

The Invisible Child

A Comparative Study of Newborn Removal Judgments from a Child Equality Perspective (CEP)

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Abstract

We know little about how children are portrayed in care order cases. Using a Child Equality Perspective (CEP), which demands the child's presence in proceedings even for children who are not capable of partaking fully in the decision-making process, we examine a sample of 216 judgments from 8 countries involving 220 infants. Our study reveals that the children remain largely invisible, but with clear country differences. Children's invisibility constitutes a fundamental obstacle for children being "equal" in

the judgments that will shape the child's future. This invisibility raises concerns about the quality of the judicial decisions about the child's best interest.

Keywords

child protection – child rights – cross-country comparison – judiciary discretion – newborns

1 Introduction

The removal of children from their parents' care by judicial decision-makers is a very serious intervention in children's lives. Yet we know very little about how these decision-makers view and represent the specific children involved in the case. This study examines whether and how the children who are at the centre of the removal decision are represented in the written judgments about their case. Prior scholarship on children's representation and presence in child protection cases has shown that adultism, the preponderance of cultural views that focus on adults' interests and experiences, predominates in these presentations and excludes children's views and wishes (see Dingwall *et al.*, 2014; Hoyle *et al.*, 2018; Kennan *et al.*, 2018; Magnussen and Skivenes, 2015; McEwan-Strand and Skivenes, 2020; Pösö and Enroos, 2017; Stalford *et al.*, 2017; Vis and Fossum, 2013). The contrast to adultism is a perspective that focuses on the child as a moral individual on equal footing with other individuals in society (Archard and Skivenes, 2009). In practical situations, this child-centric perspective involves professionals, decision-makers and institutions. It considers the child's situation and position in addition to children's participation through direct or indirect testimonies. The UN Convention on the Rights of the Child (CRC) Article 5 instructs governments to ensure that children are provided, '... in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.' The CRC's Article 12 on children's participation is essential in this context as it places children at the centre stage in all matters that concern them. This Article has been widely discussed in the literature (Archard, 2004; Archard and Skivenes, 2009; Daly, 2018; Gal and Duramy, 2015; Križ, 2020; Lundy, 2007). However, less has been written about the understanding of a child's perspective and children's place in their case.

In this article, we undertake an empirical study of the written decisions of courts and court-like bodies from a Child Equality Perspective (CEP) in eight

European countries: Austria, England, Finland, Estonia, Germany, Ireland, Norway and Spain. We analysed 216 judgments¹ concerning the removal of 220 newborn children from their parents' care into public care to examine to what extent and how these documents represent children. We study judgments about newborns, because a focus on this group of children, who are not (yet) capable of providing direct input into the decision-making process through expressing their views, allows us to reveal the extent to which decision-makers take into consideration the child's position and individual characteristics. These are hard cases because the lack of the child's expressed viewpoints focuses the reader's lens on the voice of the decision-makers and other adults involved with the child. In this context, which is heavily skewed towards adults, an analysis of the presence of the child and the child's needs and interests is especially crucial and interesting.

The goal of this study is to provide empirically-based knowledge about salient decisions about children's domains that are often shielded from public view. The article contributes to current scholarship with new knowledge about newborn care order cases that are brought to court. It offers new insight into decision-makers' considerations in removal cases as well as knowledge about decision-makers' exercise of discretion in the weighting of arguments and considerations in care order proceedings. We shall first outline the Child Equality Perspective (CEP) and show how this theoretical framework undergirds the study and the operationalisation of the indicators we used for the empirical analyses. Subsequently, we describe the differences in child protection systems before discussing our research methods and presenting our findings. Lastly, we shall discuss the implications of our findings for practice and future research.

2 The Child Equality Perspective (CEP)

The CEP conceptualises children as occupying a social position in which children are formally, culturally and intersubjectively equal to other individuals in society. One characteristic of this perspective is that it extends the classical position of a child-centric perspective as being about children's participation. A CEP represents an approach that regards children as individuals on equal footing with other individuals. It departs from the overall recognition of children's rights, as do several other similar theoretical standpoints (for example,

1 We use the term "judgments" about the written decisions, although for Norway and Spain, the correct term would be "decisions" because these decision-making bodies are not a court, but a court-like tribunal (Norway) and an administrative body (Spain).

Skivenes and Strandbu, 2006; Lundy, 2008; Daly, 2018), but puts a special emphasis on the different layers of children's equality and their interactions: legal, socio-cultural, inter-subjective and organisational. The CEP is a theory about legal and administrative decision-making about children that is related to children's rights. It is not only about child removals and courts. A vital part of the CEP concerns the specific traits of being a child (see, for example, Strandbu and Skivenes, 2006; Magnussen and Skivenes, 2015; Skivenes, 2018). The perspective distinguishes between groups of children and children as individuals, as discussed in General Comment No. 14 (2013):

- (1) *The universal characteristics of children:* children as a human group have some general physical and psychological characteristics as they grow and develop from the moment of conception to adulthood. A plentitude of research on children's development exists that provides information about what the normal development and expectations for children at various stages are.
- (2) *Group characteristics:* children may, for a shorter or longer period, have some specific characteristics because they belong to a group; for example, they may have a disability, they may be a migrant or live in poverty. There is extensive knowledge about the particular needs of children within these groups.
- (3) *The child's characteristics* involve each child as a unique person with the perspective that they have specific experiences and needs that require attention. We consider this approach a prerequisite for children's participation. A child's expressed views about their interests and needs, as well as respect for the child's view of the world, are imperative in any process involving children's interests. However, the key message of a CEP is how children are perceived by others. This is formulated clearly by Archard and Skivenes (2009: 19–20, our emphasis):

In sum the right of children who can form opinions to express them is not just the right to be consulted where this means an entitlement to have those views guide adults as to what is for the best; nor is it a right to try to show that they are mature enough to be self-determining agents. It is a basic right of individuals who have their own views (who are capable of forming them) to express those views. *It is a right of all individuals to be involved in a process whereby their own future is determined even if their view of that future has no weight in any final determination of matters; and even if they cannot hope to persuade others of their ability to make their own decisions.* Thus an interpretation of the child's opinion as either authoritative or consultative does not capture all the reasons for hearing

the child.

The CEP requires the child's presence in proceedings even in the absence of direct and immediate evidence provided by the children themselves. This approach includes children who are not capable of partaking fully in the decision-making process, whether due to young age or impairment.

2.1 *Operationalizing the CEP for Empirical Analysis*

In our empirical study, we analyse the position of newborn children in the written judgments in which decision-makers decide whether a care order is necessary. We have chosen newborns to examine whether children who cannot be expected to possess or voice an opinion are visible in courts' justifications about the decisions they make. Our empirical material consists of written judgments about care orders in eight jurisdictions that all subscribe to the CRC and must respect children's rights: Austria, England, Estonia, Finland, Germany, Ireland, Norway and Spain. Our analysis focuses on the premise set by the CEP that decision-makers must consider the specific child involved when deciding about a child's best interest. Importantly, this crucial task of establishing the CEP on an individual basis cannot be completed by mere reliance on the child's participation because this would deny some groups of children, such as newborns, their recognition as moral individuals and prevent their right to have their perspective taken into account. The first requirement is that decision-makers mention the child in the judgment (see Magnussen and Skivenes, 2015) and acknowledge the general circumstances for newborns, for example, their needs and vulnerabilities. Regarding newborns' group characteristics, some interests and needs can be identified on a general basis, for example, newborns' needs might include being fed and receiving regular skin-to-skin contact. Second, as individuals, children may, however, have additional or other needs and interests. This sets limits to the level of generalisation that can justifiably be applied to an assessment of the child's needs and interests. A newborn may be born premature, with withdrawal symptoms, be underweight, healthy, within a certain Apgar score and so forth. The CEP requires that this type of information be mentioned for the specific child whose interests are at stake in the case. This would again inform what type of measure and/or intervention might be necessary.

There are different ways to describe a child's situation, and there are various important bases for gaining knowledge about how the situation reported to the child protection authorities affects the child. Different professionals and types of expert knowledge from psychologists, teachers, doctors, social workers and lawyers may be relevant when the courts decide whether the situation

is a high-risk situation for the child. The knowledge and experience people have as mothers, fathers, sisters, brothers, friends, or foster parents may also be a source of information about the child. In the method sections, we describe in more detail the codes we developed for analysing the comprehensive text material.

3 Child Protection Systems in Eight Jurisdictions

The eight jurisdictions chosen for this analysis represent different types of welfare states: three liberal welfare states (Estonia, England and Ireland), three conservative (Austria, Germany and Spain) and two Nordic welfare states (Finland and Norway). They represent different types of child protection systems: risk-oriented (Estonia, England, and Ireland) and service-oriented systems (Austria, Germany, Spain, Finland, and Norway). All countries provide services to children and families to some extent and have organisations that aim to protect children from abuse and neglect. The rationales of providing services and the extent of services differ (see more details about the different orientations in child protection: Berrick *et al.*, in print; Burns *et al.*, 2017; Gilbert *et al.*, 2011; a summary is also available at <https://www.discretion.uib.no/resources/child-welfare-facts/>). Two of the systems – England and Ireland – have established guardians ad litem for retrieving information about the child's interest and well-being (see Burns *et al.*, 2017). They provide reports to the court with detailed information about the child's medical status, health, needs and progress in care placement.

All the jurisdictions in this study have ratified the CRC. Their policies towards children have resulted in high positions in the global rankings of children's rights and well-being: from being the first to the 31st to 38th (with one exception of the ranking as the 169th) as demonstrated in Table 1. The rankings of child flourishing, based on national data about a range of child well-being issues, demonstrate that all the countries in this study belong to the highest rankings. Norway is the country in which, in a global sense, children are more likely to flourish and lead happy and meaningful lives than anywhere else (Clark *et al.*, 2020). The child protection removals per 1,000 children show a variation between the eight countries, with lower removal rates in the risk-oriented child protection systems (except for Spain, a service-oriented system). Although infant mortality deaths vary to some extent, they are rare in the global context in every country in this study. All countries have laws in place that set out the legal process for removing a newborn child from their parents' care. For an overview, see <https://www.discretion.uib.no/resources/legal-frame-newborn/>.

TABLE 1 Country categorizations and international rankings

Country	Welfare state model	Child protection System	KidsRights Index (2020)	UNICEF SDG report (2017)	WHO UNICEF Lancet (2020)	Out-of-home placements per 1,000 children**	Mortality rate, infant (per 1.000 live births, 2018)
Austria	Conservative	Service	12	15	0.90 (19)	8.7#	2.88
England	Liberal	Risk	169*	13	0.92 (10)	6.2#	3.63
Estonia	Liberal	Risk	31	17	0.88 (27)	10#	2.52
Finland	Scandinavian	Service	3	5	0.91 (16)	16.2^	1.38
Ireland	Liberal	Risk	38	11	0.95 (5)	5.1#	3.14
Germany	Conservative	Service	5	2	0.92 (14)	10.8#	3.09
Spain	Conservative	Service	86	16	0.91 (17)	4.3#	2.53
Norway	Scandinavian	Service	14	1	0.95 (1)	10.3#	2.05

*The KidsRightsIndex refers to the United Kingdom, not England.

** SOURCE: berrick et al, in press. # = STOCK; ^ = FLOW

The contextual information summed up in Table 1 leads us to assume that *all* the jurisdictions have established policies and practices to make decisions about infant removals so that children's rights are recognised as a standpoint and the particular needs and rights of the child in question are examined and reasoned in the judgments. We assumed to see differences in the intensity of how the CEP is manifested in the court judgments: Austria, Finland, Germany, and Norway would present judgments with higher recognition of infants than Estonia and Spain. This assumption is made based on their positions in international rankings of children's rights and well-being.

4 Research Methods

The focus of this paper is on judicial decision-makers' reasoning and justifications for deciding whether a newborn child should be removed from parental care. The empirical data consist of 216 written judgments, involving 220 newborns in Austria, England, Estonia, Finland, Germany, Ireland, Norway and Spain. The judgments were decided in eight countries or a large region in one country for one or several years. For the sake of simplicity, we use the term "country" for each of the jurisdictions. We defined "newborn child removal" as the removal of newborn babies from birth to 31 days old at the time of the removal. The baby may be older than 31 days if born prematurely. The term "newborns" refers to children who have not moved back home from the hospital after birth, or who have only stayed with their parents for a few days (a maximum of one week). The term also refers to newborns who stayed with their parents at a parent-child facility with close follow-up from the staff after birth. The crucial commonality is that the parents exercised care for the child on their own only to a very limited extent. The child was no longer a newborn at the time of the care order hearing due to assessments and preparations required for a care order application. The children in this sample were about nine months on average at the time of the court decision (see Table 2).

The sample of 216 written judgments comprises *all* the newborn removal judgments that were decided or publicly available (England and Ireland) for one or several years: the year 2016 (Finland and Norway); years 2016–2017 (Austria), years 2015–2017 (England, Estonia and Germany), and years 2008–2018 (Ireland). Information about data collection can be found here: <https://www.discretion.uib.no/projects/supplementary-documentation/newborn-judgments/>. For information about ethical approvals, please see <https://www.discretion.uib.no/wp-content/uploads/2019/12/INFORMATION-ABOUT-DATA-PROTECTION-ETHICS-AND-DATA-ACCESS.pdf>. Information about

TABLE 2 Removals, proceedings, and outcomes (n=220 children)

Country & period covered in data material	Total	Austria		England		Estonia		Finland		Germany		Ireland		Norway		Spain	
		2016-17	2016-17	2015-17	2015-17	2016-17	2016-17	2015-17	2015-17	2016-18	2016-18	2016-17	2016-17	2016-17	2016-17	2016-17	2016-17
Newborns	220	25	14	17	25	28	18	77	16								
Care Orders, n (%)	194	24	12	15	24	18	15	71	15								
Child's age at first placement. Days (median)	89,9%	100%	85,7%	82,4%	92,0%	66,7%	88,2%	93,4%	93,8%								
Child's age at care proceedings. Months (median)	14,6	14	18	13	21	8	8	27	8								
		(5)	(3)	(9)	(6)	(3)	(1)	(12)	(6)								
Child's age at care proceedings. Months (median)	8.8	8.3	7.5	6.9	9.8	7.8	18.2	4.4	7.7								
		(8)	(6)	(7)	(9.5)	(7)	(14)	(3.5)	(6)								

storage and treatment of the data is available here: <https://www.discretion.uib.no/wp-content/uploads/2019/11/SAFE-STORAGE-OF-CHILD-PROTECTION-JUDGMENTS.pdf>.

The empirical data consist of written sources. The eight countries have different requirements about how the decision-makers must reason and justify their decisions, and whether judgments must be in writing at all. Details on the formal requirements can be found here: <https://www.discretion.uib.no/wp-content/uploads/2019/10/FORMAL-LEGAL-REQUIREMENTS-FOR-JUDGMENTS-IN-CARE-ORDER-DECISIONS-IN-8-COUNTRIES.pdf>. The written judgments have a relatively fixed structure: they typically consist of an account of the case, the parties' submissions, and the court's considerations and reasoning. The judgments contain between 3 and 20 pages of text. Most judgments that were not in English were translated into English by a professional translation service. A detailed outline of the translation process can be found here: https://www.discretion.uib.no/wp-content/uploads/2019/10/Translation-process_short-description.pdf.

4.1 *Data Analysis*

For the analysis, each researcher first read a broad sample of judgments. The purpose of this initial step was for researchers to obtain a general impression of the different aspects of the material, including the types of cases and questions on which the judges took a position. We sought to assess the themes in the judgments and to identify how the judges reasoned and argued. Subsequently, all decisions were systematically reviewed in their entirety with a focus on the mentions of the child in the judgments. For Norway, we examined the section on "facts" (the information that is regarded as objective facts in the case on which all agree) and "the county board's reasoning" as they are separate sections in the judgment.

Based on the CEP and previous research, we sought information about six codes that encompass both descriptions of the specific child in the case and general statements about children (see the appendix for the full coding scheme). In developing codes, we consulted with country representatives of the wider research group of the Centre for Research on Discretion and Paternalism at the University of Bergen, Norway, to learn about country-specific nuances. First, we examined whether and how the child was described in the judgments. This code included all types of statements that discuss the child, including their needs, feelings, behaviour, health issues and so on. These descriptions typically rely on reports or statements from institutions such as child protection agencies and hospitals, foster parents and others. We used four categories to describe the extent to which the newborns were discussed: (1) 'Nothing:' the

child is not described or assessed; (2) 'Very little:' the child was only mentioned briefly in one or two sentences. The judgment provided general information about babies but little information about the specific child. (3) 'Some:' the child was described in as much as a paragraph, and the description concerned the specific child. (4) 'A lot:' The judgment included several paragraphs and a wide spectrum of information specific to the child in the case.

Second, we analysed whether the child's needs were mentioned. We wanted to assess whether the needs of the specific child were discussed or whether the statements were more general, for example, about babies' need to be fed regularly. We coded four answer categories referring to the level of specificity of the description of the baby: (1) 'general', (2) 'specific', (3) 'general and specific' needs are mentioned, and (4) 'not mentioned.' Third, we studied whether the judgment contained information about the child's pre-birth condition using two answer categories: 'yes' and 'no'. Fourth, we analysed whether the judgment mentioned the baby's condition at birth. We used six answer categories: (1) 'Not mentioned', (2) 'premature', (3) 'all well', (4) 'weight of the baby', (5) 'withdrawal symptoms' and/or whether the baby tested positive for drugs; and (6) 'other'. Fifth, we coded whether there were any statements about what the baby in the case required in terms of care. The two answer categories for this code were 'mentioned' and 'not mentioned'. Sixth, we examined whether the baby was exposed to risk and/or neglect during the first days of their life. This code includes information about a lack of parenting skills and capacity, leading to risk or neglect in the time between birth and first placement. This includes instances where others, such as health care workers or staff at parent-child centers, intervened to prevent harm to the child and instances where the parents were unable to prevent risk to the child posed by someone else. Four answer categories were used: (1) 'Yes', (2) 'no', (3), 'not mentioned', and (4) 'NA', where the child was never cared for by their birth parents.

The software program NVivo 12 was used for coding. All coding was undertaken by research assistants and thereafter reliability tested by another researcher. Any discrepancies in coding were discussed and solved with the PI. A log of the coding process was kept. We compared the judgments within and across jurisdictions and examined similarities and differences. In the findings section, we present illustrative quotes. We refer to judgments with acronyms denoting the type of case, as in NENG.16, where "N" stands for the type of case (newborn), "ENG" stands for the country (England) and "16" refers to the year (2016).

4.2 *Limitations*

In this study, we analyse the formal reasoning expressed in written documents. Although our data are strong overall, including all judgments in a country or

region for one or several years, there are some limitations. As the focus is solely on the written judgments, we do not learn about the extra-material reasoning that is bound to happen in these decision-making processes. Likewise, there are differences in the legal and administrative systems (Koch *et al.*, 2017) which may set specific norms about how to write the judgments. Other issues are the differences in how much information the judgments include, and the discretion judges are given in how to write the judgments, which leads to variation within jurisdictions.

The analysis is based on the premise that regardless of the legal system, we must expect that all the important evidence and arguments are present in the judgments. At a minimum, this must be the case if there are appeal proceedings. From a normative perspective (Habermas, 1984; 1996), decisions about intrusive state interventions must be accountable and justifiable to the child and the parents who are involved as well as the broader public. To rule out potential blind spots in our study, we spoke with a small number of judges and decision-makers in each of the five countries – Austria, Estonia, Ireland, Norway and Spain – about the evidence and justifications they present in the written judgments. We were told that the written justifications are usually very comprehensive, including all the crucial reasons for a decision. As our study is limited to the written reports about the decisions, we do not presume that the information presented in the written reports necessarily correlate directly with the level of consideration the decision-makers gave to the child in the entire process of decision-making. But establishing such a correlation is not the goal of this study. The focus of this study is on the child in the written documents about these decisions. They should reflect the child as these decisions are about the child's best interests.

The justifications are usually written after the judiciary decision-makers have taken a stand to show that the decision is legally durable (Eckhoff and Helgesen, 1997). In our analysis, we systematically focus on the direct descriptions of the child. We are not searching for the hidden meanings behind the arguments or the indirect meaning of arguments. This may exclude some arguments which indirectly examine the child but which are represented by describing the mother or other adults taking care of the child and their relations with the child (for example, their skills to take care of the child). We recognise that the nature of care provided by the parents or the conditions in which the parents live may be important for the court to examine but argue that from the point of view of a Child Equality Perspective they only indirectly address the child and thus exclude children's position as equals. Neither have we examined the specific reports that Guardians ad Litem or experts have written about the children and submitted to the court. Finally, the samples from England and Ireland are non-representative since we analysed only the

publicly available judgments. As there were few publicly available judgments, we extended the time frame of the judgements we included in England and Ireland. Despite these limitations, the judgments are a suitable source for reconstructing the judicial decision-making process by studying the courts' reasoning in these cases. This study is the first of its kind in its comprehensive analysis of a wide range of recent judgments about children's removal from parental care. It involved labour- and resource-intensive data collection and is a crucial first step in analysing these documents, which are often invisible to the general public.

5 Findings

Out of the 216 judgments, which involved 220 children, 89 percent resulted in a care order (see Table 2). There are country differences, ranging from 67 per cent in Germany to 94 per cent in Spain and 100 per cent in Austria. On average, the newborn removals occurred when the child was 14 days old, and the care order proceedings took place when the child was nine months old (see Table 2). There are country differences, with Norway on one end of the spectrum, where the baby was 27 days old on average when removed (with a median of 12 days). On the other end of the spectrum lie Germany, Ireland and Spain, where the baby was eight days old on average when removed (with a median of three, one, and six days, respectively).

The length before a care order case was brought to a hearing in court varied (see Table 2): the longest period was in Ireland, where the baby was over 18 months old on average at the time of the hearing (with a median of 14 months). The shortest period was in Norway, where the baby was about four and a half months on average at the time of the hearing (with a median of three and a half months). For most countries, the child was between seven and a half months to ten months old at the time of the care order hearing and decision.

5.1 *Description of the Specific Child*

We examined whether the specific child in the case was described in the written judgment at all, including firsthand and secondhand references from reports or statements from institutions, foster parents, or others. As shown in Table 3, we found that 19 per cent of the children (42 children) were not mentioned. Forty-two percent of the children were only briefly mentioned, with little to no information about the specific child in the case. Reference was typically made to the medical or health condition, the character or behaviour, or the recent development of the child. This is an illustrative example from a Finnish case, with a ten-month-old child at the time of the care order proceedings:

TABLE 3 Frequency of mentions of specific child, all children (n=220), in percent

Code	Total	Austria	England	Estonia	Finland	Germany	Ireland	Norway	Spain
Nothing	18.6%	8.0%	28.6%	29.4%	24.0%	46.4%	11.1%	7.8%	18.8%
Very little	42.3%	48.0%	35.7%	41.2%	60.0%	39.3%	50.0%	32.5%	56.3%
Some	30.0%	32.0%	35.7%	23.5%	12.0%	14.3%	33.3%	41.6%	25.0%
A lot	9.1%	12.0%	-	5.9%	4.0%	-	5.6%	18.2%	-

The child's health has been good. The Finnegan scoring used to measure withdrawal symptoms has indicated no need to consider medication for symptoms. The baby has been found to have some symptoms, but they have possibly been caused by the mother's smoking during the pregnancy.

NFIN21.16

For 30 per cent of the children, there is some mention of the specific child in the case. This was usually limited to a straightforward statement of fact (for example, a medical condition), or an elaboration of a single point (such as several examples for the same character trait). This is an example from a German case, with an under one-month-old child at the time of care order proceedings: 'X suffers from neonatal abstinence syndrome and urgently needs further inpatient treatment. The parents lack insight into the severity of the disease and the need for treatment, so the child was taken into care by the youth welfare office on [date]. Taking into care is currently urgently required; the child must remain in the clinic until further notice' (NGER07.16).

For nine per cent of the children, there is a lot of information, with several paragraphs and a wide spectrum of information specific to the child in the case. These judgments provided more comprehensive descriptions of the child and mentioned several different aspects or developments to describe the specific child. This is an example from a Norwegian case, with an eight-month-old child at the time of care order proceedings:

The child was within the normal range within the ability to absorb communication from the outside world, but otherwise showed delays, some significant, in other development areas. Except for gross motoric skills, where the child was followed up by a physical therapist and father with special exercises, little or no development was recorded in the child in the approx. four weeks that passed between the tests. The Board uses the psychologist's findings. Therefore, at the end of the parents' stay at the [center], there was serious concern about congenital delay in the child. She had weak signals and little ability to communicate her own needs. In addition, she was perceived as clearly characterized by stress and insecurity towards the surroundings, which was evident, among other things, by tremors in the face, stiffness in the body, and by the inability to self-regulate in interaction. Particular mention is made of the information, among other things from the father that X calmed down better in the garden by herself than if she was held. Recent research has shown that stress has a strong negative impact on the development of the child

and child brain. The assessment was that X's development capacity was largely used to cope with stress and to a lesser extent for her development and exploration.

NNOR49.16

There is variation between countries (see Table 3). Norway was the only country where we found a majority of judgments to include 'some' or 'a lot' of information on the child (60 per cent), followed by Austria (44 per cent), Ireland (39 per cent), and England (36 per cent). In contrast, 'nothing' or 'very little' in terms of description the child was found in the cases from Germany (86 per cent) and Finland (84 per cent), followed by Spain (75 per cent) and Estonia (71 per cent). While the results of most countries were somewhat distributed from 'nothing' to 'a lot', none of the cases in England, Germany, and Spain contained 'a lot' of child-specific information.

5.2 *Children's General and Specific Needs*

The code children's general or specific needs captures a narrow description of the needs of the child or for a child. Fewer than one-tenth (nine per cent) of all judgments described the specific care needs of the child (see Table 4). Over one third (38 per cent) provided a general description, and 19 per cent of judgments provided both a general and a specific description of the child's needs. The following example from a Spanish case, which describes a six-month-old child at the time of care order proceedings, discusses only the child's general needs: 'Due to her young age and her characteristics, X needs a family that provides her with emotional stability and security to continue developing positively' (NSPA15.17).

By contrast, this quote from an Irish case concerning an 18-month-old child at the time of care order proceedings, mentions the specific needs of the child:

She was unshakable in her professional opinion that the child needs stability to be put in place now. The child is almost 18 months old and her attachment is at a critical period of development. The child recognizes the main people in her life and that is why consistency in access is a very important thing for the child. It was her professional opinion that it was critical for the child to experience stability in her care now and throughout her childhood

NIRLO8.13

Spain (62 per cent), Ireland (56 per cent), Germany (54 per cent) and England (43 per cent) were the countries with the judgments most likely *not* to mention

TABLE 4 The child's needs, all children (n=220), in percent

General/specific description of needs (n=children)	Total (n=220)	Austria (n=25)	England (n=14)	Estonia (n=17)	Finland (n=25)	Germany (n=28)	Ireland (n=18)	Norway (n=77)	Spain (n=16)
General	83 37.7 %	6 24.0 %	7 50.0 %	10 58.8 %	17 68.0 %	5 17.9 %	5 27.8 %	30 39.0 %	3 18.8 %
Specific	21 9.5 %	3 12.0 %	-	-	3 12.0 %	6 21.4 %	2 11.1 %	4 5.2 %	3 18.8 %
Both general and specific	43 19.5 %	8 32.0 %	1 7.1 %	4 23.5 %	-	2 7.1 %	1 5.6 %	27 35.1 %	-
Not mentioned	73 33.2 %	8 32.0 %	6 42.9 %	3 17.6 %	5 20.0 %	15 53.6 %	10 55.6 %	16 20.8 %	10 62.5 %

the child's care needs, followed by Austria (32 per cent), Norway (21 per cent), Finland (20 per cent) and Estonia (18 per cent). Norway (35 per cent), Austria (32 per cent) and Estonia (23 per cent) were the countries with the judgments that had the most descriptions of the child's care needs that were both general and specific. In the category of general descriptions, Finland (68 per cent), Estonia (59 per cent) and England (50 per cent) stood out. Germany (21 per cent) and Spain (19 per cent) led the frequencies in the smallest category – that of specific descriptions of the child's needs. On the other end of the spectrum, only five per cent of Norwegian and no judgments from England and Estonia provided specific descriptions of the child's needs.

5.3 *Children's Pre-Birth Condition*

Most judgments (75 per cent) did not mention the child's pre-birth condition (see Table 5). The "pre-birth condition" code covered statements in the judgments that discussed whether the child had been exposed to risk before birth, such as exposure to drugs, smoking, medicine and so on. It also included statements about any issues that arose for the unborn child during the pregnancy that were likely to influence the child and statements about the pregnancy being normal. One quarter (24 per cent) of all judgments mentioned the child's pre-birth condition. Here is an example of a case concerning a 14-month-old child at the time of the care order proceedings from Ireland: 'The GAL [guardian-ad-litem] also noted the results from X's urine tests which demonstrate that the Respondent mother was using substances while pregnant' (NIRLO6.13).

There was considerable cross-country variation: the Estonian judgments stood out because a little over half (53 per cent) discussed the child's pre-birth condition. One third (33 per cent) of the Irish judgments reported on the child's pre-birth condition, followed by Germany and Norway (both 29 per cent). Austria, Finland, and England were the least likely to mention the child's pre-birth condition.

5.4 *Children's Condition at Birth*

More than half of the judgments (52 per cent) did not mention the child's condition at birth (see Table 6). The "condition at birth" code includes several themes: premature birth, doing well at birth, the baby's birth weight and whether the baby had any withdrawal symptoms or tested positive for drugs. (Withdrawal from nicotine was only included in this code if the baby had a serious case of nicotine dependence or was seriously harmed by nicotine.) Here is an example of a case of a nine-month-old child at the time of the care

TABLE 5 Pre-birth condition, all children (n=220), in percent

Code	Total	Austria	England	Estonia	Finland	Germany	Ireland	Norway	Spain
Pre-birth condition mentioned	24.5 %	8.0 %	14.3 %	52.9 %	8.0 %	28.6 %	33.3 %	28.6 %	18.8 %

TABLE 6 The child's condition at birth, all children (n=220)

Condition at birth (n=children)	Total (n=220)	Austria (n=25)	England (n=14)	Estonia (n=17)	Finland (n=25)	Germany (n=28)	Ireland (n=18)	Norway (n=77)	Spain (n=16)
All well	22 10.0 %	1 4.0 %	-	2 11.8 %	-	-	-	18 23.4 %	1 6.3 %
Premature	31 14.1 %	6 24.0 %	1 7.1 %	3 17.6 %	2 8.0 %	2 7.1 %	4 22.2 %	11 14.3 %	2 12.5 %
Weight	14 6.4 %	2 8.0 %	-	-	1 4.0 %	-	2 11.1 %	7 9.1 %	2 12.5 %
Withdrawal symptoms	32 14.5 %	5 20.0 %	-	3 17.6 %	3 12.0 %	3 10.7 %	7 38.9 %	6 7.8 %	5 31.3 %
Other	62 28.2 %	4 16.0 %	1 7.1 %	1 5.9 %	6 24.0 %	4 14.3 %	1 5.6 %	42 54.5 %	3 18.8 %
Not mentioned	115 52.3 %	11 44.0 %	12 85.7 %	8 47.1 %	14 56.0 %	19 67.9 %	8 44.4 %	35 45.5 %	8 50.0 %

order proceedings from Spain: 'The minor was born with a significant abstinence syndrome. He then presented low muscle tone (which persists today) and was diagnosed with a disability of the neuromuscular system, with recommended stimulation and physiotherapy' (NSPA06.16).

Where the child's birth condition was mentioned in the judgment (see Table 6), the baby was described as doing well (10 per cent), prematurely born (14 per cent), or as having withdrawal symptoms (14 per cent). Only 6 per cent of the judgments mentioned the baby's birth weight, while 29 per cent fell under the category 'other'. The country differences that stand out here are the low rates of reporting the baby's birth condition in England (14 per cent) and Germany (32 per cent).

5.5 *Children's Exposure to Risks or Neglect in the First Days*

This code encompasses statements about the child experiencing direct or presumed risks or neglect and a lack of parenting capacity and skills in the period between birth and placement in out-of-home care. Overall, about a quarter of the judgments (26 per cent) did not mention risks to the child or neglect (see results in Table 7), but there were noticeable country differences: almost three-quarters of the Irish (72 per cent) and half of the Spanish judgments did not mention risk or neglect of the child. At the opposite end, all the Austrian and most Norwegian judgments (91 per cent) mentioned risks to or neglect of the child. Out of the judgments referring to risks or neglect, approximately one third (33 per cent) included a statement of actual or presumed risks or neglect. An example from an Estonian case of a six-month-old child at the time of the care order proceedings illustrates the former: 'The child has been repeatedly left without parental care and attention and, due to malnourishment, the child has been hospitalized' (NEST13.16). A little over one-fifth of the judgments (21 per cent) stated that the child was not at risk or neglected. Furthermore, for 19 per cent of the children, a reference to risk or neglect was not possible because the child had not been cared for by the parent(s). This situation arose in two countries, Estonia (29 per cent) and Norway (49 per cent).

There are overall noticeable country differences: Estonia (53 per cent), Norway (42 per cent), and Austria (36 per cent) rank highest in the frequency of reporting possible risks or neglect. Germany ranks lowest along this dimension (14 per cent). Austria (64 per cent), England (50 per cent), Germany (43 per cent) and Spain (31 per cent) rank highest in mentioning that the child was not at risk or neglected, while this was never mentioned in Estonia and Norway, and only in 5.6 per cent of judgments in Ireland.

TABLE 7 Risk and neglect during the first days, all children (n=220)

Risk/neglect in first days (n=children)	Total (n=220)	Austria (n=25)	England (n=14)	Estonia (n=17)	Finland (n=25)	Germany (n=28)	Ireland (n=18)	Norway (n=77)	Spain (n=16)
Yes and presumed yes	73 33.2 %	9 36.0 %	4 28.6 %	9 52.9 %	8 32.0 %	4 14.3 %	4 22.2 %	32 41.6 %	3 18.8 %
No	47 21.4 %	16 64.0 %	7 50.0 %	-	6 24.0 %	12 42.9 %	1 5.6 %	-	5 31.3 %
Not mentioned	57 25.9 %	-	3 21.4 %	3 17.6 %	11 44.0 %	12 42.9 %	13 72.2 %	7 9.1 %	8 50.0 %
NA	43 19.5 %	-	-	5 29.4 %	-	-	-	38 49.4 %	-

5.6 *Children's Care Requirements*

The code for care requirements includes considerations about the type of care the child needs. A little over half of all judgments (51 per cent) mentioned the baby's care requirement(s) (see Table 8). The judgments that most frequently mentioned the baby's care requirement(s) were from Norway (71 per cent) and Austria (60 per cent). The Finnish and Estonian judgments were the least likely to describe the baby's care requirements: 20 per cent and 29 per cent, respectively. There was a significant variation between the levels of detail provided on the child's care requirements. An example from Estonia, concerning a six-month-old child at the time of the care proceedings, is illustrative: 'The child is six months old and needs day-to-day care and constant supervision' (NEST13.16). A much more comprehensive description is provided in a case from Norway concerning a child of two months at the time of the care proceedings:

The reason for the inquiry is that X was born with nicotine withdrawal and he appears to be a very sensitive boy. One tries to find his tolerance limit, with a view to stimulating his senses. We see that he needs time to get into a position for interaction, even though one has wrapped him up and keeps him stable. He manages to make eye contact for 1–2 seconds. When his eyes meet, he trembles in the lower jaw. So it becomes too violent and uncomfortable for him to meet another's gaze. Then his gaze slides away and he looks blank.

We see that his tolerance for stimulation is low. We work with an emergency foster mother to find the balance between stimulation and calm through what he shows us. Can it be too much, for example, that one talks to him while he is being cared for, given food? Does one have to dim the light for him? We have advised [the emergency foster mother] to take this into account in her handling of X. We also advised her to hold / handle him carefully, not pat him too much, but stroke. She was advised to let as few as possible handle him and give him the bottle. [The emergency foster mother] has also been advised to stay home as much as possible. Sensitive children need calm and stability to avoid extra stress.

NNOR13.16

6 **Discussion: the Invisible Child**

We examined the presence of 220 newborns in 216 judgments and found that, overall, children were largely invisible. We presumed that the newborns would

be present in the judgments because their interests are at the centre of these significant decisions about their lives. It is discouraging to find that six out of ten children were barely mentioned or not mentioned at all. On average, the child would be nine months at the time of the court decision, and information about the child should be available to the decision-makers. We will return to this point below.

We examined whether specific factors that we should anticipate to find were very relevant for decision-makers, such as the child's pre-birth conditions and care needs. Our expectation about the child's underrepresentation was confirmed. Our case selection criteria meant that all children were removed from their parent(s) very early in their lives, and presumably, many of the children in the judgments came to the attention of child protection services before their birth, for example, where a mother was known to misuse substances. It is therefore surprising that less than a quarter of the judgments made any reference to the child's condition before birth. It is even more surprising that less than half refer to the child's condition at birth. For children whose lives have only just begun, the period leading up to birth and birth itself form a crucial part of their life experience, and a child-centric approach would emphasise this experience. Importantly, we would expect some acknowledgment of the child's situation and characteristics even in the absence of negative factors, for example, where the child is 'all well' as was reported in a mere ten per cent of judgments. Less surprising was the relatively high proportion of judgments mentioning risk or neglect experienced by the child in the first days after birth, because newborn removals are typically initiated and justified due to concerns about a high risk for the child. Still, one-fourth of the judgments did not mention either risk or neglect, which may indicate that the baby was removed directly from the hospital.

The child's requirement for care was explicitly mentioned in just over half of judgments. Typically, this was stated where a child had particular needs or special vulnerabilities due to medical conditions or general health. Given the context of these cases, this is disappointing from a Child Equality Perspective. This perspective emphasises that children are moral equals to adults. In the absence of a mismatch between the child's care requirements and the parent's care provision, the removal of the newborn would not have become a question for the court to decide. Thus, it seems safe to assume that *all* children require care that should be acknowledged and described in the judgments. Information about the child's requirement for care would allow decision-makers to make an informed decision about placements. Furthermore, a description of the child's care requirements would shed additional light on why the removal was necessary.

Even where the child's needs were described, descriptions were mostly general, referring to babies or small children in general, as opposed to describing the specific child's condition and circumstances. A third of the cases did not even go this far: they omitted *any* mention of the child's needs, whether general or specific. The fact that around ten per cent of judgments provided specific descriptions of the baby and another 20 per cent both general and specific needs descriptions of the baby shows that it is possible to include this information in a judgment. Countering the argument that these children are so young that their life stories are too short to tell, we point to the quotes from the judgments that contain some or a lot of information about the children. These judgments demonstrate that even where there are no obvious health or other problems, the child can take a more prominent place in the judgments acknowledging them as healthy or well, or by referencing the pre- or post-birth condition. Furthermore, in many of the countries, the child was on average eight to ten months at the time of court proceedings, which is long enough to provide at least some information about the lived experiences of the child.

From a decision-making point, our analysis displays a weakness in the information base for the decisions. Facts and evidence about the child are missing, and thus a justifiable objection can be raised about the validity of these decisions. This weakness contradicts the principle of the CRC's Article 3 about the child's best interest, which requires that each child's specific interests and needs be considered and given primary consideration. The fact that newborn removal cases are mostly concerned with the justification for the removal and the restriction or termination of parental rights and render the child invisible contradicts a Child Equality Perspective.

6.1 *Cross-Country Differences*

Our study demonstrates that it was rare for a child not to be described *at all* in a judgment, but it did happen in all countries, albeit to varying degrees. The German judgments are noteworthy because close to half of them did not describe the specific child in the case at all. On the other end of the spectrum lie Austria and Norway, where less than ten per cent of cases did not describe the specific child. For the remaining countries, it is around 20 to 30 per cent. We examined whether the age of the child at the time of the care proceedings may explain some of the country differences (see Table 2 above), thinking that if a child is only a few months old, there is less information available about the child. However, we did not find such a relationship between our findings and the average age. On the contrary, Norway, the country with the lowest average age of the baby at the time of care proceedings, is also the country that provides a lot of information about the child overall.

TABLE 8 Care requirements, all children (n=220), in percent

Code	Total	Austria	England	Estonia	Finland	Germany	Ireland	Norway	Spain
Requirement of care mentioned	50.9 %	60.0 %	42.9 %	29.4 %	20.0 %	42.9 %	44.4 %	71.4 %	37.5 %

The country differences are indicative of how court systems approach and regard children and display variation in the presence of a child-centric approach. They also reveal individual differences between decision-makers exercising their discretionary authority within each system. One illustrative example of how judgments can respect children's rights that ensures the quality of the decision is the following: of vital importance to determine a child's best interests is information about the specific needs and care requirements for babies who may be placed in public care. These are two vital dimensions when deciding whether a baby should be removed, and what the best placement would be. Estonia, Finland and Norway stand out with eight out of ten judgments mentioning the child's needs, but only Norway has an equivalent mentioning of care requirements (71 per cent). Less than half of the judgments from Spain, Ireland and Germany mention the child's needs. For these countries, the mentioning of care requirements is at a similar level overall for the same cases.

When we analyse whether there are countries that fulfill the standards of the CEP to a higher degree, Norway and Austria stand out as doing better than the other countries on most of the measures we used for this analysis. We wonder whether this may be due to legislation, and the best interest standards. For Austria, this certainly is plausible as the child protection legislation provides a detailed list of 12 considerations that decision-makers must consider (see Skivenes and Sørdsdal, 2018). However, the Norwegian legislation only provides few directions for a child's best interest decision. Thus, these findings could be explained by a comparatively stronger child centrism in Norwegian society and the child protection system (Falch-Eriksen and Skivenes, 2019; Hestbæk *et al.*, 2020; Skivenes, 2011; see also Table 1, which displays the country's high score on children's rights). By way of example, in 2018, the Norwegian child protection law was amended to include elements valuable for children about love, safety, and understanding:

§ 1-1. Purpose of the Act.

The law aims to ensure that children and young people who live in conditions that can damage their health and development receive the necessary help, care and protection at the right time. The law shall ensure that children and young people are met with security, love and understanding and that all children and young people get good and safe conditions for growing up (Norwegian child welfare act)² (authors' translation).³

2 The law in Norwegian reads: «§ 1-1. *Lovens formål.* Loven skal sikre at barn og unge som lever under forhold som kan skade deres helse og utvikling, får nødvendig hjelp, omsorg og beskyttelse til rett tid. Loven skal bidra til at barn og unge møtes med trygghet, kjærlighet og forståelse og at alle barn og unge får gode og trygge oppvekstvilkår.»

3 An official translation of the amended law is not yet available.

Of course, we are aware of the legal traditions and the various approaches to justify a judgment, and that we have not accessed or analysed expert or GAL reports about the child. Therefore, we must be cautious about drawing definitive conclusions. However, the fact that there were judgments in every country that included some description of the child provides strong evidence for our analysis. In most countries (except England and Germany), there were one or more judgments that provided quite extensive descriptions of the child. This suggests that judges use their discretionary authority to include or exclude the child in the written judgments, and that it *is* possible to document the child's presence in all these countries.

7 Concluding Remarks

Child protection decision-making processes in courts are an understudied area, with little currently known about the requirements and conventions of judicial justification (see Burns *et al.*, 2017; Burns *et al.*, 2019). This article contributes to current scholarship with insights into these processes. Our theoretical platform of a Child Equality Perspective (CEP) entails measuring the efforts made by decision-makers to explore and describe the child's circumstances within a decision-making process. We think that this perspective could be the basis for a standard of analysis of policy and practice in child protection and other institutional contexts by researchers, policy makers and professionals making decisions in children's best interests. A CEP aims to ensure the child's presence in proceedings even in the absence of direct and immediate evidence provided by the children themselves. As such it is especially relevant for children who are not capable of partaking fully in the decision-making process. Our study revealed that the child remains largely invisible in the judgments in terms of their individual characteristics. Children's invisibility represents a fundamental obstacle for them being "equal" in judgments that will considerably shape their future. We have cast some light on dimensions of the broader notion of a CEP, and how this perspective provides a tool for reviewing structures and decision-making practices in matters concerning children. We believe decision-makers committed to a CEP would uncover the specific child's situation and characteristics, resulting in much greater visibility of the child in these and other immensely important decisions in a child's life. Ending on a positive note, we wish to point out how the Norwegian County Boards, for example, have made a strong effort since 2015 to increase and ensure children's involvement and their perspective in child protection cases. This effort includes guidelines for hearing the child; registering statistical information

about the child's involvement; a designated section in the template for the written judgments about the child; and training of staff in how to interact with children. We think these types of measures can encourage decision-makers to render children visible in decisions about them.

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