



Wetenschappelijk Onderzoek- en  
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Cahier 2023-11

# Rechtsbijstandsverlening in kinderopvangtoeslagzaken

*De doorwerking van de zelfredzaamheidstoets in  
bezwaarprocedures tegen de Belastingdienst  
over kinderopvangtoeslagzaken tussen 2011-  
2021*

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Summary

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**Cahier**

De reeks Cahier omvat de rapporten van onderzoek dat door en in opdracht van het Wetenschappelijk Onderzoek- en documentatie Centrum is verricht. Opname in de reeks betekent niet dat de inhoud van de rapporten het standpunt van de Minister van Justitie en Veiligheid weergeeft.

## Summary

### Legal aid in the childcare benefits scandal

The effect of the self-reliance criterion in objection procedures against the Dutch tax administration concerning childcare benefits applications between 2011-2021

#### Introduction

From 2004 to at least 2019, the Dutch tax administration terminated the right to childcare benefits and claimed repayment of advances for a large number of parents. In many of these cases, parents had made small mistakes on their application or had been misled by childcare agencies. Nevertheless, they were required to repay large sums of money in received benefits. Furthermore, their right to future childcare benefits was revoked. As a result, many parents faced major financial problems.

The very strict way in which the Dutch tax administration handled cases concerning childcare benefits has had enormous consequences for the parents affected as well as for government, the judiciary, and agencies tasked with implementing social welfare policies. Various parliamentary committees of inquiry and evaluations over the past three years have mapped these consequences. This report deals with an aspect of the childcare benefits scandal that has so far remained under researched: could the aggrieved parents get sufficient legal support or were they left on their own in submitting an objection to the Dutch tax administration?

Dutch citizens of limited means can apply for state-financed legal aid provided by private lawyers. The Legal Aid Board decides on these applications based on different laws and regulations. Parents who were affected by the childcare benefits scandal and who wanted to object to the decision made by the Dutch tax administration were often denied legal aid. As a result, these parents had to represent themselves in objection hearings against the Dutch tax administration, or refrained from filing a notice of objection altogether. This issue was brought to the public's attention from the end of 2020 through publications in various media outlets<sup>1</sup> and two parliamentary motions.<sup>2</sup>

This research shows how the Dutch legal aid system functioned in objection procedures against the Dutch tax administration during the childcare benefits scandal (2011-2021). Additionally, the research provides suggestions to improve the functioning of the legal aid system. In doing so, it contributes to broader debates on how to strengthen citizens' legal protection against the government.

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<sup>1</sup> Van Ammelrooy, P. (2021). Overheid weigerde slachtoffers van toeslagenschandaal jarenlang gratis rechtsbijstand [For years, government denied victims of benefits scandal free legal aid]. *De Volkskrant*, February 10, 2021. Accessed on January 11 2023 from '[Overheid weigerde slachtoffers van toeslagenschandaal jarenlang gratis rechtsbijstand](https://www.volkskrant.nl/nieuws-achtergrond/overheid-weigerde-slachtoffers-van-toeslagenschandaal-jarenlang-gratis-rechtsbijstand~d6e31104-9600-4100-9000-000100000000)' ([volkskrant.nl](https://www.volkskrant.nl)).  
*RTL Nieuws* (10 februari 2021). Slachtoffers toeslagenaffaire jarenlang rechtsbijstand geweigerd: 'Grof schandaal' [Victims of benefits affair denied legal aid for years: 'Gross scandal']. *RTL Nieuws*, February 10, 2021. Accessed on January 11, 2023 from [Slachtoffers toeslagenaffaire jarenlang rechtsbijstand geweigerd: 'Grof schandaal' | RTL Nieuws](https://www.rtl.nl/nieuws/2021/02/10/slachtoffers-toeslagenaffaire-jarenlang-rechtsbijstand-geweigerd-grof-schandaal).

<sup>2</sup> *Parliamentary Papers II 2020/21*, 31 753, nos. 230 and 233.

*Conclusion: The Dutch legal aid system did not function adequately objection procedures regarding childcare benefits. Preconditions for the implementation of the self-reliance criterion were not present to a sufficient degree. Additionally, the protocols regarding applications for legal aid formulated by the Legal Aid Board were experienced as strict.*

The Dutch legal aid system aims to ensure access to justice for everybody in the Netherlands, including citizens of limited means. Because the system is financed through public means, certain conditions apply. These conditions are codified in the Legal Aid Act (*Wet op de rechtsbijstand, Wrb*) and the Decision on eligibility of applications for legal aid (*Besluit rechtsbijstand- en toevoegcriteria, Brt*). The core idea behind the Legal Aid Act is that state-financed legal aid should be granted only when really necessary. The assumption is that citizens are self-reliant, meaning that they are able to address simple legal problems themselves, or with help from their own social network or with assistance from low-threshold legal services such as Legal Services Counters (*Juridisch Loket*) or socio-legal counsellors. These services can help citizens to understand their legal problem or to draft a notice of objection, but they do not offer representation in objection hearings or appeal proceedings. Cases in which citizens are considered self-reliant do not qualify for legal aid by a subsidized lawyer. In the case of childcare benefits, citizens are expected to be able to independently object to decisions made by the Dutch tax administration. Legal aid is only granted in exceptional circumstances and requires lawyers to convince the Legal Aid Board that the complexity of the case requires legal aid.

According to the professionals interviewed in this study, this way of working ultimately contributed to the fact that aggrieved parents did not always receive the legal aid they did in fact need given the complexity of their case and their personal circumstances.

### **Preconditions for self-reliance fall short: strengthen low-threshold legal services**

This study has shown that the preconditions for the implementation of the self-reliance criterion were not present to a sufficient degree. Firstly, it is assumed that all citizens with a legal problem can access low-threshold legal services, such as those provided by socio-legal counsellors. However, this is not the case in practice as these services are not available everywhere. Additionally, previous research has shown that citizens with a similar legal problem have different capacities to address this problem.

Consequently, self-reliance in practice differs between individuals as it depends on a combination of factors including the characteristics of the legal problem, personal circumstances such as illness, financial problems or debts, and capabilities. These factors are not taken into account in the legal framework. They are also not present in the protocols formulated by the Legal Aid Board that are used to decide on applications for legal aid. Secondly, the self-reliance criterion assumes that government agencies such as the tax administration offer assistance to citizens who want to object to their decision and that procedures for objection and complaint are working properly. The childcare benefits scandal has shown that this was not the case.

Moreover, interviews with professionals demonstrate that the problems observed in the childcare benefits scandal are also evident in other areas. The shortcomings in the application of the self-reliance criterion seem to be characteristic of tax cases in general. There are also similarities to cases in other areas of law, such as those handled by the Central Judicial Collections Agency (CJIB) and certain cases in personal and family law.

The improvement for these issues can be sought in strengthening low-threshold legal services. Opportunities for high quality and widely accessible socio-legal support are important to ensure that citizens with a legal problem are helped quickly. Solutions might also involve mediation, in which citizens and government agencies enter into a conversation to discuss the situation, explore the problem, and consider whether the decision rendered is justifiable. Such an approach then focuses more on solving the problem without starting legal proceedings. This does require government agencies to be citizen-oriented instead of strictly adhering to the rules.

### **The strict application of the legal aid policy has far-reaching consequences: opt for more generous granting of legal aid**

The strict application of legal aid policy by the Legal Aid Board has had far-reaching effects. Some of the aggrieved parents may have refrained from applying for legal aid or filing a notice of objection. Additionally, lawyers working within the legal aid system indicated that they submitted fewer or no applications for legal aid in cases regarding childcare benefits. The underlying legal issues in these cases were often complex and intricate. Both parents and lawyers had trouble accessing the relevant tax files. As a result, lawyers could not always get a clear understanding of the situation. Under these circumstances, it also proved difficult to argue the complexity of the case, which was needed to qualify for state-financed legal aid.

Data provided by the Legal Aid Board show that legal aid was granted in two-thirds of the applications they received. However, the number of applications for legal aid seems low in comparison to the large number of parents affected by the childcare benefits scandal. Furthermore, the rejection rate for childcare benefit cases is relatively high compared to the total number of applications to the Legal Aid Board during that period.

The improvements for these issues can be sought in a more generous legal aid policy. Legal aid lawyers experience the current way of working as exclusive: applications are rejected unless the lawyer can successfully argue the complexity of the case. The insights from this study suggest that an inclusive way of working is more in line with actual practice: legal aid is granted, unless it is very clear that someone can handle it themselves.

A more inclusive approach can firstly contribute to preventing further legal proceedings. Secondly, a more generous legal aid policy ensures that legal aid providers are involved at an earlier stage. During the objection procedure, the government agency reviews the decision in its entirety, whereas during appeal proceedings the administrative judge only conducts a limited review. Therefore, it is important to present the appropriate legal arguments already in the notice of objection. In the current legal aid system, social lawyers sometimes become involved only after the objection has been lodged. This impairs the ability of legal aid lawyers to effectively represent their clients.

### **The temporary regulation for legal aid in case of insufficient self-reliance**

In the time period of this study, the 'Temporary regulation for legal aid in case of insufficient self-reliance' (Ratz) was introduced. This scheme mitigates part of the problem with the self-reliance criterion. The Ratz is intended for citizens who before did not qualify for legal aid because they were supposed to be self-reliant, and where low-threshold legal services are unable to provide the appropriate assistance. By still granting state-financed legal aid in such cases, the Ratz ensures that citizens are not left in the lurch.

## **Overview of research findings**

The functioning of the legal aid system, in particular in relation to the self-reliance criterion, has been analysed through various methods (see table S1).

- A legal analysis was used to study the meaning of self-reliance in the context of the Legal Aid Act, the Decision on eligibility of applications for legal aid and the protocols developed by the Legal Aid Board. In other words: what is the law in the books?
- Relevant parties have been interviewed on how the self-reliance criterion was employed in objection procedures in childcare benefits cases. In other words: how is the law applied in practice?
- The number of applications for legal aid has been studied using registration data from the Legal Aid Board.

The research findings are outlined below by section.

## **Open description of self-reliance in the law**

A recurring debate with regard to state-financed legal aid is how the system is financed. Based on jurisprudence from the European Court of Human Rights, conditions may be imposed on granting state-financed legal aid. Hence, the self-reliance criterion can be seen as a substantive limitation to financing legal aid. The core idea is that state-financed legal aid should only be granted in those cases where it is truly necessary. This idea is based on several assumptions about the design of the legal aid system and the behavior of parties within it:

- Limiting the right to legal aid contributes to keeping expenditure on state-financed legal aid manageable.
- State-financed legal aid is not necessary for relatively straightforward legal questions because other suitable assistance, such as municipal or other government services, socio-legal counsellors or social work is available.
- Government agencies are citizen-oriented. For instance, they should offer assistance when applying for benefits or lodging an objection against decisions of administrative bodies. The procedures for this should be transparent and clear to citizens.
- Given the same legal problem, citizens possess similar capabilities to address the problem.

The term 'self-reliance' as such is not included in the Legal Aid Act. However, the idea of a self-reliant applicant is described. It concerns situations where the applicant can independently, or supported by other parties whose activities are not covered by the Act, address their case. The Decision on eligibility of applications for legal aid describes a few specific cases for which legal aid certificates will not be granted. These include applications for benefits, filing taxes, submitting a notice of objection in a tax case, applying for a waiver of tax debts, and filing other requests or applications for a decision by a governing body. Additionally, no subsidized legal aid will be provided for notices of objection in tax cases if the dispute is of a numerical nature. An exemption can be made if a case is factually or legally complex. This shows that self-reliance as it is defined in the law is based on characteristics of the legal problem. Consequently, every citizen is expected to be self-reliant in relatively straightforward cases such as the ones above and be able to handle these without professional legal assistance. Research literature shows that this idea of a general level of self-reliance is inconsistent with reality.

Decisions on applications for legal aid are made by employees of the Legal Aid Board on a case by case basis. In childcare benefits cases, the relevant document is

'instruction W013'. This instruction is available to the public on the website of the Legal Aid Board. This ensures that the instruction serves as a source of information for employees of the Legal Aid Board but also for legal aid lawyers and citizens.

### **Strict application of the self-reliance criterion**

Lawyers can apply for legal aid in two different ways. In both procedures, the application will be assessed based on protocols developed by the Legal Aid Board, including the self-reliance criterion:

- The High Trust procedure has been established as the standard practice since 2010. In this procedure, applications are granted without substantive review. Verification of whether applications were granted rightfully is carried out after the fact, via spot checks.
- In the regular procedure, applications are submitted to the Legal Aid Board and employees of the Board decide whether legal aid is granted.

Based on interviews with employees of the Legal Aid Board, employees of the Legal Services Counters, legal aid lawyers and socio-legal counsellors, the general impression emerges that the self-reliance criterion was applied almost without exception by the Legal Aid Board. Employees of the Legal Aid Board subscribed to the idea that legal aid is only intended for cases requiring specialist legal assistance. Consequently, applications in child care benefits cases were generally rejected because citizens were expected to be self-reliant. Exceptions were possible, but cases had to be legally and/or factually complex. There are no straightforward criteria to determine whether a case should be considered legally and/or factually complex. This depends on the motivation provided by the lawyer in their application and the judgment of the employee reviewing the case. The instruction of the Legal Aid Board mentions only one specific type of case: a dispute about childcare benefits where the childcare agency kept disorderly accounts – so that parents were unable to provide the right documents to the tax administration. In these cases, complexity is assumed and legal aid is granted.

Employees of Legal Services Counters advise citizens with a legal problem on their eligibility for legal aid, among other things. In this advice, they take into account not just the financial situation of individual clients but also the assessment criteria used by the Legal Aid Board, including the self-reliance criterion. Interviewed employees had relatively limited experience with childcare benefits cases during the research period. However, in these and other cases, their policy is to advise citizens with a legal problem to contact a lawyer when their case is complex but also to warn them that they may not qualify for legal aid, depending on the decision by the Legal Aid Board. Citizens may have perceived this as discouraging.

Legal aid lawyers experienced application of the self-reliance criterion by the Legal Aid Board as strict. In the opinion of the interviewed lawyers, not enough attention was paid to the legal complexity of childcare benefits cases. In many cases, it was wrongly assumed that the dispute was factual or numerical. Additionally, in many cases legal aid lawyers found it difficult to argue that a case was complex. There were no clear criteria to demonstrate complexity. This was particularly the case for applications submitted via the High Trust procedure. Several lawyers had the experience that their submitted applications were rejected upon subsequent inspection. As a result, their fee was withdrawn. The costs incurred for these cases are borne by the lawyer. They are not allowed to recover them from the client.

Regarding self-reliance, the Legal Aid Act refers to services outside of the legal aid system, including socio-legal counsellors, who may assist citizens in lodging a notice of objection. However, according to the socio-legal counsellors we interviewed they can

only partially fulfill this role. In practice, childcare benefit cases turned out to be too complex for socio-legal counsellors. At the same time, counsellors had trouble referring citizens with a legal problem to a legal aid lawyer. Due to the strict application of the self-reliance criterion, these cases were not always financially interesting for lawyers. Besides, both counsellors and lawyers believed that the time commitment required in these cases was substantial – due to their complexity – while the chances of a successful objection or appeal were slim.

### **One-third of applications for legal aid were rejected**

Based on registration data of the Legal Aid Board a general impression of the number of applications that were granted and rejected can be formed. This concerns applications for legal aid in objection procedures against the Dutch tax administration concerning childcare benefits in the period 2011-2021. Approximately two thirds of the applications were granted. Therefore, some of the parents who objected to a decision by the Dutch tax administration about childcare benefits in the period 2011-2021 did receive state-financed legal aid. Based on the available data it was not possible to ascertain how many applications were rejected on the grounds of self-reliance.

### **Part of the problem explained**

The focus of this research was on the assessment of applications for legal aid in objection procedures in childcare benefit cases. The role that 'self-reliance' played in this assessment was studied as well. Because of this focus, only part of the lack of legal assistance in the childcare benefit scandal could be elucidated. Our study found indications that in some cases no application for state-financed legal aid was made at all. In addition, this research has certain limitations relating to the design and available data (see also Table S1), which means that the results do not provide a complete picture. Besides, our study was not able to provide insight into the experiences of parents who are not eligible for state-financed legal aid because their income falls above the limit set by the Legal Aid Act. Nevertheless, the research has provided important insights into the functioning of the Dutch legal aid system.

**Table S1 Overview and limitations of the research methods used**

Research method	Description	Limitation
Legal analysis	Parliamentary documents concerning: - articles 12 and 28 of the Legal Aid Act (Wrb) - article 8 of the Decision on eligibility of applications for legal aid (Brt)  Rulings (1994 - 1 December 2021) published on Rechtspraak.nl concerning the application of the self-reliance criterion	Mainly rulings that are important for legal practice and for society are published on Rechtspraak.nl.
Interviews	24 respondents with experience or knowledge of the state of affairs in childcare benefit cases: - Ministry of Justice and Security: 4 - Legal Aid Board: 5 - Legal Services Counters: 5 - social lawyers: 7 - socio-legal counsellors: 3	The interviews only provide information on the perceptions and experiences of the interviewed professionals.
Registration data Legal Aid Board	Applications for legal aid in objection procedures against the Dutch tax administration in childcare benefits cases during 2011-2021	Cases are not registered as 'childcare benefit case' or 'objection case'. Therefore, cases have been selected based on case descriptions.

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