

Changing Parenthood and Migration

MIGRATION LAW IN RELATION TO MULTI-PARENTING,
MULTI-PARENT CUSTODY AND SURROGACY

Advisory Report

The ACVZ

The Advisory Committee on Migration Affairs (ACVZ) in the Netherlands is an independent body that advises Government and Parliament on migration law and policy.

Colophon

'Changing Parenthood and Migration'

English summary of the advisory report 'Veranderend ouderschap en migratie', addressed to the Minister for Legal Protection and the Minister for Migration

ACVZ Publication, The Hague, 2019

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Introduction

In December 2016, the Government Committee on the Reassessment of Parenthood (hereinafter referred to as the Government Committee) published its report entitled '*Kind en ouders in de 21^{ste} eeuw*' (Child and Parents in the 21st century). In it, the Government Committee proposed regulations on multi-parenting and multi-parent custody arrangements for a maximum of four individuals. The reason for this is that current regulations do not adequately address the various forms of social parenthood that exist within society (such as stepparent families and same-sex parents). In addition, the Government Committee put forward proposed regulations for surrogacy arrangements with legal safeguards. The aim of these regulations is to prevent Dutch parents from seeking a surrogate in countries that do not offer adequate protection for the rights of the surrogate and the child. In this report, the Advisory Committee on Migration Affairs (ACVZ) advises on the impact of the Government Committee's proposals on migration law.

In this advice, the ACVZ has provided answers to the following questions:

- 1) To what extent will the proposals of the Government Committee have an impact on migration law?
- 2) To what extent will it be necessary or advisable to amend migration law in order to allow the regulations recommended by the Government Committee to be implemented in scenarios where one or more of the parties involved (the parents, custody holder, surrogate and/or children) are foreign nationals?
- 3) To what extent might the proposed regulations, or amendments to migration law required as a result thereof, be used for the sole purpose of establishing a claim to a right of residence in the Netherlands for parents and/or custody holders?
- 4) In the event that the answer to the third question is that such use would be likely: Is it possible to design migration law or the regulations recommended by the Government Committee in a way that prevents such use? And if so, what way would that be?
- 5) How might migration law help to prevent the Netherlands from becoming a destination country for international surrogacy?
- 6) How might migration law offer surrogates additional protection against possible exploitation?

The advice has been built on three premises:

- the rights and best interest of the child;
- the importance of legal uniformity and legal protection;
- the articulation between the prevention of misuse¹ of rights on the one hand and the legitimate interests of the families involved on the other hand.

Conclusions and recommendations

1. On multi-parenting and multi-parent custody

The ACVZ has set out the proposed regulations for multi-parenting and multi-parent custody arrangements in Chapter 3. The proposals of the Government Committee also permit foreign nationals to rely on the proposed regulations, insofar as international private law does not oppose this.

Conclusion 1

The ACVZ concludes that implementation of the proposals of the Government Committee will have an impact on migration law. In the interest of legal uniformity and legal protection, the ACVZ considers that the amendments as regards the concept of a 'family' in parentage law urgently needs to be implemented in migration law as well. It is also necessary to regulate the residence status of individuals in these new family structures. Legal uncertainty will continue to exist as long as migration law does not address their residence status.

The ACVZ notes, moreover, that there are no provisions in national migration law that take account of social developments that mean that the family relationship between parents and their child does not necessarily imply that a relationship exists between the parents.

Based on the above, the ACVZ has established the following recommendations:

Recommendation 1

Harmonise the definitions of the terms 'family', 'parent', 'custody holder' and 'blood relative' in the Civil Code and the Aliens Act 2000 by:

- adding definitions for 'parent' and 'custody holder' to Section 1 of the Aliens Act by referring to the definitions laid down in the Civil Code. Section 1 currently does not include definitions for these;
- amending the definition of the term 'family formation' in Section 1(1) of the Aliens Decree so that families formed as a result of the regulations proposed by the Government Committee are brought within its scope.

Recommendation 2

Amend Section 3(14) of the Aliens Decree to permit a parent or custody holder to reside with a child. Further requirements could be stipulated with regard to such residence within the limits of the UN Convention on the Rights of the Child (UNCRC), Union law and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). When determining the conditions for residence with a child, primary consideration should to be given to the best interest of the child.

Conclusion 2

In its review, the ACVZ has found that misuse of the proposed regulations on multi-parenting and multi-parent custody arrangements cannot be entirely excluded. Misuse of rights can never be completely ruled out. However, a great number of experts consulted by the ACVZ consider that the complexity of the procedures that must be completed acts as a guarantee against misuse. Moreover, Belgium and France (which operate a simple adoption procedure) and the Canadian province of British Columbia (which has a multi-parenting procedure) do not report any cases in which their schemes were used for the sole purpose of obtaining residency. In the view of the ACVZ, the starting point must be to strike a balance between the prevention of misuse on the one hand and the protection of the legitimate interests of the parties involved on the other hand. In consideration of the above and having reviewed a number of options for preventing misuse, the ACVZ submits the following recommendation:

Recommendation 3

The regulations on multi-parenting and multi-parent custody arrangements proposed by the Government Committee should not be subject to restrictions on residence. Allow the family court to consider and assess each application for a multi-parenting or multi-parent custody arrangement on a case-by-case basis. However, in order to guard against misuse, the legislative text should include a stipulation that participants in the procedure must provide the court with:

- a personal declaration that the procedure is not being used for the sole purpose of obtaining residency in the Netherlands, in the event that a participant in the procedure is not a Dutch national or does not hold legal residence status within the meaning of Section 8(b), (d) or (e) of the Aliens Act;
- a declaration on the residence status of any participant who does not hold Dutch nationality.²

Also stipulate in the legislative text that:

- the court must verify the declaration on residence status of any participants not holding Dutch nationality, before granting permission for the agreement to be put into effect;
- the court must reject the application if it finds that the objective of the foreign national is to gain admission to the Netherlands, rather than establish a multi-parenting or multi-parenting custody arrangement.

2. On surrogacy

The ACVZ has set out the proposed regulations on surrogacy arrangements in Chapter 4. By way of these regulations, the Government Committee wishes to achieve that Dutch nationals no longer seek options abroad for surrogacy pathways, but equally considers it unacceptable if there was a risk that the

Netherlands itself might become a destination country for international surrogacy. It has therefore proposed a requirement that at least one of the commissioning parents and the surrogate must be habitually resident in the Netherlands.

Conclusion 3

Where Union citizens with legal residence status (and individuals equated with them) are concerned, the ACVZ sees no possibility to impose residency requirements over and above the requirement of habitual residency as contemplated by the Government Committee, with a view to preventing the Netherlands from becoming a destination country for people who wish to have a child by way of surrogacy. However, the ACVZ does recommend that further requirements be stipulated in relation to the residence status of foreign nationals not being Union citizens (third-country nationals). The imposition of such further requirements will prevent participation in the procedure by individuals who reside in the Netherlands illegally, individuals whose procedures are ongoing and whose residence status is therefore uncertain and individuals who only have a temporary right to reside in the Netherlands. It will furthermore prevent the commissioning parents and surrogate from executing an agreement that may be in breach of the Foreign Nationals (Employment) Act.

Recommendation 4

Only open up the surrogacy procedure to Union citizens with legal residence status, individuals that must be equated with them and third-country nationals who have permanent residence status³ in the Netherlands. To this end, insert the following conditions in the draft Section 205, subsection 3, of Book 1 of the Civil Code (*the court shall grant the permission referred to in subsection 1 only if...*):

- i: the surrogate shall be a Dutch national or hold legal residence status in the Netherlands by virtue of Section 8(b), (d) or (e) of the Aliens Act.
- j: at least one of the commissioning parents shall be a Dutch national or hold legal residence status in the Netherlands by virtue of Section 8(b), (d) or (e) of the Aliens Act.

Conclusion 4

The proposal of the Government Committee breaks with the legal principle that the birth mother is always the child's legal mother (*the 'mater semper certa est' principle*). This would see the Netherlands adopt a position that is practically unique in the world. For the sake of the child's interests and given the importance of legal protection, the ACVZ considers it crucial that a child carried in pursuance of a surrogacy agreement is born in the Netherlands, as this would ensure that Dutch law on parentage applies. The rationale here is that even if recommendation 4 is followed, there might be isolated cases where unforeseen circumstances leave the commissioning parents and/or surrogate without the

right to reside in the Netherlands at the time the child is born. The ACVZ therefore recommends as follows:

Recommendation 5

With regard to surrogates and/or commissioning parents who no longer have the right to reside in the Netherlands, create a short-term visa for the purpose of the birth of a child conceived under the surrogacy procedure.

Conclusion 5

The ACVZ concludes that the European Directive on preventing and combating trafficking in human beings and protecting its victims and the transposition of this Directive into national law can, if needed, offer surrogates protection against exploitation. The ACVZ considers it important that surrogates are aware of this Directive. Moreover, the ACVZ considers it undesirable if, in addition to the surrogacy agreement, any employment, service or rental agreement were to exist or were to have existed between the surrogate and the commissioning parents. This is because the existence of multiple dependency relationships increases the risk of human trafficking. The ACVZ therefore submits the following recommendations:

Recommendation 6

Ensure that where the surrogate involved is foreign, the counselling (which the Government Committee's proposal provides for) includes, among other things, general information on the European Directive on preventing and combating trafficking in human beings and protecting its victims and specific information on the provisions of Section 273(f) of the Criminal Code and the temporary right of residence in case a report is made pursuant to Chapter B8.3 of the Aliens Act Implementation Guidelines.

Recommendation 7

Stipulate in the regulations that prior to the surrogacy agreement, no (other) employment, service or rental agreement is permitted to exist or to have existed between the commissioning parents and the surrogate.

Closing remarks –On the effects of international private law

The extent to which the proposed *family rights provisions* govern the legal position of foreign nationals is first of all determined by the designation rules of international private law. The ACVZ therefore considers it vitally important that an assessment is made of the manner in which international private law *impacts on migration law* and any amendments recommended by the national committee on international private law after or simultaneously with publication of this advice. The ACVZ stands ready to issue supplementary advice in this regard as required.

¹ 'Misuse' refers to use for the sole purpose of establishing a claim to a right of residence in the Netherlands for parents and/or custody holders.

² This recommendation seeks to establish a parallel with Section 44, subsection 1(i) of Book 1 of the Civil Code, which establishes a similar provision in respect of marriage to a foreign partner.

³ By '**permanent residence status**' the Committee is referring to the residence status of foreign nationals who:

- are Union citizens or must be regarded as such (**Section 8(e) of the Aliens Act**, or
- hold an EU residence permit for long-term residents that meets the conditions stipulated in Section 8, under (b) and (d), of the Aliens Act (**Section 45(a) in conjunction with Section 8, under (b) and (d), of the Aliens Act**), or
- hold:
 - an ordinary permanent residence permit (**Section 20 of the Aliens Act in conjunction with Section 8(b) of the Aliens Act**, or
 - a permanent asylum residence permit (**Section 33 in conjunction with Section 8(d) of the Aliens Act**

By using the term 'permanent', the Committee is seeking to link up with the use of this term in Union law (see also the use of this term in Section 45(a), subsection 2 of the Aliens Act.)