

A photograph of three people, two men and one woman, sitting together and reading books. The man on the left is looking down at his book, the woman in the middle is looking at her book, and the woman on the right is looking at her book. They are all focused on their reading.

FREEDOM OF RELIGION OR BELIEF OF MINORS

DISCUSSION IN VIEW OF ASYLUM CLAIMS



In 2017 a 10 years old Afghan minor, accompanied by both parents, lodged an asylum claim of her own with the Dutch government, claiming she had converted to the Christian faith. According to the Immigration Authority, a child of her age is not likely to be able to make a personal informed decision concerning a conversion but can only be expected to follow the parents in their decisions. Also, it was said that the minor can be expected to follow their parents in the Islamic faith once returned to Afghanistan. This paper discusses the validity of the arguments in the light of the intrinsic right of minors to choose their own religion or belief.

THE CHILD'S DECLARATIONS

The child declares that she was always crossed with her father about the compulsory Islamic religious rites and dress code. As a girl she also felt being discriminated because she was, e.g., not allowed to attend school. After arrival in the Netherlands in 2015 the family was introduced to the Christian faith and started attending church. At the same time the tensions between the girl and her father about Islamic demands eased as the girl gained more liberty. The girl says she enjoys reading and studying the Bible, attending church and (in our opinion) she had gained a good understanding of the Christian faith, considering her age. Furthermore the church has declared that she faithfully helps at Bible classes for 'young converts' as interpreter. Also, she has developed the ambition of becoming a lawyer in order to help people whose rights are being denied.

GENERAL PRINCIPLES FOR ASSESSMENT

In this report we will focus on the general principles for assessment. These concern the following two issues:

- Has a minor an intrinsic right to freedom of religion or belief of his own?
- If yes, when can a minor be expected to possess the capacity to exercise this right?

Freedom of religion or belief

Article 14 of the Convention on the Rights of the Child¹ clearly states the intrinsic right of minors to freedom of thought, conscience and religion:

1. *States Parties shall respect the right of the child to freedom of thought, conscience and religion.*
2. *States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.*

Furthermore, Art. 12 states:

1. *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

The General Comment No. 12 (2009) of the UN Committee on the Rights of the Child further explains that the phrase 'capable of forming his or her own views'

"should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity." (section 20)

and emphasizes

"that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him. In this respect, the Committee underlines the following:

- *First, in its recommendations following the day of general discussion on implementing child rights in early childhood in 2004, the Committee underlined that the concept of the child as rights holder is "... anchored in the child's daily life from the earliest stage". Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.*
 - *Second, it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter.*
 - *Third, States parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard. (etc.)"*
- (section 21)

¹ Further referred to as 'CRC'

The UNHCR interim report A/70/286 of the Special Rapporteur on freedom of religion or belief² elaborates on this:

"The status of each individual child as a rights holder and his or her reliance on support usually provided by the family must be seen in conjunction. On the one hand, the rights of the child can never flourish without an enabling environment. On the other hand, the need of the child for an enabling environment must not lead to the wrong conclusion that parents or other family members can simply override, ignore or marginalize the rights of the child. The status of the child as rights holder must always be respected and should, inter alia, be reflected in the manner in which parents provide guidance and direction to the child. The decisive term employed in the Convention on the Rights of the Child is 'the evolving capacities of the child'."

And article 5 CRC states:

"States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention."

The following conclusions can be drawn from this:

1. Minors have an intrinsic right to choose a religion or belief of their own, regardless of age.
2. Minors have the right to be heard in asylum cases when there is a claim of having a conviction or belief of their own that can be a ground for asylum.
3. A hearing may not be refused merely because the minor is expected to be too young for holding or expressing a view of his or her own; if needed a hearing must use non-verbal means of communication.
4. Whereas parents may introduce their children into the particular religion or belief they adhere to, they should respect the child's own evolving capacities to make his own choice.

Evolving capacities

As we have seen, minors have an intrinsic right to freedom of thought, conscience and religion. When growing up, however, the parents will, in general, determine the religion or belief in which the child will be educated. The parents have the right to do that, but this right is qualified. While growing up the child will gradually develop views and convictions of his or her own and the capability to act accordingly. This 'evolving capacity' must be taken into account in, e.g., the assessment of credibility of conversion of a minor.

It is important to understand that these evolving capacities are not merely dependent on age but on personal experience, culture and levels of parental support and expectation as well:

"Societies require legal frameworks that prescribe the ages at which children acquire certain rights. The Committee on the Rights of the Child, in its guidelines relating to Article 1, the definition of the child, acknowledges the growing autonomy of the child and the need to respect the gradual acquisition of independent exercise of rights. (...) However, the evidence that children do not acquire competencies merely as a consequence of age, but rather through experience, culture and levels of parental support and expectation, has implications for determining the most effective legal framework for respecting children's

² <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/245/07/PDF/N1524507.pdf?OpenElement>

right to participate in and take responsibility for those decisions they are capable of, while also providing appropriate protection.”³

As a consequence, in the assessment of the credibility of conversion of a minor, the Immigration Authority will need to take into account all these aspects.

With further reference to the report by Gerison Lansdown, the following should be noted:

“All children capable of expressing a view are entitled to do so and to have it taken into account. Article 12 [CRC] does not restrict expression to formal language. Views can be expressed in many ways, for example, through emotions, drawing, painting, singing, drama. Very young children, even babies, as well as children with profound learning difficulties, are capable of expressing views. A higher threshold of competence is required when determining what weight should be attached to the child’s views. Here, Article 12 explicitly states that the greater the age and capacity of the child, the more seriously their views should be considered.

Four levels of involvement have been identified in the decision-making process:

- *To be informed.*
- *To express an informed view.*
- *To have that view taken into account.*
- *To be the main or joint decision-maker.”*

*(...) Article 5 [CRC] further emphasises the role of parents or other care-givers in terms of the provision of direction and guidance in **the exercise by the child of his or her rights**, consistent with their evolving capacity. In other words, it implies a transfer of responsibility for decision-making from responsible adults to children, as the child acquires the competence, and of course, willingness to do so. Article 5 makes no mention of age as a factor in determining levels of capacity, thereby recognizing that the demonstration of the requisite skills, knowledge and understanding is crucial to the exercise of rights. (...) The exercise of autonomy requires capacity, desire and opportunity. With regard to the desire to take responsibility for oneself, children must not be forced against their will to take decisions they do not feel competent or willing to take. Indeed, it is one of the rights of childhood that children are not burdened with inappropriate levels of responsibility. Many children, however, do want to exercise greater autonomy in their day-to-day lives, and the presumption that they lack competence serves to deny them the opportunities to acquire it. Article 5, in conjunction with Article 12, stresses that children are entitled to support, encouragement and recognition in taking decisions for themselves in accordance with their wishes and capacity, as well as in the context of their family and community.” (p. 4)*

In section 2 of his report, Lansdown examines conventional stage theories and recent cultural theories of child development:

“Conventional child development theories tended to construct children as moving through a process of acquiring maturity according to pre-determined biological and psychological forces, actively acquiring an understanding of their world, with little recognition of their capacities or agency within it. Presumptions of children as immature learners have led to a failure to value or witness the behaviours they exhibit that testify to their active participation in shaping their own and others lives around them. (...)

Increasingly, developmental psychologists are applying a theoretical framework in which child development is understood as a cultural process and childhood is understood as a product of specific economic, social and cultural processes. (...) What these cultural frameworks offer is a more complex

³ Gerison Lansdown, “The evolving capacities of the child”, UNICEF Innocenti Research Centre, 2005, p. x
<https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf>.

understanding of how children develop and what influences that process. They challenge the view that certain behaviours, thinking and social relationships can be ascribed as 'normal' at any given age, and they challenge assumptions that it is possible to prescribe what is likely to be appropriate or harmful to a child's development without understanding the context in which it arises, the underlying values and the prior experiences of learning. Woodhead observes that 'the implication of accepting that child development has to be understood as a cultural process is that benchmarks are not intrinsic, fixed or prescribed. They are extrinsic, historically specific and negotiable within a framework of promoting children's rights' " (p. 12)

In section 3 Lansdown explores the implications of children's evolving capacities for the realisation of their rights and observes that

"recent social and ecological theories emphasise that rather than development taking place in orderly, predictable stages, children come to know and understand the world through their own activities in communication with others. The key implication of this approach is that, rather than leaving children to explore at their own pace and at their own level, the most effective model for developing competencies is one in which children work collaboratively, either with adults or other children, each serving as a resource for others, and taking varying roles and responsibilities according to personal understanding and expertise. This reality is instinctively recognised by mothers and fathers all over the world who interact with and respond to their young children." (p. 16)

In summary:

1. Minors acquire competencies through experience, culture and levels of parental support and expectation.
2. Minors first learn to express an informed view and next their view will develop in such a way that it needs to be taken into account and finally the minor can make a decision of his or her own.
3. Minors come to know and understand the world through their own activities in communication with others. The most effective model for developing competencies is one in which children work collaboratively, either with adults or other children, each serving as a resource for others, and taking varying roles and responsibilities according to personal understanding and expertise.

ASSESSMENT BY THE IMMIGRATION AUTHORITY

Informed decision re the minor's personal faith

According to the Immigration Authority, a child of her age is not likely to be able to make a personal informed decision concerning her religion or belief and hence a possible conversion:

*"As to the young age, the claimed conversion of a child with the age of [name of child] can be questioned in general. Children of this age have not yet developed a mature personality of their own. Also, children do not normally choose a faith but are brought up in and taken into a faith by their parents. It is not unusual that children first develop a (conscious) choice re the practicing or not practicing of the faith when they are reaching the age of majority and develop a (more) independent personality."*⁴

⁴ In Dutch: "Ten aanzien van die jeugdigheid wordt echter tevens opgemerkt dat reeds in algemene zin vraagtekens kunnen worden geplaatst bij een gestelde bekering van een kind van de leeftijd van [naam kind]. Kinderen van deze leeftijd hebben immers nog niet een eigen, volwassen persoonlijkheid ontwikkeld. Bovendien kiezen kinderen in de regel niet voor een geloof, maar worden zij daarin opgevoed en meegenomen door hun ouders. Het is niet ongebruikelijk dat kinderen eerst rond de tijd dat zij volwassen worden en een (meer) zelfstandige persoonlijkheid ontwikkelen een (bewuste) keuze maken ten aanzien van het al dan niet praktiseren van het geloof."

In this statement the Immigration Authority does not completely dismiss the possibility of a minor to make a decision of his own regarding the religion he wants to adhere to. Yet, the general assumption is that minors do not do that. Only when a person reaches the age of majority he can be expected to develop a (conscious) choice of his own. Clearly, the Immigration Authority presumes that competence is merely a matter of age, thus ignoring the demands to assess the evolving capacity that is the result of experience, culture and levels of parental support and expectation.

As we have seen in the previous section, it must be considered that the most effective model for developing competencies is one in which children work collaboratively, either with adults or other children, each serving as a resource for others, and taking varying roles and responsibilities according to personal understanding and expertise. In the particular case the following observations can be made:

1. The girl was grown up without education and with the demands of Islamic rites and dress code.
2. The girl was clearly able to express her view about this: she had discussions with her father about this regularly.
3. Once in the Netherlands she was introduced to education and to Church. She clearly indicates that she enjoys the freedom of personal development. She also developed the ambition of becoming a lawyer in order to help people whose rights are being denied. This ambition is not trivial for children of her age.
4. It is evident that the girl has developed competencies by attending school, Church meetings, and by taking up the role and responsibility of interpretation at Bible Study meetings. It is important to note that the church has declared that she is very faithful in this responsibility which is not trivial for a ten year old minor.
5. The competencies the girl has developed may not seem fitting to her age but considering her background and experience it can not be said to be incredible. Unlike most Dutch children, she has personal experience of two completely different cultures and ways of life, including two different faiths, and is able to choose between them and express her choice and her motivation.

In conclusion, applying the principle of evolving capacities she cannot be denied the capacity of making and expressing a personal view regarding the religion or belief she wants to adhere to.

The parent's leading

After discussing the girl's statements re her conversion the Immigration Authority further concludes *"that her personal conviction is not really leading but the choice of her parents. These statements do not indicate a conversion to the Christian faith based on an independent, conscious and thoughtful choice of [name child], in spite of her age. (...) It is expected that the parents will follow the Islamic faith on return to Afghanistan as they did before they came to the Netherlands and that [name child] will follow them there."*⁵

The 'choice of their parents' refers to her parents' choice to attend church in the Netherlands. As the Immigration Authority had also concluded that the parents' conversion was not credible, they now conclude that the parents will practice Islam once again when returning to Afghanistan.

⁵ In Dutch: "Hieruit volgt dat niet zozeer haar eigen persoonlijke overtuiging leidend is, maar de keuze van haar ouders. Deze verklaringen duiden niet op een bekering tot het christendom waar in weerwil van haar jeugdige leeftijd een zelfstandige, welbewuste en weloverwogen keuze van [naam kind] aan ten grondslag ligt. (...) Aangenomen wordt dat de ouders bij terugkeer wederom het islamitische geloof zullen volgen, zoals zij dat ook deden voorafgaand aan hun komst naar Nederland en dat [naam kind] hen daar zal volgen."

Without discussing the credibility of conversion of the parents, which is not the subject of this report, the following observations can be made:

1. Whether or not the claimed conversion to the Christian faith of the parents is credible, it is for the parents to decide how they want to raise their daughter. It is not the competence of the Immigration Authority to work on the basis of an assumption of their own as that is an infringement of Article 8 of the European Convention on Human Rights about the right to respect for private and family life:
 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
2. The parents have explicitly declared that they want to respect the girls own choice with regard to her personal faith. Apparently the parents have gained a better understanding of their responsibility, right and duty to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention, as stated in art. 5 CRC, than the Dutch Immigration Authority.

COLOFON

AUTHOR

Dr. Marnix Visscher
Co-ordinator legal support

Version 1.1, 25th July 2019

This report can be downloaded from
www.juridisch.gave.nl and can be freely distributed

ACKNOWLEDGEMENT

We are grateful for advice by prof. Christof Sauer.
However, the content of this report is the sole responsibility of the Gave Foundation.

LEGAL SUPPORT BY GAVE

The Dutch Gave Foundation has the desire that refugees who have fled to the Netherlands are being seen and loved. Gave is an interchurch organisation that wants to raise awareness among churches and Christians re their biblical calling to welcome refugees in their midst.

The legal team campaigns on behalf of Christian refugees in the Netherlands and co-operates in international networks for the promotion of a fair assessment of asylum claims of Christian refugees.

Stichting Gave

Marie Curiestraat 35
3846 BW Harderwijk
T 0341 - 460 328
www.gave.nl | juridisch@gave.nl
IBAN NL85 INGB 0006 9900 56