Belgium: the Convention of the Rights of the Child in Belgian case law

Reference:
Chapter 7: Belgium
Subtitle: The Convention of the Rights of the Child in Belgian Case Law

Wouter Vandenhole¹

Abstract: Since the entry into force in Belgium of the Convention on the Rights of the Child (CRC), its provisions have been invoked by tribunals and courts in about 250 to 300 judicial decisions. A major obstacle in Belgian doctrine is the denial of direct effect to a number of CRC provisions. The CRC has played a gap-filling role in the absence of domestic legislation, particularly in regard to the right of children to express their views and have access to court. In the area of migration, it has performed a strong corrective role towards the legislator and a legitimising one towards the judicial bodies. The CRC often plays a subsidiary role in the absence of domestic legislation or relevant provisions in the European Convention on Human Rights. The CRC is certainly not the only legal reference text on children’s rights; nonetheless, the full potential of the CRC and the interpretative work of the CRC Committee has not yet been fully capitalised upon by Belgian judicial bodies.

1 Introduction to the Belgian Legal System


1.1 The Question of Direct Effect

The Belgian legal order is a civil law system.² The relationship between the CRC and its Protocols, as international treaties, and national law is closest to monism (Cassese 2001: 164–165): that is, international treaties like the CRC are an integral part of the Belgian legal order. They are directly applicable without any need to transform or incorporate the international rules into domestic law.

However, the CRC’s direct applicability does not mean its provisions are directly invokable by individuals before Belgian judges, which raises the question of direct effect, often also referred to as the self-executing character of a treaty or treaty provisions (Alen and Pas 1996). This question is assessed at the level of each treaty provision individually, or even at the level

¹ UNICEF Chair in Children’s Rights, University of Antwerp. The UNICEF Chair in Children’s Rights is a joint venture of the University of Antwerp and UNICEF Belgium. UNICEF respects the academic freedom of the chair-holder. Opinions expressed by the chair-holder do not commit UNICEF. I would like to thank Steven Van Raemdonck for offering research assistance.
² Belgium is a federal state with six main federated entities: the Flemish Community and the Flemish Region; the French Community; the Walloon Region; the German-speaking Community; and the Brussels Capital Region.
of paragraphs of a provision, but assuredly not at the level of the treaty as a whole. For each CRC provision or paragraph thereof, it needs to be established whether it has direct effect or not, that is, whether individuals can invoke it directly before Belgian judicial bodies.

Whether a treaty provision has direct effect in the Belgian domestic order is determined by the domestic judge. Each judge is free to take a stance on this matter, so that it is perfectly possible that one judge could decide that a certain CRC provision has direct effect while another opines that it does not. There is a general tendency with the Council of State (Conseil d’État), the highest administrative court, to deny direct effect to CRC provisions. The Court of Cassation, Belgium’s main court of last resort, has become rather restrictive on this since 1999 and accepts any direct effect only for a selected number of CRC provisions. Lower courts and tribunals tend to be more open, as will be discussed in detail in section 3.

In the literature, the restrictive approach to the direct effect of the CRC (and to that of other human rights treaties, with the exception of those which, like the European Convention on Human Rights (ECHR) and International Covenant on Civil and Political Rights (ICCPR), deal with civil and political rights) has been deplored. Even the most cautious authors in this regard have argued that while they believe it is unthinkable to extend direct effect to all CRC provisions, the provisions that guarantee civil and political rights similar to those in the ECHR or ICCPR must be given direct effect, as the latter treaty provisions have been given direct effect (Senaeve and Arnoeyts 2004: 111–113). Others argue in favour of a more evolutive interpretation of the direct effect of the CRC provisions. Alen and Pas have suggested a gradual concept, comparable with Scheinin’s more-or-less scale (1994: 75–78), whereby the degree of direct effect depends on the normative power of a provision as well as on the policy space left to the state (Alen and Pas 1996: 173). Claes and Vandaele have proposed the introduction of an assumption of direct effect. They endorse a gradual approach in which, inter alia, the core content of a right plays a guiding role (2001).

Clearly, then, the CRC Committee was too optimistic and too generalizing in welcoming, in 1995, ‘the fact that the Convention is self-executing [in Belgium] and that its provisions may be, and in practice have been in several instances, invoked before the court’.

Once a treaty provision has been accorded direct effect, it prevails over conflicting domestic norms. CRC provisions with direct effect are, in other words, superior in the hierarchy of norms to domestic provisions. However, the absence of direct effect of a CRC provision does not deprive it from all meaning in the Belgian legal order. Such a provision may play an indirect role, for example, by being supportive of judicial reasoning even if it does not give

---

3 Senaeve rejects direct effect for a number of provisions on the basis of their wording, that is, when in his view they are only imposing obligations on States parties (art. 4, art. 11 and 26 CRC).

direct legal grounding to a court’s decision (Senaeve and Arnoeyts 2004: 106), or by contributing to the interpretation of a norm.5

1.2 Children’s Rights in the Belgian Constitution

Belgium’s constitution has a separate section, Title II, on fundamental rights and freedoms, while a provision on children’s rights, article 22bis, was introduced in two stages. Following the horrendous cases of sexual abuse of children that came to light in the 1990s, the right of each child to respect for his or her moral, physical, mental and sexual integrity was codified in 2000. In 2008 this constitutional provision concerning children’s rights was broadened into a more comprehensive guarantee. Article 22bis now reads:

Each child is entitled to have his or her moral, physical, mental and sexual integrity respected.
Each child has the right to express his or her views in all matters affecting him or her, the views of the child being given due weight in accordance with his or her age and maturity.
Each child has the right to benefit from measures and facilities, which promote his or her development.
In all decisions concerning children, the interest of the child is a primary consideration.
The law, federate law or rule referred to in Article 134 ensures these rights of the child.

Article 22bis contains an explicit integrity guarantee, as well as three of the four general principles of the CRC. The general principle of non-discrimination and equality was not included because the Constitution already has two general provisions on the matter (arts. 10 and 11 Belgian Constitution). Article 22bis thus captures the spirit of the CRC well without repeating it verbatim.

The wording of this article’s final paragraph, possibly somewhat opaque to those unfamiliar with the Belgian Constitution, is borrowed from article 23 of the Constitution, the provisions of which contain social and economic rights. The paragraph is intended to mean that the constitutionally guaranteed children’s rights provision has no direct effect, i.e. that it cannot be directly invoked in litigation. In a recent judgment, the Council of State confirmed the absence of direct effect of the fourth paragraph of article 22bis (on the best interests of the child).6

2 Access to Justice

Broadly speaking, Belgium has three types of judicial bodies: the Constitutional Court (known until 2007 as the Court of Arbitration), administrative judges (with the Council of

---


State as supreme administrative judge), and the ordinary judicial branch of tribunals and courts (with the Court of Cassation as supreme court).

In principle, children have no standing and claims have to be brought to court by their legal representatives. However, children with sufficient maturity (the capacity of discernment) may be given legal standing, mainly when it comes to (highly) personal issues such as marriage or affiliation, but so too if their legal representatives fail to act and/or if the issue is pressing, for example, where a claim for damages is introduced against an assaulter,\(^7\) if a claim is made against the Public Social Assistance Centre, that is, the local administration in charge of social assistance,\(^8\) or where proceedings are instituted with regard to education\(^9\) or in the context of migration procedures.

These exceptions are not guaranteed in law, though, and depend on the proclivities of the judge concerned.\(^10\) Judges have divergent practices—and the literature, differences of opinion—on the question of whether article 12 of the CRC can serve as a legal basis for allowing minors to intervene at their own initiative in procedures among their parents.\(^11\) The Cour de Cassation has held that the provisions guaranteeing a right to be heard (inter alia, art. 12 CRC) do not give minors the right to intervene voluntarily in legal proceedings which do not directly affect their interests, such as the criminal prosecution of one of the parents in the case of non-observance of contact-rights arrangements.\(^12\) Sometimes, voluntary intervention is accepted (for example, on the basis of article 9 of the CRC), but it is limited to the right to express one’s views in the procedure and does not extend to material claims such as limiting a parent’s right to personal contact.\(^13\)

For more than a decade, attempts have been made to guarantee in legislation that children have subsidiary standing in instances such as when legal representatives fail to take action or have conflicting interests, but so far all have failed. In view of the ratification of OPIC by Belgium, the discussion might be revived.

An important institution is the public prosecutor, who plays a role not only in criminal but also civil procedures. As protector of public order and society’s more vulnerable members (including minors), he or she has the power to institute legal action in a number of instances defined by law, particularly in the area of youth protection.\(^14\)

---

10 For an in-depth discussion, see Robert (2006) as far as civil procedures are concerned, and Veny and De Vos (2006) with regard to administrative procedures.
14 For an extensive analysis, see Swennen, Caluwé (2006).
As far as the Constitutional Court is concerned, litigation on behalf of children by advocacy groups is possible. Every legal person with a justifiable interest can institute annulment proceedings against a statute. The Human Rights League and Defence for Children have done so repeatedly in matters affecting children. In addition to the annulment procedure, there is a procedure whereby a judicial body can ask the Court’s guidance in the interpretation of a constitutional provision that is at stake (referral for preliminary ruling).

3 An Overview of Case Law on the CRC

The following analysis of Belgian case law focuses on the CRC and its Optional Protocols; it does not include case law in which the CRC is not referenced by the judicial body. It should be borne in mind nonetheless that the Belgian case law on children’s rights is more elaborate than that alone on the CRC and its Optional Protocols, given that children’s rights are also guaranteed in general human rights treaties, in the Belgian Constitution and possibly through the general principle of the best interests of the child.

In 2004, Senaeve published an extensive, and allegedly exhaustive, review of the Belgian case law for the 1992–2002 period. His review built on more than 130 cases in which the CRC had been referenced (Senaeve and Arnoeyts 2006). For the purpose of this chapter, we undertook a review of the 2003–2013 period, the second decade of CRC litigation in Belgium, and identified about 140 published cases in which the CRC was referred to by the tribunal or court itself. The number of cases thus seems to have remained stable between 1992 and 2013. In what follows, we flag the major tendencies that emerged during those years, and, where appropriate, important shifts that took place in the second decade of CRC litigation.

Regarding the highest courts in Belgium, it is mainly the Constitutional Court that engages with the substance of the CRC. The Court cannot directly assess if a statute (i.e. a formal law) is in conformity with the CRC. It only has the power to assess the constitutionality of a statute, which means that it tests it in the light of constitutional provisions rather than those of international treaties. That being said, the constitutional provisions themselves are sometimes explicitly interpreted with reference to the CRC. A key reason why the Constitutional Court has been able to engage with the CRC is that it has dismissed the relevance of the direct-effect doctrine for its work, precisely because it cannot directly assess the compatibility of statutes with the CRC or any other human rights treaty. As such, the CRC has played an important role in cases of migration, family law (paternal affiliation and adoption, parental rights), juvenile justice and education.

---

15 We therefore did not include cases in which children’s rights, but not the CRC itself, were referenced by the judicial body. Similarly, we excluded cases in which only (one of) the litigating parties invoked the CRC. We did, however, include cases in which the judicial body cited another judgment in which the CRC had been referenced, even though the judicial body directly concerned did not itself reference the CRC.

3.1 Direct Effect

The supreme administrative court, the *Conseil d’état*, has been dismissive of the direct effect of CRC provisions (Senaeve and Arnoeyts 2004: 114), and consequently has hardly engaged with them. Lemmens, a Council of State judge until September 2012, explained that this is due to the nature of the cases it hears, that is, ones involving migration issues. In migration cases, a substantive assessment of administrative acts is seldom made, and the reasoning remains basic (Lemmens 2008). However, the Council of State has accepted, at least implicitly, the direct effect of some CRC provisions in other areas of litigation (Senaeve and Arnoeyts 2004: 151, 156; Lemmens 2008: 52), albeit that so far it has never found a violation of them.

The Aliens Appeal Board (*Raad voor Vreemdelingenbetwistingen, Conseil du Contentieux des Etrangers*), an administrative judicial body in the field of migration established in 2006 to ease the caseload of the Council of State, systematically denies article 3 of the CRC any direct effect. It recognises, nevertheless, that this article is a useful interpretative tool. Moreover, in a recent case on family reunion, the Board accepted that article 24 of the EU Charter of Fundamental Rights was applicable, and that, to better understand it, article 3 of the CRC had to be studied, along with the interpretative work of the CRC Committee. The Aliens Appeal Board does recognise that article 12 of the CRC has direct effect.

Turning to the judicial branch, the Court of Cassation—after an initial period of openness to the direct effect of the CRC—has since 1999 grown far more restrictive. In its case law, it has generally said that article 3 of the CRC has no direct effect. Nonetheless, in some cases the Court has included this article in its reasoning, which appears to suggest an implicit recognition that it does indeed have direct effect. The underlying logic as to when article 3 is considered to have direct effect is hard to deduce, for it has been used in both civil and criminal cases; Senaeve’s position that the 1999 judgment is to be interpreted in a very restrictive way (i.e. only applicable to a specific penal law provision) is therefore hardly tenable. The *Cour de Cassation* has explicitly rejected the direct effect of articles 2, 7 and 25 and

---

17 See, for example, Council of State 29 May 2013 with regard to articles 3, 8 and 20 of the CRC; Council of State 30 March 2005; Council of State 28 June 2001 with regard to article 9(1) of the CRC.


20 Aliens Appeal Board 21 February 2013. Drawing on the CRC Committee’s General Comment No. 5, it concluded that article 3(1) of the CRC and article 24 of EU Charter also apply to measures that affect children indirectly, such as requests for family reunification by adults.


23 At least implicit recognition of direct effect article 3 in the Court of Cassation 16 January 2009 (personal contact); Cass 31 October 2006; 14 October 2003 (trial by adult court).

24 Court of Cassation 26 May 2008.

25 Court of Cassation 11 June 2010.
of the CRC. It accepts, though, that the European Convention on Human Rights ECHR) needs to be applied in conformity with the principles of international law such as the CRC.27

Lower courts and tribunals tend to be unanimous in recognising the direct effect of article 12 of the CRC.28 Following the introduction of specific legal provisions in Belgian legislation on the right to be heard, some tribunals and courts have built on this article in a complementary or even corrective way, mainly so in order to grant access to court (see section 2).

Where the greatest divergence of opinion is found, however, is in respect of article 3 of the CRC, which concerns the best interests of the child. For some judges, it has no direct effect or none, at any rate, according to a certain reading;29 for others, it has direct effect if it is joined in combination with other provisions31 or viewed in its negative-obligations dimension.32 Other judges, yet again, seem to accept its direct effect unconditionally.33 It has been argued, too, that it has some direct effect as a binding interpretative framework for other CRC provisions34 or when examining the compatibility of legislation with article 8 of the ECHR.35

The discussion about the direct effect of article 3 of the CRC is, nevertheless, not particularly relevant in practice, given that the consideration of the child’s best interests is recognised as a general principle of law and is, as such, frequently invoked by parties and used by judges without any reference to a formal source of law, be this article 3 of the CRC or article 22bis of the Constitution.

With regard to a significant number of CRC provisions, the direct effect has been recognised by some judges (that is, for articles 2(2)36; 7;37 8;38 939, 16,4020;412142; 26,43 2744 and 2845).

26 Court of Cassation 26 May 2008.
27 Court of Cassation 30 September 2011.
28 See, for example, Summary Proceedings Leuven 16 September 2010, NJW 2011, 236.
30 The view is that the article does not have direct effect if it is read so as to create a right to social assistance; it does have direct effect, however, in the sense that the judge has to take into consideration as a matter of priority the best interests of the child whenever he or she has a certain margin of appreciation. Labour Tribunal Brussels 9 December 2004, JDJ 2005, no. 244, 33–40 and SocialeKronieken (hereafter Soc.Kron.) 2005, 135–141.
31 In combination with art. 28 CRC, see CRC President Brussels 7 December 2004.
32 By negative-obligations dimensions I refer to those obligations that require a state to abstain from certain action, as opposed to positive obligations which do require a state to take action. See Labour Tribunal Huy 19 January 2005, JDJ 2005, no. 242, 29–35: the CRC prohibits a rule that allows parents and children to be separated without the possibility of invoking the best interests of the child.
38 Id.
41 Labour Court Mons 3 September 2009, unpublished (implicitly).
42 Youth Tribunal Antwerp 29 April 2003, NJW 2003, 1376–1377.
Other judges have denied the direct effect, in particular in litigation on social assistance to undocumented foreign children, to articles 2, 3, 6, 26 and 27, 46 and 37. 47 However, such denial of direct effect does not always deprive the CRC of all meaning. Sometimes a so-called standstill-effect 48 or minimum core 49 is nevertheless recognised, or CRC provisions without direct effect are mentioned in combination with constitutional provisions and other CRC provisions; it is also the case that judges draw on the Constitutional Court’s case law, which in turn has been inspired in part by the CRC. 50

3.2 Areas of Law

The fields of law in which judicial bodies use the CRC have shown fairly consistent trends in the past two decades. The CRC features most prominently in immigration law, particularly in regard to social assistance for undocumented children. In family law, questions of affiliation, adoption and parental authority have been raised. Somewhat remarkably, the CRC has not been especially prominent in the fields of education, youth protection and juvenile justice, although some cases have arisen. As the 1992–2002 period has been discussed extensively elsewhere, the focus here is on the second decade of CRC litigation in Belgium.

3.2.1 Migration

The bulk of CRC litigation in 2003–2013 dealt with migration, particularly social assistance to children who were in the territory illegally. Key provisions included articles 2, 3, 26 and 27 of the CRC.

Early case law addressed the question of whether undocumented children fell under the jurisdiction of the state 51 and what scope of social assistance was due to them. 52 In a landmark judgment of 2003, the Constitutional Court held that it could not be limited to urgent medical care as it was for adults (discussed in more detail in section 4). 53 Subsequent cases examined whether and how this could be given practical effect under the restrictive conditions outlined by the Court, inter alia, without indirectly encouraging parents with illegal status not to leave the country.

The CRC was often used pending the applicability of the new legislation\(^{54}\) —or to challenge that new legislation, which provided that only material aid in kind could be given to children in a reception centre.\(^{55}\) It was feared that this approach would separate children from their parents.\(^{56}\) The CRC was also invoked to justify judicial orders to Public Social Assistance Centres to grant social assistance pending the allocation of a place in a reception centre\(^{57}\) or awaiting the outcome of a regularisation request to be allowed to reside in Belgium due to exceptional circumstances.\(^{58}\) While a majority of judges still ordered social assistance under the common system,\(^{59}\) others pointed out that the new legislation was in line with the CRC\(^{60}\) and that the situation of these children was the responsibility of their parents.\(^{61}\) Following an acute shortage of places in reception centres, it was argued that the Public Social Assistance Centres had the obligation to provide social assistance.\(^{62}\)

In addition, cases arose in which parents were in Belgium illegally but their Belgian children were not.\(^{63}\) An order to leave the country served on the parents of a child who is entitled to stay (due to his or her Belgian nationality) has been held to equate to the de facto removal of that child from the territory and found in violation of articles 2, 3 and 9 of the CRC.\(^{64}\)

Likewise, the expulsion of unaccompanied children without a concrete, sustainable solution in their country of origin has been considered a violation of the best interests of the child and articles 3 and 20. The children were said to be under the care of the Belgian state, not of their parents, with the implication that the latter could not be blamed for the situation and the former not absolve itself of its responsibility.\(^{65}\)

The right to education has played an important role in migration litigation. Re-assigning a family to a reception centre in another language-area of Belgium has been held to violate the CRC, in particular articles 3 and 28.\(^{66}\) Likewise, expulsion during the schooling period has been held to be in violation of art. 3 \textit{juncto} 28 CRC.\(^{67}\) Judges have ordered that a minor had to be offered a temporary residence permit until he finished suitable training;\(^{68}\) alternatively, they suspended the removal order to guarantee continuity in schooling.\(^{69}\) Other judges have

\(^{54}\) Labour Tribunal Antwerp 22 November 2004, 157–159.

\(^{55}\) For an attempt to operationalise the system such that only children would benefit from it, see Labour Tribunal Kortrijk 4 February 2004, \textit{OCMW-visies} 2004, 73–77.


\(^{57}\) Labour Tribunal Brussels 1 July 2010, vreemdelingenrecht.be.


\(^{62}\) Summary proceedings Labour Tribunal Charleroi 20 January 2012, \textit{JDJ} 2012, no. 314, 40–41. This line of reasoning has been criticised.


\(^{64}\) President Brussels 16 November 2005, \textit{JDJ} 2006, no. 255, 49–52.

\(^{65}\) Tribunal of First Instance (Civil) Brussels 7 September 2009, unpublished.


\(^{67}\) President Brussels 7 December 2004, unpublished.

\(^{68}\) Tribunal of First Instance (Civil) Brussels 7 September 2009, unpublished.

argued, however, that responsibility for any threat to the continuity of education due to expulsion is to be attributed exclusively to the parents, who refuse to leave the country.\(^{70}\)

Prohibiting minors from participating in sports competitions on account of their illegal status was held to be in violation of the Constitution’s non-discrimination provisions, which were said to apply as well to the rights guaranteed in the CRC, particularly articles 28, 29 and 31.\(^{71}\)

Where the CRC has proven less powerful has been in challenging the deprivation of liberty of non-accompanied foreign minors. Some judges maintained that this practice is not prohibited as such by article 37 of the CRC, provided that any deprivation of such children’s liberty remains an ultimate measure, is for the shortest period possible, and has taken the child’s best interests into account.\(^{72}\)

However, the detention of children in an adult reception centre has been held to violate articles 3 and 37 of CRC (as well as 3 and 8 ECHR) because the housing and living conditions were deemed wholly inadequate for children’s well-being and development.\(^{73}\)

Other judges have argued that when parents are detained with a view to their being expelled, the children who accompany them are not themselves deprived of liberty; indeed, the rather cynical argument went, according to articles 3, 9 and 10 of the CRC the state was not allowed to separate them from their parents and was thus obliged to ensure their residence in these closed reception centres.\(^{74}\)

The federal legislator and migration authorities have been reminded that the requirements to give children the opportunity to express their views and have their best interests taken into account cannot be ignored or denied, even if these requirements are not explicitly provided for in the migration bill.\(^{75}\)

### 3.2.2 Affiliation

In family law, the CRC, and in particular the best interests provision, has played a significant role in litigation on paternal affiliation. The establishment of paternal affiliation tends to be considered as in the best interests of the child.\(^{76}\)

With regard to genetic testing to establish who the biological father is, it has been held that physical integrity (invoked to bar genetic testing) has to be balanced with the right of the child to know his or her parents and to be raised by them; the interests of the child thereby prevail (art. 7 CRC).\(^{77}\) Likewise, the right to know one’s parents was considered more important than the fact that the alleged biological father had a criminal record (including for sex offences). The latter was not considered serious enough to be overtly inimical to the child’s best interests, and hence the request to establish paternal affiliation could not be

---

\(^{70}\) Court of Appeal Ghent 21 June 2007, unpublished.

\(^{71}\) Court of Appeal Mons 16 December 2009, vreemdelingenrecht.be.


\(^{74}\) Investigation Chamber Brussels 13 August 2007, unpublished.

\(^{75}\) Constitutional Court 18 July 2013, no. 106/2013.

\(^{76}\) Tribunal of First Instance (Civil) Brussels 15 February 2011, unpublished.

refused. Furthermore, in view of the right to have one’s full identity established as soon as possible after birth, it was ordered with regard to a child that had been left behind, to include place and date of birth as fundamental elements of identity in the birth registration system.

The Constitutional Court has made it clear that in the various procedures for establishing paternal affiliation, judicial supervision of the best interests of the child must be possible, thereby entailing that the child’s views and interests can be taken into account by a judge.

Cases on parental authority also drew heavily on the best interests of the child as per article 3 of the CRC: alimony arrangements or forced contacts between father and child were held to be contrary to the best interests of the child by civil (juvenile) courts. Penal judges who dealt with the crime of non-observance of contact arrangements (niet-afgifte kind, non-représentation d’enfants) sometimes argued that article 3 of the CRC does not prevent forced contacts rights with a parent, as it in the best interests of the child to develop an emotional bond with both parents; others held that this article is not directly applicable in such cases. However, if an applicant shows an affective bond with a child but that bond is not or no longer mutual, the juvenile court cannot automatically deny contact rights: it has to examine whether granting the right to personal contact is in the best interests of the child.

Still in regard to issues of parental authority, the best-interests principle has also been used to deal with the dispensation of the minimum age limit for marriage and to establish the procedure to follow in order to have the main place of residence of children be given to the grandparents. In an exceptional instance, the judge relied on article 12 of the CRC to ensure that the views of the child were taken into account in residential arrangements.

The particular relevance of the CRC (inter alia, art. 21) to adoption has been acknowledged, and article 8 of the ECHR has to be read in the light of the CRC. In one matter, a man who had formerly been in a stable relationship with a woman was allowed to adopt their biological child on the grounds that it was in the child’s best interests; in another, an adoption which the intended mother sought for the purpose of concealing commercial surrogacy was found in violation of children’s rights, in particular article 35 of the CRC and articles 1–3 of the OPSC. It was held that not granting an adoption allowance in the case of kafala (that is, the

---

83 Tribunal of First Instance (Criminal) Brussels 30 June 2011.
84 Court of Cassation 4 March 2008.
85 Court of Cassation 16 January 2009 (personal contact).
89 Court of Cassation 30 September 2011.
90 Youth Tribunal Antwerp 29 April 2003, NJW 2003, 1376–1377.
91 Court of Appeal Ghent 30 April 2012, TJK 2012, 261–263.
practice under Islamic law of taking care of a child who has been left behind) does not contravene article 20 of the CRC, given the fundamental differences between kafala and adoption.92

3.2.3 Juvenile Justice

The CRC has not been relied upon very often in juvenile justice matters. A contentious matter remains the possibility of trying minors older than 16 years in adult courts under the procedure of uithandengeving or dessaisissement, one whereby the judge in the juvenile court hands over the minor to an adult criminal court. The CRC Committee has asked Belgium to eliminate this procedure.93 The right to appeal as guaranteed in article 40(2)(b)(v) of the CRC has been held not to be applicable because of the reservation made by Belgium. In instances in which a judge has been willing to make a substantive assessment, he or she has not found a violation: article 3 of the CRC does not prevent judges in the adult courts from (re)qualifying the facts after a minor has been handed over to them.94 Neither article 37 nor 40 of the CRC is believed to impose an obligation on the judge who deals with the deprivation of liberty of a minor to examine the precise detention situation of the minor.95 The Constitutional Court has given more transformative power to the CRC in some of its judgments on juvenile justice matters (see section 4).

3.2.4 Social Security

Social security arrangements have been held to be in violation of the CRC. In Belgium, guaranteed family benefits (gewaarborgde gezinsbijslag, prestations familiales garanties) have been established under a residual, non-contributory regime for those with a sufficient link with Belgium. However, although there were some exceptions to this, it was not enough that a foreign applicant’s child be of Belgian nationality and resident in the country; to be eligible, the applicant also had to prove five years of actual and uninterrupted residence in Belgium. This was considered disproportionate to the objective being pursued, namely to expand the residual regime where prospective beneficiaries had a sufficient link with the Belgian state. The Constitutional Court explicitly used the CRC to develop an a fortiori argument to its constitutional non-discrimination analysis.96 Contrariwise, similar legislation with regard to a non-Belgian child was held not to be in violation of the CRC.97

The CRC was also believed to reinforce the finding of constitutional discrimination in a case challenging the differential treatment of fully unemployed persons, some of whom were entitled to unemployment benefits while others were not. The children of the former were entitled to a higher level of child benefits than those of the latter. Here again, the Constitutional Court pointed out in particular that article 2 of the CRC also prohibits unequal

92 Constitutional Court 19 June 2013, no. 92/2013, B.5.2.
94 Court of Cassation 31 October 2006.
95 Court of Cassation 22 March 2005.
97 Constitutional Court 21 February 2013, no. 12/2013.
treatment on the basis of the status of children’s parents. In a number of other constitutional cases on child benefits and equal treatment, the CRC did not play a role.

4 Notable Cases

A cross-section of notable cases will show how the CRC has helped to facilitate legal reform. These cases were heard by different judicial bodies, relate to different legal fields, and draw on diverse CRC provisions, but a commonality underlying them is that the CRC tended to function as a set of meta-norms enabling the judicial bodies to go beyond existing domestic legislation or challenge problematic legislative arrangements.

The Constitutional Court has used article 3 of the CRC in a series of judgments relating to paternal affiliation to underline that judicial bodies need to be able to take the child’s best interests into account. The Court held that a legislative arrangement according to which a judge can only marginally assess the best interests of the child and take them into account only if they are seriously damaged is in violation of article 22bis of the Belgian Constitution and article 3(1) of the CRC. In its view, both of these provisions necessitate that the best interests of the child should be prioritised even though they are not to be granted an absolute character. Here, the Court broke with its earlier case law and, for the first time, emphasised the prioritisation of the child’s best interests in any exercise of balancing of interests.

In the field of juvenile justice, the Constitutional Court has been unwilling to challenge the practice per se of trying minors in an adult court. It has argued, though, that when minors are handed over by a juvenile judge to a Court of Assize, the latter has to take into account the best interests of the child. In view of the specific nature of the administration of juvenile justice, a separate system of criminal administration of justice is required. With regard to the Court of Assize, this means that its composition needs to be adapted so that at least a majority of the bench of three has received special training in youth law and criminal law.

Quite remarkably, the Constitutional Court relied less on the CRC than on general human rights treaties (namely, article 14(4) of the ICCPR and article 6 of the ECHR). Similarly, it relied heavily on the ICCPR and the ECHR, in addition to article 40(2)(b)(i) and (iv) of the CRC, in its ruling that in case of diversion, the requirement to give up the presumption of innocence in order to be eligible for a restorative justice procedure is unconstitutional.

With respect to the right to education, the Constitutional Court has made it clear that the child’s right to education prevails over the educational freedom of parents. Historically, educational freedom has been strongly protected under Belgian constitutional law, as is reflected in article 24 of the Constitution. The Court has held that the freedom of choice of parents in the field of education is to be interpreted in such a way that it takes into account both the observance of compulsory education as well as, crucially, the best interests of the

---

99 Constitutional Court 7 March 2013, no. 30/2013, B.10–B11.
101 Constitutional Court 13 March 2008, no. 50/2008, in particular B.15.6–B.15.18.
child and his or her fundamental right to education.\footnote{103}{Constitutional Court 11 March 2009, no. 50/2009, B.16.2.} The parents’ freedom of choice is therefore not absolute; the child’s right to education may limit it.\footnote{104}{Ibid., B.17.2.} Hence, the state can introduce control mechanisms for home schooling. Likewise, it can impose final objectives, basic skills and development targets on all educational institutions that receive subsidies—though not on home schooling\footnote{105}{Constitutional Court 29 October 2009, no. 168/2009, B.10.1–10.2.}—without violating constitutional provisions, article 28 of the CRC or article 13(3) of the International Covenant on Economic, Social and Cultural Rights.\footnote{106}{Court of Arbitration 18 February 1998, no. 19/98, B.11.1.}

In the field of migration, the Court of Arbitration handed down a landmark judgment in 2003 concerning the treatment of undocumented children. It found that the governmental objective of abstaining from measures that would encourage illegal adult residents to stay on in the country (an objective which was meant to be served by restricting social assistance to urgent medical care) could not justify denying social assistance to a child entirely and under all circumstances if that denial would force the child to live in conditions detrimental to his or her health and development. The Court drew explicitly and elaborately on articles 2, 3, 24(1), 26 and 27 of the CRC. It held in particular that the state had the obligation to guarantee that children are protected from discrimination based on the status of their parents. The judgment was a watershed development in entitling undocumented children to full social assistance as a matter of principle.

5 Conclusion

Since it entered into force in Belgium, the CRC and its provisions have been invoked in about 250 to 300 published or publicly available judicial decisions and judgments. Although this might seem a significant figure, not all of these cases engaged with the CRC in a meaningful way. A major obstacle in Belgian doctrine is the denial—in particular by some of the higher courts—of direct effect to various CRC provisions, with the result that this often precludes substantive analysis of a matter in relation to the CRC. Denial of direct effect does not necessarily render a CRC provision irrelevant, given that it might be accepted as having an interpretative or ‘standstill’ minimum-threshold function. Nonetheless, the recognition of direct effect allows a party to a case to invoke the CRC directly in the absence of comparable domestic legal provisions, thus giving the CRC provisions greater strength.

In cases in which the direct effect of CRC provisions was accepted, or in which that question is considered irrelevant (i.e. in the case law of the Constitutional Court), the CRC has sometimes played a gap-filling role in the absence of domestic legislation. For example, prior to the introduction of legal measures specifically on the right of children to express their opinions, tribunals and courts often used article 12 of the CRC in order to hear children in court proceedings (Senaeve and Armoeyts 2004: 141–143).

In performing this gap-filling role, the CRC also served to raise awareness about the need for legislation which could both clarify modalities and complete the implementation of article 12...
in the domestic legal order (Poelemans 1997, 57–58). Some judicial bodies have used the CRC, in particular article 12, to trigger new legal developments, doing so by allowing children to intervene voluntarily in proceedings that concerned them and thereby granting them standing.

Among the supreme courts in Belgium, the Constitutional Court, liberated from the doctrine of direct effect, has engaged the most actively and substantively with the CRC provisions. The CRC has been instrumental in annulling migration legislation with regard to social assistance for undocumented children. It has likewise helped lower courts and tribunals refrain from applying restrictive legislation in that area. Here, the CRC has played a strong corrective role towards the legislator and a legitimising one towards judicial bodies.

Nevertheless, judges tend to resort to open concepts such as non-discrimination\textsuperscript{107} and best interests. The CRC provisions dealing with more specific rights have been used rather rarely, albeit that there are exceptions to this trend (namely, articles 12, 26–27, and 28). Moreover, judicial bodies seem to prefer constitutional norms, general principles in the domestic legal order (in particular the best interests of the child principle), or the ECHR over the CRC as their main reference norms. In that sense, the CRC often plays a subsidiary role in the absence of domestic or ECHR provisions; when the latter are available, they are often more specific or have been interpreted and developed by the European Court of Human Rights.

In sum, it is important to remember that the CRC is not the only legal reference text on children’s rights. At the same time, the full potential of the CRC and the interpretative work of the CRC Committee has not yet been fully capitalised upon by Belgian judicial bodies.

References


\textsuperscript{107} The distinctive characteristic of art. 2 CRC—that it also prohibits discrimination on the basis of the status of the parents—has been used in particular in migration cases where the irregular status of the parents was at stake.


