

## 7 | Discharge of parental authority Considerations regarding the compatibility of the new provision of the Dutch Civil Code with the European Convention on Human Rights

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### 1 INTRODUCTION

The notion of parental responsibilities is closely related to the evolution of the legal position of the child. Historically, the legal position of the child has evolved from being seen as the property of the parents, to a vulnerable individual in need of protection to a rightholder in his/her own right.<sup>1</sup> The initial terminology of parental rights has also been gradually replaced by that of parental responsibilities so as to reflect the subordination of the parents' interests and rights to those of the children.<sup>2</sup>

It should be noted from the outset that there is no universal definition of 'parental responsibilities'. In the European Union 'parental responsibility' has been interpreted to mean 'all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access'.<sup>3</sup> Pursuant to the Dutch Civil Code (the 'DCC'), parental authority comprises the duties and rights of parents with regard to the care and upbringing of their child (Art. 1:247(1) DCC). Care and upbringing include the care and responsibility for the child's mental and physical well-being, and fostering the development of its personality.

State authorities may limit or withdraw parental responsibilities. Such limitations can be imposed via three different types of child protection orders,

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1 M.A. Mason, *From Father's Property to Children's Rights: The History of Child Custody in the United States*, Columbia University Press New York 1994; J.M. Eekelaar, 'The Emergence of Children's Rights', 6 *Oxford Journal of Legal Studies* 1986, 161.

2 S. Lifshitz, 'The Best Interests of the Child and Spousal Laws', in: Y. Ronen, C.W. Greenbaum (ed.), *The Case for the Child, Towards a New Agenda*, Intersentia Antwerp 2008, p. 46.

3 Art. 2(7) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L338/1, 2003.

as follows: a supervision order, a care order for the discharge of parental responsibilities,<sup>4</sup> and an emergency care order.

This contribution analyses the concept of discharge of parental responsibilities from the perspective of the Dutch Civil Code and the ECtHR.

Important legislative amendments to the DCC with regard to child protection orders (Arts. 1:254-278 DCC) that came into force on the first of January 2015 have led to a significant shift of legal conditions for discharge of parental responsibilities. The legal conditions for discharging parents of their responsibilities have been eased, so as to facilitate the possibilities for courts to impose such measures.

Until 1 January 2015 the legal conditions for discharge of parental responsibilities were focused on parental behaviour or parental failure (is a parent a 'good enough parent?'). Article 1:266 DCC referred to the parent being 'unfit or unable to fulfil the duty of caring for the child or its upbringing'. Relevant case law underscored the use of a discharge order as a measure of last resort.<sup>5</sup> As long as parents accepted that their child was living in alternative care with a supervision order, a discharge order was not legitimized.

The intention of the legislator with the recent amendments was to shift the attention from the parent(s) to the child. It is, however, important to assess whether the newly introduced conditions to discharge of parental rights are in line with the right to respect for family life of parents and child as is guaranteed in Article 8 of the European Convention on Fundamental Rights and Freedoms (the 'ECHR' or 'Convention'). Does the new DCC take sufficient account of the rights and interests of parents and children to stay together without state interference as guaranteed under Article 8 ECHR? The assessment of compliance with the ECHR is highly relevant from both a theoretical and practical perspective. According to Articles 93 and 94 of the Dutch Constitution, international human rights treaties or provisions which by nature of their content can be binding on everybody have binding power and shall take precedence over national law. The substantive ECHR provisions are directly enforceable in Dutch practice<sup>6</sup> and there have been several situations where the Netherlands had to change either its laws or its practice following negative rulings of the European Court of Human Rights (the 'ECtHR' or 'Court').<sup>7</sup>

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4 In this contribution the term 'discharge of parental authority' has been used. In the case-law of the ECtHR the terminology used is usually 'deprivation of parental responsibilities/authority'.

5 HR 25 April 1997, NJ 1997/596; HR 7 April 2000, NJ 2000/563.

6 J.H. Gerards & J.W.A. Fleuren, *Implementatie van het EVRM en de uitspraken van het EHRM in de nationale rechtspraak*, Nijmegen: Radboud Universiteit 2013 (in opdracht van het WODC), pp. 35-36.

7 Following *Salduz/Turkey* (ECtHR 27 November 2008, no. 36391/02) & *Panovits/Cyprus* (ECtHR 11 December 2008, no. 4268/04) the Dutch Supreme Court on 30 June 2009 'implemented' the relevant conditions of the ECtHR with regard to juveniles' right to counsel during police interrogations (ECLI:NL:HR:2009:BH3081) and following *S.T.S./the Netherlands* (ECtHR 7 June 2011, no. 277/05) the Dutch Supreme Court overruled the established

Section 2 of this contribution focuses on the provisions of the DCC regarding discharge of parental responsibilities. For a clearer picture of the recent legislative changes, a brief outline of the relevant provisions of the 'old' DCC is provided. Section 3 presents an overview of the ECtHR's relevant case law, with a focus on the aspects which are likely to have an impact on the Dutch situation. Finally, section 4 assesses the impact of the European case law on the Dutch practice in the area of discharge of parental responsibilities.

## 2 DISCHARGE OF PARENTAL AUTHORITY UNDER DUTCH LAW

The Dutch system of child protection as regulated in the DCC provides for three possible measures: a supervision order, a care order or an emergency protection order. A *supervision order* entails the temporary limitation of parental authority to a third person, without discharging the parents of their parental responsibilities. It may be imposed with or without the placement of the child in alternative care for a maximum of one year with the possibility of extension for successive one-year periods. A *care order* entails that the legal parents are discharged of parental responsibilities and a third party (natural or legal person) will be granted the custody over the child. Finally, an *emergency protection order* (emergency supervision order or emergency care order) may be imposed for a maximum duration of three months.

Bill No. 32 015, in force as of 1 January 2015, amended the DCC with respect to the imposition of care and supervision orders. According to the explanatory memorandum, this bill aims – in line with the UN Convention of the Rights of the Child ('CRC') – to better protect children against parents who fail to bring them up in a healthy and balanced manner.<sup>8</sup>

This section analyses the relevant provisions of the DCC with respect to discharge of parental responsibilities. For a better understanding of the current legislative framework, subsection 2.1. briefly illustrates the legal provisions in force before 2015. Subsection 2.2. highlights the new legal concept of discharge of parental responsibilities that was introduced on 1 January 2015.

### 2.1 Discharge of parental authority before 1 January 2015

Until 1 January 2015, the Dutch *care order* could be ordered by a court on two different legal grounds: (1) if the parent was 'unfit or unable to fulfil the duty of caring for the child or its upbringing' (Arts. 1: 266 and 268 DCC), or (2) on

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case law of the Supreme Court with regard to the inadmissibility of an appeal if the court's authorization to a juvenile's placement in alternative care had in the meantime lapsed (HR 24 June 2011, ECLI:NL:HR:2011:BQ2292; HR 14 October 2011, ECLI:NL:HR:2011:BR5151).

8 *Kamerstukken II* 2008/09, 32 015, no. 3 (MvT), p. 2.

grounds of abuse, certain irrevocable criminal convictions, an improper way of living, the serious disregard of the directions of the foundation responsible for the protection of the child or the existence of a well-founded risk of neglect of the best interests of the child because of the parent reclaiming or taking back the child from other caregivers (Art. 1:269 DCC).<sup>9</sup> As mentioned above the imposition of a care order resulted in the deprivation of parental responsibilities. The effect of discharge of parental authority, regardless of the ground used, was that the parent could no longer take decisions with regard to the upbringing of the child, which were entrusted to a third party. Where the court is convinced that a minor may again be confided to the discharged parent, it could reinstate such a parent with parental authority (Art. 1:277(1) DCC). Therefore the option to regain parental authority was always open to parents.

Further, it is important to note that discharge of parental authority did not entail a severance of ties between a child and its parents. Parents still had the right to (request) contact and access, children remained their heirs, the legal ties with their blood relatives such as grandparents remained equally unchanged, and parents' maintenance obligation to their children remained intact. The Dutch child protection system did not include an adoption order as the most far-reaching form of child protection, unlike many other European countries. Although theoretically adoption could be used as a protection measure, in practice it hardly happened. Adoption orders were only used for cases when parents were no longer alive or consented to an adoption.

However, it should be stressed that the Dutch courts showed reluctance to use the aforementioned *care order* and preferred ordering the other, less intrusive measure, the *supervision order*, which was perceived as temporary, to be discontinued as soon as the family reunification became possible.<sup>10</sup> Even when it was clear that the future of the child was not with the biological family but in foster care, case law shows that the supervision order was often used instead of a care order as long as parents consented to the placement in care of their child.<sup>11</sup> Courts perceived the care order – intended by the legislator

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9 Until 1983 parents who were deprived of parental authority on the basis of intentional (mis)behaviour lost their right to vote; this reflects the punitive nature of the child protection order '*ontzetting*' that was established over 100 years ago; this first child protection order was introduced in 1905. The care order '*onthefving*' (unintentional behaviour) was later introduced (in 1947). The supervision order was introduced in 1922 in combination with the introduction of the children's court judge.

10 Art. 1:262 DCC (until 1 January 2015 Art. 1:257 DCC) states that 'the help and support of the foundation shall be directed to ensure that the parent vested with parental authority shall as much as possible remain responsible for the care and upbringing (section 2) and shall foster the family ties between the parent and the minor (section 4)'.

11 See e.g. HR 8 May 1992, NJ 1992/498; HR 25 April 1997, NJ 1997/596. Several (law) reviews have criticized the use of supervision orders for long-term foster care placements; see e.g. *Met recht onder toezicht gesteld, Evaluatie herziene OTS-wetgeving*, Utrecht: Verweij-Jonker Instituut 2000 (law review supervision order); E.C.C. Punselie, *Juridische haken en ogen*, Den

for situations in which it was clear that parents had no educational role in the future upbringing of their child – as too far-reaching, too radical, and an unnecessary punishment for parents. This led to a child protection practice in which permanency planning for the child was rarely ordered.<sup>12</sup> It should also be recalled that, as stated above, a supervision order needed to be renewed annually. Therefore, due to the preference for this measure to the care order, children for whom it was clear that they would not return to their legal parents during childhood were faced with yearly court hearings and decisions. This led to tensions for the child and the foster parents as well as for the legal parents. All parties were uncertain about the situation of the child after another year of supervision by the court-appointed Youth Care Office which was made responsible for the implementation of the supervision order.

The Dutch Supreme Court nuanced this approach only in 2008.<sup>13</sup> It decided that a stable parental consent to placement in foster care of the child should be taken into account when deciding about a care order. However, such consent should not always preclude courts from imposing care orders while taking into account the child's best interests with regard to stability and continuity of his/her educational environment. The Supreme Court decision can be seen as precursory to the relevant legislative amendments that came into force on 1 January 2015.

Further, in practice the second type of care order provided for under Art. 1:269 DCC and based on the legal ground of intentional improper behaviour of the parents (*ontzetting*) was hardly used. Instead, the courts preferred to rely on the first ground, i.e. the parents' unfitness for or inability of the appropriate upbringing of the child (provided for under Art. 1:268 DCC). The existence of the two different legal grounds and provisions for a care order was therefore being questioned.<sup>14</sup>

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Haag: Trillium 2000; Werkgroep wetgeving Beter Beschermd, *Kinderen Eerst!*, The Hague 2006 (governmental advisory group for the revision of child protection orders).

12 Until the 1980s the number of children faced with a supervision order or a care order was almost similar (in 1980 around 10,000 children with a supervision order and 10,000 children with a care order). As per 30 September 2012 the number of children faced with a supervision order (around 30,000 children) is four times higher than the number of children with a care order (around 7,500). See [www.cbs.nl](http://www.cbs.nl) (search 'Bijna 40 duizend kinderen onder toezicht of voogdij').

13 HR 4 April 2008, *NJ* 2008/506.

14 See e.g. the Committee Wiarda 1971 (Commissie voor de herziening van het kinderbeschermingsrecht, *Jeugdbeschermingsrecht*, The Hague: Staatsuitgeverij 1971; J.E. Doek, 'De ontheffing van het ouderlijk gezag – enige beschouwingen over de noodzaak van bezinning op en vernieuwing van de ontneming van gezag', *FJR* 1997, nr. 5, pp. 106-114; M.R. Bruning, *Rechtsvaardiging van kinderbescherming – naar een nieuw maatregelenpakket na honderd jaar kinderbescherming* (diss. VU Amsterdam), Deventer: Kluwer 2001, p. 421).

## 2.2 Discharge of parental authority after 1 January 2015

As mentioned above, the care order could be imposed by courts on two different grounds: (i) unfitness or unwillingness to adequately care for a child or (ii) intentional misbehaviour of the parents. The effect of a care order, regardless of the ground used was the same, i.e. discharge of parental authority. Moreover, the second ground (intentional misbehaviour of parents) was rarely used in practice. These factors contributed to the legislator's decision to merge the two grounds into one provision for the new care order (the so-called 'discharge of parental authority'). Article 1:266 DCC as in force at the moment reads:

- 'The district court may discharge a parent of parental authority
- (a) if a minor grows up in a manner which constitutes a serious threat to his or her development, and the parent is unable to take responsibility for the child's upbringing within a period of time deemed reasonable for the person and the development of the minor, or
  - (b) if the parent abuses his or her parental authority.'

This amendment was intended as a simplification of the two different types of care orders as described above.<sup>15</sup> In addition, the legislator aimed to better balance the care order and the supervision order. Until 2015, without parental consent a care order on the basis of unfitness or unwillingness of the parent(s), could only be imposed when a supervision order proved unsuccessful. In practice a supervision order was only followed by a care order when parents did not consent to or obstructed a placement in care. This led to long-term foster care arrangements without legal certainty for the child in alternative care, even when it was evident that the child could or would no longer go back to the original caregivers. Since the supervision order aimed to reunite the parent(s) and the child, the use of a supervision order for long-term foster care situations was often incongruous and led to many uncertainties for all parties involved.

The new care order aims at giving room for a direct discharge of parental authority when it is clear that there is no educational prospect for the child in the biological family within a period of time deemed reasonable for the child. Such a situation may occur, for example, when the primary caregiver of the child is a severe drug abuser and the child is in urgent need of care.<sup>16</sup> In this case a supervision order may not be of an added value.

Furthermore, the new wording used for care orders and supervision orders provides additional insight into the legislator's intent to better balance these two measures with the best interests of the child. Thus, a care order may be

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<sup>15</sup> *Kamerstukken II 2008/09, 32 015, no. 3 (MvT), p. 11.*

<sup>16</sup> *Kamerstukken II 2008/09, 32 015, no. 3 (MvT), pp. 11-12.*

imposed 'if a minor grows up in a manner which constitutes a serious threat to his or her development, and the parent is *unable* to care for the child within a period of time deemed reasonable for the person and the development of the minor' (Art. 1:266 DCC). Conversely, a supervision order may be imposed if 'a minor grows up in a manner which constitutes a serious threat to his or her development, and the parent is *able* to care for the child within a period of time deemed reasonable for the person and the development of the minor' (Art. 1:255 DCC).

The phrasing 'a period of time deemed reasonable for the person and the development of the minor' is intended to stimulate that decisions about the proper child protection order are made from the perspective of the child instead of the perspective of parental rights.<sup>17</sup> Decision-makers have to give child-specific reasons and must also deal with aspects related to the future situation of the child, including a time line for permanency planning. It is in line with current sociological research according to which young children need swifter permanent decisions about their educational environment and family situation.<sup>18</sup>

According to the explanatory memorandum, the interpretation of 'a time reasonable [for the child]' is dependent on the age and development of the child. The provision was left open intentionally, so as to allow for tailored approaches without imposing fixed time and age limits for the use of the supervision or care orders.<sup>19</sup>

The use of a supervision order for many consecutive years cannot normally be considered to be in line with the condition of 'a time reasonable for the child'. Nevertheless, the explanatory memorandum says that in order to adhere to the conditions that follow from Article 8 ECHR and the ECtHR's case law, in most situations a supervision order should precede a care order.<sup>20</sup> That is, the use of a care order following an unsuccessful supervision order better legitimizes why this far-reaching court decision is necessary in order to protect the child: because professional support aimed at keeping the family together or reuniting parent and child has failed and the care order thus responds to the principle of proportionality.

The explanatory memorandum further specifically mentions four factors that need to be taken into account when imposing a care order (discharge of parental authority) and when the child is living in foster care:<sup>21,22</sup>

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17 *Kamerstukken II* 2008/09, 32 015, no. 3 (MvT), pp. 7-9.

18 See e.g. F. Juffer, *Beslissingen over kinderen in problematische opvoedingssituaties. Inzichten uit gehechtheidsonderzoek*, Raad voor de Rechtspraak 2010. Download via: <http://www.rechtpraak.nl> (search: 'Juffer').

19 *Kamerstukken II* 2008/09, 32 015, no. 3 (MvT), p. 34.

20 *Kamerstukken II* 2008/09, 32 015, no. 3 (MvT), p. 35.

21 *Kamerstukken II* 2008/09, 32 015, no. 3 (MvT), p. 34.

- a. a foster child has the right to a full and harmonious development in foster care; therefore especially for young children permanency planning in relation to the educational and developmental perspective of the child is paramount;
- b. if reuniting parent(s) and child is no longer feasible or realistic a yearly renewal of a supervision order will lead to uncertainty for all parties; in principle a long-term supervision order of several years with a yearly renewal of the court order is not the appropriate response;
- c. the interests of the child to continuity in its upbringing and an undisturbed secure attachment relation should then prevail;
- d. parents' consent to a placement in foster care of their child should not be decisive for an imposition of a care order.

If an authorized foundation responsible for the implementation of the supervision order requests a children's court judge to extend the supervision order with an outplacement of the child after two years, the request should comprise a recommendation of the Child Protection Board (Art. 1:265j(3) DCC). The Child Protection Board has been given a new legislative duty to review such requests and to consider whether an extension of the supervision order for the child in alternative care is indeed in his or her best interests and meets the 'time reasonable for the child' requirement. The new duty to review long-term supervision orders for children in alternative care reflects the legislator's goal to better respond to the child's best interests when deciding between a supervision order and a care order to protect the child.

Initially, the legislator intended to include a new duty for the Child Protection Board to have compulsory periodic reviews of whether the actions taken would best guarantee the rights of the child (Art. 1: 305(1) DCC). This compulsory periodic review was meant to have parties evaluate aspects such as the efforts made to move children from residential care to foster care, whether enough contact was secured between the child and its parents. However, this legal provision was ultimately not included as it was deemed that the guardianship agency was already conducting periodic reviews, which would render an actual legal obligation superfluous.

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22 This article takes into account the legislative situation as of January 2015. Even if it does not form the scope of the present contribution, it should be noted that Dutch case law published after the drafting of the present contribution shows that courts continue to be reluctant in using a care order in situations of children in foster care with parents who cooperate. Although the Dutch legislator has clearly explained that a supervision order is not fit for situations of permanent foster care, both courts and the Child Protection Board that is responsible for requesting child protection orders to the court seem to be hesitant to use a care order when parents cooperate with long-term foster care of their child, even when it is clear that the child has no future at home; Hof Den Bosch 27 August 2015, ECLI:GHSHE:2015:3336; Rb. Overijssel 21 April 2015, ECLI:RBOVE:2015:2652. See for a care order decision that was not preceded by a supervision order to protect the child against further physical abuse Rb. Amsterdam 17 June 2015, ECLI:RBAMS:2015:3778.



It should be noted that the possibility of the district court to reinstate a parent with parental authority remains intact. The reinstatement may occur upon the parent's request if the court is convinced that this is in the child's best interests and that the parent is able to permanently bear responsibility for the child's upbringing (Art. 1:277(1) DCC). The interests of the child are paramount in these situations. Thus, sometimes, even if the parent meets the legal requirements to be reinstated with parental authority a court may rule against it if, for example, the child has been living in a foster family for a long period of time. Damaging this long-standing situation would be contrary to the child's best interests.<sup>23</sup>

### 3 DISCHARGE OF PARENTAL AUTHORITY BEFORE THE ECtHR

The previous section analysed the provisions of the new DCC with respect to discharge of parental authority. It has been shown that the DCC in force as of 1 January 2015 has brought substantial changes to matters of parental responsibilities especially by expanding the judges' discretion when deciding on discharge of parental duties. This section provides an overview of the case law of the ECtHR on matters of parental responsibilities. The focus will be on the requirements which may prove of specific relevance to the Dutch context.

The ECtHR has analysed cases of discharge of parental authority mainly from the perspective of Article 8 of the ECHR (right to respect for private and family life). Situations where applicants' complaints related to procedural matters such as length of proceedings<sup>24</sup> or access to a lawyer<sup>25</sup> which are more typically linked to Article 6 of the ECHR (the right to a fair trial) have been equally dealt with under Article 8 of the ECHR. The Court has justified its position by arguing that Article 8 includes implicit procedural guarantees.<sup>26</sup> For these reasons, this contribution will focus on the ECtHR's case law under Article 8 ECHR.

Further, before going into the case law analysis it is worth recalling that the main aim of the ECtHR is to secure the effective protection of individual fundamental rights.<sup>27</sup> The principle of effectiveness essentially entails that 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.<sup>28</sup> This aspect should be borne in mind when analysing the compatibility of Dutch practice with the ECtHR case law as the ECtHR will look beyond the formal definition ascribed

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23 *Kamerstukken II* 2008/09, 32 015, no. 3 (MvT), p. 37.

24 ECtHR 28 June 2014, no. 40245/10 (*X/Slovenia*).

25 ECtHR 8 January 2013, no. 37956/11 (*A.K. and L/Croatia*).

26 ECtHR 8 January 2013, no. 37956/11 (*A.K. and L/Croatia*), para 63.

27 ECtHR 9 October 1979, no. 6289/99 (*Airey/Ireland*), para 24.

28 ECtHR 9 October 1979, no. 6289/99 (*Airey/Ireland*), para 24.

to certain terms but rather how the discharge of parental authority works in practice, and what are the consequences in law and in reality of such a measure.

### 3.1 The scope of states' obligations under Article 8 ECHR

Article 8 ECHR provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The ECtHR has ruled that Article 8 primarily entails the states' obligations to refrain from interfering with family life (negative obligation). Whenever a state had interfered with family life, such interference would be compatible with Article 8 ECHR if it was provided for by law, pursued a legitimate aim (in these cases usually the rights of others and the protection of health), and it was necessary in a democratic society, i.e. the reasons adduced for an interference were relevant and sufficient to the aim pursued. In the context of this analysis the decision whether there was a violation of Article 8 ECHR or not would depend on whether the reasons put forward were relevant and sufficient (the so-called proportionality analysis), notwithstanding the state's margin of appreciation. It is nevertheless worth mentioning that the 'legality requirement' may sometimes play a role as the ECtHR has developed an autonomous interpretation of the term 'provided for by law'.<sup>29</sup> Therefore, an interference does not only need to be provided for by national law, but the national law in question needs to be clear, accessible and foreseeable. In cases of restriction of parental rights, the discretion allowed to national authorities by law may raise certain issues. This matter was raised in *Olsson v Sweden* where the applicants complained that the authorities were allowed wide discretionary powers to intervene whenever the child's health and development were jeopardised, without requiring any actual proof of harm.<sup>30</sup> However, the ECtHR did not perceive this wide discretion as incompatible with the Convention requirements. The ECtHR emphasised that overly strict legal provisions may

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29 D.J. Harris, M. O'Boyle & M. Warbrick, *Law of the European Convention on Human Rights*, Oxford University Press: Oxford 2014

30 ECtHR 24 March 1988, no10465/83 (*Olsson/Sweden*), para 62.

interfere with the requirement that authorities intervene efficiently for protecting children from harm.

Further, in addition to the aforementioned negative obligation, the ECtHR will analyse whether the decision-making process was fair and ensured due respect for the interests safeguarded by Article 8 ECHR (procedural obligations).<sup>31</sup> As part of this requirement, the ECtHR looks whether the parent(s) and the children had been given the opportunity to participate in the proceedings, if they were heard, if they had been represented by an attorney, or if there were any other obstacles which in practice led to the impossibility to participate adequately in the proceedings which led to the removal of parental rights.

It should also be noted that cases of deprivation of parental rights give rise to positive obligations of the state. In cases of separation of parents from their children the positive obligations usually mean that the state needs to take steps to reunite children with parents. Further, the ECtHR repeatedly stated that the boundaries between negative and positive obligations do not lend themselves to precise definition.<sup>32</sup>

It is worth recalling that the ECtHR's intervention is limited by the principle of subsidiarity. One aspect of this principle is the 'margin of appreciation' doctrine. The margin of appreciation is essentially used by the ECtHR to refer to situations where the domestic authorities enjoy certain discretion in dealing with fundamental rights (see also section 3.2. below). The ECtHR will only intervene if the domestic authorities have overstepped this discretion.<sup>33</sup> Further limitation arises from the scope of review of the court. Thus, as repeatedly stated in its case law, the ECtHR will not act as a court of fourth instance, i.e. it will not review decisions of national courts unless there was a breach of a Convention Article.<sup>34</sup>

The paragraphs above outlined in general lines the states' obligations with respect to family cases under Article 8. The following section shall analyse the specific principles applicable to cases of separation of children from parents and deprivation of parental rights.

### 3.2 Principles for separation and deprivation of parental rights

Usually separation of parents and children precedes deprivation of parental rights. The basic assumption in the ECtHR's case law is that separation will only be temporary, for the least amount of time possible.<sup>35</sup> States should make

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31 ECtHR 8 July 2004, no. 11057/02 (*Haase/Germany*), para 94.

32 ECtHR 25 November 2004, no. 23660/02 (*Vitters/The Netherlands*).

33 Harris, O'Boyle & Warbrick 2014, on p. 11.

34 Harris, O'Boyle & Warbrick 2014, on p. 11

35 ECtHR 18 June 2013, no. 28775/12 (*RMS/Spain*), para 71.

efforts to ensure that children are reunited with their parents as soon as reasonably possible.<sup>36</sup> Whenever deprivation of parental rights entails a permanent severance of the family ties, the state must put forward extraordinary compelling reasons for justifying such a measure.<sup>37</sup> Domestic authorities need to take into account the child's best interests at all stages. While the child's best interests are a primary consideration in cases of separation, a permanent severance of family ties (for example by deprivation of parental rights or putting a child up for adoption) requires an analysis of the child's best interests as a paramount consideration.<sup>38</sup> Also, the ECtHR stresses that in some circumstances the interests of children and parents do not coincide and the best interests of the child override those of the parent(s).<sup>39</sup>

Further, for all the above measures of separating parents from children, the states are allowed a certain margin of appreciation. The intervention of the ECtHR is inversely proportional to the margin of appreciation: the wider the margin of appreciation, the less intensively will the ECtHR scrutinize the domestic decisions. In cases of separating children from parents the ECtHR ruled that states enjoy a wide margin of appreciation with regard to the initial decision to separate.<sup>40</sup> However, this margin of appreciation will decrease with the passage of time, in the sense that the longer the separation, the weightier the reasons put forward by the state must be.<sup>41</sup> Further, when it comes to newborn babies, extraordinary compelling reasons must exist to justify a separation from their mothers at birth.<sup>42</sup>

### 3.3 Areas of ECtHR intervention

The sections above have outlined the way the ECtHR analyses cases of family separation and discharge of parental authority and the general principles applicable thereto. This section will zoom into sensitive areas where the ECtHR tends to intensify its scrutiny.

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36 ECtHR 18 June 2013, no. 28775/12 (*RMS/Spain*), para 71.

37 ECtHR 27 June 1996, no. 17383/90 (*Johansen/ Norway*) and ECtHR 28 October 2010, no. 52502/07 (*Aune/ Norway*). It should be noted that these cases entailed deprivation of parental rights and authorization for adoption of the children.

38 ECtHR 28 October 2010, no. 52502/07 (*Aune/ Norway*), ECtHR, 13 March 2012, no. 4547/10 (*YC/ UK*).

39 ECtHR 8 July 2004, no. 11057/02 (*Haase/ Germany*), para 93.

40 ECtHR 17 July 2012, no. 64791/10 (*M.D. and Others/Malta*), para 71.

41 ECtHR 17 July 2012, no. 64791/10 (*M.D. and Others/Malta*), para 71.

42 ECtHR 12 July 2001, no. 25702/94 (*K. and T./ Finland*), para 168. In this paper we do not focus on emergency protection orders.

First, with specific relevance for Dutch practice it is worth recalling that ECtHR has so far issued one inadmissibility decision.<sup>43</sup> The case concerned the relieving of a father of his parental authority due to criminal proceedings against him and the authorities' subsequent refusal to reinstate him to his parental rights (following his acquittal of criminal charges). The ECtHR declared inadmissible the complaint about the deprivation of parental rights for non-observance of the six-month time limit. As to the complaint regarding the restoration of parental rights, the ECtHR dismissed it as manifestly ill-founded. The Court placed particular emphasis on the fact that the applicant had not been denied contact with his children. It further held that the domestic decisions had been fully reasoned and that the Dutch authorities acted within their margin of appreciation.

However, notwithstanding a state's margin of appreciation, there are situations where the ECtHR looks more closely at the decision-making process. The ECtHR repeatedly noted that 'the fact that a child could be placed in a more beneficial environment for its upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents'.<sup>44</sup> In view of this principle ECtHR found violations where parents were separated from their children on account of the parents' financial situation<sup>45</sup> or intellectual capacity.<sup>46</sup> In these cases it was deemed that the domestic authorities should have looked into alternative means of overcoming these difficulties, without resorting to (prolonged) family separation. Also, in the aforementioned cases ECtHR stressed that there had been no allegations of ill treatment of the children.<sup>47</sup>

Further, whenever deprivation of parental authority was applied automatically as a consequence of criminal convictions of the applicant, without domestic courts having weighed *in concreto* whether the measure was in the best interests of the children concerned, the ECtHR has equally found violations of Article 8 ECHR.<sup>48</sup>

It is also important to note that even though states enjoy a wide margin of appreciation when it comes to the initial decision to separate, this does not mean that the ECtHR will refrain from reviewing domestic decisions all together. In a case where such initial decision to separate was taken against the back-

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43 ECtHR 25 November 2004, no. 23660/02 (*Vitters/The Netherlands*). One other relevant judgment against the Netherlands concerning separation of a child from its parents rather than deprivation of parental rights is ECtHR 17 December 2002, 35731/97 (*Venema / The Netherlands*). This judgment will be analysed in more detail in the paragraphs below.

44 ECtHR 26 February 2002, no. 46544/99 (*Kutzner/Germany*), para 69.

45 ECtHR 18 June 2013, no. 28775/12 (*RMS v. Spain*); ECtHR 26 October 2006, no. 23848/04 (*Wallova and Walla/Czech Republic*).

46 ECtHR 26 February 2002, no. 46544/99 (*Kutzner/Germany*).

47 ECtHR 26 February 2002, no. 46544/99 (*Kutzner/Germany*).

48 ECtHR 28 September 2004, no. 46572/99 (*Sabou and Pircalab/Romania*), para 48; ECtHR 17 July 2012, no. 64791/10 (*M.D. and Others/Malta*), para 77.

ground of an apparent conflict between a social worker and the applicants, the ECtHR assessed whether the national authorities had been entitled ‘to consider that there existed circumstances justifying the abrupt removal of the child from the care of the parents without any prior contact and consultation’ of the parents.<sup>49</sup> On the facts of the case, it found that the authorities had not properly justified the urgency of the situation, and did not adequately consider whether there was a risk of harm to the children.<sup>50</sup>

Moreover, as to the decision-making process, previous case law demonstrates that particular emphasis will be placed on the domestic courts administration and evaluation of evidence as well as to the degree of the parties’ involvement into the decision making process.<sup>51</sup> Thus, for example if the reports administered by psychologists or psychiatrists are conflicting, regardless of whether some of those reports had been filed by the applicants themselves, the ECtHR tends to reinforce the presumption against parental separation/ deprivation of parental rights.<sup>52</sup> It is important that decisions of social workers and other authorities involved are scrutinized by domestic courts.<sup>53</sup> Even if the child was heard by administrative authorities and such child was opposed to contact with a parent, absence of a court scrutiny of the administrative proceedings is likely to tilt the balance in favour of the aggrieved parent.<sup>54</sup> Conversely, not hearing the parents or not involving them in the process may trigger a violation of Article 8. The case of *Venema v. The Netherlands* is illustrative in this sense.<sup>55</sup> In this case the Dutch authorities, suspicious of the mother suffering of a mental illness imposed a supervision order whereby the applicants’ one year old daughter was placed in foster care. The order was issued without informing or hearing the parents. In its reasoning, the ECtHR placed considerable weight on the absence of involvement of the parents. In this context, it stated that it must ‘be satisfied that the national authorities were entitled to consider that there existed circumstances to justifying the abrupt removal of the child from the care of its parents without any prior contact or consultation’.<sup>56</sup> On the facts of the case, the Court did not consider that the alleged ‘unpredictable reaction’ of the parents was on its own a sufficient justification for excluding them from the procedure.<sup>57</sup> It should be stressed that the Court did not find a violation on account of the supervision order *per se*, but rather as the parents were faced with such an order without

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49 ECtHR 8 July 2004, no. 11057/02 (*Haase/ Germany*), para 93.

50 ECtHR 8 July 2004, no. 11057/02 (*Haase/ Germany*), para 97.

51 ECtHR 8 July 2004, no. 11057/02 (*Haase/ Germany*); ECtHR 26 February 2002, no. 46544/99 (*Kutzner v. Germany*).

52 ECtHR 26 February 2002, no. 46544/99 (*Kutzner/Germany*).

53 ECtHR 17 July 2014, no. 19315/11 (*T./ Czech Republic*), para 126.

54 ECtHR 17 July 2014, no. 19315/11 (*T./ Czech Republic*), para 126.

55 ECtHR 17 December 2002, 35731/97 (*Venema / The Netherlands*).

56 ECtHR 17 December 2002, 35731/97 (*Venema / The Netherlands*), para 93.

57 ECtHR 17 December 2002, 35731/97 (*Venema / The Netherlands*), para 96.

having the possibility to submit their comments or evidence beforehand.<sup>58</sup> Even if this case does not concern deprivation of parental rights as in this case the family was eventually reunited, it nevertheless sheds light on the procedural aspects the Court takes into account in its reasoning.

Furthermore, contact between a parent and child is of the utmost importance to the ECtHR, as in the absence of contact, separation may lead to an impossibility to resume family life. In this respect, the Court has also ruled that there should be a periodic *ex officio* review of the situation in order to assess whether such separation is still warranted or whether contact is possible.<sup>59</sup>

It follows that national authorities are required to conduct careful and personalized assessments of the individual situations bearing in mind the principle that separation should be seen as a temporary measure and its application necessary only whenever other measures are not suitable in the individual circumstances of the case.

#### 4 IMPACT OF THE ECtHR CASE LAW ON DUTCH LEGISLATION AND PRACTICE

Sections 2 and 3 above outlined the Dutch present and past legislation and practice on matters of parental authority and the relevant ECtHR case law, respectively. It has been shown that the beginning of 2015 marked what appears to be a significant change in the Dutch legislation on discharge of parental authority. The aim was to replace the current prevailing practice of imposing temporary supervision orders in cases where the possibility to reunite children with their biological parents is remote. Thus, the conditions for instituting care orders have been relaxed in the sense that the current legislation allows for more judicial discretion for discharge of parental authority (i.e. the care orders). Importantly, a new criterion of 'reasonable time' has been introduced which should be one determining factor for the decision-making process. As per this new criterion, a *supervision order* is to be imposed if the judge deems the parent(s) able to resume their responsibility for the child within a reasonable time. Conversely, a *care order* (entailing discharge of parental authority) should be imposed if the parents are unable to care for the child within a reasonable time. In the absence of any legal provision it will be for courts to determine on a case-by-case basis the amount of time needed for the 'reasonableness criterion'.

The ECtHR, on the other hand, has on several occasions examined matters of separation between parents and children and discharge of parental authority. Even if in these cases the factual context is of high relevance, several principles and areas to which the Court tends to pay particular attention can be distilled

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58 ECtHR 17 December 2002, 35731/97 (*Venema / The Netherlands*), para 96.

59 ECtHR 17 July 2014, no. 19315/11 (*T./ Czech Republic*), para 128.

from its case law. In this section an attempt is made to point out the implications of ECtHR's rulings for Dutch future practice in light of new legislation.

One aspect that merits brief attention is the 'legality' requirement under the ECtHR. As discussed, interferences in private life need to be provided for by law and the law should meet conditions of clarity, accessibility and foreseeability. Since the new Dutch care order grants significant discretion to domestic courts in assessing the need to impose the measure, it is possible that a challenge will be brought as to the foreseeability of this law. However, it is not likely that such a challenge will succeed as especially in matters of parental authority the ECtHR perceives discretion as an inherent element in the decision-making process.<sup>60</sup>

The core aspects which may trigger a more intensive scrutiny or potential infringements of Article 8 on the part of the ECtHR will probably relate to the manner of implementation of the care order and to the application in practice of 'the reasonable time' requirement.

As to the manner of implementation, it should be pointed out that there is no clear legal requirement in the new DCC to the effect that a care order is to be applied only after unsuccessful supervision order(s).<sup>61</sup> Therefore, since the care order entails relief of parental authority and it is as such a more far-reaching measure, imposing such a care order directly will be more difficult to justify in line with the ECtHR principle that separation is to be temporary and family reunification should be ordered as soon as reasonably possible. Clearly, weighty reasons need to be adduced in support of the argument that family reunification was not foreseeable in view of the concrete circumstances. As mentioned above, one example put forward by the legislator in the explanatory memorandum is that of a heavy drug user. In that case, according to the explanatory memorandum, a care order would be better suited for the child than a supervision order. In this regard, it should be noted that in previous case law the ECtHR placed strong emphasis on improvements in the situation of the parents. In those cases, the ECtHR did not accept the argument of separation based on past conduct of the parent(s), where they showed signs of improvement.<sup>62</sup> The Court looked at whether the authorities made genuine efforts aimed at family reunification. The success or failure of such a claim will depend on the domestic arrangements for contact and on the chances of success for the parent to regain parental authority if the situation improves. It bears stressing that the ECtHR has always placed importance on contact arrangements between parent and child. Put differently, regular contact should not be withdrawn, especially if there are no allegations of violence of the parent to the child.

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60 ECtHR 24 March 1988, 10465/83 (*Olsson/Sweden*), discussed in section 3.1. above.

61 As discussed in section 2 above, at the moment the explanatory memorandum contains an indication to this effect, but this is not binding on domestic courts.

62 ECtHR 12 July 2001, no. 25702/94 (*K. and T./Finland*), para 179.



Further, some remarks should be made with respect to the 'reasonable time' requirement in the new DCC. Even if this is an aspect to be determined on a case-by-case basis, national decision-makers should not lose sight of the ultimate aim: to reunite parents with children. Thus, supervision measures should be temporary and it must be shown that regular efforts were made to reunite families. Also, in line with European case law, domestic authorities are to undertake these efforts of their own motion, and not only at the request of an interested party. The longer the separation, the closer will the ECtHR scrutinize whether genuine efforts were made to bring parents and children back together. In this vein it is worth recalling that the ECtHR has repeatedly stressed that the best interests of the child do not always coincide with those of the parents and that in cases of conflict the former override the latter. From this perspective, it can be argued that the new DCC is more attuned to the requirements of Article 8 ECtHR as successive prolongations of supervision orders without ensuring permanency for children can hardly be considered to serve their best interests. In these circumstances children may form bonds with the foster family and these bonds deserve adequate legal protection. It will be for the domestic judges to adequately balance all the interests at stake and to ensure that the child's best interests are observed. It is important that throughout the duration of a supervision order authorities show that a genuine effort was made to reunite families, that forensic evidence (such as psychiatric, psychological reports etc.) was duly considered by domestic courts and that evidence of, for example, improvement in the personal situations was not easily dismissed. The ECtHR has repeatedly stressed that the fact that the child is placed in a more beneficial environment cannot on its own justify a child's removal from its biological family.<sup>63</sup>

One other aspect to be noted is that foster parents could also benefit from the protection of Article 8 ECHR. This contribution focused mainly on the right to respect for family life of biological parents with their children who are placed into care. However, long-term fostering agreements trigger family bonds between foster parents and children.<sup>64</sup> These foster parents too may claim a breach of family life if, for example, supervision orders last unreasonably long in spite of lack of evidence of improvement of the situation of the biological parent which triggered the placement of children into care.<sup>65</sup> In this sense, the aim of the new DCC to put a stop to uncertainties for foster families is arguably more in line with the requirements of Article 8, seen from the perspective of foster parents.

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63 ECtHR 26 February 2002, no. 46544/99 (*Kutzner /Germany*), para 69.

64 ECtHR 17 January 2012, 1598/06 (*Kopf and Liberdal /Austria*).

65 The scenario envisaged in that situation is not that of a separation between foster parents and children but rather a situation where they would claim that the uncertainty of a situation (triggered for example by yearly prolongations of supervision orders or other related measures) goes against the principle of legal certainty which is embedded in their right to respect for family life.

## 5 CONCLUSION

Aspects related to (deprivation of) parental rights are not only private family matters. While it is mainly for national authorities to regulate how and when intervention is necessary, such intervention needs to observe the general principles of the ECHR, in particular Article 8. The ECtHR will exercise its supervision in line with the margin of appreciation doctrine and the subsidiarity principle. Moreover, cases of placing children into care are highly factual, which poses certain difficulties for forecasting in abstract the implication of the new DCC in the light of Article 8 ECHR.

However, this contribution sought to highlight the main aspects of the new Dutch Civil Code against the principles distilled from the ECtHR case law. Even if the ultimate assessment will be based on actual facts, it is nevertheless important for domestic authorities to take into account these principles when deciding on concrete cases.

Thus, in the light of the analysis above, one aspect which may prove highly problematic is the possibility of imposing care orders directly, without having them preceded by a supervision order. For such situations to comply with the ECHR, the Dutch courts would have to show that there was clearly no possibility for the parent(s) to improve their situation so as to resume family life with the child. Also, if such imposition results in a lack of efforts on the part of the authorities to assist in family reunification, it may entail a strong adverse reaction from the ECtHR. In the same vein, the ‘reasonable time’ requirement may face some scrutiny from the ECtHR, depending on how it is assessed by national courts. Periods of separation should be accompanied by the authorities’ efforts to reunite children with their parents. In their efforts the authorities must show that they have effectively tried to achieve such reunification, which was ultimately not possible. Last but not least, parties should be offered reasonable opportunities to present their case and submit evidence. While it may be acceptable not to involve the parents/children in emergency situations, such justifications will be less compelling with the passage of time. Also, the Court will most likely look into the actual circumstances, i.e. so as to assess whether a particular circumstance was indeed of an emergency nature. As to the hearing of parties, both children and parents are to be heard, but when it comes to children, aspects such as their age and maturity will play a significant role in the Court’s review of the domestic decision-making process.