dutch non-asylum migration law expresses the principles of Article 8 of the ECHR. This is also true for Dutch child (protection) law. The two fields of law are shaped by both the (negative) obligation of the state not to interfere with family life and the (positive) obligation of the state to interfere once the conditions of Article 8.2 of the ECHR are met. When family life has been created in a period when the persons involved are aware of the circumstance that the residence status of (one of) the persons involved is unstable, it is generally not considered interference if one of the family members is expelled. This also holds for unaccompanied minors (AMVs). Only in very exceptional circumstances is an infringement of Article 8 of the ECHR assumed. In these situations, there is an obligation on the state to grant a residence permit.

Child (protection) law and migration law

Parental responsibility is critical in various areas of migration law. If it can be proven that parents are not able to take care of their children – even with the aid of social organisations – this situation can lead to a right to residence. Child (protection) law authorities and regulations play an important role in assessing whether parents are capable of caring for their children. These material and formal principles are expressed in particular in the OTS *beleidskader* (child protection order policy framework) of the Dutch migration authorities. On the basis of this policy framework, both children who are under a child protection order and their parents can be granted residence permits. In these situations, state interference has (from the perspective of child protection law) already occurred in family life within the of Article 8 of the ECHR, meaning that the state has a positive obligation to ensure the right to respect for family and private life. Moreover, in migration law, a child protection order issued by a children's judge is considered objective proof that parents cannot take care of their children.

This migration law approach is at odds with the child (protection) law approach, where not parental responsibility but the interest and development of the children is central. In child (protection) law, parental rights and obligations have been made to serve the best interests of children, which are always established based on an individual assessment of the situation of the child, including all relevant circumstances. This makes the threshold between the negative and positive obligations of the state stemming from Article 8 of the ECHR in the context of child (protection) law fluid in nature. Migration law is characterised by a binary approach based on fixed categories.

Chapter 4: Core powers and duties of child protection agencies, the child protection board, and migration and return authorities

The fourth chapter provides an overview of the powers and duties of the various actors involved: child protection agencies (GIs), the child protection board (RvdK), the Immigration and Naturalisation Service (IND), and return and departure authorities (DT&V), as well as the Central Authority International Children's Issues (Ca). Clear differences exist between migration law actors and child protection actors in their powers and duties. Whereas IND and DT&V have relatively unambiguous mandates, the RvK and, especially, GIs have different kinds of powers. This particularly holds true for Stichting Nidos. When the powers and duties of migration law and child protection law clash, tensions can arise.

These tensions are particularly prominent when dealing with unaccompanied minors (AMVs). An AMV has a more central position in return procedures than do children without residence permits who are in the Netherlands with their parents. When children reside in the Netherlands with their parents, it is primarily the parents who must address the obligation to return and, for example, attend consultations with the DT&V. AMVs, conversely, must do this themselves, if necessary, with help and support from their guardians from the child protection agency. These guardians must often assess the possible harm that children might experience as a result of return actions and determine whether such actions can serve their best interest (e.g. because it can contribute to sustainable future prospects). Making such assessments aligns with the duties and powers of guardians of child protection agencies, as laid down in the Dutch Civil Code. A guardian may deem certain return actions (e.g. return consultations with DT&V or approaching the embassy of the country of origin) so harmful that no justification is possible. In other words, even if the return actions contribute to the child's future prospects, this might be outweighed by the risk of severe developmental harm to the child as a consequence of these return actions. However, such child protection law assessments and positions of the guardian have no relevance in migration law. Migration authorities and courts expect guardians to completely comply with migration law principles and norms in supporting minors' return obligations.

Another area of tensions between the fields of law is that GIs – unlike parents – are bound by privacy rules. Registered youth professionals are also bound by codes of conduct. Therefore, guardians from child protection agencies cannot share information with the IND or DT&V without explicit permission from the minor. However, in migration law, guardians are equated with parents and regarded as a legal extension of the minor. In this role, guardians are expected to share information freely.

In addition, tensions exist between the advocacy role of guardians in migration procedures and their role in supervising rejected unaccompanied minor asylum seekers. When acting as a representative of the minor, guardians are responsible for bringing to the fore a sound assessment of the best interest of the child in migration procedures, regardless of migration law considerations. The IND is then responsible for judging this assessment. Migration law judges review whether the IND has done so sufficiently. When the asylum application of a minor is rejected, the guardian should – both in their child protection capacity and in their migration law role as a "parent" – take the migration law decision as a starting point in assessing the best interest of the child. However, in their advocacy role, it is also the responsibility of guardians to ensure that minors can access their rights as laid down in European regulations and directives. In practice, differentiating between these distinct roles of guardians is complicated.

Lastly, tensions exist between the core duties of the DT&V and guardians. Both have the duty to stimulate voluntary departure from the Netherlands by AMVs who are not eligible for residence

permits in the Netherlands. However, the ways in which guardians and the DT&V aim to stimulate voluntary departure differ.

Chapter 5: Conclusions part one

1. What are the duties and powers of child protection guardians
   a) When advocating the interests of minors in migration procedures?
   b) When they feel that the interests of the minor are not or insufficiently represented in a migration law action or decision?
   c) In what situations should a guardian adopt a position regarding a migration law decision or action about a minor?
   d) Whether and to what extent can a guardian be bound by migration law frameworks?

From a child (protection) law perspective, a guardian can assess a child's best interests in all matters related to that child. Regarding powers, no difference exists between Stichting Nidos and other GIs. The relation between minors and guardians from child protection agencies is regulated by the Dutch Civil Code. When children reside in the Netherlands with their parents and are under child protection orders, it is generally the parents who have the authority to make decisions regarding residence. When minors are removed from their parents and placed in care, it is the child protection agency who determines where the child resides – within the limits set by the judge in the order.

Based on Article 1:247 of the Dutch Civil Code, the guardian attends to the wellbeing and safety of the child and promotes the development of the child's personality. In the context of these obligations – as well as in their role as the "representative" of the child – a guardian from a child protection agency can put forward the best interests of the child in any stage of the migration procedure, as long as the guardian deems it in the child's best interest to do so. Furthermore, a guardian can appeal a deportation decision or request a temporary injunction when they feel the best interests of the child are insufficiently served by the decisions or actions of migration authorities.

The guardian has discretion in their assessment of the best interest of the child. The Guardianship Method (*Methode Voogdij*) of 2015 states that the Dutch Civil Code does not regulate how the guardian should conduct their duties, nor does the law specify what a minor needs. This discretion entails that a guardian is not necessarily bound by the migration law framework. This does not mean that migration law does has no significance. A guardian can consider the migration law consequences for the child when making decisions. For example, it is not necessarily in the best

2. What are the powers and duties of representatives of the migration authorities
   a. Regarding guardianship over minors in migration procedures?
   b. When they feel that a guardian hinders a migration law action or decision?
   c. In what situations should representatives of migrations authorities adopt a position on actions of the guardian of a minor in a migration procedure?
   d. Whether and to what extent can representatives of the migration authorities be bound by the legal framework regarding guardianship over minors?

interest of a child to stay in the Netherlands if this means that the child will be homeless without a valid residence permit once when they turn 18. The guardian can also decide to cooperate with voluntary return to prevent deportation. In these situations, the guardian has discretion to decide which actions are in the best interest of the child.

The legal concepts of "guardianship" and "family guardianship" have no direct consequences for the powers and duties of either IND or DT&V. Chapter 3 shows that the reason for these differing powers between IND and DT&V in cases of family guardianship lies within migration law itself and the evidentiary value migration law awards this legal concept. Because migration law defers to child protection law in the context of a child protection order (OTS), the child protection order takes the lead. However, (family) guardianship is not in itself grounds for residence, and a child protection order or guardianship order does not necessarily mean that a child cannot be deported. As such, there are no specific powers or duties for representatives of the migration authorities in child protection law. These representatives are bound by child protection law only to the extent that they can be expected to respect the powers and duties of the guardian regarding a child, just as they are bound to respect parental authority over children.

The DT&V also issues opinions in "no-fault" (*buitenschuld*) procedures and procedures regarding the OTS *beleidskader*. According to current case law of the Council of State, the actions (or lack thereof) by the guardian can be held against a minor in the assessment of whether substantial effort to return has occurred. This means that representatives of the migration authorities can adopt a position on the actions of the guardian and consider these actions when making decisions. In the OTS *beleidskader*, opinions issued should be focussed on whether the child protection order can be transferred to another country and do not involve an assessment of the actions of the guardian or the parents of the child.

Guardians can issue opinions regarding the best interest of a child in many migration law procedures. Opinions by IND or DT&V, however, are not relevant in child protection procedures. A guardianship order – contrary to a child protection order –need not be renewed. The lack of judicial review on how guardians perform their duties after a guardianship order has been given is a matter of debate in the field of child law. These debates are also relevant for guardianship orders for children without legal residence in the Netherlands. Guardianship orders lack many of the possibilities children's judges possess in cases of child protection orders (OTS). When judging a request for renewing a child protection order, a judge can, for example, set targets which the parents and child protection agency must work towards and deadlines for certain actions. The judge can also assess decisions made by the family guardian from the child protection agency and scrutinise the family guardian's efforts to reach targets – such as returning children to their parents – and order changes if necessary. Because a guardianship order does not require an annual renewal, it lacks such control by children's judges.

Part 2: Difficulties in practice

The second part of this report focusses on implementation in practice. We have mapped situations in which tensions arise and, based on legal and empirical research, compiled a list of difficulties. For a selection of these difficulties, we provide an overview of the relevant legal frameworks, using fictitious cases. Difficulties are discussed within two main themes: *the different legal positions of minors with and without child protection orders* and *sustainable solutions for rejected unaccompanied*

minors: adequate conditions, no-fault and the division of duties between the actors involved. Appendix 1 outlines additional difficulties which could not be discussed in detail in this report. In this part of the research, we discuss the (possibly conflicting) perceptions of actors regarding their responsibilities, interpretations of the hierarchical relationships between and meanings of relevant norms, and the interactions between these norms in practical situations. We aim – to the extent possible – clarify the applicable legal frameworks and standards in these difficulties and intend to provide tools for the various actors involved to navigate the areas of tension in which they operate. Below, we discuss the most important findings.

1.	3. a.	What perceptions do representatives have of their own responsibilities, as well as those of the other actors involved?

Within the OTS *beleidskader*, the actors involved have agreed to strive for a clear division of responsibilities. Expert reports issued by the child protection board in the context of child (protection) procedures are taken as a starting point for assessment by the migration law authorities. It is the IND's responsibility to weigh these reports in their decision-making. The expert advice guideline (*Richtlijn deskundigenadviezen*) issued by the SKIV concerning these reports also stresses a clear division of responsibilities. In the interviews, representatives of the various actors also expressed that they aim for a clear division of responsibilities. Nevertheless, these efforts cannot mitigate all tensions. At times, the development of children is threatened by a lack of legal residence to such an extent that the core duty of child protection agencies – protecting children – cannot be separated from the residence status of these children.

In situations of unaccompanied minors with an asylum background, the actors involved have different responsibilities regarding return and no-fault policies. In these situations, tensions and difficulties arise that hinder the cooperation between actors. Of the actors involved, Stichting Nidos is given the most roles to fulfil (for an overview, see the table in Section 7.4). Parts of these roles appear downright contradictory. The perceptions actors have of their own responsibilities and those of other actors are clearly connected to the tensions they experience in practice.

2.	3. b.	What meanings do the actors involved ascribe to central concepts from migration law and child (protection) law, such as "adequate conditions" and "seriously threatened development"?

Chapters 6 and 7 discuss how child (protection) law and migration law define central concepts, such as "adequate conditions" and "seriously threatened development", in different ways. In migration law, these concepts are defined in a stricter and more general sense, whereas child

4. What tensions and difficulties are experienced by professionals involved
   a. Which parts or aspects of (the combination of) guardianship and child protections orders and migration law are experienced as conflicting or difficult by representatives of child protection agencies and migration authorities?
   b. What (potential) tensions are observed by other professionals involved, such as lawyers, judges and the child protection board?
   c. In which practical situations do representatives of child protection agencies and migration authorities experience tensions or conflicts? What factors influence these situations?

(protection) law focusses on the best interests of individual children. Some of the tension between the organisations involved can be understood from these differences.

Chapter 6; The differing legal positions of minors with and without child protection orders

A child protection order exerts great impact on the positions of children in migration law. When a child protection order is issued by a children's judge for a minor without a (sustainable) residence permit, this can create grounds for legal residence. For families without such a child protection order, migration authorities assume that the development of the children is not seriously threatened and that, therefore, the children can return with their parents.

The OTS *beleidskader* and the interviews have revealed that – if a child protection order exists – policy premises shift from principles of migration law principles to those of child protection law. This emphasis on the presence of child protection orders issued by a children's judge as proof of the threatened development of children originates from the system of migration law, which greatly values objective proof. From the perspective of migration law, a child protection order issued by a children's judge meets this standard of proof.

However, it is questionable whether the child protection order is the most useful legal concept to comprise the basis for the assessment by migration law of whether parents can adequately care for their children. Firstly, one assumption underlying the recognition by migration law of child protection orders is the idea that such orders imply that it is the parents who threaten the child's development. However, this assumption is not necessarily true from a child protection law perspective. A child's development can also be threatened by factors within the child itself, as a consequence of which raising the child becomes so demanding that parents cannot meet their needs. Furthermore, acceptance and cooperation with professional aid is a secondary criterion for issuing a child protection order. As such, minors with parents who are willing and able to cooperate with voluntary professional support in raising their children will often not receive child protection orders – and can thus be deported to their country of origin – whilst children with parents who refuse or fail to cooperate do get child protections order and, therefore, residence permits in the Netherlands.

Furthermore, child welfare professionals have discretion in both requesting and issuing child protection orders. Child (protection) law differs from migration law in that it is characterised by discretion and customisation, rather than legal unity and legal equality. In child (protection) law, minors and families with similar problems do not necessarily receive the same child protection measures. The measures issued depend on many factors, such as the availability of parenting support, possible bureaucratic barriers and the assessment of individual professionals. Taking the child protection order as a starting point for the migration law decision creates differences in treatment between families with and without child protection orders, even if differences might not exist in the actual threats to the children which would justify these different migration law outcomes. Several respondents experienced these differences in the treatment of children with and without child protection orders as arbitrary and undesirable. This situation also places the child protection board and child protection agencies in a bind. On the one hand, they do not want to consider the migration law status of a family in their decision to request a child protection order, but on the other, the lack of legal residence often directly impacts the developmental threats of minors.

Secondly, a child protection order can only be issued when a parent with parental authority is present in the Netherlands. Unaccompanied minors (AMVs) can never receive child protection orders, even if their development is severely threatened. AMVs are already under guardianship of a child protection agency, and so even AMVs with severe problems will never be eligible for residence permits based on severe threats to their development, even though they are potentially even more vulnerable than children who are in the Netherlands with their parents. A consequence of this situation is that different possibilities exist for children in equally distressing situations. For children with severe problems whose parents are in the Netherlands, sustainable solutions can be found in the OTS *beleidskader*, whereas this is not possible for children whose parents are abroad or have disappeared. This particularly harms the (relatively small) group of AMVs who have never applied for asylum and who are placed under the guardianship of regular (other than Stichting Nidos) child protection agencies. The abolishment of the discretionary powers of the Minister of Migration to grant legal residence in particularly distressing situations has severely impacted this category of children. Representatives of child protection agencies, the child protection board and the IND have experienced the lack of options for this particular category as a critical difficulty.

Respondents consider AMVs with asylum backgrounds not being eligible for the OTS *beleidskader* as relatively less problematic. They regard this group as fundamentally different than AMVs without previous asylum applications. It is possible that migration policy goals – such as a fear for a "pull effect" – as well as the much larger size of this group play a role. Nevertheless, this group also includes minors with very serious problems.

Chapter 7: Sustainable solutions for rejected unaccompanied minors: Adequate conditions, no-fault, and the division of duties

This second theme focuses specifically on rejected unaccompanied minor asylum seekers. These AMVs with asylum backgrounds are generally under the guardianship of the specialised child protection agency Stichting Nidos. Although AMVs without asylum backgrounds fall under the same migration and child protection law framework, in practice, these groups are regarded differently and supported in different ways. Many AMVs whose asylum claims are rejected end up living in illegality after turning 18. That so many young people end up living in illegality means that the authorities involved have not succeeded in realising sustainable future prospects for these young people, either in terms of legal residence in the Netherlands, residence in an adequate care facility abroad or residence with family members abroad.

A number of difficulties arise when seeking sustainable solutions for AMVs whose asylum claims have been rejected. Firstly, migration law and child (protection) law differ regarding what constitutes adequate accommodation in the country of origin or elsewhere outside of the Netherlands. These differences can become prominent when supporting minors during a reform procedure and can lead to tensions between the organisations involved. Differences between migration law and child (protection) law regarding adequate accommodation are also critical in migration law procedures regarding so-called "no-fault" permits.

Stichting Nidos and the DT&V each have their own duties in return procedures which are regulated by different fields of law. The support of Stichting Nidos in voluntary return procedures is mainly regulated by child protection law, while taking into account the migration law decisions. In the supervision of AMVs whose applications have been rejected, this leads to difficulties in assessing whether accommodations are adequate. These differing views on adequate accommodation lead to the collision of child protection law and migration law in no-fault policies. No-fault policies fail to consider that, legally, a child cannot depart without the permission of the guardian and that a guardian cannot give permission for voluntary return if they do not deem return in the best interest of the child. Different tasks of Stichting Nidos intersect in these situations. This strengthens the

image that the child protection agency Stichting Nidos is too focussed on residence in the Netherlands. Due to contradictory roles and the high complexity of the practice of voluntary return and no-fault policies, Stichting Nidos is in a difficult position, which causes tensions between Stichting Nidos and, in particular, the DT&V. These tensions originate in the collision between child protection law and migration law.

Another area of tension between the two fields of law is the actions of the guardian in migration law procedures. Child protection agencies (Stichting Nidos, as well as regular child protection agencies) hold much discretion in assessing the best interest of a child. The guardian from the child protection agency should, based on their expertise, assess whether giving permission for steps in a migration procedure is in the best interest of the minor. Case law of the Council of State, however, has categorised actions of the guardian as "frustrating" or "not cooperating". As such, the actions of the guardian can have consequences for the minor in migration law. This places guardians in a difficult position. Guardians have the duty to – from their expertise as child protection workers – make decisions about children to promote their best interests and development. At the same time, their decisions can exert consequences in future migration procedures, because in migration law case law, the guardian is seen as acting *on behalf of* the child. In these situations, it is irrelevant whether the minor agreed to the decisions of the guardian or was even informed of them. Moreover, it is questionable whether it is feasible for guardians to properly foresee possible future migration law consequences or, furthermore, to what extent these possible future consequences are considered when assessing what actions are in the best interest of a child. It is obvious that a specialised child protection agency such as Stichting Nidos has more expertise on migration law than do regular child protection agencies.

Similar tensions can also arise around the topic of sharing information, for example, about the presence of family members of the minor in the country of origin or elsewhere in Europe. This final difficulty is connected to the division of responsibilities between actors and the different – sometimes contradictory – child protection and migration law duties of Stichting Nidos. Child (protection) law, privacy regulations and migration law collide in these situations, especially when sharing information that can be relevant for return. Such information can exert consequences in migration procedures, and IND and DT&V expect Stichting Nidos to share such information with them. However, a child protection agency can only share information with the permission of their client, unless otherwise specified by law. Moreover, child protection agencies have discretion; even when clients give permission, guardians are not obliged to share information if they feel it is not in the best interest of the child. At the same time, failing to share information can exert consequences in a migration procedure. These tensions between migration law and child (protection) law, as well as confusion about the powers and duties of various actors – especially regarding the child protection law powers and duties of Stichting Nidos and other child protection agencies, are the cause of the tensions which are experienced in practice.

Chapter 8: Potential solutions

5. Potential solutions:
    a. How have tensions, conflicts and situations been handled to date, what laws prevailed in those situations, and how are these methods of handling situations experienced by the actors involved?
    b. For what tensions, conflicts and situations can it be clearly discerned from law and regulations which law should prevail?
        i. If it can be clearly discerned: which law should prevail in these tensions, conflicts and situations?
        ii. If not, how can tensions, conflicts or situations be solved in a different way, and what is necessary to achieve these solutions?

The legal fields of child (protection) law and migration law both exist side by side and are related. Clear interactions occur between international and national child protection law and international child laws. The norms from international child law increasingly find their way towards EU law and the case law of the ECHR, which also regulate Dutch national migration law. These norms of child law disrupt the system of Dutch migration law, which causes tensions and difficulties within migration law. Furthermore, restrictive interpretations of these higher norms in migration law cause friction between migration law and Dutch child (protection) law, which tends to interpret international conventions such as the Convention on the Rights of the Child more comprehensively.

The best interest of the child is also incorporated into migration law, through child protection law concepts. For example, migration law generally defers to child protection and family law interpretations of parental authority and guardianship. In migration law, child protection orders function as a means of establishing whether parents can, with the help of social organisations, care for their children. In cases of guardianship for AMVs, migration law does not defer to a child protection approach. Whereas in the past, particularly distressing situations of children without asylum backgrounds could be solved through the discretionary powers of the Ministry of Migration in close cooperation between the IND and child protection agencies, in many cases, this is no longer possible. This causes tensions and difficulties for which no solutions exist within the present child (protection) and migration legal framework.

Child (protection) law does not defer to migration law with regard to the sharing of information. Migration law authorities have not been granted exemptions in child protection or general privacy rules. This causes collisions in no-fault policies, because these policies assume that parents or guardians are able to share all information available.

In the context of return, the migration law and child protection duties and powers of the actors involved co-exist, and there is no hierarchical relationship. Voluntary return is primarily regulated by child (protection) law, considering decisions by migration authorities, including the obligation to leave the country if such a decision has been issued. Deportation is primarily regulated by migration law, whilst the legal concepts of child protection law, such as guardianship, do not hinder deportation. Guardians have the duty and power to assess the best interests of children in these situations, regardless of the migration law's views on what such interests would comprise. Neither

the legal position of Stichting Nidos nor the subsidies they receive for their role interfere with these powers and duties.

The manners in which migration and child protection actors currently effectuate their powers and duties in voluntary return and no-fault procedures lead to dissatisfaction amongst all parties involved. Tensions and conflicts arising from these situations, for example, regarding issues of adequate accommodation or the sharing of information, remain unsolved. An impasse seems to prevail.

Based on this research, we have identified a number of possible solutions, as summarised below:

1. Migration law is continually developing. This is related to the influence of EU law but also to the political powers that influence this field of law. The situation, in that the power to grant residence based on the interests of children is primarily discretionary in nature and has not been laid down in laws and regulations, means that residence grounds for children can be changed easily and quickly. Such developments make it difficult for child protection actors, such as child protection agencies and children's judges, to know migration law and anticipate the decisions of migration authorities. Laying down child-specific grounds for residence – such as the OTS *beleidskader* – in law would ensure better protection of the rights of children. In this manner, actors in child (protection) law would be better enabled to protect the best interests of children, whilst using the migration law framework as a point of departure.
2. The limited space in migration laws and regulations to grant residence in particularly distressing situations, as a result of the abolishment of the discretionary power of the Minister of Migration, means that it has become more difficult to find solutions based on the best interests of children in particularly distressing situations. This leads to tensions and difficulties in practice. Such tensions could be addressed by creating more space in migration law to assess the best interests of children and – if necessary – grant residence based on these interests. This would require a change in the system of migration law, meaning that – similar to in child protection law – parental rights and duties would not be a means only to promote the interests of children as a group but also to promote the interests of individual children. Various forms could be considered to achieve this. For example, the best interest of the child concept could be laid down as a ground in the *Vreemdelingenwet*, or a special child-specific procedure could be developed for both asylum and non-asylum cases. Such grounds or procedures would enable an integrated assessment of the best interests of children. A reintroduction of the discretionary powers of the Minister of Migration to grant residence in particularly distressing situations could also address some of the difficulties created by their abolishment.
3. Research must be done on how the principle of the best interest of the child can be laid down in migration law, as well as what the consequences would be. It is essential to investigate how the concept of severe threat to the development of a child – in other words, the developmental interests of children – could manifest in this field of law. Examples could include the initiative proposal to amend the *Vreemdelingenwet 2000* in connection to anchoring the best interest of the child, which mentions "serious threats to the interests of a minor", or the *Richtlijn deskundigenadviezen* of the child protection board (RvdK) and the migration authorities IND and DT&V, which uses the term "a too large risk of permanent developmental damage". The development of a framework of concepts with a corresponding methodology to assess the developmental interests of children is critical to providing material significance to the best interest of the child principle in migration law. The development of a framework of concepts with a corresponding methodology to assess the developmental interests of children is

necessary to balance between the flexibility of the best interest of the child principle – which makes this principle a useful means to adapt to the individual needs of children – and the importance of legal equality.

4. In the shorter term, the OTS *beleidskader* could be extended to enable the actors involved to seek sustainable solutions in the Netherlands for children who are placed under guardianship of child protection agencies. At minimum, cases of children who are placed in closed care facilities (*gesloten plaatsing*) – which is only possible with a special order issued by a children's judge – should, in a similar manner to minors with child protection orders, be discussed by the SKIV, so sustainable solutions can be found in cooperation with guardians.
5. In specific situations where return might be possible, more research should be done by IND and DT&V on the situations where children would arrive after departure or deportation. Various forms are possible, such as the *individueel ambtsbericht*. Strengthening the capacity of and cooperation with the Central Authority might also contribute to these investigations. The experience that the DT&V has gained in recent years in cases where they investigated possibilities to transfer a child protection order may also be relevant. Such investigations should ensure the safety and privacy of children and their families.
6. Within migration authorities, doubts exist about how Stichting Nidos executes its duties, for example, in the context of return, and whether this execution can be considered as being in the best interest of the child. At the same time, it is important that the independent position of Stichting Nidos as a child protection agency is respected, clarified and – where possible – strengthened. Attempting to limit the powers of Stichting Nidos through migration law or, for example, the decision to award subsidies, would be less desirable. Whether it is possible to realise more control over the return supervision of Stichting Nidos through the child protection law framework should be investigated. A possible solution could be an annual check by a children's judge, similar to those of children with child protection orders, which must be renewed annually. Children's judges are best suited as authorities to review guardians' work and question whether the best interests of children are sufficiently represented.
7. A lack of clarity currently exists regarding the family tracing and research capabilities of IND and DT&V regarding situations in countries of origin, including in what circumstances these capabilities are used. More transparency is needed regarding this issue. Further research is required on whether the State meets its obligations to family tracing based on Article 24 paragraph 3 of the Reception Directive. In the expected policy reaction to the TQ judgement of the CJEU, the Minister of Migration can provide clarification regarding the fulfilment of the obligation to investigate adequate accommodations in countries of origin, which results from Article 10 paragraph 2 of the Return Directive and Article 24 of the Charter.