6. CONCLUSION

Accepting and hosting children among other asylum-seeking individuals in European countries under the scope of the UNCRC provisions is a difficult process as it is based mainly on legal procedures differing among Member States, depending entirely on national law and the level of UNCRC implementation within each individual country's legal context. To this end, the UNCRC is correctly considered to be a critical landmark in the process of protecting the general child welfare, as well as providing legal protection to all children, including UAM seeking refuge far from their country of origin. Unfortunately, however, the implementation of the UNCRC within the Greek legal context is often problematic, especially when it comes to the issue of UAM detention, thus leading to children being deprived of certain UNCRC rights both at arrival and during the first administrative steps in the host country. To this day Greece is characterised by a clear absence of an efficient legal and procedural framework, responsible for protecting and covering the basic needs of UAM at arrival. For this reason, protective custody is often replaced by administrative detention, leading to minors being placed in detention and treated like adults regardless of their asylum status.

Consequently, even though detention is considered to be the harshest method of securing an illegal alien's deportation, practice in Greece has shown that this form of custody still lies far from being considered as protective when it comes to safeguarding UAM rights, which is evident by the excessive reports and the repeated condemnations both from the ECtHR and the Greek Ombudsman, on the grounds of violation of the 'best interests of the child' principle. Hence, the humanitarian issue of keeping UAM in detention is still a matter to be solved and it is the extensive use of prolonged detention overthrowing protective custody, characterised by clearly unsuitable detention conditions for UAM, that clearly highlights the severe deficiencies in the Greek legal context, when it comes to protecting children's rights under the scope of the UNCRC. For that reason and in order to overcome the above-discussed issues, Greece must focus its attention and resources on reinventing the national legal framework, so that it reaches a higher level of applicability and effectiveness, combined with policies that support the rights of UAM at arrival, including a protective and sound referral pathway that will replace the currently applied procedures regarding UAM detention. Only then Greece will be able to take a first step towards reinstating a series of effective migration policing techniques with a view to protecting the rights of UAM, through facilitating positive adjustment and integration of the UNCRC provisions within the Greek legal context.

APPENDIX ASYLUM AND MIGRATION PROCEEDINGS IN BELGIUM

Challenges for the Best Interests of the Child Principle and Unity of Jurisprudence

Ellen Desmet*

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1. INTRODUCTION

This chapter analyses two strands of case law of the Council for Alien Law Litigation (CALL or Council) in Belgium from the perspective of children's rights and the need to ensure unity of jurisprudence. On the one hand, it looks into appeals against decisions of the Commissioner General for Refugees and

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1 The analysis of the asylum case law in this chapter is based on Ellen Desmet, 'Minderjarigen in de vollederechtsgerichtspraktijk van de Raad voor Vreemdelingennoging' [2018] Tijdschrift voor Vreemdelingenrecht 198.
Stateless Persons (CGRS) denying a minor or his/her parent(s) the refugee and/or subsidiary protection status, in which the CALL undertakes a full judicial review. On the other, it scrutinises appeals against return orders delivered by the Immigration Office in the context of the durable solution procedure to the guardian of an unaccompanied minor (UNAM), for which the CALL only has an annulment competence.

First, in a quantitative analysis, the relationship between the outcome of the case (accepting or rejecting the appeal) and the language of the proceedings (French or Dutch) is analysed. Even though the necessary caution is warranted, the findings do reveal a different approach between the French-speaking and the Dutch-speaking Chambers, especially in the asylum case law. The second part of the chapter concerns a qualitative analysis, assessing the legal weight attached to the principle of the best interests of the child in both strands of case law. It is demonstrated, among others, that the legal weight attached to the best interests principle in the asylum case law of the CALL varies on a continuum from non-applicable/non-relevant, to a procedural application and (exceptionally) a substantive application. In the annulment cases under review, there seems more coherence in how the best interests principle is interpreted, which may be related to its incorporation in the relevant national legal provisions. These quantitative and qualitative findings of divergence within the Belgian asylum and migration case law involving (unaccompanied) minors raise questions from a children’s rights perspective, as well as from the perspective of legal certainty and unity of jurisprudence. This is an exploratory research, however: the research design does not allow formulation of definitive explanations of the findings. Only correlations are identified, no causal explanations are given. Where possible and relevant, hypotheses are formulated as to the interpretation of certain findings.

After a short presentation of the Council for Alien Law Litigation, the methodology adopted is discussed. Thereinafter follow the quantitative and qualitative analyses, discussing each time first the asylum case law, and then the appeals against return orders in the context of the durable solution procedure for unaccompanied minors. The chapter closes with some final reflections.

2. THE COUNCIL FOR ALIEN LAW LITIGATION

The Council for Alien Law Litigation is an independent administrative court in Belgium, competent for handling appeals against individual decisions taken on the basis of the Aliens Act of 15 December 1980. The CALL currently consists of 54 judges, who are divided over nine Chambers: one Chamber is presided by the First President, one by the President, three Chambers handle cases in Dutch, three Chambers deal with cases in French, and one Chamber handles bilingual cases.

The case law of the Council is divided in two branches: the full judicial review appeal and the annulment appeal. The full judicial review appeal consists of appeals against decisions of the Commissioner General for Refugees and Stateless Persons regarding the granting of the refugee and/or subsidiary protection status. Here, the Council can take three types of decisions: confirm the decision of the CGRS (which in the majority of cases will come down to a denial of international protection status); reform the decision (and grant refugee or subsidiary protection status); or annul the decision and send it back to the CGRS. A decision of the CGRS is annulled when it is vitiated by a substantial irregularity which cannot be remedied by the Council, or because essential elements are lacking to the effect that the Council cannot confirm or reform the decision without additional investigative measures. Against any other decision based on the Aliens Act, only an annulment appeal can be lodged, limited to a legality control. Either the Council rejects the appeal, or it annuls the decision and sends it back to the Immigration Office, for violation of substantial or under penalty of nullity prescribed formalities, or for exceeding or disposing of power.

One of the legal obligations of the Council for Alien Law Litigation is to safeguard unity of jurisprudence – which is not self-evident given the large number of judgments that the Council has already issued since the start of its activities on 1 June 2007. At the level of the Council, the President and the President are entrusted with this task, and take the necessary measures to that end. Within each Chamber, its President, with the support of a coordinator, watches over the unity of jurisprudence; he or she may order that a case be dealt with by three judges instead of by one judge, when the legal difficulties or the

2 Also referred to as the Aliens Appeals Board, for instance by the European Court of Human Rights.

7 Art. 39/9 §1 Aliens Act.
8 The Minister or the Immigration Office can also appeal against a decision of the CGRS granting international protection status, but this is very rare. Art. 39/56, 2nd al. Aliens Act.
9 Except in the rare cases where the appeal was introduced by the Minister or the Immigration Office, see art. 6.
10 Art. 39/2 §1 Aliens Act. See also Art. 39/76 §51–2 Aliens Act.
11 Art. 39/2 §1, 2nd para., 2° Aliens Act. The CALL does not have investigative competence itself.
13 In March 2019, the Council had already adopted more than 217,000 judgments, see http://www.evr-coc.be/edl/.
14 Art. 39/6 §1 Aliens Act.
importance of the case so demand.13 When the First President or the President, after having obtained the advice of the judge involved, consider it necessary for the unity of the case law or for the development of the law, that a case be heard by the United Chambers, he or she orders the referral to these Chambers.14 The United Chambers consist of six judges of the CALL, three French-speaking and three Dutch-speaking.15 When both parties request a referral to the United Chambers with a view to ensuring unity of jurisprudence, the First President or the President are obliged to accept this.16 When the latter assess, however, that the importance of the case so demands, they can decide to refer the case to the General Assembly of the CALL, which is composed of all judges.17 The General Assembly holds hearing in even numbers, with a minimum of ten judges. Like in the United Chambers, both linguistic registers are equally represented. Judgments adopted by the United Chambers and – especially – the General Assembly are considered to set out the lines for subsequent case law, and in this way guarantee unity of jurisprudence. In addition, the – also legally required18 publication of the judgments of the CALL potentially contributes to a greater unity of case law. This makes a more exhaustive analysis possible than of the decisions issued by the ordinary judiciary in Belgium, or of migration case law in some other countries,19 which are not published systematically.

This chapter analyses two specific strands within the full judicial review and annulment appeals of the Council respectively, in which minors are involved. On the one hand, it looks into appeals against decisions of the CGRS denying a minor or his/her parent(s) the refugee and/or subsidiary protection status. On the other, the chapter scrutinises appeals against 'orders to be brought to the border' (Annex 38) delivered by the Immigration Office to the guardians of unaccompanied minors. These are specific orders for minors, whereas adults who are irregularly staying in Belgium receive an 'order to leave the territory'.20 For unaccompanied minors, Belgium has established a specific residence procedure, which aims to ensure a 'durable solution' for the minor concerned.21 The Aliens Act identifies three possible durable solutions: (i) family reunification, in accordance with Articles 9 and 10 of the UN Convention on the Rights of the Child (UNCRC), in the country of legal residence of the parents; (ii) return to the country of origin or the country where the unaccompanied minor has legal residence, with guarantees of adequate reception and care according to his age and degree of maturity, either by his parents or other adults who will take care of him, or by public authorities or non-governmental bodies; (iii) or legal residence in Belgium.22 If the Immigration Office decides that family reunification or return is the durable solution, it issues an order to be brought to the border to the guardian of the unaccompanied minor, requiring him to do so within 30 days. This order is not forcibly executed, however, as long as the person is a minor, but he or she does not have a legal stay in Belgium anymore. When turning 18, these young people can receive an order to leave the territory, and be forcibly removed.23 The judgments under scrutiny here are the appeals against these orders to be brought to the border.

3. METHODOLOGY

A two-step methodology was adopted to analyse both strands of case law. A first selection was made on the basis of relevant keywords24 entered in the case law database of the CALL25 within a specific time frame.26 This yielded 536 judgments within the full judicial review appeal, and 179 judgments within the annulment appeal (even though a larger time span was taken).27 In a second step, this sample was reduced to 'relevant' judgments. For the full judicial review appeal, the 'relevance' criterion was defined as 'involvement of a minor as an applicant or child of the applicant'. This can be as an unaccompanied minor, a minor with a legal residence in Belgium, or a minor under the legal age of majority.

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14 Art. 39/12 § 1 Aliens Act.
15 Art. 39/12 § 2 Aliens Act.
16 Art. 39/12 § 1 Aliens Act.
19 See e.g. on asylum case law in Ireland, Samantha Arnold, 'Child refugee and subsidiary protection appeals in Ireland' (2018) 38 Child and Family Law Quarterly 55.
20 Art. 61/18 Aliens Act.
21 For more information, see Katia Fournier, 'Dureline oplossingen voor niet-begeleide minderjarige vreemdelingen: pleins voor de toekomst' in Ellen Doemdt, Jindeke Verhellen and Steven Bouckaert (eds.), Rechten van niet-begeleide minderjarige vreemdelingen in België (de Knor, 2019).
22 Full judicial review appeal: 'minderjarige' (in Dutch) or 'mineur' (in French); annulment appeal: 'heeft tot intrekking' and 'ruge' (in Dutch), 'ordre de reconduire' and 'nuit' (in French).
23 See Helena De Vylder, 'Niet-begeleide minderjarige vreemdelingen: wat nu achter jaart' in Doemdt, Verhellen and Bouckaert (eds.), Rechten van niet-begeleide minderjarige vreemdelingen in België (n. 21 above).
24 For example, the words 'aliens' or 'asylum', 'minderjarige' (in Dutch) or 'mineur' (in French), 'international' (in Dutch) or 'international' (in French), 'human rights' (in Dutch) or 'droits humains' (in French), 'Europe' (in Dutch) or 'Europe' (in French).
25 See also the website of the CALL (www.call-belgique.org).
26 Nested search was used, starting with the keywords, entered in the full judicial review appeal database, and then narrowing down (e.g. adding or replacing keywords). The judicial review appeal database was searched for judgments delivered between 1 January 2012 and 31 December 2017, at the time of the research.
whether or not represented by his/her guardian, or as an accompanied minor.

In the latter group, the minor may also be the applicant, or be the child of a parent or guardian who challenges a decision of the CGRS, without being a party to the proceedings (child of the applicant). Judgments concerning minors in a different situation than applicant or child of the applicant (for example, minor brothers or sisters of the applicant, minor spouses, and 'left behind' children in the country of origin) were therefore excluded.

In addition, the focus was on foreign nationals who were minors at the time of the procedure before the CALL. Judgments about persons who claimed to be minors, but of which the Guardianship Service had ruled that they were of age, or about persons who were minors at the time of certain facts or during an earlier asylum procedure, but who were in the meantime of age, were not included in the analysis.

For the annulment appeal, relevant judgments were judgments on the merits relating to appeals against an order to be brought to the border, delivered to the guardian of an unaccompanied minor in the framework of the durable solution procedure. The following judgments were thus excluded: rejections of an appeal because the applicant has not appeared and is not represented; judgments that found a lack of interest because the minor turned 18,29 and cases where none of the parties asked to be heard within 15 days of sending a decision rejecting the appeal, so that they were deemed to agree with the decision.30

On the basis of these criteria, the sample was reduced to 253 relevant judgments in full judicial review appeal. The main countries of origin were Afghanistan, Albania, Guinea, Iran and Russia. At the time of the research, the majority of the asylum cases was handled by one Dutch-speaking Chamber and two French-speaking Chambers.31 The country of origin determines the language of the proceedings: 100% of the Afghan and 93% of the Iraq cases were handled by a Dutch-speaking Chamber, whereas 95% of the Guinean and 74% of the Albanian cases came before a French-speaking Chamber. Within the annulment appeal, 48 relevant judgments were identified, the main countries of origin being the DRCongo (25%), Albania (10%), Morocco (10%) and Guinea (8%). These judgments were then analysed making use of Excel and NVivo.

The methodology used has both limitations and benefits. First of all, this chapter focuses on people younger than 18 years as a result of the search terms used ('minor'). This age limit does not necessarily correspond to the reality in which children and young people find themselves: a young person of 17 years and six months can be less vulnerable than a young person of 19 years, for example. This limitation applies not only to this chapter, however, but also more generally to the children's rights framework. Moreover, it is theoretically possible that the search terms did not capture all relevant judgments. In view of the neutral selection criterion, however, it can be assumed that the analysis relates to a representative sample of judgments in the time frames concerned. Nevertheless, compared to the total number of judgments that the CALL has already pronounced, the sample is still limited. Therefore, it cannot be deduced from this research whether and to what extent these findings also apply to the case law in general (in particular judgments in which no minors are involved). Furthermore, this is not a longitudinal analysis, but a 'photo' of the situation during a specific time frame. Finally, since this exploratory study consists of a case law analysis, the perceptions and strategies of the actors involved (minors, their parents or guardians, lawyers, the CGRS or the Immigration Office, and judges) are not included here. This also limits the possibility to make explanatory statements at this point.


In a quantitative analysis, the outcome of the case in relation to the language of the proceedings (French or Dutch) was analysed. In the full judicial review appeal, this concerns the confirmation, reform or annulment of the decision of the CGRS; in the annulment appeal, this relates to the rejection of the appeal or the annulment of the decision of the Immigration Office. One reason for this research were claims about differences between the Dutch-speaking and French-speaking asylum jurisprudence within the CALL. For instance, the 2015 AIDA Report for Belgium stated:

'Generally speaking, lawyers and asylum seekers are quite critical about the limited use the [Council for Alien Law Litigation] seems to make of its full jurisdiction, which is reflected in the low reform and annulment rates. It is also important to note that there is a big difference in jurisprudence between the more liberal Francophone and the stricter Dutch Chambers of the CALL.'32

This difference had not been empirically substantiated, however.

For the asylum case law, the outcome of the case was also analysed in relation to the following variables: the legal position of the minor (accompanied or 28 Art. 39/59 82, al. 2 Aliens Act.
30 Art. 39/73 § 52 and 3 Aliens Act.
31 Since February 2018, another Dutch-speaking Chamber has been handling asylum cases on a more regular basis as well.
unaccompanied), the role of the minor in the proceedings (applicant or child of applicant), the Chamber, the judge, and the country of origin. These variables could not explain, however, the divergence noted between the Francophone and the Dutch-speaking Chambers. The Dutch case law did show a greater consistency in the relative share of the three types of decisions across the different judges and countries of origin than the French case law.33

4.1. FULL JUDICIAL REVIEW APPEAL (ASYLUM CASE LAW)

Figure 1. Comparison between asylum case law involving minors and asylum case law in general, per type of decision.

![Comparison between asylum case law involving minors and asylum case law in general, per type of decision.](image)

Whereas this chapter distinguishes between ‘confirmation’, ‘reform’ and ‘annulment’ of a decision of the CGRS, the statistics of the CALL differentiate between ‘refusal of the refugee and subsidiary protection (SP) status’, ‘recognition as refugee/subsidiary protection’ and ‘annulment’. Theoretically speaking, a confirmation of a decision of the CGRS does not necessarily equal a refusal of the refugee status and subsidiary protection status, whereas reforming a decision of the CGRS does not per se imply a recognition as refugee or the granting of subsidiary protection. This is so because also the Minister or the Immigration Office can appeal a decision of the CGRS that he or she considers to be in violation of the Aliens Act or the relevant royal decrees.34 This situation did not occur within the sample of judgments, though, so that the different types of decision can be equated.

A comparison per type of decision between the sample of judgments and the general asylum case law shows that decisions involving minors are twice as often reformed (10% versus 5% overall) and annulled (24% versus 12% overall) (see Figure 1). In judgments in which minors are involved, as applicant or as child of the applicant, the Council thus refuses international protection more often than in general (66% confirmations of the decision of the CGRS versus 83% overall).

Figure 2. Comparison between French and Dutch asylum case law involving minors, per type of decision.

Within the group of judgments analysed, this difference in outcome is entirely attributable to the Francophone case law, where the number of confirmations of decisions of the CGRS is considerably lower (45%) than the global share of confirmations (83%) (see Figure 2). Within the French Chambers, there are more reforms (15%) and especially more annulments (41%) than in the general asylum case law. In Dutch judgments, an – albeit smaller – difference is

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33 See Desmet, ‘Minderjarigen in de volle rechtsnachtprocedure van de Raad voor Vreemdelingenbezuinigingen’ (n. 1 above) 202–205.
34 ‘The figure ‘Asylum case law in general’ is based on Figure 16 from Bamps et al., ‘Présentation du Conseil du Contentieux des Étrangers’ (n. 4 above) 43.

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noticeable in the opposite direction: recognition as a refugee or the granting of subsidiary protection status is slightly more often refused in the sample of judgments (88%) than in general (83%). In only 4% of the cases, do Dutch Chambers reform a decision of the CGRS and grant international protection; in 7% a decision is annulled.

4.2. ANNULMENT APPEAL (DURABLE SOLUTION PROCEDURE FOR UNACCOMPANIED MINORS)

Both branches of case law – full judicial review appeal (asylum) and annulment appeal – are in general characterised by a similar share of confirmations of the decisions of the CGRS and the Immigration Office (83%36 and 85% respectively).

36 The figure 'Annulment appeal in general' is based on the numbers of 2016 in Figure 17 in Bamps et al., 'Présentation du Conseil du Contentieux des Étrangers' (n. 4 above) 44. As mentioned above, the sample covers a longer period (January 2015–June 2017). In 2013, 18% of the decisions of the Immigration Office were annulled.

37 See Figure 1.

Comparing the samples of judgments analysed here – asylum cases involving minors and durable solution cases regarding unaccompanied minors – a similar trend can be identified, in that the Council seems to be stricter when (unaccompanied) minors are involved, and thus annuls more judgments. This trend is even more pronounced in the annulment procedure, where more than half of the decisions of the Immigration Office (52%) were annulled and sent back to the Immigration Office for a new decision to be taken (compared to 34% of the decisions being reformed or annulled in the asylum case law involving minors) (see Figure 3). One possible explanation is that in the sample of asylum cases involving minors, also cases were included where minors were children of the applicants, and thus potentially less directly affected by the decision on international protection (or at least considered to be so by the judge).

Figure 4. Comparison between French and Dutch judgments relating to family reunification or return as a durable solution for UNAM, per type of decision

Breaking down the type of decisions as to the language in which the proceedings regarding the return of an unaccompanied minor were held, reveals that the French-speaking Chambers rejected the appeal in 37.5% of the cases, whereas the Dutch-speaking Chambers did so in 58% of the cases. Also here, the French-speaking Chambers thus demonstrate a more critical stance towards the first instance decisions than the Dutch-speaking Chambers (annulling more), but the difference is less pronounced than in the asylum case law.

Comparing the French-speaking Chambers in both strands of case law, the share of confirming decisions is rather similar (45% in full judicial review appeal compared to 37.5% in annulment appeal). Between the Dutch Chambers, a more prominent difference emerges between full judicial review appeal (89% confirmations) and annulment appeal (58% confirmations, thus rejections of the appeal). These figures thus corroborate, for the sample of judgments analysed, the finding that Dutch-speaking asylum Chambers are substantively more reluctant to contest first instance decisions, than both the French-speaking asylum Chambers and the Dutch-speaking Chambers in annulment procedures.
5. LEGAL WEIGHT ATTACHED TO THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

The principle of the best interests of the child has been incorporated differently in the two legal frameworks under review (international protection, on the one hand, and durable solutions for unaccompanied minors, on the other). For both legal frameworks, there are of course the general sources regarding the best interests of the child at the international (Art. 3(1) UNCRC), European (Art. 24(2) Charter of Fundamental Rights of the European Union) and national (Art. 22bis(4) Constitution) level. Until recently, the best interests of the child was not included in the Aliens Act with regard to international protection. Only a 2013 Royal Decree held that ‘[t]he best interests of the child is a paramount consideration that shall guide the [CGRS] ... when investigating the application for international protection’.34 This provision imposes, however, a greater legal weight (‘paramount’) to be attached to the best interests of the child than the UNCRC (‘primary’). In November 2017 (thus after the sample was taken), the same provision has been included in the Aliens Act.35 In contrast to this relative absence of the best interests of the child principle in Belgian asylum legislation, the best interests of the child has been incorporated in various national legal provisions relevant to the durable solution procedure for unaccompanied minors. The best interests of the child must be considered before taking any return decision.36 This is explicitly repeated when a return decision concerns an unaccompanied minor.37 Moreover, when investigating the possibility of return to the country of origin or a country where the unaccompanied minor has a legal residence right, the state authorities must ensure that it is in the best interest of the child to be placed in the reception structure.38 Finally, the Belgian Constitutional Court has confirmed that these provisions of the Aliens Act only permit the return of the minor … or family reunification as durable solution … in so far as that return or reunification is compatible with the best interests of the child.39

34 Art. 14 §4 Royal Decree of 11 July 2003 determining the procedure and functioning of the Office of the Commissioner General for Refugees and Stateless persons.
35 Art. 57/1 §4 Aliens Act, inserted by Art. 37 of the Law of 21 November 2017. It is regrettable that this provision was included in an article that, at least for the remainder, focuses on accompanied minors.
36 Art. 74/13 Aliens Act: ‘When taking a decision to expel, the Minister or his authorized representative shall take into account the best interests of the child, family life and the state of health of the third-country national concerned.’ This is a transposition of Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (2008) OJ L348/38, Art. 5.
37 Art. 74/16 §1 Aliens Act: ‘Before taking a decision to expel an illegally-staying unaccompanied foreign minor, the Minister or his representative shall consider every proposal for a durable solution of his/her guardian and take into account the best interests of the child.’
38 Art. 74/16 §2, 2nd para., §3 Aliens Act.
39 Constitutional Court 18 July 2013, No. 1062931, R.6.6. The Court also held that the competences of the Minister or his representative regarding the enforcement of migration

The CALL thus has a legal obligation to take the best interests of the child into account, both in asylum cases involving minors (full judicial review appeal) and regarding the durable solution procedure for unaccompanied minors (annulment appeal). The legal sources upon which this obligation is based are different, however, with a ‘light’ incorporation of the best interests of the child principle in Belgian asylum legislation (at least until recently), versus a strong entrenchment of the best interests of the child in the national legal framework regarding durable resolutions and return of unaccompanied minors. This seems to be reflected in the extent to which the applicant invokes the best interests of the child before the CALL (rarely in asylum case law,40 versus frequently in appeals against orders to be brought to the border, issued to the guardian of an unaccompanied minor). Moreover, the legal weight attached to the principle of the best interests of the child differs in both strands, as is elaborated on in the next sections.

5.1. FULL JUDICIAL REVIEW APPEAL (ASYLUM CASE LAW)

The asylum case law demonstrates a remarkable diversity in approaches to the legal weight of the principle of the best interests of the child. These approaches are hereinafter analytically disentangled, but various of these often concur together in one judgment. They can be situated on a continuum, ranging from the rejection of any impact of the best interests principle, to a procedural and (exceptionally) a substantive approach.

A first approach is that Article 3(1) UNCRC41 and Article 22bis(4) of the Constitution,42 are denied direct effect, whereby the CALL refers to established case law of the Council of State and the Court of Cassation.43 In asylum cases, however, the debate about the direct effect of Article 3 UNCRC has lost

policies are restricted by the obligation to determine a durable solution that is adapted to the situation of each minor.” Ibid., 8-9.
40 See also I.-F. Hayez, ‘Les minorés dans la procédure devant le Conseil du Contentieux des Étrangers’ in Adam et al. (eds.), 10 år Raad voor Vreemdelingenbemiddeling: dadmarkdelijke redding bevoegdheid – 10 jaar Raad voor Vreemdelingen, la protection juridictionnelle effective (n. 4 above) 373.
41 Reference is rather made to the ‘young age’ of the applicant.
42 CALL 19 February 2016, No. 162428; CALL 4 March 2016, No. 163488; CALL 4 July 2016, No. 171191.
43 CALL 3 February 2016, No. 163305.
importance because of the applicability of Article 24(2) of the Charter. Given that the legal framework on applications for international protection in the Aliens Act is based on the transposition of the recast Qualification Directive, the best interests of the child must be taken into account in asylum cases. A second reasoning concerns matters in which children are not applicants themselves, but in which the applicants ask to consider the best interests of their child or children. The CALL then has held that the principle of the best interests of the child is not applicable, because the applicants did not submit their appeal on behalf of their child as well, or because no decision is being taken about the children. However, the principle of the best interests of the child does not only apply to decisions that have a direct impact on children (for example, when they themselves are applicants for international protection), but also to decisions that have an indirect impact on children.

In a third line of argumentation, the Council refers to its limited competence within the full judicial review procedure (i.e. assessing whether the applicant is a refugee or is entitled to subsidiary protection), and considers that the best interests of the child would only be affected by another decision (for example, a removal measure or the granting of a residence right) for which the CALL is not competent. Such an approach is clearly at odds with the fact that the best interests of the child must be considered in all actions concerning children, including the assessment of their application for international protection, or that of their parents.

Fourthly, the CALL often states that:

'The general consideration that the best interests of the child is the primary consideration in any decision affecting the child, does not affect the particularity of asylum law, where Articles 48/3 and 48/4 of the Alien Act in implementation of European legislation and of the Geneva Convention of 28 July 1951 provide clearly defined conditions for recognition as a refugee or the granting of subsidiary protection status.'


51 CALL 29 November 2016, No. 178619.

52 UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1) (2013) UN Doc. CRC/GCC/14/19, §19.

53 CALL 3 February 2016, No. 161278, see also CALL 13 May 2016, No. 167645 (family reunification) and CALL 23 September 2016, No. 175374 (granting of residence right).

54 Art. 1(1) UNHCR, emphasis added; see also Art. 2(4) Charter (‘in all actions relating to children’).

55 CALL 23 November 2016, No. 178246.
be recognised. The principle of the best interests of the child requires, however, that the claim be examined from the child's perspective, both when the child is the applicant him- or herself and when the parents request international protection. Moreover, the Belgian legislator requires that the best interests of the child are 'paramount consideration' that shall guide the CGRS during the investigation of the application for international protection. Through the above argumentation, however, the Council refrains from a substantive assessment of the best interests of the child.

In two judgments, the principle of the best interests of the child was discussed in the context of the obligation to state reasons and the burden of proof respectively. A decision by the CGRS was annulled because it had not responded to the applicant's arguments regarding the child's best interests. In another judgment, the CALL held that the applicant had to provide concrete elements to show that her minor child feared persecution or that she would run a real risk of serious harm, in order to become eligible for refugee status or for subsidiary protection status.

The CALL also regularly checks whether the CGRS has provided sufficient procedural safeguards when handling an application for international protection of an unaccompanied minor, such as being heard by a specialised protection officer in the presence of a guardian and a lawyer. Here, the Council supervises the (procedural) determination of best interests (BID), but not the (substantive) best interests assessment (BIA). This test often occurs as well without explicit reference to the best interests principle. On the other hand, it is not clear why this procedural check sometimes is, and sometimes is not carried out in the judgments.

Consequently, there are a number of judgments in which the best interests of the child are considered, but are given a negative interpretation. For example, the Council has held that the recognition of an incorrect or hypothetical nationality cannot be in the interest of the applicant's daughter.

In one judgment from the sample of 253 rulings, the CALL makes a more substantive assessment of the best interests of the child. The applicant was a Sunni Arab woman with a son with a serious mental disability (who was not a party to the proceedings himself). Whereas the argument of the applicant was based on the Aliens Act, the Royal Decree of 11 July 2003, Article 24(2) of the Charter, and the UNHCR Guidelines on child asylum claims, the judge referred of his own accord to Recital 18 of the recast Qualification Directive as the only legal source to respect the best interests of the child – which is not the strongest legal basis. The Council considered that, in view of the situation in Baghdad (and, by extension, Iraq), the applicant's son, being a Sunni with a serious mental disability, had a well-founded fear of persecution. Because the son always needed the attention and assistance of his mother, the Council also established a well-founded fear of persecution on the part of the applicant because of the serious medical problems of her son since she, as a Sunni, because of his behavior will also attract the negative attention from the (Shiite) people and militias without having the protection of the Iraqi authorities against this. In this case, both mother and son were recognised as refugees, among other things on the basis of the dependency relationship of the son with regard to the mother, and despite the fact that the son himself was not a party to the proceedings. This judgment stands therefore in contrast with the argumentation in other judgments discussed above, that the principle of the best interests of the child is not applicable because the child is not an applicant himself.

Even within a limited group of judgments, there thus appears to be within the full judicial review procedure a great diversity in approaches to the legal significance of the principle of the best interests of the child. A negative attitude seems to prevail. In the majority of cases the best interests principle is considered to be inapplicable or irrelevant, only a procedural review – although it is a full judicial review procedure – is carried out, and/or the principle is interpreted in a negative way. Such approaches are not in line with international and European regulations and case law, which explicitly require that the best interests of the child is given a high priority, also in asylum cases. The 2013 Royal Decree even assigns a decisive significance to the best interests of the child when assessing applications for international protection. It is therefore high time for the CALL to proceed to a substantive assessment of the best interests of the child in its full judicial review procedure, in compliance with the guidelines of the CRC Committee. For legal protection and legal certainty, it is essential that legal questions are answered in the same way, in accordance with the European and
international human rights framework. In this respect, the recent ‘upgrading’ of the requirement that the best interests of the child guide the CGRS as a paramount consideration from the 2013 Royal Decree to the Aliens Act may induce lawyers to invoke the best interests principle more frequently, and thus oblige judges to respond to this argument.

5.2. ANNULMENT APPEAL (DURABLE SOLUTION PROCEDURE FOR UNACCOMPANIED MINORS)

In the judgments concerning family reunification or return as a durable solution for an unaccompanied minor, the range of approaches taken towards the legal weight of the principle of the best interests of the child is less diverse. Some judgments also deny the direct effect of Article 3(1) UNCRC79 and/or Article 22bis(4) of the Constitution.80 This does not necessarily imply that these judgments do not consider the best interests of the child, given that in relation to the durable solution procedure for unaccompanied minors and return, the obligation to consider the best interests of the child has also been explicitly enshrined in the Aliens Act.81

On the other hand, various judges refer to the best interests of the child in their grounds for annulment. These grounds may relate to a violation of general principles of good governance, such as the principle of due diligence or the formal obligation to state reasons and/or to a violation of specific provisions in the Aliens Act that include the obligation to consider the best interests of the child. The Court observes then, for instance, that the Immigration Office has not carried out a diligent investigation, but has only based itself on assumptions without offering the necessary guarantees to as appropriate reception and care in the country of origin. The Council concluded that the contested decision had not considered the best interests of the child, and annulled the decision on the basis of a violation of the principle of due diligence.82 The judgment of the Constitutional Court of 18 July 2013, that explicitly stated that return or reunification can only be a durable solution when in the best interests of the unaccompanied minor, is also frequently referred to by the CALL.83

In an interesting judgment, the best interests of the child did not only concern the unaccompanied minor herself, but also the child she had with a refugee recognised in Belgium.84 The Council referred to the fact that Article 74/13 of the Aliens Act – which requires that in any expulsion decision, the best interests of the child are considered – concerns a transposition of Article 5 of the Returns Directive, which renders the Charter of Fundamental Rights of the European Union applicable. Given that the Explanations relating to the Charter indicate that Article 24 of the Charter is based on Article 3 UNCRC,85 the latter provision is relevant for a more appropriate understanding of Article 24 of the Charter. Referring to the fact that Article 3(1) UNCRC is not only applicable to measures that have a direct impact on children, but also to those that impact children indirectly,86 the Council noted that, although the contested decision mentions that the unaccompanied minor has a child with a refugee recognised in Belgium, the best interests of the child of the unaccompanied minor, and specifically the family life in Belgium, were not taken into account. Only the best interests of the party concerned, namely the unaccompanied minor, had been considered. If the durable solution consisted in a reunification with the parents in the country of origin (Serbia), this would imply that either the unaccompanied minor had to leave her child, and the child would thus be separated from the mother, or that she had to take the child with her, in which case the child would be separated from his father because of his refugee status. Information from UNCRC indicated that Roma from Kosovo, like the partner of the unaccompanied minor, are very vulnerable in Serbia, and that it cannot be expected that the family would settle there. The Council concluded that Article 74/13 of the Aliens Act had been violated.

Compared to asylum cases involving minors, the legal weight given to the principle of the best interests of the child in judgments concerning the durable solution procedure for unaccompanied minors seems to be more coherent. Here, the predominant approach is not a dismissive one, but an assessment of whether the best interests of the child have been considered, as required by the national legal provisions at stake. This seems to point in the direction of

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79 CALL 14 September 2015, No. 152423; CALL 26 October 2015, No. 155331; CALL 29 April 2016, No. 167002.
80 CALL 9 February 2017, No. 182033.
81 E.g. in judgment No. 185728, the CALL annuls the judgment on the basis of a lack of verification by the Immigration Office of the guarantees of reception and care by the parents or family members of the minor, without even responding to the arguments of the applicant about Arts. 3 UNCRC and 22bis Constitution. CALL 21 April 2017, No. 185728.
82 CALL 14 January 2015, No. 136183. See also CALL 2 February 2015, No. 137706, where the Council observed that it is ‘particularly negligent not to carry out an investigation regarding the best interests of the child’, and also decides that the principle of due diligence has been violated. For a similar reasoning leading to a violation of the obligation to state reasons, see e.g. CALL 29 April 2016, No. 167002.
83 CALL 14 January 2015, No. 136183.
84 CALL 15 January 2015, No. 136183.
86 [judges of the Council report that also in the annulment appeal procedure in general, the best interests of the child is considered when the decision has an indirect impact on the child. See M. Ryckaseys and S. Kragels, 'Het hoger beloen van het kind in het annulatiecontrole' in C. Adam et al. (eds.), 10 jaar Raad voor Vreemdelingenbewaring: daadwerkelijke rechtbescherming – 10 ans de la Cour des Comptes des Etrangers: la protection juridictionnelle effective (n. 4 above) 299.]
a practical relevance of incorporating best interests of the child provisions in national legislation – even though from a strictly legal point of view the added value thereof is mostly limited, given that Article 24 of the Charter is applicable in most asylum and migration law cases. This lends support to the call of the Federal Migration Centre – Myria – to include a transversal provision in the Aliens Act that obliges the administrative and judicial authorities to consider first and foremost the best interests of children in all procedures that concern them. This would overcome the currently fragmented approach in the Aliens Act, where the best interests of the child is referred to in some provisions (relating to, for instance, unaccompanied minors, return, family reunification, and human trafficking and smuggling) but not in others.  

6. FINAL REMARKS

This chapter provided a quantitative and a qualitative analysis of two strands of law within the full judicial review procedure and the annulment procedure of the Belgian Council for Alien Law Litigation. Within the full judicial review procedure, asylum cases of 2016 in which minors were involved as applicant or child of the applicant, were scrutinised. Within the annulment appeal, the sample concerned cases on the durable solution procedure for unaccompanied minors between January 2015 and June 2017.

The quantitative analysis revealed that, in case law involving (unaccompanied) minors, the Council adopts a more stringent stance towards first instance decisions. In the asylum case law, judgments in which minors are involved are twice as much reformed and annulled than the ‘general’ case law. This difference is entirely due, however, to the Francophone case law, which is therefore more critical of the decisions of the CGRS than the Dutch-speaking Chambers. In the durable solutions cases, the difference with the overall figures on annulment cases is even more pronounced, as more than three times as many judgments are annulled in the sample than in general. Also here, the French-speaking Chambers tend to annul more, but the difference from the Dutch-speaking Chambers is less pronounced than in the asylum case law.

The quantitative analysis therefore confirms at least in part the hypothesis of a difference between the Dutch-speaking and French-speaking jurisprudence, namely in the relative share of each type of decision, and this especially in the asylum case law. On the basis of this research it cannot be determined whether/to what extent this difference is related to the fact that it concerns judgments about (unaccompanied) minors, or whether this phenomenon manifests itself as well in the other case law of the CALL. In some recent press statements, the CALL acknowledges the divergence within its asylum case law. According to its press magistrate:

'[t]here is a difference in approach and methodology, which has historically grown. This can partly be explained by a division between Northern European, more administrative thinking, and Southern European, more principled thinking, because of which similar cases lead to different conclusions.'

In the view of the First President of the CALL, 'it concerns differences between Chambers, or between judges, differences that can be linked to the file and do not coincide with the linguistic frontier.' He warns against analysing the case law through the prism of language: 'Next to those who find the Flemish judges too strict, there are all those who would like to prove that the Francophone judges are too lax.

The qualitative analysis showed major differences in the way in which the Chambers in the full judicial review procedure of the CALL legally approach the principle of the best interests of the child. In the few judgments that mention the best interests of the child, the principle is often rejected as inapplicable or irrelevant. In some judgments, only a procedural assessment takes place, or the concept is interpreted in a negative way. Such approaches go against international and European legislation and case law, in particular Article 3 UNCRC and Article 24 (2) of the Charter. They also do not comply with the legal obligation of the CGRS to consider the child’s best interests as a paramount consideration when investigating the application for international protection – which the CALL must supervise. The guidelines of the CRC Committee must substantiate both the substantive determination of the best interests of the child and the procedural safeguards during this process.

More recently, the news magazine Alter Échos reviewed 303 appeal cases of Iraqi asylum seekers between July and December 2016, arriving at similar findings. The Francophone judges confirmed the negative decision of the CGRS in 68% of the cases, whereas the Dutch-speaking judges did so in 88.5% of their judgments. Cédric Vallet, ‘Conseil du contentieux des étrangers: deux poids, deux mesures’ Alter Échos no. 471 (Brussels, 4 March 2019).


Vallet, ‘Conseil du contentieux des étrangers: deux poids, deux mesures’ (n. 81 above).

[Ibid.](#)
In the annulment procedure, the legal approach towards the best interests of the child principle is less divergent than in the asylum case law. Even though some judgments also deny the direct effect of Article 3(1) UNCRC and/or Article 22bis(4) of the Constitution, most judgments do consider the best interests of the child on the basis of the national legal provisions requiring them to do so. This indicates at least the practical - even though not always legal - relevance of incorporating the best interests of the child principle in the domestic legal framework. Finally, there is also the paradoxical outcome that in the annulment procedure, where the Council is limited to a legality control, the best interests of the child turns out to play a greater role than in its full judicial review procedure. This is probably at least partly related to a larger reluctance to consider the best interests of the child in asylum cases, given the claimed 'particularity' of asylum case law. Nevertheless, in order to ensure legal certainty, rights protection and unity of jurisprudence, it is fundamental that legal questions receive the same answer in different judgments, in accordance with the European and international human rights framework.

1. INTRODUCTION

The purpose of this chapter is to assess the role of children's rights in decision-making with special focus on asylum-seeking children in Botswana. This topic is significant because in 2017, the Court of Appeal considered two applications brought by men and women, who had been detained along with their minor children, following failed applications for asylum. The first of these decisions was *Marie Iragi and 2 others v. The Attorney General*,¹ this case concerned two women who sought asylum in Botswana accompanied by three minor children.

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¹ Senior lecturer at the University of Botswana Department of Law.
² UAIFPT 000017-17 (unreported).