

CHILDREN'S RIGHTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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The European Convention on Human Rights (the 'ECHR' or the 'Convention') has just turned 65 years old. During this time the ECHR and the European Court of Human Rights (the 'ECtHR' or the 'Court') have been at the forefront of human rights protection in Europe. Over the past 65 years the ECtHR has delivered over 18,000 judgements which led to significant reforms of the Contracting States' practice and legal systems. Nevertheless, the Strasbourg system is far from perfect. In recent years challenges to the legitimacy of the ECtHR have arisen and reforms have been and continue to be implemented to deal with the ever increasing workload of the Court.

This contribution seeks to briefly outline the achievements and shortcomings of the Court's case law related to children. It is well known that the ECHR is a general human rights instrument and provisions referring expressly to children are scarce in the text of the Convention.¹ Nevertheless, over time the ECtHR has developed an impressive body of case law covering children.² Children have featured both as applicants in their own name or their rights have been brought to the fore by parents or other legal representatives. Thus, one can find references to children in the ECtHR's case law on most of the Convention Articles, touching upon a wide variety of children's rights issues, including international child abduction,³ the protection of children against (sexual) abuse and neglect,⁴ children in detention⁵ and the right to a fair trial of children subjected to criminal justice proceedings.⁶ It is Article 8 of the ECHR which has been mostly used in relation to children.⁷ Under Article 8 ECHR, the Court has dealt with diverse aspects of children's rights, including the right to personal identity, adoption, foster care, the right to personal integrity, the child's best interests, to name but a few. Importantly, the ECtHR has

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1 U. Kilkelly, *The child and the European Convention on Human Rights*, Dartmouth: Ashgate 1999.

2 See also the *Handbook on European Law relating to the rights of the child* by the EU Agency for Fundamental Rights and the Council of Europe (i.a. to be found at <http://fra.europa.eu/en/publication/2015/handbook-european-law-child-rights>), which has been prepared by an international team of children's rights scholars led by the Department of Child Law of Leiden University.

3 ECtHR 6 July 2010, appl.no. 41615/07 (Neulinger and Shuluk/Switzerland); ECtHR 26 November 2013, appl.no. 27853/09 (X/Latvia); etc.

4 ECtHR 29 January 2009, appl.no. 35810/09 (O'Keeffe/Ireland); see also ECtHR 18 June 2013, appl.no. 48609/06 (Nencheva and Others/Bulgaria) and 28 September 2015, appl.no. 23380/09 (Bouyid/Belgium).

5 See e.g. ECtHR 29 February 1988, appl.no. 9106/80 (Bouamar/Belgium); ECtHR 16 May 2002, appl.no. 39474/98 (D.G./Ireland); ECtHR 6 May 2008, appl.no. 20817/04 (Nart/Turkey); ECtHR 19 January 2012, appl.no. 39884/05 (Korneykova/Ukraine).

6 See e.g. ECtHR 27 November 2008, appl.no. 36391/02 (Salduz/Turkey), ECtHR 11 December 2008, appl.no. 4268/04 (Panovits/Cyprus) or ECtHR 16 December 1999, appl.no. 24724/94 (T./UK).

7 U. Kilkelly, 'The CRC in litigation under the ECHR', in: T. Liefwaard & J.E. Doek (eds.), *Litigating the Rights of the Child*, Dordrecht: Springer 2015, p. 195

incorporated some of the guarantees of the United Nations Convention on the Rights of the Child (the 'CRC') and the recommendations of the United Nations Committee on the Rights of the Child in its case law. As the ECtHR judgements are binding on the Contracting States, and in the absence of a similar mechanism at the United Nations level the ECtHR has been considered the body able to bring teeth to the rights of the child as enshrined in the CRC or other international instruments.⁸

Yet, the relationship between the ECtHR and children's rights has also had its shortcomings. Scholars have highlighted the scarcity of references to the CRC in the Court's case-law, especially in the Court's reasoning. Thus, the Court either referred to this instrument in the 'Relevant Law' part but declined to make any further reliance in its reasoning, or references are not included all together.⁹ Further, in some instances the ECtHR has been reluctant in acknowledging children as agents as opposed to mere objects of protection.¹⁰ It was highlighted that by relying excessively on children's vulnerability the Court can either deny agency to children or appear to create artificial distinctions between beneficiaries of human rights' protection.¹¹ Moreover, from a legal reasoning standpoint the Court seems to struggle sometimes with the inclusion of children's rights in its case law. In the following paragraphs two recent cases of the ECtHR shall be highlighted to illustrate on the one hand inconsistencies in reasoning and on the other hand to applaud the Court's approach to children's rights.

The case of *Paradiso and Campanelli v. Italy*¹² concerned the highly topical issue of international surrogacy. The application was lodged by the intended parents – who it turned out not to have any genetic link with the baby – in their own name and on behalf of a baby born via a surrogate arrangement. Without going into a lengthy discussion on the facts and reasoning of this case,¹³ it is interesting to note that the Court dismissed the standing of the intended parents to act as representatives of the baby, on the basis of absence of genetic links. As a result, the child was not a party to the proceedings. Nevertheless, this did not stop the Court from finding a violation of Article 8 of the ECtHR on account of disrespect of the child's right to personal identity. In its reasoning the Court relied on the provisions of Article 7 CRC. Despite the favourable outcome for the child and the inclusion of references to the CRC, the Court's reasoning is problematic. As stated, the child was not a party to the proceedings, and yet the violation found was precisely on account of disrespect of a particular right of the child. This is illustrative of the Court's struggle to incorporate the rights of children when children face major obstacles in accessing courts, including the ECtHR. It is noteworthy that this case is now pending before the Grand Chamber, therefore it may be a good opportunity for the Court to undertake a more detailed analysis and refine its approach to standing and representation of children in proceedings before it.

8 A.M. Reneman, 'Het Kinderrechtenverdrag krijgt tanden: over hoe het VN Verdrag inzake de Rechten van het Kind via het EU-recht en het EVRM binnendringt in het Nederlandse vreemdelingenrecht', *Asiel & Migrantenrecht* 2011, p. 349.

9 Kilkelly 2015 (*supra* note 7), p. 207.

10 W. Vandenhoele & J. Ryngaert, 'Mainstreaming children's rights in migration litigation: Muskhadzhiyeva and others v. Belgium', in: E. Brems (ed.), *Diversity and European Human Rights, Rewriting Judgments of the ECHR*, Cambridge books online 2012, p. 68-92.

11 *Ibidem*.

12 ECtHR 27 January 2015, appl.no. 25358/12 (*Paradiso and Campanelli/Italy*).

13 For more details on this case, see <http://leidenlawblog.nl/articles/what-about-the-children>.

Nevertheless, another recent judgement represents a very good example of the ECtHR's willingness to engage with children's rights. The case of *M and M v. Croatia*¹⁴ concerned a custody dispute and allegations of domestic abuse. The applicants were a non-custodial parent and her daughter. The application was analysed under several Articles of the Convention. However, for the purposes of the present contribution it is important to note that the Court went at some length to criticize the failure of the domestic authorities to hear the child in the domestic custody proceedings. In doing so, the ECtHR relied heavily on Article 12 of the CRC – the child's right to be heard, and incorporated these guarantees in the procedural dimension of Article 8 ECHR. The Court's reasoning and its reliance on the CRC represent a laudable example of the ECtHR engagement with children's rights and its potential to advance these rights in the future.

All in all, the ECHR in its 65 years of existence has proved instrumental for advancing children's rights and it is hoped that the future will be positive for individuals in need of protection, including children.

14 ECtHR 3 September 2015 appl.no. 10161/13 (M and M/Croatia).