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Age Assessment of Unaccompanied Minors in Sweden and the Rights of Children

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Abstract

In 2015, Sweden saw a large influx of asylum-seekers into the country, many of whom claimed to be unaccompanied minor. Without personal documents to attest their age, the authorities often doubted these claims of minority, prompting a need for age assessment. The government called for medical age assessments to be developed and introduced and a method for medical age assessment was hastily developed. In 2017 alone, 10,000 medical age assessments were conducted. Eventually, scientists blew the whistle, criticising the method for its insufficient scientific standard and calculating that approximately *every third child* risks being erroneously classified as an adult under the current method used in Sweden for medical age assessments. With this uncertainty in mind, we investigate Swedish age assessments, under domestic and international law, for the purpose of increased legal certainty for children facing age assessment.

In this thesis, we first review the process of age assessment. We look at who is subject to age assessment, and what law governs it. Then, we review the current method for medical age assessment, and the criticism that it has received in particular, whilst also reflecting on medical and radiological age assessments in general, and the viability of these methods. We find that the criticism is substantive and that it may be impossible to validate medical age assessments due to a lack of proper reference groups. Having established the uncertainty of current medical age assessments, we move on to the process of proving your age. That is, making your age credible. We find that while the applicant has the burden of proof in theory, due to the difficulty of ascertaining uncertainties in asylum applications, there is a shared burden of inquiry and the legal consequences of not conducting the inquiry to the required high standard befall the State actor. The result being that the child should be given the *benefit of the doubt.* On the subsequent subject of the standard of proof, we find that were it not for the shared burden of inquiry and the *benefit of the doubt*, then proving your age would be of insurmountable difficulty. With Swedish domestic law reviewed in detail, we widen the scope and investigate the effects that international law may have on age assessment. We argue that for the Convention on the Rights of the Child to function effectively, it must also apply to children who have yet to prove their age. Thus, consideration of their best interests must be taken. The UNCRC and the UNHCR are in further support of the child being given a liberal *benefit of the doubt* and assessment of general credibility. Lastly, we analyse the above findings collectively and conclude, *inter alia,* that because of the highly criticised method for medical age assessment, where the applicant has submitted to the medical examination, there should currently be sufficient doubts of the applicant's age in every case. Thus, the State must assume that the applicant is a child under EU law. We then compare the conclusions of this thesis with a previous quantitative study of appellate court judgements and find that there have been no successful appeals of a temporary age decision due mostly to Swedish authorities not acknowledging doubts arising from the criticised method for medical age assessment.

Sammanfattning

Flyktingströmmen 2015 medförde en stor ökning av antalet asylsökande till Sverige, varav många anförde att de var ensamkommande minderåriga. Inte sällan ifrågasatte myndigheterna sökandenas åldrar, vilket medförde ett behov av åldersbedömningar. Regeringen gav då i uppdrag att skyndsamt utveckla och påbörja medicinska åldersbedömningar, och en metod för detta utvecklades hastigt. Enbart under 2017 utfördes därefter 10 000 åldersbedömningar med metoden. Efter en tid höjde rättsläkare och vetenskapsmän rösten och kritiserade metoden för bristande vetenskaplig standard. De bedömde att cirka *var tredje barn* riskerar att felaktigt bedömas som vuxen med nuvarande metod för medicinsk åldersbedömning. Med denna osäkerhet i åtanke undersöker vi svenska åldersbedömningar, under nationell samt internationell rätt, med syfte att öka rättssäkerheten för de barn vars åldrar ska bedömas.

I denna uppsats granskar vi först processen för åldersbedömning. Vi undersöker vem den är tillämplig på och vilka lagar som styr. Därefter granskar vi i synnerhet den nuvarande metoden för medicinska åldersbedömningar och kritiken som lyfts mot den, medan vi även reflekterar över medicinska åldersbedömningar och deras användbarhet i allmänhet. Vi finner att kritiken är välgrundad och att det även kan vara omöjligt att bekräfta tillförlitligheten i medicinska åldersbedömningar; till följd av bristen på referensgrupper. Efter att ha bekräftat osäkerheten i nuvarande metod för åldersbedömningar fortsätter vi med att undersöka processen för att bevisa din ålder. Vi finner att medan sökanden i teorin har bevisbördan, så finns det på grund av svårigheterna i att fastställa osäkerheter i asylmål en delad utredningsbörda. De rättsliga konsekvenserna av att utredningen inte utförs till den höga standard som krävs faller på staten, som då måste ge sökanden tvivelsmålets fördel eller ”*the benefit of the doubt*”. Angående det efterföljande ämnet beviskrav, finner vi att vore det inte för den delade utredningsbördan och *benefit of the doubt,* skulle det vara oöverkomligt svårt för sökanden att bevisa sin ålder. Efter att ha granskat svensk rätt i detalj vidgar vi därefter blicken och utreder effekterna av internationell rätt på åldersbedömning. Vi argumenterar för att om Barnkonventionen ska fungera effektivt måste den även vara tillämpbar på barn som inte har bevisat sin ålder ännu. De ensamkommande barnens bästa måste därför beaktas även vid åldersbedömning. Vidare är FN:s barnrättskommitté samt UNHCR i stöd för att barn ska ges ett generöst *benefit of the doubt* samt trovärdighetsbedömning. Till sist analyserar vi sammantaget det som vi har funnit ovan och drar bland annat slutsatsen att på grund av den nuvarande, mycket kritiserade, metoden för medicinsk åldersbedömning så bör det alltid anses kvarstå så pass mycket tvivel efter en medicinsk åldersbedömning att staten måste anse att sökanden är ett barn enligt EU-rätt. Vi jämför därefter slutsatserna i denna uppsats med en tidigare kvantitativ studie av överrättsdomar och finner att ingen överklagan av ett tillfälligt åldersbeslut har nått framgång till följd av att myndigheterna inte vill vidkännas att tvivel kvarstår efter en medicinsk åldersbedömning enligt nuvarande metod.

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For first introducing me to the subject of age assessment and teaching me the fundamentals of which I have since built upon, I thank my former colleagues at the Swedish Refugee Advice Centre. I also express my gratitude to advokat Tomas Fridh for discussing my conclusions with me and helping me realise that what I have found is perhaps sensible after all.

Additionally, I would like to thank the helpful staff at the Economics Library in Gothenburg. I believe it is remarkable, and very much taken for granted, that a student of a different university may write their thesis in a different city, without the slightest impediment.

Lastly, to loved ones, for support and considerate acts. Thank you.

Author

Emil Johansson
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Abbreviations

COI	Country of Origin Information
CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FL	Administrative Procedure Act (Förvaltningslagen)
FPL	Administrative Court Procedure Act (Förvaltningsprocesslagen)
LMA	Reception of Asylum Seekers Act (Lag om mottagande av asylsökande m.fl.)
MRI	Magnetic Resonance Imaging
RB	Code of Judicial Procedure (Rättegångsbalken)
RMV	National Board of Forensic Medicine (Rättsmedicinalverket)
SoL	Social Services Act (Socialtjänstlagen)
UNCRC	United Nations Committee on the Rights of the Child
UtlL	Aliens Act (Utlänningslagen)
VCLT	Vienna Convention on the Law of Treaties

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Introduction

Background

Most people would likely not consider it controversial that children should benefit from greater protection than adults. Children are without a doubt more vulnerable than adults and as a result require greater protection. The idea that children should be particularly cared for is not even unique to humans, as the concept is vital to long-term survival for almost any species. In modern times, the idea has been codified as the principle of *the best interests of the child*, found, *inter alia,* in the Convention on the Rights of the Child ('CRC')[1], which – perhaps unsurprisingly – is the most ratified treaty in the world. Every member of the United Nations, except for the United States, has ratified the CRC which means that 196 countries are now party to it.[2] According to its Article 3(1), the best interests of the child shall be a *primary consideration* in all actions concerning children. This includes, of course, situations in which children apply for asylum and States must recognise their status as refugees. In asylum law, – which we will be concerning ourselves with in this thesis – the additional safeguards that children benefit from under international law provide them with greater protection, by reason of their physical and mental immaturity. To benefit from these additional rights, in what may very well be a life or death situation, it is thus imperative to the child refugee that the reception country correctly recognises her as a child.

In Sweden, your age is considered part of your identity, together with your name and your nationality.[3] Written evidence is the primary method of proving one's identity and most often the written evidence would consist of a passport or other identification documents. Additionally, the written evidence would have to be of a certain quality for it to successfully prove one's identity.[4] This requires passports or other identification documents to possess certain security features that prove their authenticity and distinguishes them from counterfeit documents. Such security features may include holographic images or electronic chips with biometric identifiers. It should not be far-fetched to claim that countries ravaged by war – countries that might have been without proper government for years – may be incapable of producing such documents for their citizens who end up escaping the country. The written evidence that an asylum seeker brings with her may not be considered of sufficient quality to prove her age, or she could be without any written evidence at all. Under such circumstances, only oral testimonies would remain. The Swedish Migration Court of Appeal has however ruled that oral

[1] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).
[2] United Nations Treaty Collection (2019. <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#1>.
[3] MIG 2011:11.
[4] Prop. 1997/98:178, 8.

testimonies may only make one's age credible in exceptional cases.[5] This is mainly due to the asylum procedure being in written form, yet the Court does not further specify how they reached this conclusion. It follows then that the asylum seeker who lacks written evidence is left with little option but to have her age assessed, which would generally include a medical age assessment upon consent from the applicant. In summary, age may be a deciding factor in the outcome of one's asylum application and applicants may find themselves lacking sufficient written evidence to make their age credible, which often leaves age assessment as the only remaining option. Irrespective of the multiple critique raised in relation to age assessment and its reliability, it is clear that for a child refugee to be given the rights that they are owed, it is imperative that age assessments are both *accurate* and *reliable*. Age assessments with a large margin of error threaten both legal certainty and equality before the law, and – perhaps most importantly – may lead to children being returned to countries where they risk treatment that would have otherwise granted them asylum, had their age been assessed correctly.

In Swedish practice, age assessments are routinely performed through use of radiological medical age assessments[6], the details of which will be outlaid below. In short, the growth completion of the applicant's third molar ('wisdom tooth') is examined by X-ray, and magnetic resonance imaging is used to evaluate the closure of the distal femoral growth plate (more commonly referred to as 'MRI knee'). The National Board of Forensic Medicine ('Rättsmedicinalverket' further referred to as 'RMV') developed and is responsible for the method used.[7] Following the refugee influx of 2015, almost 10,000 medical age assessments were performed in 2017 alone.[8] Forensic medical doctor Fredrik Tamsen, then employed at RMV, first blew the whistle on medical age assessments when he put forth that the margin of error could potentially be twice as large as RMV claims.[9] This event sparked significant journalistic scrutiny which lead to legal practitioners, statisticians and doctors alike speaking out against the method used for medical age assessment.[10] Statistics professors Bring & Rönnegård asserted that the National Board of Health and Welfare, who first endorsed the MRI knee method, were guilty of the logical fallacy *confusion of the inverse*.[11] Another

[5] MIG 2014:1.
[6] Rättsmedicinalverket, 'Återrapportering avseende regeringsuppdrag till Rättsmedicinalverket att genomföra medicinska åldersbedömningar (Ju2016/03931/Å)' (2016), 7–9.
[7] *Ibid.*
[8] Swedish National Board of Forensic Medicine, 'Statistik', < https://www.rmv.se/om-oss/forskning/aktuell-statistik/>.
[9] F Tamsen, 'Resultat av åldersbedömningar pekar på felaktigheter i metoden' *Läkartidningen* (20 September 2017).
[10] See *inter alia* N Efendić, 'Uppgifter: Var femte pojke felklassas med knämetod' *Svenska Dagbladet* (18 October 2018).
[11] Bring & Rönnegård, 'Åldersbedömning av barn och unga vuxna – en utmaning ur flera perspektiv' <https://snackastatistik.se/aldersbedomning-av-barn-och-unga-vuxna/>
For a more comprehensive explanation of the fallacy, see below, 17. In summary, the National Board of Health and Welfare calculated the probability that a child has a mature knee, while they claimed to have calculated the probability that a person with a mature knee is a child. Thus, committing the fallacy of the *confusion of the inverse*.

professor of statistics, together with forensic medical doctor Tamsen mentioned above, published a study where they found that of the 9,617 males who were subjected to the procedure in 2017, approximately 15 % were children and that these children had an approximate 33 % risk of being erroneously classified as adults.[12] In other words, *every third child* risks being erroneously classified under the current method for medical age assessment. *Following* this criticism, the Swedish National Council on Medical Ethics, published an opinion where they criticised RMV and called for an independent investigation to evaluate the medical age assessments and review the criticism that has been voiced.[13] In response to the criticism from the medical ethics council, RMV refuted the criticism and in defence, *inter alia*, questioned why they were not asked to first answer the criticism before the calls for an investigation.[14] Nevertheless, the government has since then announced their intention to appoint an investigation into the matter.[15] As of May 2019, the investigation has, however, not been formally appointed yet. Additionally, there is currently a pending case NGO's have reported RMV, the Migration Agency, and the Migration Court to the Swedish Chancellor of Justice.[16] In the report, the organisations claim that the combined actions of the Swedish authorities regarding age assessment have been in breach of the prohibition of torture etc. of Article 3 ECHR.[17]

When an applicant for asylum in Sweden asserts that she is a child, the Migration Agency shall, if there is reason to doubt the claim, carry out an age assessment and make a temporary decision on the age of the applicant. Before the temporary age decision is made, the applicant shall be offered to undergo a medical age assessment. This decision is temporary until the entire asylum application has been tried. Which is when the final age decision is made. Before the final decision has been made, the temporary age decision may be appealed to the Migration Court.[18] In a previous study, I collected and compiled the judgements of every such appeal of a temporary age decision.[19] Since the procedure above was introduced in 2017, 65 judgements had been made in total and not a single judgement had changed the decision of the Migration Agency to consider the applicant an adult. I found that criticism of the method for medical age assessment was routinely disregarded and that the

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[12] P Mostad & F Tamsen, 'Error rates for unvalidated medical age assessment procedures' International Journal of Legal Medicine (2019), 133:613–623, 613.
[13] The Swedish Council on Medical Ethics, 'Medical age assessments in the asylum process – ethical aspects' (20 December 2018).
[14] Rättsmedicinalverket, 'Yttrande till Justitiedepartementet över skrivelse från Statens medicinsk-etiska råd' Ju2018/05355/Å (22 Mars 2019), 4.
[15] N Efendić, 'Uppgifter: Var femte pojke felklassas med knämetod' *Svenska Dagbladet* (9 April 2019).
[16] N Efendić, 'Staten JK-anmäls för brister i åldersbedömningarna' *Svenska Dagbladet* (6 May 2019).
[17] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[18] 13 kap. 17–18 §§; 14 kap. 8b § Aliens Act.
[19] E Johansson, 'Överklaganden av tillfälliga åldersbeslut för asylsökande, en kvantitativ studie' (2019) <https://www.academia.edu/38580370/%C3%96verklaganden_av_tillf%C3%A4lliga_%C3%A5ldersbeslut_for_asyls%C3%B6kande_en_kvantitativ_studie>.

benefit of the doubt was thus not applied at all. Applicants who did not submit to a medical age assessment, often due to doubts regarding the method's margin of error, were not given the benefit of the doubt, as they were not considered to have made a genuine effort to substantiate their claim regarding the inquiry into their identity. Applicants who did submit to the medical age assessment were not given the benefit of the doubt either, as doubt was not considered present, despite criticism raised towards the method used. Even when the court acknowledged the criticism, this did not help the case, due to the burden of proof lying being placed on the applicant. Even if the medical age assessment is disregarded as being of low quality, it did not help with furthering the applicant's claim the she is a child.

This preliminary quantitative study of appellate court decisions of mine, as well as the ongoing debate on medical age assessments, inspired three further questions: (1) Considering the serious difficulties in procuring written evidence and the fact that a disregarded medical age assessment does not help the claim, what is the extent of the applicant's burden of proof in proving their identity, including age? (2) Considering that what little evidence may be present is often deemed insufficient and that the benefit of the doubt is sparsely given, what is the standard of proof (beyond the obvious 'credible') for proving your age, and in particular how should the benefit of the doubt be applied? (3) Lastly, by reason of their physical and mental immaturity, children are given additional rights and safeguards. Can it be argued that these additional children's rights, which are derived from international law, should apply to children whose ages have yet to be proven, and if so, what effects would these rights have on the process of age assessment?

Purpose of the Research

Age may, as we have established, be of critical importance in one's asylum application. By extension, equally important is actually proving one's age in particular, and identity in general. Given that this matter is of such importance and may, as with every aspect of an asylum application, be a question of life and death, it is imperative for there to be great legal certainty, so that every child is indeed granted the rights that she is owed. Yet the field of law that is age assessments is not entirely clear. Thus, the purpose of this research is to study these unclear areas of law and hopefully bring larger clarity and certainty to the children whose ages are assessed.

The criticism of the method for medical age assessments in Sweden, as briefly described above, is part of the reason why I previously examined the appeals of temporary age decisions. Similarly, it is also part of the reason why I now continue researching age assessments. For the sake of full disclosure, it should be mentioned that I consider the criticism of RMV's method for medical age assessments to be well-grounded and generally believable. I have reviewed the method itself and the studies that criticise it and I have found the arguments against the method to be coherent and well-grounded.

Nevertheless, I am no radiologist, nor am I a forensic medical doctor or a statistician. It could very well be that the method for medical age assessment used in Sweden is of high quality and has a small margin of error. It matters little to the legal interpretation and analysis of this study if the scientific method in question is good or bad. However, the purpose of this research does operate on the assumption that medical age assessments may have a questionable margin of error and that it may in turn lead to legal uncertainty for children who face age assessment. While it is perhaps not the most controversial assertion, this study is biased towards aiding unaccompanied minors who seek asylum by searching for arguments that may increase legal certainty in their cases. Nevertheless, I do not aim to forsake objectivity in my pursuit of this purpose and the logic of my arguments should hold up under scrutiny. While the general purpose of this research is to work towards better legal certainty, the purpose of this study in particular – which also defines the scope of it – is connected to the three research questions raised above, regarding the burden of proof, the standard of proof, and children's rights concerning age assessment.

The burden of proof is possibly the largest obstacle that the child faces in proving their age. Yet in international refugee law, the burden of proof may clearly be shared. It is a shared duty of fact-finding due to the great difficulty of ascertaining the facts of an applicant's story. Therefore, because of the imbalance of resources and capabilities, the majority of the responsibility to inquire into the facts of the story befall the State actor. In addition to the aforementioned general purpose, I wish to study the extent of the burden of proof, to what degree it rests on the child, and what considerations may shift this burden. Following the examination of the burden of proof, we will review the standard of proof. At first glance, one might say that the standard of proof is obvious. It is clearly stated in the law, after all. Your identity must be made 'credible'.[20] The question is rather what 'credible' means in this situation. What level of evidence is required to prove that you are in fact a child? This would obviously vary by large margins from case to case, depending on *e.g.* the child's country of origin. Nevertheless, I will attempt to bring clarity to the requirement of making your age claim credible. Perhaps more importantly on this note, my previous examination of appellate court judgements showed that the principle of the *benefit of the doubt* is scarcely given. To that end, I intend to study this principle and attempt to determine under what conditions the benefit of the doubt is supposed to be given and in what manner it is supposed to tip the evidentiary scales. Furthermore, I wish to compare the conclusions that I may draw on the burden and standard of proof with my previous findings of Swedish age assessments *in practice*. By doing so, I hope to identify similarities and differences between age assessments in theory and in practice.

[20] t/n The Swedish word used is 'sannolik' (see MIG 2014:1). A literal translation of 'sannolik' would be 'probable'. I have however opted to use 'credible' instead, as it is more in line with international refugee law and literature.

Methodology

This thesis is divided into three chapters: the *examining*, the *analytic* and the *comparative* chapter.

First, we shall examine the applicable law on age assessment, under Swedish, EU, and international law, as well as the method for medical age assessment that is currently used in Sweden. After having reviewed the law on age assessment, we shall broaden the scope and examine children's rights in general; and under the CRC in particular. The purpose of the primary examining chapter is to provide an insight into the complex field of age assessment, where natural and social sciences blend. In this section, I will be reviewing legal sources in an orthodox manner and attempt to present coherent arguments on what the applicable law on age assessment and children's rights is and how it should be interpreted.

After establishing in the first chapter what the applicable law is, in chapter two we shall analyse and critically reflect on it from the perspective of the need for increased legal certainty for children facing age assessment. Rather than focusing on what the applicable law currently is, we will consider what it 'ought to be', or what it could be, given what was established in the first chapter. It is not my intention for this chapter to fully become *de lege ferenda* argumentation. Instead, the aim of the analysis is to synthesise an argumentation that allows for an innovative interpretation of the law and that takes children's rights and legal certainty into greater consideration, while still remaining within the boundaries of the applicable law.

Following the investigative and reflective chapters, the third chapter of the thesis is a comparative one. In this section, we shall compare the theoretical findings and conclusions of the first two sections – on what the applicable law is and ought to be – with the findings of my previous study from the appellate court judgements on what the applicable law actually is in practice. By comparing the theoretical findings with the practical ones, we will attempt to spot differences between how the law is applied in practice and how it should, or could, be applied in theory. As mentioned above, I have previously conducted a study where I examined all of the Swedish appellate court judgements on temporary age decisions. To do so, I first narrowed down what legal assessments were common to most – if not all – judgements and had them become categories. These were, *inter alia,* had the applicant submitted to a medical age assessment, had the legal representative criticised the method, what written evidence had been submitted and how did the court evaluate it, etc.[21] Categorising the judgements was vital to enabling comparison of any value between them. At the time, I was interning at the

[21] For the full compilation of judgements and categories used, see the appendix of E Johansson, 'Överklaganden av tillfälliga åldersbeslut för asylsökande, en kvantitativ studie' (2019) <https://www.academia.edu/38580370/%C3%96verklaganden_av_tillf%C3%A4lliga_%C3%A5ldersbeslut_for_asyls%C3%B6kande_en_kvantitativ_studie>.

Swedish Refugee Advice Centre and colleagues there provided assistance with feedback on how to categorise the judgements, which I believe lends credibility to the successive analysis. After finalising what categories to use, I then inputted the data of all judgements into the digital spreadsheet that held the compilation. When all judgements had been entered into the spreadsheet, I was able to use data processing tools such as a 'pivot table' to analyse the judgements and easily spot potential trends. In this last chapter, we shall thus compare theory with practice.

The vast majority of the Swedish sources of this thesis are, of course, in Swedish. When rarely available, I have attempted to use semi-official translations as much as possible. However, for the sake of coherence, one may surmise that translations of Swedish sources to English have been done by me. Regarding my mastery of the two languages; Swedish is my mother tongue, and I studied law in English at a master's level at the University of Maastricht for an academic year, where I also assisted a researcher with translating a survey from English to Swedish. In translating, I have had very beneficial help from the *Glossary for the Courts of Sweden*[22], published by the Swedish National Courts Administration, often referring to its judgement when choosing between words of similar aptitude.

[22] Swedish National Courts Administration, 'Glossary for the Courts of Sweden' (2016) <http://www.domstol.se/Publikationer/Ordlista/svensk-engelsk_ordlista.pdf>.

Examining Age Assessments in Sweden

The importance of age, and the assessment of it, in the context of migration law ultimately derives from the additional rights and safeguards afforded to children by the Convention on the Rights of the Child ('CRC'). As the treaty with the most parties to it, a total of 196 states, it has an unprecedented spread and influence. One of the core principles of the CRC is the principle of the *best interests of the child*, enshrined within Article 3(1). The article states that in all actions concerning children, the best interests of the child shall be a primary consideration. In effect, this principle may ultimately lead to a child being granted asylum, under circumstances where an adult would not, due to it being in the best interests of the child for her not to be returned to the country of origin, and because of the particular vulnerabilities of children. In practice, however, it is rarely so simple. When assessing what the bests interests of the child in question is, one must also take into consideration other aspects such as if the child has a family and where that family is. In addition, the best interests of the child shall be *a primary* consideration, and not *the primary* consideration. According to the *travaux préparatoires* of the CRC, one of the drafters 'pointed out that the interests of the child should not be the overriding, paramount consideration in every case, since other parties might have equal or even superior legal interests in some situations, such as in a medical emergency during childbirth'.[23] State interests of general migration control may, however, never override considerations of a child's best interests.[24] Children have multiple vulnerabilities compared to adults and by reason of their physical and mental immaturity, children require additional safeguards such as those provided by the CRC. However, prior to considering if the best interests of the child should be afforded primacy over other interests, or what the bests interests of the child in question actually are, one crucial factor must be ascertained: is the applicant a child or not? According to the first article of the CRC, a child is a human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier. Since majority in Sweden is attained when one turns eighteen years, those below that age will be considered children for the purpose of this thesis.

In general, a main principle of the law of evidence is that the burden of proof lies on whoever makes the assertion. In this case, that would be the asylum

[23] P Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in P Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994), 12.

[24] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, [33].

seeker who claims that she is a child. Thus, the asylum seeker must provide *proof* that she is in fact a child, as she claims. Evidence of one's age should predominantly be provided in writing, as will be explained below, but may exceptionally be also provided orally. When the asylum seeker lacks sufficient evidence to prove her claim, of if there are doubts as to the authenticity of the evidence presented, one has little choice but resorting to age assessment. The methods that are used to assess a person's age may vary between different EU Member States. For example, France uses psychological interview and carpal, collar bone, and dental X-ray, while Germany uses psychological interviews as well, but does not use X-ray examination.[25] In Sweden however, medical age assessment through use of radiological examination of the applicant is the method used.[26]

In this chapter, we will first review the procedure for age assessment in Sweden and the law that governs it. Secondly, we shall review the method for medical age assessment that is used. We shall then study the evidentiary requirements of proving your age, with the burden and standard of proof, and the *benefit of the doubt* as main subjects. Finally, we will return to the ultimate reason for age assessment being an issue, *i.e.* children's rights, and study the relationship between age assessment and children's rights.

1 The Process of Age Assessment

Within the Swedish Aliens Act,[27] sections 17 and 18 of the thirteenth chapter on the 'handling of matters at the administrative authorities etc.' provide the main source of written law on age assessment. It states that if the person who applies for residence permit as a refugee, or otherwise in need of subsidiary protection, asserts that she is an unaccompanied minor, the Migration Agency shall, if there are grounds for doubting that the applicant is a minor, as soon as possible conduct an age assessment and make a temporary decision on the age of the applicant. There is however no need for an age assessment or a temporary age decision if it is *obvious* that the applicant is eighteen years or older. The temporary age decision is effective immediately and the final position on the age of the applicant shall be made in connection with the final decision on residence permit. The temporary age decision may also be appealed to a Migration Court according to 14 kap. 8 b § Aliens Act. Nevertheless, as of autumn 2018, no temporary age decision has been changed by an appellate court.[28] Before the Migration Agency makes a

[25] EASO, 'Practical Guide on Age Assessment: Second Edition' (2018) < https://www.easo.europa.eu/sites/default/files/easo-practical-guide-on-age-assesment-v3-2018.pdf>, 106.
[26] Rättsmedicinalverket, 'Återrapportering avseende regeringsuppdrag till Rättsmedicinalverket att genomföra medicinska åldersbedömningar (Ju2016/03931/Å)', 7-9.
[27] Aliens Act (2005:716).
[28] E Johansson 'Överklaganden av tillfälliga åldersbeslut för asylsökande, en kvantitativ studie' (2019) *supra* n 21, 18.

temporary age decision that would assess the applicant as eighteen years or older, they must first offer the applicant to submit to a medical age assessment, which may only be performed with the written consent of the applicant.

The Migration Agency shall make an age assessment when there are grounds for doubting that the applicant is a minor, yet it is not obvious that she is eighteen years or older. It is rather unclear where this line is drawn. One *should* find it difficult to argue that there are grounds for doubting that a twelve-year-old is below eighteen years. Similarly, one who has just turned eighteen would not by common sense *obviously* look eighteen. According to the *travaux préparatoires*, there are no grounds for doubt when it is 'clear' that the applicant is a child, despite lack of identification documents.[29] In practice, judging how clear it is that the applicant is a child, despite lack of written evidence, is an age assessment on its own. One would assume that this 'light version' of an age assessment is done in practice by simply looking at the person and judging her maturity. In the landmark case MIG 2014:1, the Migration Court of Appeal states that it is not possible to determine the age of an applicant for asylum by assessing her appearance and the National Board of Health and Welfare agrees that assessment of appearance is not an acceptable method of investigation for children in the upper teens. From this it would seem that appearance assessment is a somewhat acceptable method for prepubescent children, while it becomes less acceptable the older the child appears, calling for a proper age assessment. Given the resistance towards appearance assessment, I assume that it is likely that unaccompanied children who lack written evidence are very rarely considered 'clearly' children and that only exceptionally is the age assessment procedure not initiated for teenagers. On the other end of the applicant 'clearly being a child' is when it is *obvious* that she is eighteen years or older. According to the *travaux*, 'obvious' means that it should concern *unambiguous* cases where there is no room for any other assessment than considering the applicant an adult, either because it is clear to '*each and every one*' that it concerns an adult or because there is evidence that without a doubt clarifies the applicant's age.[30] In these obvious and unambiguous cases where the applicant is an adult, the Migration Agency registers the applicant in question as an adult without a temporary age decision being made. 'Obvious to each and every one' seems to suggest an assessment of the applicant *appearing* significantly older than eighteen years, indicating that appearance assessment is only *unacceptable*[31] as a method, in an unknown age span between puberty and some upper limit where one is unambiguously an adult.

When it is neither clear that the applicant is a child, nor obvious that she is an adult, an age assessment and a successive temporary age decision must be made. The first part is an assessment of all evidence in the case, both to the advantage and disadvantage of the applicant. While one could be born any of the 365 days a year, the age assessment is in effect binary. What matters is

[29] Prop. 2016/17:121, 32.
[30] Prop. 2016/17:121, 32.
[31] Cf. MIG 2014:1.

whether the applicant is below eighteen years old, not how far from it in any direction she may be. If the Migration Agency considers making a temporary age decision where they decide that the applicant is eighteen years or older, they must first offer the applicant the choice of submitting to a medical age assessment. For the Migration Agency to consider making such a decision that would warrant offering a medical age assessment, they must first assess the evidence of the case that is already available. As such, considering the above passage on whether one is clearly a child, I would assert that the law provides for three formal potential age assessments. The first age assessment is made mainly by appearance, considering if the applicant is clearly a child or obviously an adult. If there are grounds for doubting that the applicant is a child, then the second age assessment evaluates the available evidence. Should doubt remain following this evaluation, meaning that the Migration Agency considers deciding that the applicant is an adult, the Agency must offer a medical age assessment. After the results of the medical procedure have been acquired, a third age assessment will be made which considers the results together with any other available evidence. In other words, there are three occasions during the age assessment procedure where the Migration Agency may be alleviated of their doubt of the applicant's age.

Following the age assessment, regardless of whether a medical examination has been performed, a temporary age decision will be made. This decision is effective immediately and lasts until the final position on the age of the applicant is made, in connection with the decision on residence permit. While it is a temporary decision, the result of it would certainly suggest the outcome of the final decision. If the temporary age decision is in favour of the applicant, *i.e.* if the applicant is considered a child, then that decision would not later be changed to the detriment of the applicant. Doing so would not be compliant with the best interests of the child[32] or the prohibition of *reformation in peius*[33] in 37 § FL[34], which only allows for changing decisions to the detriment of the applicant if the decision is wrong because of false or deceptive information given by the applicant. An unfavourable temporary age decision may be appealed, yet statistics show that out of sixty-five such appeals, none have been fruitful.[35] In theory, there is nothing to stop an unfavourable temporary age decision from turning into a favourable final one. In practice however, that turn of events would require newfound and decisive evidence which, while not impossible, would certainly not be common.

Disregarding the suggestive effect that the temporary age decision may have on the final one (not to mention the outcome of the asylum application in general), the temporary age decision also matters greatly when it comes to the treatment of the applicant during the asylum procedure, leading up to the final decision on residence permit. The Reception of Asylum Seekers Act

[32] The *best interests principle* may also be found in 1 kap. 10 § Aliens Act.
[33] Cf. RÅ 2000 ref 16.
[34] Administrative Procedure Act (Förvaltningslag (2017:900)).
[35] E Johansson 'Överklaganden av tillfälliga åldersbeslut för asylsökande, en kvantitativ studie' (2019) *supra* n 21, 18.

('LMA')[36] provides the rules on treatment of asylum seekers. According to sections three, four, and eight, adult asylum seekers are to be provided accommodation, occupation that contributes to a meaningful stay, and economic aid. The accommodation in question is often a flat that is shared with others.[37] Adults are more or less left to their own devices. Their economic aid may however be reduced under 10 § LMA as punishment for not cooperating with the investigation or not partaking in the prepared occupation, such as education in Swedish and maintenance of the accommodation. While the Migration Agency provides accommodation to adults, it instead designates responsible municipalities for the care of unaccompanied minors. The duties that these designated municipalities have towards unaccompanied minors, under the Social Services Act ('SoL'), are greater than the duties of the Migration Agency towards adult asylum seekers. The municipalities must consider the best interests of the children that they are allotted and arrange their education, provide for their individual needs and arrange appropriate accommodation. It is unquestionably better for the individual asylum-seeker to be considered a child during the application procedure and receive the benefits of a designated municipality.

In the previous order on age assessment there were no temporary age decisions. In fact, no age decision was made at all as the question of the applicant's age was solely decided on within the decision on residence permit. With the exception of 'obvious' cases, the applicant's asserted age would be accepted until the final decision.[38] This old order meant that those who would later be judged as adults would be treated as children during the asylum process and receive rights and benefits meant for children. When explaining the need for changing the order on age assessment, the government particularly stressed the detrimental effects on children's living conditions that adults being placed in shared accommodation with them would have. The government considered it unsatisfactory from both a children's rights perspective and an economic one that adults consume resources meant for children. However, the government offered no comprehensive explanation of the immediate detrimental effects that adults living with children supposedly has. Nevertheless, prior to the introduction of the *new order* on age assessment, Prime Minister Löfven ordered the Migration Agency to increase age assessments following, *inter alia,* reports of a twelve-year-old boy being raped by two cohabitants, who were later suspected of being adults with one possibly as old as forty-five.[39] While the government presented no proof that adults 'wrongfully' sharing accommodation with children is automatically detrimental to the lives of said children, the claim is most likely uncontroversial in the minds of the many. Supposing that adults and children should indeed live separately, then it is in the best interests of both the child and the state that age assessments are as accurate as possible. Both

[36] Lag (1994:137) om mottagande av asylsökande m.fl.
[37] Migrationsverket, 'Accommodation' (2017) <https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/While-you-are-waiting-for-a-decision/Accommodation.html>.
[38] Prop. 2016/17:121, 12.
[39] Niklas Svensson 'Löfvens krav: Fler ålderskontroller' *Expressen* (23 February 2016).

considering the availability of economic resources and the quality of living conditions. For this reason, I would like to input that while criticism of age assessment appears rather frequently in this text, I am not principally against age assessment. *Accurate* and *reliable* age assessment may in several ways be very beneficial to asylum seeking children who would otherwise be unable to prove their minority. In summary of the above, the new order on age assessment that we are examining was introduced for the economic efficiency of the state and the increased quality of life for children seeking asylum.

The *new order* was introduced by amendment[40] to the Aliens Act, which added 13 kap. 17-18 §§ and 14 kap. 8 b §. The law came into effect May 1st, 2017 and is only applied to asylum cases registered after February 1st, 2017. Hence, in legal terms the new order is fairly new. When inquiring on the total number of temporary age decisions made since the new order came into effect, the Migration Agency's statistics department was unable to answer. The statistics department did however provide the total number of cases where the applicant's age was raised above 18 since May 2017, which was 8,650 as of January 2019. In comparison with 8,650 write-ups, statistics from the Swedish National Courts Administration showed that there had only been 65 judgements on a temporary age decision being appealed.[41] After further inquiry at the Migration Agency, two officers were able to manually look into the number of temporary age decisions made and report back that 190 such decisions had been made since September 2017.[42] It seems more reasonable that 65 out of 190 decisions would be appealed, rather than 65 out of the 8,650 total age write-ups. We may recall that the Migration Agency must only make an age assessment and decision when it is not 'obvious' that the applicant is eighteen years or older. Clearly, the Migration Agency considered these 8,650 applicants who asserted that they were children as obviously adults. The applicants in question must indeed have looked very old for it to be 'unambiguous and without room for any other assessment than considering the applicant an adult, either because it is clear to each and every one that it concerns an adult or because there is evidence that without a doubt clarifies the applicant's age'.[43] I find it worrying that 97.8 % of applicants seemingly do not receive an age assessment before their final decision on residence permit, but are instead immediately considered adults, without trial.

The Migration Agency may only decide on a case without an oral procedure if the decision is to declare the applicant a refugee, according to 13 kap. 1 § Aliens Act. In other words, if the applicant is not immediately declared a refugee, there must be an oral procedure. In practice, the Migration Agency calls the applicant to an interview, together with their trustee, legal representative and a translator. The purpose of the interview is to investigate matters relevant to the asylum application, such as the identity of the applicant

[40] SFS 2017:258.
[41] E Johansson 'Överklaganden av tillfälliga åldersbeslut för asylsökande, en kvantitativ studie' (2019) *supra* n 21, 18.
[42] This information was obtained by email and phone call on 20 December 2018. The records of it are on file with the author and may be obtained on request.
[43] Prop. 2016/17:121, 32.

and their grounds for protection. However, oral testimonies may only exceptionally make one's age claim credible.[44] Nevertheless, matters pertaining identity, such as age, are discussed during the interview. When investigating the applicant's age, officers may ask questions related to established country of origin information ('COI') that can be tied to the applicant's age. The officer may for example ask how old the interviewee was when a certain significant event occurred in the country, such as a new leader of the nation coming to power. The evidentiary requirements and methods of proving one's age will be developed below. It should, however, be mentioned that Swedish authorities, including the Migration Agency, have a responsibility of inquiry according to 23 § FL. They are responsible for a case being investigated to the extent required by the nature of the case. If required, the authorities shall through questions and remarks assist the applicant to clarify and complement the production of evidence. The responsibility of inquiry will be developed in full below. In addition to the written evidence acquired, and the interview held, the Migration Agency will also collect a report on the perceived maturity of the applicant from the Social Welfare Committee of the designated municipality. This is done under 17 kap. 1 § Aliens Act which allows the Migration Agency, the police and the Migration Courts to collect information regarding the applicant's personal circumstances from the Social Welfare Committee.

Following the interview, and after the asylum seeker has presented whatever evidence she may have, the Migration Agency will consider one of two decisions. Either accepting the assertion that the applicant is a child or doubting it and considering deciding that she is an adult. For the latter case, we may recall that the Migration Agency must offer the applicant to submit to a medical age assessment under such circumstances. A medical age assessment may only be performed with the written consent of the applicant. In practice, this decision is taken by their trustee who must decide whether the medical age assessment is beneficial to the asylum seeker or not. It is certainly a very difficult decision to make, even for those who happen to write a thesis on the topic. The applicant's legal representative will not partake in that decision. This is due to the Swedish Bar Association making an advisory statement in 2015 that legal representatives should not contribute to their client submitting to a medical age assessment, unless particular reasons call for it.[45] The results of a medical age assessment are difficult to judge and may be to the disadvantage of the client. For this reason, the Bar Association discourages their members from contributing to their client submitting to the procedure. This leaves the decision making in the hands of the trustee, who would generally be unprepared to understand and evaluate the implications that submitting to the medical age assessment may have. Out of the 65 appellate court judgements that I studied, 41 had consented and submitted to a medical age assessment.[46] If one does not consent, the age assessment will

[44] MIG 2014:1.
[45] Advokatsamfundet 'Vägledande uttalande angående medicinska åldersbedömningar i asylärenden' (2015).
[46] E Johansson 'Överklaganden av tillfälliga åldersbeslut för asylsökande, en kvantitativ studie' (2019) *supra* n 21, 12.

be made on the available information. Given that the Migration Agency are supposed to offer a medical age assessment when they are considering deciding that the applicant is an adult, not consenting to the procedure will most likely result in an age write-up for the applicant.

1.1 A Review of Medical Age Assessments

Let us begin this section with attempting to define what a medical age assessment is. The term is rather self-explanatory, yet I believe that some would be confused as to what the 'medical' part necessarily means. The Oxford English Dictionary defines the adjective 'medical' as 'Relating to the science or practice of medicine.' Medicine, in this regard, being the science or practice and not a drug. The current method for medical age assessment in Sweden that will be described below is entirely radiological. It uses both X-rays (*i.e.* electromagnetic radiation) and MRI (*i.e.* magnetic fields) to examine different parts of the body. *Radiology* is a medical specialty that uses medical imaging to diagnose and treat patients. Considering this, a more precise term for the medical age assessments that are used now would be *'radiological age assessment'.* A *medical* age assessment could involve any discipline of medicine to assess a person's age, not just radiological methods. The reason I bring this up is because of the previous method for age assessment in Sweden, which was only partly radiological, whilst the current method is purely so.

The previous method for medical age assessment maintains relevance because of the landmark case on age assessment, MIG 2014:1. This case is still the dominant source of interpretation regarding age assessment and the method for medical age assessment reviewed in the Migration Court of Appeal case question was the previous method in use. This rather threadbare method was established by the National Board of Health and Welfare in 2012.[47] It states that: medical age assessments should routinely be initiated with a clinic paediatric examination of the youth and include anamnesis (*i.e.* inquiring about the patient's medical history) and an anthropometric assessment (*i.e.* assessment of body measurements). X-ray examination of hand skeleton and teeth should complement the paediatric examination and uncertainties surrounding the accuracy of the radiological methods should be handled in a standardised way through use of established protocols for reports on age assessment. The report further states that considering the method's margin of error, the overall assessment should be generous and governed by the principle of the *benefit of the doubt*. It also states that calculating the probability that a person is older than eighteen should be performed on an acceptable level in a medical context, which means that a probability of 95 % should be required in the radiological assessment. This last part of the statement from 2012 on the previous method may be the most relevant. When

[47] Socialstyrelsen, 'Medicinsk åldersbedömning för barn i övre tonåren (Dnr 31156/2011)' (2011).

discussing age assessment in MIG 2014:1, the Migration Court of Appeal cites the statement and the medically acceptable margin of error of 95 %. While not a direct confirmation, the Court does not question the stated scientific accuracy required and appears to signal that this view of the National Board of Health and Welfare is correct. As we shall see, the requirement of 95 % accuracy is certainly not treated as binding today. However, it should still serve as a heavy indication of what an acceptable margin of error is. Especially considering what physicians claim to be 'medically acceptable'. When reviewing judgements on appeals of temporary age decisions, I noticed that attorneys would criticise the current margin of error by reference to MIG 2014:1 and the then acceptable accuracy of 95 %. In response, the Migration Agency would infer that this level of accepted accuracy is no longer applicable as it refers to a previous method for medical age assessment. As we have seen above, it is correct that the quote on what a medically acceptable margin of error is does stem from a statement on the previous method for medical age assessment. Nevertheless, while the choice of body parts to examine and radiological methods to use has changed since the case was published, it is possible to argue that what is 'medically acceptable' as a margin of error has not changed. Reasonably, an acceptable margin of error is not dependent on the method used, but rather on the purpose and aim of the results. Furthermore, both the previous and current method make use of tooth X-ray. The only radiological difference between the previous and current method is that the current method uses MRI knee as well. Therefore, I believe that despite the change of methods, sufficient similarities still remain for the acceptable margin of error of 95 %, mentioned in MIG 2014:1, to still be applicable today and to the current method in use. The accepted margin of error defines what uncertainties we may accept without sacrificing too much legal certainty. Assessing that 95 % accuracy is the minimum requirement from a legal certainty standpoint is *independent* of the current method used in question. Regardless of the method used, the margin of error we may accept should remain the same. Which is why I argue and conclude that the accuracy of 95 % mentioned in MIG 2014:1 regarding the former method for medical age assessment should also be applicable to the current method in use today.

Following the influx of unaccompanied minors applying for asylum in 2015, the government tasked the National Board of Forensic Medicine ('RMV') with conducting medical age assessments.[48] With current research and proven experience as a starting point, RMV were to begin conducting medical age assessments with *great urgency* and *immediately* increase the ability and capacity in this area. Around the same time, the National Board of Health and Welfare published an ethics analysis of age assessments in general[49] and a study on methods for radiological age assessment.[50] The highlight of the

[48] Justitiedepartementet, 'Uppdrag till Rättsmedicinalverket att genomföra medicinska åldersbedömningar' Ju2016/03931/Å (2016).
[49] Socialstyrelsen, 'Åldersbedömning inom ramen för asylprocessen – en etisk analys' (28 May 2016).
[50] Socialstyrelsen, 'Metoder för radiologisk åldersbedömning – En systematisk översikt' (4 June 2016).

ethics analysis was that the principle of *in dubio pro reo* holds true also for age assessments. They conclude that it is more morally reprehensible to wrongfully consider a child an adult and deny them protection, than it is to wrongfully grant an adult protection, because they are believed to be a child, without the right to it. In other words, just as before, age assessments should be generous and governed by the principle of the *benefit of the doubt.* The other report, on methods for medical age assessment, concluded that magnetic resonance imaging ('MRI') should rather be used than traditional X-ray, because of the radiation doses for large groups of asylum seekers. It found MRI of the knee to be particularly promising and in need of further studies. This report on methods for medical age assessment and its probability calculations and conclusions on the promising nature of MRI knee laid the ground for what would become the current method used for medical age assessment. However, the report has received significant criticism since it was first published. Mainly, it is statistics professors Bring & Rönnegård who have claimed that the calculations in the report are incorrect and asserted that it is guilty of committing the logical fallacy *confusion of the inverse*.[51] To describe the fallacy, the statisticians use an example of people with breast cancer.[52] They compare two related probabilities of A: 'the probability that a person with breast cancer is a woman', and B: 'the probability that a woman has breast cancer'. In A, they illustrate the probability of the sex of a person with breast cancer as 99 of 100 people with breast cancer will be women; *i.e.* 99 %. In B, they illustrate the probability of women having breast cancer as 2 out of 100 women; *i.e.* 2 %. The National Board of Health and Welfare calculated the first probability, *i.e.* the probability that a child has a mature knee, while they claimed to have calculated the probability that a person with a mature knee is a child. Thus, committing the fallacy of the *confusion of the inverse.* Since then, the National Board of Health and Welfare has admitted that the statistics professors are correct and declared the report on method for medical age assessment from 2016 incorrect and obsolete.[53] Nevertheless, the actual and current method for medical age assessment that arose from this report remains the same.

Medical age assessments began in March 2017 using the newly developed method which is described in RMV's report back to the government on the task it was given to conduct age assessments.[54] The medical age assessments that RMV conduct are built on a cumulative assessment of two examinations: X-ray examination with ionizing radiation of wisdom teeth and magnetic

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[51] J Bring & L Rönnegård, 'Åldersbedömning av barn och unga vuxna – en utmaning ur flera perspektiv' (2018) <https://snackastatistik.se/aldersbedomning-av-barn-och-unga-vuxna/>.

[52] J Bring & L Rönnegård, 'Åldersbedömning - en statistisk utmaning' (2018) < https://snackastatistik.se/wp-content/uploads/2018/02/%C3%85ldersbed%C3%B6mningBringRonnegard.pdf>.

[53] Socialstyrelsen, 'Rapport om metoder för åldersbedömningar förtydligas' (April 2018) <http://www.socialstyrelsen.se/nyheter/2018/rapportommetoderforaldersbedomningarfortydligas>.

[54] Rättsmedicinalverket 'Återrapportering avseende regeringsuppdrag till Rättsmedicinalverket att genomföra medicinska åldersbedömningar' Ju2016/03931/Å (2016), 7–9.

resonance imaging examination of the distal femur ('MRI knee').[55] The cumulative assessment of the result of these examinations is made through use of a standardised matrix created by RMV. The matrix then results in a medical age assessment of the examinee in relation to the eighteenth year of birth. A forensic medical examiner is subsequently responsible for the medical age assessment that is presented as a probability assessment. The wisdom teeth's level of maturity is assessed from X-ray images by two independent dentists. They examine whether at least one of the wisdom teeth in the lower jaw has reached full maturity with roots that have closed completely. The independency of the assessing dentists means that the study is *blinded*. The dentists are unaware of both information about the examinee and what assessment the other dentist has made. If the applicant possesses no wisdom teeth, or if the imaging quality is not sufficient, the dentists may consider the case 'non-assessable'. Should assessment of the wisdom teeth not be possible, then the MRI knee alone will influence the final age assessment – and *vice versa*. The MRI knee assessment is also blinded and made by two independent assessors, who are thankfully not dentists but radiologists. They study the closure of the distal femoral epiphyseal plate. When the femur grows as we reach our final size, it doesn't grow equally and from all sides. Instead, the bone has these epiphyseal plates, or 'growth plates', at the ends which it grows from. The growth plates are not bone, but cartilage, which is soft tissue. However, when the growth plates fuse and the femur has finished growing, the cartilage is replaced by bone; *i.e.* hard tissue. In this case, MRI is used for its ability to distinguish whether the epiphyseal cartilage has yet become bone. MRI is used because of its ability to distinguish hard and soft tissue. Closed growth plates are of course an indication that the person is older than one with still growing bones, yet it cannot precisely specify age as not everyone's growth plates close at the same age. Particularly, there is a discrepancy between the two sexes. A large portion of the criticism towards these medical age assessments stem from the uncertainty of when growth plates usually close. When assessing said closure, the radiologists do so according to 'established' classification of the different stages of closure. Presumably, one does not endure several years of medical school if stages of epiphyseal closure are easily explained, which is why I will not attempt to do so. It has however been called into question whether the radiologists that assess the MRI images are indeed competent enough to accurately determine a fully mature knee joint.[56]

For either tooth or knee to be considered fully mature for the purposes of the medical age assessment, it is required that both assessors of the body part considers it fully mature. Otherwise, the body part will not be considered fully mature. However, the result of the probability assessment, *i.e.* the medical age assessment that is used as evidence, does not distinguish between one or two mature body parts. The probability of the applicant being eighteen years or

[55] Rättsmedicinalverket 'Återrapportering avseende regeringsuppdrag till Rättsmedicinalverket att genomföra medicinska åldersbedömningar' Ju2016/03931/Å (2016), 7.
[56] F Tamsen, 'Resultat av åldersbedömningar pekar på felaktigheter i metoden' *Läkartidningen* (20 September 2017).

older is assessed the same, regardless of whether only one or both of the examined body parts are considered fully mature. For both cases, the medical age assessment 'suggests that the examinee is eighteen years or older'.[57] If neither tooth nor knee are considered fully mature, the medical age assessment 'possibly suggests that the examinee is below eighteen years old'. This is however different for girls, as the assessment then 'suggests that the examinee is below eighteen years old'.[58] This is due to the skeleton of girls maturing earlier than boys. A fact well-known in medicine, yet not taken into consideration by RMV until well after the medical age assessments began.[59] The forensic opinion on age, which include the medical age assessment, that RMV present to the Migration Agency, contains, *inter alia,* both the result and conclusion of the age assessment, as well as the probability scale used and its asserted margin of error. RMV's opinions do not indicate a percentage of probability, *e.g.* 'there is a 92.1 % probability that the examinee is above eighteen years old', but rather 'suggest that the examinee is eighteen years or older'. The margin of error is however shown in percentage form. The statements read that circa 10 % of children with a chronological age close to eighteen years old, with a closed growth plate and a fully mature wisdom tooth, may be misjudged. A possible issue of the forensic opinions on age showing the probability as words rather than numbers may be that it leads to a misunderstanding between scientists and legal practitioners – a possible 'type III error', or the 'right answer to the wrong question'. When the medically trained officers at RMV conclude that the medical age assessment 'suggests' an age, the legally trained officers at the Migration Agency may possibly interpret the wording 'suggests' as something else, which could in turn lead to erroneous age decisions. It was my original plan to delve into the issue of using scientific results as evidence in a legal setting, yet unfortunately the scope of this thesis proved too small. Below is however a brief example of a type III error that may occur in the process of age assessment. Furthermore, for the interested I recommend 'Rätt svar på fel fråga' by Lena Wahlberg for further reading.[60]

Pathologist and then forensic medical officer at RMV, Fredrik Tamsen, first blew the whistle on the medical age assessments and what he claimed were methodological errors.[61] Tamsen published his article half a year after the medical age assessments began. As previously mentioned, the report from the National Board of Health and Welfare laid the ground for the method used by RMV. In the report, it is stated that the femoral growth plate closes

[57] t/n: Literally, the medical age assessment 'speaks for' the examinee being eighteen years or older.
[58] RMV, 'Metoder för medicinska åldersbedömningar' (2019) <https://www.rmv.se/verksamheter/medicinska-aldersbedomningar/metoder/>.
[59] N Efendić, 'Hundratals flickor väntar på asylbesked: "Skandal' *Svenska Dagbladet* (8 March 2018).
[60] L Wahlberg, '*Rätt svar på fel fråga. Typ III-fel vid användningen av expertkunskap*', Juridisk Tidskrift. 2010, (4), 889–900.
[61] F Tamsen, 'Resultat av åldersbedömningar pekar på felaktigheter i metoden' *Läkartidningen* (20 September 2017).

considerably later than teeth.[62] However, early results from the medical age assessments showed that it is actually four times more likely that the knee joint has matured before the teeth. Thus, the method used by RMV was built on false premises from the beginning. Tamsen attempts to explain this error through the fact that the National Board of Health and Welfare based its recommendations of MRI knee on only two original studies and a 'letter to the editor'. In addition, the two studies only had sample sizes of six respectively seven seventeen-year-olds. Thus, the method that examined 10,000 applicants in a year was based on two studies of 13 subjects in total. Tamsen asserts that with such small sample sizes, there is an obvious risk that random variables may affect the outcome greatly. In the then first and largest prospective study on MRI knee, German researchers studied 26 seventeen-year-olds and concluded that 19 % had mature knee joints.[63] For the purposes of demonstration, Tamsen decides to count this low as a 10 % margin of error on MRI knee. In the original method description, RMV claimed that the wisdom tooth X-ray had a 10 % margin of error as well. Tamsen states that it is unknown whether there is covariance between wisdom tooth and knee joint. However, assuming that there is no covariance, since the method for medical age assessment that RMV uses takes both tooth and knee into consideration, the margins of error of both examinations must be combined. In that case, the combined risk that a child is falsely classified as an adult is 19 % (1 – 0.9 x 0.9). Thus, the accuracy would be 79 %, far from the previously accepted accuracy of 95 % from the Migration Court of Appeal case MIG 2014:1. In further developing the criticism of the science that RMV's method is based on, Tamsen teamed up with professor in mathematical statistics, Petter Mostad. Together, they published an article in the International Journal of Legal Medicine on '*Error rates for unvalidated medical age assessment procedures*.'[64] Mostad and Tamsen studied the official data of all 9,617 males that were submitted to the medical age assessment procedure in 2017. In the article, they present a general stochastic model that enabled them to study which combinations of age indicator model parameters and age population profiles are consistent with the observed 2017 data for males. Mostad and Tamsen found, contrary to some RMV claims, that maturity of the femur, as observed by RMV, appears on average well before maturity of teeth. According to their estimates, approximately 15% of the tested males were children. These children had an approximate 33% risk of being classified as adults. The corresponding risk for an adult to be misclassified as a child was approximately 7%. In other words, Mostad and Tamsen found that *every third child* is at risk of being falsely classified as an adult using the unvalidated method of RMV.[65]

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[62] Socialstyrelsen, 'Metoder för radiologisk åldersbedömning – En systematisk översikt' (June 2016).
[63] C Ottow, R Schulz, H Pfeiffer, et al., 'Forensic age estimation by magnetic resonance imaging of the knee: the definite relevance in bony fusion of the distal femoral- and the proximal tibial epiphyses using closest-to-bone T1 TSE sequence.' Eur Radiol. Epub (4 July 2017).
[64] P Mostad & F Tamsen, 'Error rates for unvalidated medical age assessment procedures' International Journal of Legal Medicine (2019), 133:613–623, 613.
[65] *Ibid.*, 622.

We have now seen that *unvalidated* age assessment procedures risk having a margin of error much larger than initially thought and accepted. Frankly, it should be clear to anyone that it is *bad science* to base a method that will eventually examine more than 10,000 people on two studies and a 'letter to the editor' that in total studied thirteen seventeen-year-olds. Considering the life-changing effects that these examination may have, it should go without saying that the expert authority on forensics, RMV, should have attempted to validate their procedure before beginning to use it. Although the government is certainly not without blame for tasking RMV to begin conducting medical age assessments with *great urgency* and *immediately* increase the ability and capacity in this area.

Assuming that scientifically validated procedures are indeed a good idea – a not too far-fetched assumption – then the question remains how such a validation could be done. Parallel to the hasty initiation of RMV's medical age assessments, the National Board of Health and Welfare who first found MRI knee 'promising' continued to study the area. In May 2018, they published a study on the validity of MRI age assessment.[66] It concluded that there are grounds for using MRI age assessment on males, but not necessarily females. The validation study was however criticised, again by statistics professors Bring and Rönnegård, as it only studied persons during the first half of their respective life year; *i.e.* no one between 17.5-18 years old were studied.[67] Criticism withstanding, the validation study by the National Board of Health and Welfare itself found that almost half the examined eighteen-year-olds had immature knee joints. Again, far from the 95 % accuracy previously mentioned by the Board. Returning to the question of validating an age assessment procedure, there is one fundamental problem with doing so. The validation study by the Board, and the study by *Ottow et al.* amongst other studies, all examine persons with known ages. They compare the known ages of these persons with the result of the age assessment procedure to find whether the procedure is valid. However, the reason that we conduct age assessments is precisely because we do not know the ages of the persons that seek asylum here. A proper validation study would have examined persons with known ages in *e.g.* Afghanistan, yet that is not possible because of the lack of functioning bureaucracy and civil registration in the country. The lack of which is the very reason why age assessment is required.

Professor of international law, Gregor Noll, explored the problem of age assessment and the lack of civil registration in countries of origin in his 2016 article '*Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum*'.[68] First, Noll concluded that radiological age assessments are inherently bad science due in

[66] Socialstyrelsen, 'Om magnetkamera vid bedömning av ålder – En studie av validiteten i radiologisk undersökning' (May 2018).
[67] N Efendić, 'Experter: Varannan 18-åring kan klassas som barn' *Svenska Dagbladet* (6 June 2018).
[68] G Noll, 'Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum' International Journal of Refugee Law, 2016, Vol. 28, No. 2, 234–250.

big part to the lack of reliable civil registration in asylum seekers' countries of origin. Noll notes that '[i]n a radiological age assessment, a radiologist compares a developmental feature of an individual of unknown age (here, the asylum applicant) with the average developmental features of a reference group of individuals whose age is known.'[69] The key word here being that the ages of the individuals in the reference group must be *known*. Otherwise, the comparison will be unscientific speculation. Guesswork. In countries with little to no civil registration, it is impossible to sufficiently know the ages of a local reference group. As such, any radiological age assessment is built on the assumption that a Swedish or German reference group would not differ from a Somali or Afghan counterpart. It assumes that skeletons develop identically across the world, notwithstanding differences in nutrition, healthcare, living standards and geographical-genetic pools. A comparison built on these assumptions amounts to unscientific speculation, Noll argues. It lacks medical authority and thus the authoritative status accorded to expert evidence in legal proceedings; and that is only one reason why medical age assessments would be built on bad science. The lack of reliable civil registration is the alpha and omega of the problem that is age assessment. It is the original issue and its presence continues to haunt decision-makers, despite efforts to assess age. A further issue that derives from the lack of civil registration and reference groups with known ages, Noll argues, is that it may create a 'type III error', *i.e.* the right answer to the wrong question. To show this, Noll makes the following example of a question by the decision maker:

> "'How old is A?'
>
> The answer delivered by the forensic expert could be this:
>
> > 'Compared to existing image banks of dental and skeletal developments in researched populations, the images of the proband suggest that there is a 95 percent likelihood that he or she is 18.2 years old.'
>
> Why is this an answer to a question different from the one asked by the decision maker? The decision maker did not ask:
>
> > 'What age would the proband be, if he or she had been part of the populations that previous medical studies had tested?'
>
> Had the decision maker done so, the expert's answer would have been adequate."[70]

The forensic expert is merely stating the scientific facts, yet the wrong question asked by the decision maker risks two errors. Either, the decision maker will fail to realise that the populations researched in earlier forensic science is significantly different from the population whose ages are assessed

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[69] G Noll, 'Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum' *supra* n 68, 238.
[70] *Ibid.*, 247.

– or – the decision maker may believe that the forensic expert has already considered these differences and found them insignificant. In any case, it creates a misunderstanding and a data loss that lowers the status of the expert evidence. No matter how precise the question, there might always be misunderstandings between legal practitioners and scientists. What is 'probable' by scientific standards may differ greatly from legal counterparts. Noll finishes his article by referring to the provision of EU law that governs medical age assessment, *i.e.* Article 25(5) of the Asylum Procedures Directive.[71] It states that

> 'Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor.'

In other words, the principle of the *benefit of the doubt* applies to medical age assessment. In concluding his article, Noll asserts that the combination of the unscientific nature of medical age assessment with the communicative error between legal practitioner and scientist makes it so that '[a]ny doubt about the age of an asylum applicant will necessarily persist even after a radiological examination has been conducted'.[72] Under the Asylum Procedures Directive, this will then trigger the *in dubio pro reo* rule of Article 25(5) and the doubt remaining following a radiological age assessment – the doubt that will *always* remain due to dissimilar populations – will automatically entail that the applicant is considered a child. Nevertheless, this is of course not the reality in practice. In his final remarks, Noll concludes that since the lack of reliable civil registration in asylum seekers' countries of origin is at the core of the problem of medical age assessment, '[p]utting the burden of proof of age on to adolescents originating from such countries of origin is to treat them as if they had roughly the same evidentiary resources as European citizens. It is a case of treating unlike cases alike'.[73] In reality, applicants from such countries are being discriminated against on the basis of their nationality, and such discrimination is prohibited both by the Refugee Convention[74] and by international human rights law.

In conclusion, there are strong suggestions that the method for medical age assessment used in Sweden and developed by RMV has significant flaws. The major flaw is that the method is unvalidated. There has not been a proper validation study with a reference group of known ages. In any case, given the

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[71] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.
[72] G Noll, 'Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum' *supra* n 68, 250.
[73] *Ibid.*
[74] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), [3].

lack of civil registration that lies at the core of this problem, it might not even be possible to conduct a proper validation study. Meaning that medical age assessment will never amount to more than unscientific speculation. If we assume that radiological age assessments are indeed inherently flawed, how could age assessment otherwise be conducted? In their article on '*Identification: age and identity assessment'*, Hjern *et al.* conclude that '[c]onsidering the great variability in psychological maturity and experience between individuals in the upper teens and the difficulty of obtaining an exact chronological age for many young asylum seekers, other grounds for reception could be considered. The British system, based on a thorough psychosocial assessment rather than imprecise medical methods, is probably the best existing model today for how such a reception for young asylum seekers could be designed'.[75] This argument is supported by the UNHCR *Guidelines on policies and procedures in dealing with unaccompanied children seeking asylum.*[76] In its note on age assessment, the guideline states that '[age] assessment should take into account not only the physical appearance of the child but also his/her psychological maturity' and that '[w]here possible, the legal consequences or significance of the age criteria should be reduced or downplayed. It is not desirable that too many legal advantages and disadvantages are known to flow from the criteria because this may be an incentive for misrepresentation. The guiding principle is whether an individual demonstrates an "immaturity" and vulnerability that may require more sensitive treatment'.[77] The Convention on the Rights of the Child also supports the notion that what is important is the immaturity of the child, as this is the very reason why children need special protection. The preamble to the CRC reads that: 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection'. As stated in Hjern *et al*, the specific age of 18 which was used to define children in the CRC may be seen as a simplification of these underlying concerns.

It would seem that we have been focusing on assessing the physical maturity, while we perhaps should have been focusing on the mental immaturity and the needs of the children whose ages we doubt. Assessing the physical maturity of children from unstudied – or rather *unstudiable* – population groups may not only be unscientific speculation, but a betrayal of the needs of children that we have promised to protect. The issue at hand is whether a young person needs asylum. Whether they need protection. The closure of the distal femoral growth plate is rather irrelevant to those needs, while the mental maturity of those fleeing war is all too relevant.

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[75] A Hjern, H Ascher, M Vervliet and I Derluyn 'Identification: age and identity assessment' Research handbook on child migration' (Edward Elgar Publishing 2018), 292.
[76] UNHCR, 'Guidelines on policies and procedures in dealing with unaccompanied children seeking asylum' Geneva (1997).
[77] *Ibid.,* [5.11].

2 How to: Prove Your Age

Having hopefully clarified *what* an age assessment is and when it is made, as well as the details and criticism of the infamous Swedish medical age assessments, I now intend to move on to one of the key point of current debates: *i.e. how* an age assessment is made. I intend to present a comprehensive look at the legal process of age assessment that leads up to an age decision, focusing on the actual *assessment*. For starters, we may remind ourselves of what an age assessment actually is. While it can be inferred from Swedish law that the age assessment leads to the age decision, in reality the assessment and the decision are one and the same.[78] The decision maker at the Migration Agency makes an age assessment after any and all evidence has been collected, including any medical age assessment (or rather 'a forensic probability statement following a medical examination', in other words an item of written evidence). When the case is ready to be decided, the decision-maker assesses the available evidence and judges whether it lives up to the standard of proof. Since the temporary age decision is separate from the main application for residence permit, the age assessment becomes an administrative legal proceeding of its own. The age 'assessment' is an assessment of evidence, akin to perhaps fatherhood determination. The Migration Court of Appeal has ruled that it is an established principle of the law of evidence of administrative procedure law that the applicant for a benefit has the burden of proof that she fulfils the legal requirements for being granted said benefit.[79] In our case, being considered a child is a privilege and the burden of proof lies on the applicant to fulfil the requirements of making that claim credible. The age assessment is in reality the judgement by the decision-maker whether the claim made is credible or not. While age itself is all but binary, the age assessment is very much so; for it may only have two outcomes. You are either considered above, or below, the age of eighteen. In a way, this brings us back to Professor Noll's example of a type III error above. The term 'age assessment' would lead one to believe that it assesses the age of a person. It does not. The question asked for the age assessment is not 'how old is A', but rather 'is it probable that A is below eighteen years old?'. The correct and latter question may only be answered with a 'yes' or a 'no'. In practice, that answer is in the form of the temporary age decision. The answer to the question of whether all available evidence has been able to make the claim credible.

In criminal law, it would in theory be irrelevant to judge the intent of the accused before first proving beyond reasonable doubt that he carried out the deed. Similarly, there is no need to fulfil any evidentiary requirements – or the 'standard of proof' – before first establishing where the burden of proof lies. For this very reason, we shall now first examine the burden of proof in the age assessment process. Thereafter we shall examine the standard of proof and the actual evaluation of evidence for an age assessment.

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[78] Cf. 13 kap. 17 § UtlL
[79] MIG 2006:1

2.1 The Burden of Proof and the Burden of Inquiry

The burden of proof is the obligation of a party in a trial to produce the evidence that will prove the claims they have made. The placement of the burden of proof is a core part of our legal system that differs depending on the relevant field of law. In civil proceedings, there are generally two equal parties where one has made a claim against the other. In this case, the burden of proof lies on the claimant. It is of course only reasonable that whoever makes a claim first has to prove it. However, should the claimant meet his burden, then the burden of proof may shift to the other side. The situation is similar in criminal law, where the prosecutor makes a claim and must then prove it. Although there are differences, such as the standard of proof being higher in criminal law (*e.g.* proving something *beyond reasonable doubt* in criminal law, compared to *on the balance of probabilities* in civil proceedings) and the presumption of innocence. In both criminal law and administrative law, the state represents one of the parties in the trial. However, while the state prosecutor always carries the burden of proof in criminal law, the authority that is party to a trial in a case of administrative law does not. As recently mentioned, the Migration Court of Appeal has stated that it is an established principle of the law of evidence of administrative procedure law that the applicant for a benefit has the *burden of proof* that she fulfils the legal requirements for being granted said benefit.[80] Being granted *e.g.* residence permit, family reunification, or minor status, are considered to be such benefits that place the burden of proof on the applicant. Conversely, in administrative procedure law, the burden of proof for onerous decisions lies on the authorities. In cases of detention or expulsion – decisions that are certainly not beneficial to the applicant – the burden of proof would instead rest on the Migration Agency.[81] This principle of identifying whether the decision is beneficial or onerous and placing the burden of proof accordingly is the main rule in administrative procedure law. While the applicant, in the case of age assessment, is burdened with fulfilling the standard of proof, she is not alone in this quest because the Migration Agency also has a *burden of inquiry*. In addition, the migration courts have a *responsibility of inquiry* as well. The difference between the two will be outlaid below. As professor *emeritus* of procedural law Christian Diesen puts it, 'the important question from an evidence standpoint is not where the burden of proof is placed, but rather who must produce the investigation on which the assessment of evidence is made.'[82] The fact that a party has the burden of proof, does not necessarily mean that the same party also has the duty of producing said proof. For such cases, a distinction may be made between the burden of proof, and the burden of inquiry, which may befall on different parties.

[80] MIG 2006:1
[81] C Diesen *et al.* 'Prövning av migrationsärenden. BEVIS 8' (Norstedts juridik 2012), 202.
[82] *Ibid.*, 203.

The responsibility of inquiry derives from several sources. We shall focus primarily on domestic ones, as those will be most familiar to the responsible authorities, but I will also mention an example from EU law. Article 10(3) of the Asylum Procedures Directive[83] tasks Member States with ensuring that decisions by the determining authority on applications for international protection are taken after an *appropriate examination*. According to the article, this includes, but is not limited to, obtaining relevant country of origin information, having decision-makers be trained in asylum and refugee law, and having the possibility of seeking expert advice whenever necessary. While the directive does not have direct effect, any Swedish provision would need to be interpreted in light of it.[84] Nevertheless, it is not the most stringent of requirements for the examination to be 'appropriate'. Thankfully, domestic law provides for more precise regulation. The Administrative Procedure Act ('FL'), according to 1 §, applies to processing of matters at the administrative authorities as well as the courts when processing administrative matters. The act itself governs how processing of administrative matters should be done and ensures quality. It includes, *inter alia,* provisions on legality, objectivity, service, and availability. Most important for our inquiry into the legality of age assessment is the responsibility of inquiry within 23 § FL. It reads that *an authority shall ensure that a matter is investigated to the extent that its nature requires.* Almost the exact same wording is found in 8 § Administrative Court Procedure Act (henceforth 'FPL')[85] with the addition that nothing unnecessary shall be inserted into the case and that superfluous inquiry may be dismissed to this extent. Lastly, the principle is even found in 43 kap. 4 § Code of Judicial Procedure (henceforth 'RB')[86] which applies to all court proceedings. However, the extent that the nature of a matter requires inquiry will of course vary between administrative, civil or criminal law cases.

While the law refers to it as a 'responsibility' of inquiry, Diesen makes several distinctions which derive from the responsibilities that befall authorities and courts.[87] He separates the responsibility of the decision-maker, and the responsibility of a party. The decision-maker has a '*duty of inquiry'* while a party has a *'burden of inquiry'*. Furthermore, regarding the minimum requirements of fulfilling said duty and burden, he distinguishes between the decision-maker's *'standard of inquiry'* and the party's *'requirement of inquiry'*. This distinction is due to the differences that unsatisfactory fulfilment has. If the decision-maker fails to meet the standard of inquiry, then the shortcomings must be remedied: *i.e.* the case cannot be decided until the standard of inquiry is reached. Conversely, regarding the requirement of inquiry, failure to meet this requirement means that the party has not produced sufficient documentation for the assessment of evidence, which in turn results in a 'legal loss' for the negligent party. The opposite party will then obtain

[83] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.
[84] Cf. Case 14/83 [1984] ECR 1891 at para 28; Case C-106/89, [1990] ECR I-4135.
[85] SFS 1971:291.
[86] SFS 1942:740.
[87] C Diesen *et al.* 'Prövning av migrationsärenden. BEVIS 8' *supra* n 81, 204.

the benefit they applied for.[88] For this reason, he argues that the party which will suffer a legal loss in case of an insufficient inquiry has a *burden* of inquiry. Diesen remarks that in the case of applications for asylum, one is put in the rather paradoxical situation in the first instance of trial where the both the standard and the burden of inquiry lies on the same subject (*i.e.* the Migration Agency). As such, only the Migration Agency decides if the investigation is of sufficient standard to be decided and if they themselves have met their burden (otherwise suffering a legal loss). From a legal certainty standpoint, this construction is not satisfactory.[89] Only in the second instance, at the migration courts, would the Migration Agency not decide whether they themselves have met their responsibility. Thus, there is a lack of checks and balances in the first instance of migration proceedings, where the Migration Agency are simultaneously judge, jury, and executioner.

Regarding the standard of inquiry that an investigation must meet for the case to be decided, it follows from the above provisions that authorities and courts shall ensure that a matter is investigated to the extent that its nature requires. The standard of inquiry will accordingly vary between matters of different types – or fields of law – but must be high in asylum cases, where a negative decision may be a matter of life and death.[90] Diesen asserts that for a trial to be of legal certainty, the decision-maker must use all their available means to accomplish a basis for the decision that is sufficiently broad, deep, and quality proofed, so that they may defend their conclusion on good grounds. While there are resource limitations – both economic- and capacity-wise – and there are great difficulties associated with collecting information from certain foreign countries, the standard may nevertheless not be neglected due to such limitations.[91] The standard is a minimum requirement for a legally certain trial and the legal consequence of failing to meet the standard is that the case cannot be decided, thus the investigation must continue until the standard is reached. In our particular question of age assessment, failing to meet a sufficient investigation standard regarding a child's age, and wrongfully assessing their age as over eighteen years, may result in the child being wrongfully denied protection and *refouled* in breach of international law. The possibly dire consequences of insufficient inquiry must accordingly merit a high standard of inquiry. Still, the question remains who, or what party, bears the responsibility for any eventual shortcomings of an investigation that fails to meet its standard of inquiry.

Normally, the burden of inquiry resides with the same party that has the burden of proof. However, in matters that are particularly difficult to investigate for the party that has the burden of proof, the burden of inquiry may be shared.[92] This may be the case where *e.g.* a private person initiates a lawsuit against a large corporation. The party with the stronger resources, *i.e.* the corporation, may then be responsible for producing an objective and

[88] C Diesen *et al.* 'Prövning av migrationsärenden. BEVIS 8' *supra* n 81, 204.
[89] *Ibid.*, 207.
[90] *Ibid.*, 205.
[91] *Ibid.*, 205.
[92] *Ibid.*, 204.

unbiased investigation. The burden of inquiry is thus shared. Another such example of when the burden of inquiry may be shared is in asylum law, where claims are notoriously difficult to prove (that is after all the reason for this very thesis). The UNHCR *Handbook* supports the notion that 'the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner'.[93] The handbook goes on to say that 'in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application'. Thus, clearly the burden of inquiry does not reside solely with the applicant according to the UNHCR. In the official government report on the implementation of the (non-recast) Qualifications Directive, the shared part of the burden of inquiry that still resides with the applicant is rather referred to as a '*burden of information*'.[94] It states that

> a general principle of asylum law is that the applicant has a burden of information regarding relevant facts which may be ground for the authorities assessment of the application for international protection. The applicant shall present available documents etc. and present grounds for their application, *i.e.* they shall make the need for international protection probable. The applicant may do so by submitting a reasonable and credible story of why he or she is in need of protection. The Migration Agency on the other hand has a duty of inquiry, which encompasses the matters that follow from its responsibility of inquiry.[95]

Thus, the burden of inquiry that befalls the applicant is merely a burden of information. Similarly, to how there is a standard of proof that must be met, and a standard of inquiry for a decision to be made, one could say that the applicant's information must also reach a certain standard. The information, *i.e.* the applicant's story, must be plausible and credible. Furthermore, as the UNHCR puts it, '[t]he benefit of the doubt should […] only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible and must not run counter to generally known facts'.[96] The Migration Court of Appeal refers to the UNHCR handbook in MIG 2007:12, where it states that when assessing the credibility of the applicant's story, weight should be given to its coherence and lack of conflicting information. The information given should neither conflict with other elements of the story, nor generally known facts such as country of origin information. Thus, it may be concluded that while the applicant has a burden of proof, which is connected to a burden of inquiry, that burden of inquiry is rather a burden of providing information; information which may be enquired upon by the Migration Agency and not the application. Thus, the

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[93] UNHCR, 'Handbook ('*Handbook*') and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', December 2011, HCR/1P/4/ENG/REV. 3, [196].
[94] SOU 2006:6, 221.
[95] *Ibid.*
[96] UNHCR, *Handbook*, [204].

lion's share of the burden of inquiry resides with the Migration Agency and not the applicant. Nevertheless, there is a standard of information which the applicant's story must still meet. In essence, the story must be coherent, plausible and non-conflicting, and investigation into whether it meets these criteria is the responsibility of the Migration Agency. Now, finally, we may ask ourselves, what are the consequences of the Migration Agency failing their burden of inquiry?

In the *travaux préparatoires* of the Aliens Act, it is stated that 'when the asylum seeker's claims of persecution appear reasonable, but the factual circumstances may not be ascertained, the asylum seeker's information shall lay the grounds for the assessment. The asylum seeker shall enjoy the "benefit of the doubt"'.[97] Thus, when the applicant has fulfilled her burden of information to a sufficient standard, but the Migration Agency has not fulfilled their burden of inquiry, the asylum seeker's information should be considered true when assessing their application. While the law specifies that authorities and courts have a 'responsibility of inquiry', Diesen refers to it as a burden of inquiry, when concerning the Migration Agency, because a burden has consequences. After all, it would not be much of a burden if it was without consequence. It is only reasonable that if the party with the burden of inquiry fails in its responsibilities, they would also suffer a legal loss. When concerning age assessment, this means that if the Migration Agency has not investigated the age of the applicant to a sufficient standard, the applicant should be given the benefit of the doubt and be declared a child, if she is generally credible. This is very important, as it means that the principle of the *benefit of the doubt* may actually be applied before any assessment of evidence; before questions of the standard of proof and evaluation of evidence.

Considering that the information that an asylum-seeker is generally able to present as 'evidence' is often threadbare, it should not be surprising that the benefit of the doubt may be applied with regards to the inquiry of the Migration Agency, rather than the limited written (and exceptionally oral) evidence of the applicant. Article 4(5) of the recast Qualifications Directive[98] supports the notion that the benefit of the doubt should be given with regards to inquiry of facts, rather than assessment of evidence. It states that

> where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met: (a) the applicant has made a genuine effort to substantiate his application; (b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements; (c) the applicant's statements are found to be

[97] Prop. 1979/80:96, 88.

[98] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

> coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case; (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and (e) the general credibility of the applicant has been established.

We may now remember that the main issue concerning age assessment is the lack of documentation and disregarding of documentation even whilst present, due to lack of quality. Thus, EU law makes it clear that if the applicant has fulfilled her burden of information to a sufficient standard, *i.e.* coherent, plausible, non-conflicting, and credible, she should be given the benefit of the doubt and her information should be accepted. While the Qualifications Directive does not possess direct effect, Swedish national law must be interpreted in line with it due to its *indirect effect.* In addition to the Qualifications Directive, the Asylum Procedures Directive also contains provisions concerning the benefit of the doubt.[99] There, Article 25(5) states that

> 'Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor.'

We may now recall what Professor Noll said about doubt always remaining when using radiological age assessment, due to them being impossible to validate. This would in turn always initiate the *in dubio pro reo* rule of Article 25(5) above and have our applicant be considered a child. An important distinction to note is that while Article 4(5) Qualifications Directive requires general credibility from the applicant and a *genuine effort* to substantiate their claim, Article 25(5) Asylum Procedures Directive does not. As such, an uncooperative applicant who may not have been given the *benefit of the doubt* under the Qualifications Directive, may without issue be granted the benefit under the Asylum Procedures Directive, should doubts remain following the medical examination.

Assuming, for purposes of demonstration, that doubt does not always remain following a radiological age assessment, Article 25(5) states that the applicant should be given the benefit of the doubt if Member States are still in doubt concerning the applicant's age after the medical age assessment. This may be interpreted in two ways. Either as the benefit of the doubt being given with regards to the burden of proof and inquiry, or with regards to the standard of proof. I argue that Article 25(5) is applicable in both stages of trial. Consider these two scenarios: On the one hand, the investigation into the age of the applicant is of insufficient quality and thus doubts of their age remain; giving

[99] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

them the benefit of the doubt. This is a matter concerning the applicant's burden of proof and the authorities corresponding burden of inquiry. An insufficient inquiry makes it so that doubts remain, resulting in a legal win for the applicant who now receives the additional rights of a child. On the other hand, the results of the medical age assessment may be submitted as evidence and assessed with regards to the standard of proof concerning asylum applications. In this case, doubts would concern not the inquiry, but the quality of a select piece of evidence. Again, I would argue that both of these interpretations may be applicable simultaneously, according to the wording of the article, yet the first interpretation would be more in line with the previous examples from domestic and international law, which suggest that the benefit of the doubt should primarily be applied to insufficient inquiries. In my study of the appellate court judgements on temporary age decisions, I found that applicants, in general, were not considered children because they had the burden of proof and could not reach the standard required.[100] One of the cases that I studied strike me as particularly relevant to the present discussion. It is the only case to acknowledge some of the criticism of the method for medical age assessment that I previously presented. In the case, the judge states that the court acknowledges a 'not entirely small amount of cases where different doctors when assessing the same material has reached different conclusions concerning the maturity of the tooth or the skeleton. Thus, there is reason to consider RMV's statements with certain caution'.[101] Nevertheless, the court ruled that the applicant, who possesses the burden of proof, had not made their age credible, as is the standard of proof required. Unfortunately, this case was somewhat classified, and I do not have access to all the documents of it. In any case, when the court rules that the statements of RMV (who conduct the medical age assessments) should be considered with certain caution, that must surely indicate some semblance of *doubt*? Doubt that *should* trigger the *in dubio pro reo* rule of Article 25(5) Asylum Procedures Directive, regardless of general credibility. Doubt that *should* have the Migration Agency fail their burden of proof. Alas, as with every other appeal of a temporary age decision, even when the court acknowledged doubt, the benefit of the doubt was still denied.

We have concluded that when the applicant has fulfilled their burden of information to a sufficient standard, the torch is passed to the Migration Agency who must then fulfil their burden of inquiry; or suffer a legal loss as consequence. In practice, however, it is not so easy. I did briefly mention the issue of the Migration Agency being simultaneously judge, jury, and executioner and we shall now return to this issue before we briefly move on to discussing the standard of proof. Both authorities and courts have a responsibility of inquiry, according to 23 § FL, as previously stated. For the decision-maker, the responsibility becomes a duty of inquiry, that must be held to a certain standard. When that standard is met, a decision may not be

[100] E Johansson, 'Överklaganden av tillfälliga åldersbeslut för asylsökande, en kvantitativ studie' (2019) available at <https://www.academia.edu/38580370/%C3%96verklaganden_av_tillf%C3%A4lliga_%C3%A5ldersbeslut_for_asyls%C3%B6kande_en_kvantitativ_studie> (2019), 15–16.
[101] Migration Court in Malmö, UM 2701–18.

made. The duty of inquiry is not a burden, because not being able to make a decision is not a loss, while not fulfilling your burden bears the consequence of a loss. Thus, only a party may share the burden of inquiry, as the decision-maker may not suffer a loss; except that in certain instances they can. The decision-maker may indeed suffer a loss when they are also a party, as is the case for the Migration Agency. In the first instance of trial, the Migration Agency is both the decision-maker *and* party to the case. The Migration Agency possesses both a burden of inquiry *and* a duty of inquiry. The Migration Agency must ensure that they themselves live up to a certain standard of inquiry for a decision to be made, and when they themselves do not reach that standard, they suffer a legal loss. One does not need to be particularly bright to see that this construction is not optimal for legal certainty. It is a case of a lack of checks and balances, a question of who watches the watchmen? Certainly, the Migration Agency would never consider the inquiry to be of such standard that a decision can be made, and then have that decision be that the standard is not met, meaning that the Migration Agency suffers a legal loss. Only in the second instance – at the Migration Courts – could any potential failure regarding the burden of inquiry be addressed, as the court is then the decision-maker and no longer Migration Agency. Nevertheless, statistics show that not a single appeal of a temporary age decision has won, rendering that point moot. It would appear that there is an inherent flaw in the system, one that may possibly be the cause behind all the age assessment trouble, that being the lack of 'checks and balances.' In effect, there are only two instances of trial in the Swedish procedure for asylum application. The first, where the Migration Agency is both decision-maker and party, and the second where the two roles are split between the Migration Court and Agency. So utterly few cases are reviewed by the Migration Court of Appeal that they may very well not exist at all. Thus, for the general asylum seeker, they only have one attempt at asserting the lack of inquiry and as statistics show, no attempt has been successful thus far.

2.2 The Standard of Proof and Evaluation of Evidence

It follows from, *inter alia*, MIG 2014:1 that the asylum seeker has the burden of proof for making their stated age claim 'probable'.[102] In an international setting, a more apt word would be that the age must be 'credible'. Diesen, for example, notes that there are many different words or phrases used for the required standard of proof that all signal that the *evidence has been sufficient.*[103] Acknowledging that the applicant's claim is 'credible', 'plausible', or 'probable', all indicate that the evidence has indeed sufficed and that the applicant's story may be grounds for a decision. Keeping to the international tradition and considering the language of this paper, I will

[102] t/n 'probable' is the literal translation of 'sannolik'.
[103] C Diesen *et al.* 'Prövning av migrationsärenden. BEVIS 8' (Norstedts juridik 2012), 223 f.

henceforth refer to the standard of proof for age claims as 'credible', even though the literal translation would be 'probable'.

The standard of proof represents the level that the evidence must reach for the claim to be considered 'true'. The truth is of course relative, what matters is what can be proven or not. On a numerical scale, Diesen claims that the standard of proof in asylum law represents a frequency of 75 %, *i.e.* 'the outcome may be ensured in three out of four cases'.[104] As every case is different, it would be nigh on impossible to establish precisely what evidence is required to make your age claim credible. In any case, the whole issue of age assessment is that there is no accepted evidence present. One of the questions that I wanted to address with this chapter was 'is the standard of proof unreasonably high?' My answer to that is 'no'; because of the Migration Agency's burden of inquiry; an answer which I will detail below.

As there is no evidence to assess, there is no standard of proof to apply to the non-existent. Instead, rather than assessing non-existent evidence, the main questions should concern whether the applicant has fulfilled her burden of information, thus providing coherent, plausible, and non-contradictory information, and whether the Migration Agency has fulfilled their share of the burden of inquiry. The issue, again, lies with the fact that the Migration Agency as both decision-maker and party to the case decide themselves whether they have fulfilled their share of the burden of inquiry and whether they should grant the applicant the benefit of the doubt when they have not. When these rules regarding the burden of inquiry and the consequences of its fulfilment are applied as they should, the standard of proof is in reality not particularly interesting for this thesis on age assessment, as there is no evidence to evaluate. Recalling that the asylum-seeker who faces age assessment possesses no written evidence, it would be *impossible* for them to prove their age unless the burden of inquiry was shared with the Migration Agency and the benefit of the doubt was granted when general credibility is upheld. In other words, the standard of proof would be insurmountably high if the burden of inquiry resided solely with the applicant. It is the shared burden of inquiry that levels the playing field to a fair and just balance between the interests of the State and those of the applicant. Thus, the legitimacy of the age assessment procedure is dependent on an objective assessment of the fulfilment of the burden and standard of inquiry. Otherwise, we find ourselves in a situation where it is exceedingly difficult to prove your age.

To rewind the tape a little, let us review the asylum application procedure once more, what evidence one should have, what evidence may be required and how such evidence is evaluated. It is an axiom of the age assessment discourse that the asylum seekers in question lack sufficient written evidence; the very reason why age assessments are necessary in the first place. Nevertheless, those who apply for asylum, and assert that they are minors, are not always without papers. For example, Afghans often carry a 'tazkira' (*i.e.*

[104] C Diesen *et al.* 'Prövning av migrationsärenden. BEVIS 8' *supra* n 103, 225.

an Afghan ID) and anecdotally I have seen a plethora of different varieties of identification documentation that all share one similarity: they are insufficient in fulfilling the standard of proof for the identity claim. According to the proposition for changes to the law on citizenship and identity, the main rule for an asylum seeker to prove their identity in an acceptable manner is to submit an original passport from the home country, or an original photo-equipped identity document issued by competent authorities in the home country, assuming that the authenticity of the document may not be questioned.[105] Furthermore, as a guiding principle, the personal documents must be trustworthy and issued in a satisfactory way from an identity standpoint. Most importantly, this means that the quality or nature of the document must not be too simple. This is the reason why Afghan tazkiras are given little to no value as evidence, because they are too simple and *e.g.* lack security measures that prevent forging. The proposition does, however, also state that the technical requirements are lower on a passport issued by a developing country. While technically still evidence in a case, an identity document of too simple nature would have very little effect on the evaluation of evidence that it may as well not be present. The courts and authorities simply disregard it as 'easily being fake'. This is of course the main reason why age assessments are required; why the ages of 10 000 people were assessed in 2017[106], and so it should not require further evidence. Had their identity documents been accepted, there would be no need for those assessments. Due to the principle of free evaluation of evidence, any document may be submitted to support the applicant's age claim. Nevertheless, the purpose of an identity document is to prove a person's identity (including age) and any other document submitted as evidence would, in almost any case, be less suited for that task. According to case law, oral testimonies may only exceptionally suffice in making the age claim credible.[107] It is however unclear what exceptional circumstances must be present for oral evidence to suffice alone, yet the bar appears to be set rather high considering the number of age write-ups. In any case, we would do well to remember that the sufficiency of oral evidence is only with regards to the evaluation of evidence in relation to the standard of proof. Regardless of the evaluation of evidence, an applicant could fulfil their burden of information and tell a plausible, coherent, and non-contradictory story by oral means alone and successively win the case due to the Migration Agency not fulfilling their shared burden of inquiry, and successively giving the applicant the benefit of the doubt. The Migration Court of Appeal stating that oral testimonies may only exceptionally make one's age credible does not mean that written evidence is required for the State to view the applicant as a minor. Written evidence would, however, be required to prove one's age if the shared burden of inquiry has been fulfilled to its required standard, or if the applicant has not fulfilled their burden of information; *e.g.* by leaving contradictory information and not appearing credible at first.

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[105] Prop. 1997/98:178, 8.
[106] Rättsmedicinalverket, 'Statistik' (2019) <https://www.rmv.se/om-oss/forskning/aktuell-statistik/>.
[107] MIG 2014:1.

According to 17 kap. 1 § Aliens Act, the Migration Agency may request the social welfare committee (*i.e.* 'social services' of a municipality) to leave information on the personal circumstances of an applicant. This is routinely requested as part of the Agency's responsibility of inquiry. In practice, the social workers who have contact with the applicant are asked for an opinion on the age of said applicant. These opinions may range from the social worker being certain that the applicant is a child, to the opposite view. Of all the 65 appeals of temporary age decisions that I reviewed[108], in only one case was the opinion of a social worker not included. Indicating the widespread routine of requesting such opinions. In no case did the opinion have the effect of making the applicants age credible. Neither alone, nor in combination with other evidence. For example, in one judgement, opinions from a social worker, a school counsellor and a psychologist all supported the applicant being a minor, yet it was insufficient in making their age credible despite the Migration Agency acknowledging that the opinions supported the applicant's age.[109] In summary, social worker's opinions on the age of the applicant that they work with are routinely added to the case as written evidence, yet are seldom – if ever – decisive in proving the applicant's minority.

In my review of all the appellate court judgements of temporary age decisions, I observed many different pieces of submitted written evidence.[110] They include, *inter alia*, an Eritrean 'health card', an Ethiopian 'proof of person', a Moroccan school certificate, a Kuwaiti birth certificate, a copy of a family book, Iraqi ID documents, a Red Cross doctor's certificate, a Somali school card, etc. None of these documents are a 'sufficiently secure passport' and none of the documents were adequate in proving the minority of the applicant. Considering that oral testimonies may only exceptionally prove one's age, that asylum seekers generally come from countries with lacking civil registration and thus lack personal documents, and that the opinions from social workers are generally not sufficient evidence, there remains only one way of making your age credible today. That being the medical age assessment.

The results of the medical age assessment produce a statement from RMV on the suggested age of the examinee which is submitted to the case as written evidence.[111] We may recall that if one of two examined body parts are considered mature, the statement will read that the examination suggests that the applicant is above eighteen years old. Lacking any other evidence, if the medical age assessment suggests that the applicant is not a child, then it would be very difficult to disprove that suggestion. Indeed, the thousands of age write-ups following a medical age assessment are testimony to the large difficulty of challenging those results. The Migration Court of Appeal has also noted the decisive nature that a medical age assessment will most often

[108] *i.e.* all the judgements as of autumn 2018
[109] Migration Court in Stockholm UM 4923–18.
[110] E Johansson, 'Överklaganden av tillfälliga åldersbeslut för asylsökande, en kvantitativ studie' *supra* n 100, 19 ff.
[111] See Chapter 1.1 regarding the process of medical age assessment in Sweden.

have when there is a lack of other written evidence.[112] Nevertheless, the same judgement also mentions that the results of the medical age assessment should not be looked at alone, but a holistic evaluation of the entire inquiry and all evidence should be made when considering if the age has been made credible. In addition, the evaluation shall be generous and governed by the principle of the *benefit of the doubt*. In practice, we see that medical age assessments are indeed given decisive weight, despite oral testimonies and other evidence.[113] Suggesting a rather non-holistic assessment, contrary to the above case-law. A possible explanation for this would be a much too narrow view regarding the applicant's burden of proof, the Migration Agency's own burden of inquiry, and a habit of not acknowledging doubt when present.

As previously mentioned, without recourse to the shared burden of inquiry, the task of proving one's age when hailing from a developing country becomes insurmountably difficult.[114] If you do not agree that there is a shared burden of inquiry, then the medical age assessment may yield two results. Either, you accept the method as reliable and accurate and conclude that it proves that the applicant is either a child or an adult. Or, you acknowledge that the method has been criticised and that the results of the medical age assessment may not be trusted, but since the burden of proof still resides with the applicant, you conclude that they have still not made their age credible. In any case, regardless of how the results of the medical age assessment are evaluated, the applicant is incapable of proving their age. In this regard, we may recall the previously mentioned judgement from the Migration Court in Malmö, where the judge acknowledged the criticism of the method for medical age assessment, stated that the results should be considered with caution, yet nevertheless ruled that the applicant had not fulfilled their burden of proof.[115] The method for medical age assessment has been heavily criticised by statisticians, doctors, and lawyers alike. However, when the criticism is only considered at the last stage of evaluating evidence with regards to the standard of proof, it becomes toothless. Because the conclusion, regardless of the criticism, will be that the applicant has not made their age credible. It is only when one considers the criticism with regards to the Migration Agency's burden of inquiry that it may actually have effect. When the burden of inquiry has not been fulfilled, that being when the facts may or have not been ascertained, the applicant should be given the benefit of the doubt and their statements should be considered true. Thus, for the legal certainty of the applicant, it is *imperative* that the medical age assessment is viewed as part of the inquiry – as it clearly should – and not individually as written evidence in the form of a piece of paper. Formerly, the Migration Agency *could* offer a medical age assessment and an argument could be made then that the medical examination was not part of the inquiry, as the Migration

[112] MIG 2014:1.
[113] E Johansson, 'Överklaganden av tillfälliga åldersbeslut för asylsökande, en kvantitativ studie' (2019) <https://www.academia.edu/38580370/%C3%96verklaganden_av_tillf%C3%A4lliga_%C3%A5ldersbeslut_for_asyls%C3%B6kande_en_kvantitativ_studie>, 10.
[114] C Diesen *et al.* 'Prövning av migrationsärenden. BEVIS 8' (Norstedts juridik 2012), 226.
[115] Migration Court in Malmö, UM 2701–18.

Court of Appeal seems to imply.[116] However, under the *new order* the Migration Agency *shall*[117]offer a medical age assessment, which must mean that it is to be considered part of the inquiry into the applicant's age.
When the result of the Migration Agency's inquiry is decided almost solely by a forensic method that is first and foremost unvalidated, but also heavily criticised, it would be almost offensive to claim that the inquiry has been conducted to a sufficient standard, when the results may decide between life or death for the applicant in question; thus meriting the high standard of inquiry. When a scientifically bad method is used to decide the outcome of an inquiry, the result of the inquiry must be considered uncertain enough that the applicant should be given the benefit of the doubt and have their stated age considered credible. As previously mentioned, this notion is supported by several sources of law. The most prominent one being Article 25(5) of the Asylum Procedures Directive which *clearly* states that the applicant should be considered a minor if doubt remains following a medical age assessment. In summary, it is only when the medical age assessments lack of scientific accuracy and reliability is considered with regards to the shared burden of inquiry that the criticism of the method may actually have effect and increase the legal certainty for the unaccompanied minor. When considering the criticism solely with regards to the standard of proof and evaluation of it as evidence, it does little for the child seeking to make their age credible.

3 Age Assessment and the International Rights of Children

With 196 parties to it, the Convention on the Rights of the Child is the most rapidly and widely ratified human rights treaty in history and its influence should not be understated. The presence of the CRC permeates our legal system and reference to best interests of the child considerations may be found in several legal acts. For example, mentioned in this thesis are the Aliens Act and the Social Services Act which in their opening chapters both state that consideration should be taken to the best interests of the child in all matters concerning children.[118] Sweden ratified the CRC in 1990, yet the government and parliament believe that the convention has not had the widespread effect on administrative procedures that it should. For this reason, the government proposed that the CRC should not only be ratified, but made into Swedish law, word by word.[119] The parliament committee on social matters supported the proposition[120] and on the 13th June 2018, parliament approved the proposition that the CRC be made into Swedish law with effect from the 1st of January 2020.[121] With the CRC rising from a treaty which laws

[116] Cf. MIG 2014:1.
[117] See 13 kap. 18 § UtlL.
[118] 1 kap. 10 § UtlL and 1 kap. 2 § SoL.
[119] Prop. 2017/18:186.
[120] 2017/18:SoU25.
[121] Rskr 2017/18:389.

need to be interpreted in light of, to an actual law that must be adhered to, its effects are set to increase even further. In the proposition to make the CRC law, the government acknowledged that Swedish law must be interpreted in light of treaties and that the CRC may have priority over other rules and regulations due to the *lex specialis* principle.[122] In addition, regarding the direct applicability and tangibility of the CRC, the European Court of Human Rights has recently referenced the CRC directly in their judgement *H.A. and others v. Greece.*[123] The case concerned unaccompanied minors who were apprehended at the Greece border and successively detained and placed under 'protective custody'. The Court found that the detention conditions to which the applicants had been subjected in the police stations represented degrading treatment and could have caused them to feel isolated from the outside world, with potentially negative consequences for their physical and moral well-being. The Court found that the lack of time limits for "protective custody" can lead to arbitrary situations of prolonged child detention in violation of domestic law and, in particular, of Article 3 of the CRC. Moreover, the authorities had not taken into account the applicants' particular vulnerability as unaccompanied minors and not considered whether the measure was one of last resort. The UN Committee on the Rights of Children ('UNCRC') has further clarified that 'the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development'.[124] The judgement shows that the CRC may be referenced directly and that arguments around it are indeed tangible. In this chapter, we shall explore the effects that international children's rights in general, and those of the CRC in particular, may have on age assessment. We must, however, first answer one rather important question. Who does the CRC apply to? Unquestionably, the Convention on the Rights of the *Child* applies to children and according to its Article 1, a child is every human being below the age of eighteen years. Clearly, if the State is convinced of your minority, then the CRC applies to you. Unfortunately, the convention does not directly specify in what manner it applies to children who have been unable to make their age credible thus far. Therefore, with these children in mind, we must interpret the CRC to assess its applicability to this group.

The Vienna Convention on the Law of Treaties ('VCLT') provides a general and a supplementary rule of treaty interpretation. Sweden is party to the treaty and acknowledges in the proposition to make the CRC law that the VCLT rules should be followed when interpreting the CRC.[125] The general rule of treaty interpretation of Article 31(1) VCLT state that

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[122] Prop. 2017/18:186, 87.
[123] *H.A. and others v. Greece* (application no. 19951/16).
[124] Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration (UN Doc CMW/C/GC/4-CRC/C/GC/24, 16 November 2017, [10].
[125] Prop. 2017/18:186, 82 ff.

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 31(2) further clarifies that the context of a treaty consists of the text, including its preamble and annexes, and successive agreements and instruments made in acceptance between the parties to the treaty. When the general rule of treaty interpretation proves insufficient in providing guiding principles of interpretation, Article 32 VCLT state that '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31'. In summary, when interpreting the CRC, we should interpret it in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. To this end, we must first review the text and its preamble and secondly its *travaux préparatoires*.

The Convention on the Rights of the Child applies to children, *i.e.* humans below eighteen years old, and the objective of the CRC, as is stated in its preamble, is to afford children additional protection by 'reason of their physical and mental immaturity'. For this reason, children need special safeguards and care, including appropriate legal protection. Furthermore, the preamble to the CRC points out that in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance. In conclusion, the primary object and purpose of the CRC must be to protect children and grant them additional safeguards, care and assistance. Therefore, when interpreting the CRC in accordance with the general rule on treaty interpretation of Article 31(1) VCLT, it should be interpreted in the way that best aids children; as is its purpose. To fulfil this purpose, the additional protection afforded by the CRC must not be *illusory*. There would of course be no reason to sign and ratify a convention that is not mean to offer *effective* protection. See *e.g.* Article 19 CRC which state that States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of parental abuse etc. and that such protective measures should include *effective* procedure for the establishment of social programmes etc. See also the fact that Sweden chose to make the CRC law to strengthen children's rights in the most *effective* manner.[126] Regarding the provisions of the CRC, you could say that the 'main rule' of the convention is its Article 3(1) which state that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' Without a doubt, a purpose and an objective of the CRC is to ensure that the best interests of the child are a primary consideration in all matters concerning children. Interpreting the CRC will most definitely affect children. Therefore, the interpretation of the CRC is an action concerning children. As such, the convention itself provides that when interpreting the CRC, the best interests

[126] Prop. 2017/18:186, 58.

of the child shall be a primary consideration, also shown by its preamble. The UN Committee on the Rights of the Child ('UNCRC') has also stated that 'the purpose of assessing and determining the best interests of the child is to ensure the full and *effective* enjoyment of the rights recognized in the Convention on the Rights of the Child, and the holistic development of the child'.[127]

According to Article 1 CRC, children are human beings below eighteen years old. In Western culture, and where civil registration is rigorous, the date of birth of every child born in the country is known. I should not have to reiterate this original issue of age assessment, yet my point is that when the Earth has orbited the sun eighteen times from the day that a person was born, that person is no longer a child. Regardless of what some nations may seem to believe, they do not control gravitational forces in our solar system. Age is mathematical and your birth certificate or personal documents are simply proof of the state's opinion on your age. A child is a child, regardless of what proof the child might have. On the topic of refugee status determination, Blackstone Chambers barrister, Dr Jason Pobjoy notes that 'refugee status determination is a declaratory rather than constitutive process, and that the primary concern is about providing the protection that is owed, and not the formality of granting refugee status'.[128] Pobjoy also references a judgement where the Canadian Federal Court of Appeal observed that a refugee 'does not become a refugee because he is recognized, but is recognized because he is a refugee; there is first a situation of fact which gives rise to a condition, then recognition of a right which is expressed by a status'.[129] Similarly, a child does not become a child because she is recognised, but is recognised because she is a child. First, there is a situation of fact which gives rise to a condition. If the facts are that less than eighteen years have passed from the birth of a person, then they will possess the condition usually referred to as being 'a child'. The CRC does not concern itself with recognition of age in an individual case. According to Article 1, any human being below eighteen years old is a child and is therefore owed additional protection. Granted, the additional protection is provided by the State, and the State will not provide said protection without first recognising the applicant's status as a minor. And so, we face a dichotomy.

On the one hand, all children are owed additional protection according to the CRC and childhood is not dependent on whatever proof you may have to attest to it. Thus, children who lack personal documents accepted by the authorities should also be afforded the protection that they are owed by the CRC. On the other hand, as stated in the proposition for the new order for age assessment, the State has an interest of allocating limited resources earmarked for children and preventing adults from sharing accommodation with

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[127] UN Committee on the Rights of the Child (CRC), General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) (2013), [82].
[128] JM Pobjoy, The Child in International Refugee Law (Cambridge University Press 2017), 68.
[129] *Mileva v Canada* (MEI) [1991] 3 FC 398, 411.

children.[130] According to Article 3(1) CRC, the best interests of the child shall be *a* primary consideration, not necessarily *the* primary consideration. Professor of law and current UN Special Rapporteur on extreme poverty and human rights, Philip Alston, wrote that according to the *travaux préparatoires* of the CRC, one of the drafters 'pointed out that the interests of the child should not be the overriding, paramount consideration in every case, since other parties might have equal or even superior legal interests in some situations, such as in a medical emergency during childbirth'.[131] Alston concludes that '[n]evertheless, the formulation adopted would seem to impose a *burden of proof* on those seeking to achieve such a non-child-centred result to demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist'.[132] In addition, on the topic of the best interests of the child, contra *refoulement* of the child, the UNCRC in a joint general comment, notes that '[c]onsiderations such as those relating to general migration control cannot override best interests considerations'.[133] This should indicate that the State's interest of age assessment for the purpose of allocating limited resources would never override best interests considerations. However, for there to be a best interests of the child consideration, the CRC must of course first apply to the applicant in question.

As stated above, age assessment and determination of minority is a declaratory rather than constitutive process. The unaccompanied minor without personal documents is still a child, despite not yet having proved their condition of minority, and as a child, the CRC applies to them. However, the State does not grant them the additional protection that they are owed because the State has not recognised their condition of minority. In practice, this robs the unaccompanied minor of their rights as a child and denies them *effective* protection. According to the VCLT and as stated above, the CRC should be interpreted in light of the best interests of the child and providing children with effective protection, otherwise it is simply illusory. The notorious difficulty of proving your age also bears the risk that the child is not only deprived of their rights during the age assessment process, but possibly permanently. There are no do-overs and the asylum-seeking children only get one attempt to prove their age in practice, which is why it is so important that their best interests are also considered before their age has been determined conclusively. I find it very difficult to see how it could be considered 'effective protection of children' to wait months for the result of an unvalidated method for medical age assessment before possibly granting the child the rights that she is owed. Conversely, effective protection must be to,

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[130] Prop. 2016:17/121, 1.
[131] P Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in P Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994), 12.
[132] *Ibid.* (emphasis added), 13.
[133] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, [33].

at least temporarily, presume the credibility of the applicant's claim and grant them their additional rights during the inquiry and age assessment process. Considering that unaccompanied minors who hail from countries lacking functioning civil registration are unable to prove their age, in order for the State to provide *effective* protection to these children, there must be a *presumption of minority* and the CRC must apply to them during the asylum application procedure, inquiry and age assessment process. Otherwise, the purpose of the CRC would be defeated as it would not assist the children who are in the direst need of it. The purpose and objective of the CRC is to provide effective protection for children, and it cannot be considered in the best interests of these children for them to be denied their rights due to circumstances related to *e.g.* their country's lack of civil registration. Not granting these children their rights under the CRC because they lack personal documents to prove their age is in effect a discrimination on grounds of nationality, as the minors have no means of acquiring documentation of a certain quality when it is not produced by their country of origin. Such discrimination on grounds of nationality is expressly forbidden under both Swedish and International law.[134] In theory, the CRC applies to every child in the world, yet in practice there are stringent technical requirements on the configuration of passports[135] which in effect deny children the rights that they are owed. To counteract this, and to provide all children equal access to their rights, the CRC must also apply to children during the age assessment process; that is as long as there are doubts surrounding the age of the applicant. Having the CRC apply to children during the age assessment process would considerably increase the convention's effectiveness in providing protection for children, as is the purpose of making the CRC law in Sweden.[136]

As the Canadian Federal Court of Appeal noted, refugee recognition is a declaratory rather than constitutive process.[137] When refugees arrive in large scales, it may be more appropriate to recognise their status as refugees on a *prima facie* basis (*i.e.* 'at first appearance', or, 'on the face of it'). In fact, the majority of the world's refugees are indeed recognised on a *prima facie* basis.[138] The UNHCR describes a *prima facie* approach as

> the recognition by a State or UNHCR of refugee status on the basis of readily apparent, objective circumstances in the country of origin or, in the case of stateless asylum-seekers, their country of former habitual residence. A prima facie approach acknowledges that those fleeing these circumstances are at risk of harm that brings them within the applicable refugee definition.[139]

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[134] 2 kap. 12 § RF; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), [3].
[135] Prop. 1997/98:178, 8.
[136] Prop. 2017/18:186, 58.
[137] *Mileva v Canada* (MEI) [1991] 3 FC 398, 411.
[138] UNHCR, 'Guidelines on International Protection No. 11:
Prima Facie Recognition of Refugee Status', HCR/GIP/15/11 5 June 2015, [3].
[139] *Ibid*, [1].

A *prima facie* approach is particularly suited to large-scale arrivals of refugees and the UNHCR describes these large-scale situations as 'characterised by the arrival across an international border of persons in need of international protection in such numbers and at such a rate as to render individual determination of their claims impracticable'.[140] A *prima facie* approach may also be appropriate in relation to groups of similarly situated individuals whose arrival is not on a large-scale, but who share a readily apparent common risk of harm. The characteristics shared by the similarly situated individuals may be, for example, their 'ethnicity, place of former habitual residence, religion, gender, political background or age, or a combination thereof, which exposes them to risk'.[141] Furthermore, the UNHCR notes that '[p]rima facie recognition is based on readily apparent, objective circumstances in the country of origin or former habitual residence assessed against the refugee definition being applied to that situation' and that '[c]ountry information will play an important role in identifying the readily apparent circumstances that underlie a decision to recognize refugee status on a prima facie basis. Such information should be relevant, current and from reliable sources.'[142]

Recognising the age of an asylum-seeker who claims to be a child is, in similarity with refugee recognition, also a declaratory process. In 2017 alone, almost 10,000 medical age assessments were carried out, indicating the large-scale nature of age assessment that is taking place.[143] Regardless of any large-scale nature or whether it is impracticable to assess the age of all applicant who claim minority, those facing age assessment are similarly situated individuals and share common characteristics, most notably a lack of personal documents due to circumstances outside their control. Considering the large number of unaccompanied minors who share the characteristic of lacking any means of proving their age, and the duty to afford effective protection to these children, it would be appropriate to grant them a *prima facie* recognition as children, in similarity with how refugees are recognised on a *prima facie* basis. Doing so would, once again, increase the effectiveness of the CRC in light of its objective and purpose and decrease discrimination of children on grounds of their nationality.

A *presumption of minority*, of course including coverage by the CRC, during the age assessment process is also in line with other legal sources previously mentioned. Most prominently the *in dubio pro reo* rule of Article 25(5) Asylum Procedures Directive which state that the applicant should be considered a child if doubt remains following a medical age assessment. As shown under Chapter 2.1, several legal sources including EU directives, the UNHCR *Handbook* and domestic Swedish law support asylum-seeking children being given the benefit of the doubt when there are no particular

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[140] UNHCR, 'Guidelines on International Protection No. 11:
Prima Facie Recognition of Refugee Status' *supra* n 138, [9].
[141] *Ibid*, [10].
[142] *Ibid*, [13] & [17].
[143] Rättsmedicinalverket, 'Statistik' (2019) <https://www.rmv.se/om-oss/forskning/aktuell-statistik/>.

credibility concerns. Applicants are given the benefit of the doubt with regard to particularly difficult to prove claims, and what is the benefit of the doubt if not a presumption of truth for those claims. Furthermore, in the current Swedish reception system, applicants who claim to be children are already placed in accommodation for children until the age assessment finds otherwise.[144] In other words, an applicant who claims to be a minor is *presumed* to be a minor until found otherwise. If the State already acknowledges that a claim of minority, and sufficient doubt for it not to be obviously false, is enough to place the applicant in accommodation with other children until further notice, then surely the already present presumption of minority should also include coverage by the CRC. After all, what would be the point of an age assessment if the State was already certain that the applicant is not a child. In summary, for the CRC to function in accordance with its purpose and objective, to provide effective protection in the best interests of children, it must also apply to children who have yet to prove their age. In other words, the applicants must be presumed minors until such a time as a rigorous inquiry might find otherwise. If the CRC does not apply to children facing age assessment, then those children would not only be robbed of their particular rights as children until the age assessment has concluded, but they would also be discriminated for hailing from a country which does not produce written evidence of sufficient quality. In the dichotomy of the best interests of children being afforded the rights that they are owed, and the interest of the State to allocate limited resources, the interests of the State cannot override those of children.[145]

Continuing on the assumption that the CRC applies to children during the age assessment process, we may proceed with exploring what effects that children's rights may have on age assessment. Under Article 3(1) CRC, the best interests of the child shall be *a* primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. In its General comment No. 14 on Article 3(1), the UNCRC notes that:

> 'the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child'.[146]

On the meaning of 'consideration', Alston wrote that '[w]hile it has the same meaning as 'element' or 'factor', it also has the additional significance of emphasizing that the child's best interests must actually be considered. Such

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[144] *Cf.* Prop. 2016/17:121, 13.
[145] See UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) *supra* n 133, [33].
[146] UN Committee on the Rights of the Child (CRC), General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) (2013), [32].

consideration must be *genuine rather than token or merely formal* and must ensure that all aspects of the child's best interests are factored into the equation'.[147] Assessing what the best interests of the child are can clearly be difficult. Nevertheless, it would certainly not be in the best interests of *any* child to wrongfully be considered an adult; this should go without saying. If you subscribe to the notion that for the CRC to be effective, in accordance with its purpose and objective, in protecting all children it must also apply to children during the age assessment process, then writing up the age of an applicant would mean that another consideration has overridden that of the best interests of the child. As Professor Alston wrote, according to the *travaux préparatoires* of the CRC, the formulation of 'a' primary consideration of Article 3(1) CRC 'would seem to impose a *burden of proof* on those seeking to achieve such a non-child-centred result to demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist.'[148] In the case of age assessment, as it would never be in the best interests of the child for the age decision to decide that they are an adult, then the actor choosing the non-child-centred result (*in casu* the Migration Agency) would have the *burden of proof* that no other feasible and acceptable alternatives exist, because the applicant is in fact not a child.

It should by no means be considered a wild idea that the CRC would support a burden of proof for the state actor deciding that the applicant is an adult. As previously shown, the shared burden may be found in several sources. Perhaps most prominently, the UNHCR Handbook shows that it is a fundamental principle that in claims for refugee protection, 'the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner'.[149] See also the UNHCR's 2009 *Guidelines* which state that '[a]lthough the burden of proof usually is shared between the examiner and the applicant in adult claims, it may be necessary for an examiner to assume a greater burden of proof in children's claims, especially if the child concerned is unaccompanied'.[150] Let us also not forget the burden of inquiry that we examined under Chapter 2.1, which clearly shows that the duty of fact-finding mainly resides with the Migration Agency under Swedish domestic law, with the applicant being responsible for producing a plausible, coherent, and non-contradictory story. If you agree that the CRC is applicable to children during the age assessment process, then it is only logical for the burden of proof to shift in practice. State interests of *e.g.* general migration control (or arguably allocation of resources) cannot override best-interests consideration.[151] Therefore, there remains no legal justification for deciding that the child is an adult, except sufficient evidence to the contrary. Evidence that the applicant's adulthood that the State actor must present. While the burden of proof could be considered shifted in theory, in practice there would

[147] P Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in P Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) (emphasis added), 13.
[148] *Ibid.*
[149] UNHCR, *Handbook*, [196].
[150] UNHCR, 2009 *Guidelines*, [73].
[151] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) *supra* n 133, [33].

be little difference to the current process of age assessment, considering that the legal consequences of a failed inquiry in theory already befalls the Migration Agency.[152]

Thus far, we have concluded that for it to function effectively, the CRC must apply to applicants during the age assessment procedure, as long as doubt of their age remains. Furthermore, we have concluded that the *travaux préparatoires* of the CRC imposes a burden of proof on those seeking to achieve a non-child-centred result (*i.e.* deciding that the presumed child is an adult), which in practice should mean that the Migration Agency has to show that the applicant is an adult. Now, finally, we may finish the investigative part of this thesis by reviewing how international legal sources may affect the actual assessment of age and credibility.

We have already discussed the international aspects of the benefit of the doubt to some degree, so we shall only briefly expand upon what international law and the UNHCR may further say about the principle, the standard of proof, and evaluation of evidence. The principle of the benefit of the doubt was first endorsed[153] by the UNHCR in its *Handbook* which says that 'if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt'.[154] Regarding unaccompanied minors, the *Handbook* suggests that the assessment of a child's refugee status 'may call for a *liberal* application of the benefit of the doubt'.[155] Regardless of a *prima facie* child approach or 'presumption of minority' we know that the benefit of the doubt also applies in the case of age assessment.[156] The UN Committee on the Rights of the Child has also advised that 'the child should be given the "benefit of the doubt", should there be credibility concerns relating to his or her story.'[157] Thus, the CRC also supports giving unaccompanied minors the benefit of the doubt.

The UNHCR elaborates on the principle of the benefit of the doubt in its *Note on Proof* which state that where there is still 'an element of doubt in the mind of the adjudicator as regards the facts asserted by the applicant. Where the adjudicator considers that the applicant's story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant's claim; that is, the applicant should be given the "benefit of the doubt".'[158] For the applicant's story to be coherent and plausible on the whole, it is first necessary for the applicant to be generally credible. On this subject, the *Note on Proof*

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[152] See above Chapter 2.1.
[153] JM Pobjoy, The Child in International Refugee Law (Cambridge University Press 2017), 94.
[154] UNHCR, *Handbook*, [196].
[155] UNHCR, *Handbook*, [219] (emphasis added).
[156] UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997), [5.11].
[157] UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, [71].
[158] UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims' (16 December 1998), [12].

states that '[c]redibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, *on balance*, capable of being believed.'[159] The above requirement is true for all applicants for asylum. In the case of children, however, the UNHCR has *e.g.* pointed out that 'what might constitute a lie in the case of an adult might not necessarily be a lie in the case of a child.'[160] On the credibility of children, the *Guidelines* elaborate that:

> Children cannot be expected to provide adult-like accounts of their experiences. They may have difficulty articulating their fear for a range of reasons, including trauma, parental instructions, lack of education, fear of State authorities or persons in positions of power, use of ready-made testimony by smugglers, or fear of reprisals. They may be too young or immature to be able to evaluate what information is important or to interpret what they have witnessed or experienced in a manner that is easily understandable to an adult. Some children may omit or distort vital information or be unable to differentiate the imagined from reality. They also may experience difficulty relating to abstract notions, such as time or distance.[161]

In summary, when assessing the credibility of children and evaluating whether to grant them the benefit of the doubt, the UNHCR is clear that the threshold for that assessment should be lower for children than that of adults. Thus, not only should the benefit of the doubt given be *liberal*, but also the credibility assessment.

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[159] UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims' (16 December 1998), [11] (emphasis added).
[160] UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (22 December 2009), [72].
[161] *Ibid.*

Analysis and Conclusions on Age Assessment and Children's Rights

Having investigated age assessments to the extent that the scope of this thesis allows for, it is now time to analyse all of our findings, both from domestic, EU and international law, and see what conclusions we may draw for the benefit of legal certainty for asylum-seeking unaccompanied minors. For the sake of coherence, we shall analyse the findings with reference to the chronological process of age assessment as I summarise the above findings. By doing so, we may analyse the different sources of law simultaneously, with reference to *e.g.* the burden of proof, and review the legal process of age assessment in the order that it is carried out in practice. With this order in mind, let us now proceed with observing what considerations must be made when an unaccompanied minor without personal documents applies for asylum in Sweden.

As we know, under the current 'new' order for age assessment, when an applicant asserts that she is an unaccompanied minor and there are doubts surrounding her age, an age assessment and a temporary age decision shall be made as soon as possible.[162] In addition, a medical age assessment shall be offered[163] and the temporary age decision may also be appealed.[164] The main issue is of course that there are doubts as to the age of the applicant. The reason for this being the lack of personal documents that are configured to the stringent technical requirements which passports must have to prove one's identity (including age).[165] It should come as no surprise that there is a correlation between countries that do not produce personal documents of a sufficient level and countries that produce refugees. It is a general principle of Swedish administrative procedure law that the burden of proof resides with the applicant for a benefit. Accordingly, in the process of age assessment, the burden of proof resides with the applicant.[166] Indeed, the UNHCR also advises that the burden of proof lies on the person who makes the assertion.[167] At first glance, it is easy to stop at a place where the burden of proof solely lies with the applicant. Where the applicant alone is responsible for producing evidence that fulfils the standard of proof and in failing to do so bears the full legal consequences of being considered an adult and denied children's rights. Should you stop at the burden of proof resting solely with the applicant, then without personal documents, and case-law dictating that oral testimonies may

[162] 13 kap. 17 § UtlL.
[163] 13 kap. 18 § UtlL.
[164] 14 kap. 8 b § UtlL.
[165] Prop. 1997/98:178, 8.
[166] MIG 2014:1.
[167] UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims' (16 December 1998), [6].

only exceptionally prove one's age[168], the applicant will have no means of proving her age. Unaccompanied minors who come from countries that lack functioning civil registration would never be able to make the State recognise their minority on their own. Only through medical age assessments would they possibly be able to make the State recognise their age. However, as we have seen, the method for medical age assessment used in Sweden today has been heavily criticised and is currently under public scrutiny. The method is neither accurate, nor reliable. Thus, it lacks certainty, which directly translates to a lack of legal certainty for unaccompanied minors who apply for asylum in Sweden. If you stop at the burden of proof resting solely with the applicant, then any magnitude of criticism voiced towards the method for medical age assessment will not help the individual child currently in the process of age assessment because the criticism will not help her fulfil her burden of proof. Regardless of all the criticism, the applicant will not be able to fulfil her burden of proof, examples of which we have seen in the Migration Courts.[169] When you read the undoubtedly landmark-case of MIG 2014:1, it is easy to stop at the clear and obvious passage which states that the burden of proof lies with the applicant. However, in doing so, you miss a point of absolutely critical importance for the legal certainty of the unaccompanied minor and asylum-seekers in general, that being the *shared duty of fact-finding.*

'A dear child has many names', as the Swedish proverb says. The shared duty to ascertain and evaluate all the relevant facts, including for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application[170], is referred to by Pobjoy as a 'shared duty of fact-finding'.[171] Keeping to the terminology of burdens and standards of *e.g.* proof, Diesen instead refers to this shared duty as a shared 'burden of inquiry'.[172] While clearly mandated by international legal sources, the shared burden of inquiry may also be derived from Swedish domestic law. All authorities and courts in Sweden have a responsibility of inquiry[173] that varies depending on the matter at hand. In asylum law, where the applicant's ability to conduct an investigation themselves are almost non-existent, and where the Migration Agency is both party and decision-maker in the first instance, the responsibility of inquiry grows to a *burden of inquiry* for the State actor. A burden which encompasses the matters that follow from its responsibility of inquiry.[174] Remaining with the applicant is a *burden of information* regarding relevant facts which may be ground for the authorities' assessment of the application. To this end, the applicant shall present available documents etc. and present grounds for their application, *i.e.* they shall make the need for international protection probable. The applicant may do so by submitting a

[168] MIG 2014:1.
[169] Migration Court in Malmö, UM 2701–18.
[170] UNHCR, *Handbook*, [96].
[171] JM Pobjoy, The Child in International Refugee Law (Cambridge University Press 2017), 90.
[172] C Diesen *et al.* 'Prövning av migrationsärenden. BEVIS 8' (Norstedts juridik 2012), 209.
[173] 23 § FL.
[174] SOU 2006:6, 221.

reasonable and credible story of why he or she is in need of protection.[175] In the words of the UNHCR *Handbook*, for the applicant to achieve the above general credibility, her statements must be *coherent, plausible and non-contradictory*.[176] The applicant must make a genuine effort to substantiate her story and as UNHCR notes, 'it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the *benefit of the doubt*'.[177] Similarly, the Article 4(5)(a) Qualifications Directive also states that the applicant must make a genuine effort to substantiate his application in order to be given the benefit of the doubt. When a genuine effort to substantiate the story has been made, when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility (*i.e.* the story is coherent, plausible and non-contradictory to generally known facts), the applicant may be given the benefit of the doubt.[178] In summary, the benefit of the doubt is not given with regards to any evaluation of evidence, but rather with regards to a *lack* of evidence to evaluate. That is, when the inquiry, of which the burden to conduct said inquiry befalls the Migration Agency, is unable to ascertain the facts given by the applicant, and when the applicant's general credibility holds up, they are given the benefit of the doubt and unverifiable claims are considered true. While nowadays we may find reference to the principle of the benefit of the doubt in EU law, before Sweden joined the EU – when UNHCR had first endorsed the principle – there was reference to the benefit of the doubt in the *travaux préparatoires* of the Aliens Act which stated that 'when the asylum seeker's claims of persecution appear reasonable, but the factual circumstances may not be ascertained, the asylum seeker's information shall lay the grounds for the assessment. The asylum seeker shall enjoy the "benefit of the doubt"'.[179] I reiterate, because I believe this point cannot be overstated, the benefit of the doubt is not given when evaluating evidence with regards to the standard of proof, but rather when the inquiry of the State actor (*i.e.* the Migration Agency) has been unable to ascertain the stated facts of the applicant and her general credibility holds up. In principle, the benefit of the doubt appears to remain more or less the same since the UNHCR first endorsed it, despite 'travelling' through several legal systems. However, a more absolute benefit of the doubt has emerged from EU law, more specifically Article 25(5) Asylum Procedures Directive which state that if there are still doubts concerning the applicant's age following a medical age assessment, the Member State *shall* assume that the applicant is a minor. There is a significant difference between this rule and the principle that the UNHCR first endorsed, and that is the absent requirement of satisfactory credibility! Concerning the entire application for asylum, the applicant may only be given the benefit of the doubt if the examiner is satisfied as to her general credibility. However, regardless of the applicant's

[175] SOU 2006:6, 221.
[176] UNHCR, *Handbook*, [204].
[177] *Ibid*, [203] (emphasis added).
[178] See UNHCR, *Handbook*, [204] for international law and Article 4(5) Qualifications Directive for EU and Swedish domestic law.
[179] Prop. 1979/80:96, 88.

general credibility, if doubts remain following a medical age assessment, the Member State *shall* grant the applicant the benefit of the doubt and assume that they are a minor. As if the principle of the benefit of the doubt was not present in enough legal sources, the UN Committee on the Rights of the Child has also advised that 'the child should be given the "benefit of the doubt", should there be credibility concerns relating to his or her story.'[180] On the applicability of the Convention on the Rights of the Child, the VCLT states that treaties shall be interpreted in light of their objectives and purposes. Regarding the CRC, that must be to provide effective protection for children, in their best interests. Childhood is independent of one's ability to prove their age. You are not a child because your documents say so, but rather because you are less than eighteen years old. Thus, for the CRC to provide effective protection for all children, there must be a *presumption of minority* during the age assessment process, during which the best interests of the applicant must be considered. Furthermore, the *travaux préparatoires* of the CRC seems to impose a burden of proof on those seeking to achieve a non-child-centred result to demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist.'[181] Deciding that a child is not a child, but an adult, should undoubtedly be considered a 'non-child-centred' result. The burden of proof that the CRC imposes should not be considered controversial, given the shared burden that international, EU and Swedish domestic law already imposes. Any asylum-seeker may be given the benefit of the doubt, in accordance with above rules. However, in the case of children, which we concern ourselves with, the given benefit (of the doubt) should be *liberal*.[182] Not only should the benefit be liberal, but the requirement of satisfactory general credibility should also be lower for children. As the UNHCR noted, 'what might constitute a lie in the case of an adult might not necessarily be a lie in the case of a child.'[183]

What remains to address now is the inquiry itself. Simplified, the applicant may be given the benefit of the doubt when general credibility is satisfactory, and the inquiry has been unable to ascertain the facts of the applicant's story. In the case of age assessment, 'the inquiry' will consist of all available information, oral testimonies and written documents alike. However, if the applicant has submitted to a medical age assessment, then the results of that examination will certainly be the decisive factor of the inquiry and the answer to whether it has been able to ascertain the applicant's asserted facts. 'Unable to ascertain' is simply another way of saying that doubts remain. Thus, the question is, what are doubts and when do they remain? I argue that 'doubt' can be explained as a reflection of the required standard that the inquiry must meet. The higher the standard, the lesser the uncertainties that create doubt must be, and *vice versa*. For example, in asylum proceedings, especially those

[180] UNCRC, *General comment No. 6* (2005) *supra* n 157, [71].
[181] *Ibid.*
[182] UNHCR, *Handbook*, [219].
[183] UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (22 December 2009), [72].

concerning children[184], the standard of inquiry is high, which means that the inquiry must be rigorous. Therefore, even rather small uncertainties may constitute sufficient doubt for the applicant to be given the benefit of it. To answer the question above, 'doubts' are the uncertainties remaining following the inquiry and whether doubts are present depends on the matter at hand. However, as children should be given a liberal benefit of the doubt, the uncertainties that create doubt must not be too big. Rather, even small uncertainties should create sufficient doubt for a benefit to be given when general credibility holds up. What constitutes doubt in any individual case will of course vary on a case-by-case basis, as all are different. However, one variable remains the same across the board for every medical age assessment. That being the method used to conduct the medical age assessment in question.

The currently in use method for medical age assessment, first endorsed by the Swedish National Board of Health and Welfare and later adopted for actual use by RMV is first and foremost *unvalidated*. That is, not now, nor when the method first came into use, had any trials been made to assess the accuracy and reliability of the method. That alone is, without a doubt, bad science. You wouldn't expect a scientist to be 'lucky' and stumble upon a reliable and accurate method without conducting any testing, and of course neither did RMV. In any case, it might not even be possible to validate a method for medical age assessment at all, considering the original issue that is lack of proper civil registration in countries that produce refugees.[185] After studying RMV's own data, following 10 000 medical age assessments in 2017, professor in mathematical statistics Petter Mostad, and medical doctor Fredrik Tamsen, found that 'about 33% of all male children that have been subjected to the RMV procedure have been erroneously classified as adults (i.e., the specificity is about 0.67). Conversely, the sensitivity of about 0.93 means that about 7% of male adults have been classified as children.'[186] Their study means that the State falsely decides that *every third child* is an adult, thus robbing them of the rights they are owed as children. Concerning the previous method for medical age assessment, the National Board of Health and Welfare stated that a specificity of 0.95 was the requirement for a good scientific standard.[187] The results of Mostad and Tamsen show that the specificity of RMV's current method is far from this standard. We discussed above that the *liberal benefit of the doubt* that children may be given suggests that even small uncertainties should constitute sufficient doubt that the child may be given the benefit of. If possibly *every third child* is erroneously classified as an adult, that is not a small uncertainty. That is a big uncertainty. When every third child is possibly misclassified as an adult because of an unscientific method, one must consider that sufficient doubts remain following the examination for the *in dubio pro reo* rule of Article 25(5)

[184] UNHCR, *Handbook*, [219].
[185] G Noll, 'Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum' International Journal of Refugee Law, 2016, Vol. 28, No. 2, 234–250, 237-239.
[186] P Mostad & F Tamsen, Int J Legal Med (2019) 133: 613, 622.
[187] MIG 2014:1.

Asylum Procedures Directive to be triggered, and the State must automatically assume that the applicant is indeed a child. If not, then ask yourself, if the risk that every third child is erroneously classified is not sufficient doubt, then what in the world is? As noted by the UNHCR, without the benefit of the doubt, 'the majority of refugees would not be recognized'.[188] Thus, the benefit of the doubt is imperative to a functioning asylum system. However, the benefit of the doubt is also dependent on the standard of inquiry not being too low. That is, there should not have to be monumental doubts for a benefit to be given. Certainly, the risk that every third applicant is erroneously classified must be uncertain enough to create adequate doubts, especially considering the *liberal* benefit of the doubt that children may be given. What is remarkable of the particular 'benefit of the doubt' that Article 25(5) Asylum Procedures Directive provides is that it does not require satisfactory general credibility from the applicant. Simply, if there are doubts following a medical age assessment, the State *shall* assume that they are a child. Regarding medical age assessments, the discussion may be left there. However, not all age assessments include a medical examination, and for the sake of those applicants who refuse to submit to a medical examination, we shall analyse their situation as well.

As we know, for any asylum-seeker to be given the benefit of the doubt, they must make a genuine effort to substantiate their story and be generally credible. That is, their story must be coherent, plausible and non-contradictory to generally known facts.[189] Regarding the general credibility, 'what might constitute a lie in the case of an adult might not necessarily be a lie in the case of a child.'[190] Regardless of the applicant's general credibility, if they have not made a genuine effort to substantiate their story, they may not be given the benefit of the doubt. In several cases, the Migration Court in Stockholm has ruled that an applicant who does not submit to an offered medical age assessment has not made a genuine effort, despite the criticism of the method.[191] An act that is *genuine* is authentic, true, or sincere. When an applicant who is currently in the age assessment process reads the newspaper, sees all the criticism of medical age assessment and how inaccurate they are, can that applicant really be considered *disingenuous* for not wanting to 'incriminate' themselves? Rather, I argue that the applicant who does not submit to the medical age assessment because of the criticism does it for *genuine* reasons, because the medical examination risks showing his wrong age. It is *disproportional* to deny a child the benefit of the doubt because they refuse to submit to a medical age assessment that risks classifying them as an adult in one out of three cases. Despite not submitting to a medical age assessment, as long as the child is generally credible and the facts of their age may not be ascertained, they should be given the benefit of the doubt. In this case, it is *imperative* to remember that the threshold of

[188] UNHCR, *Handbook*, [203].
[189] See *ibid.* [203]-[204] and Article 4(5) Qualifications Directive.
[190] UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (22 December 2009), [72].
[191] See *e.g.* Migration Court in Stockholm UM 12242-17, UM 941-18, and UM 24-18.

general credibility is lower for children. They may have a fear of authorities due to circumstances relating to their claims of persecution and may thus, for example, have given another identity in another Member State on the way to Sweden and that is OK.[192]

In conclusion, because of the *unscientific* nature of the method for medical age assessment currently used in Sweden, when it is not *obvious* that an applicant who claims to be an unaccompanied minor is in fact an adult, and that applicant subsequently submits to a medical age assessment, the State *must* assume that the applicant is a child. Because there will always remain doubts under the current method. When the applicant has not submitted to a medical age assessment, there must be a *presumption of minority* for children's rights to function effectively, and the State must assess the general credibility of the child *generously* and give them a *liberal benefit of the doubt*.

The biggest issue of the entire process of age assessments is 'doubt'. As both party to the case *and* decision-maker, the Migration Agency are simultaneously judge, jury, and executioner, and they themselves decide whether the inquiry has been conducted to a sufficient standard and whether doubts remain, or even exist to begin with. When the case reaches the second instance, where the Migration Courts shoulder the responsibility of decision-making, the child has already gone without child-specific resources for some time, possibly for months. The benefit of the doubt, related to the Migration Agency's responsibility and burden of inquiry, is critical to ensuring that children's rights do not become illusory for unaccompanied minors, because it is otherwise insurmountably difficult for the applicant to prove their facts. From a legal certainty standpoint, it is *highly unsatisfactory* that there are no legal safeguards in place to prevent arbitrary assessment of the quality of an inquiry and what doubts remain following it.

[192] *Cf.* UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (22 December 2009), [72].

Comparing Theory on Age Assessment with Practice

Finally, we have now reviewed what several legal sources may say about age assessment, *in theory*. In a previous study, I collected every judgment on an appeal of a temporary age decision.[193] The purpose of this chapter is to compare those practical findings, with the theoretical ones above. To this end, we shall first briefly review my previous findings and afterwards discuss any similarities and discrepancies between theory and practice.

When I conducted the study in autumn 2018, there had been 65 judgements made in total at the Migration Courts of Malmö, Gothenburg, and Stockholm (the court in Luleå surprisingly absent), on an appeal of a temporary age decision, since the 'new order' of age assessment was introduced. In comparison, 190 temporary age decisions had been made by the Migration Agency.[194] In none of the 65 judgements did the Migration Court change the temporary age decision to instead consider the applicant a child and the Migration Court of Appeal has in no case granted leave to appeal.[195] The purpose of the study was to compile and review all these judgements to find out *why* no appeal had been successful for the applicant. In other words, I wanted to find out what the obstacles for proving your age are *in practice.* There were many ways to divide and categorise the judgements. For example, I looked at nationality, sex, what Migration Court and what judge had passed judgement.[196] What divided the cases the most was however whether the applicant had submitted to a medical age assessment, or not. The majority of applicants, 41 out of 65, had submitted to a medical age assessment.[197] Conversely, 24 applicants had not agreed to undergo the examination.[198] When identifying why their appeals were unsuccessful, the main difference was the medical age assessment.

In every case where the applicant had submitted to a medical age assessment, the Migration Agency and Court agreed with the opinion from RMV that the results of the medical examination suggests that the applicant is eighteen years or older.[199] In 80 % of these cases, the applicant had referenced the criticism of medical age assessment, shown in Chapter 1.1, in their appeal. Whilst acknowledging the criticism in a few cases, the courts did in no case consider that the applicant's age was credible, nor did the criticism affect the

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[193] E Johansson, 'Överklaganden av tillfälliga åldersbeslut för asylsökande, en kvantitativ studie' (2019) <https://www.academia.edu/38580370/%C3%96verklaganden_av_tillf%C3%A4lliga_%C3%A5ldersbeslut_for_asyls%C3%B6kande_en_kvantitativ_studie>.
[194] *Ibid.*, 2.
[195] *Ibid.*, 18.
[196] *Ibid.*, 19 ff.
[197] *Ibid.*, 12.
[198] *Ibid.*, 11.
[199] *Ibid.*, 12.

perceived quality of the Migration Agency's inquiry. The majority of judgements were passed by the Migration Court in Stockholm. When addressing criticism of the method for medical age assessment, in a third of all judgements[200], the court in Stockholm used the same pre-written passage and referenced RMV's report to the government on their task to conduct medical age assessments.[201] However, the report in question merely describes the method used by RMV. Therefore, when the court tried to address the criticism of the method, they only referred to the method, without additional argument. Thus, showing a remarkable lack of logic for a court of law. In summary, in all cases where the applicant had submitted to a medical age assessment, the results of it were decisive. In almost every case, the applicant referenced the scientific criticism of medical age assessment, yet it was fruitless. In many cases, the Migration Court did not address the criticism, however when they did, they did so poorly and with undeveloped arguments.

Where the applicant had not submitted to a medical age assessment, the negative outcome of the appeal was dependent on the lack of evidence.[202] These applicants were unable to make their age credible, mainly because oral testimonies may only exceptionally make one's age credible[203], and because their written evidence did not fulfil the stringent technical requirements on personal documents.[204] As we know full well by now, when lacking evidence, the benefit of the doubt is critical to making your age credible, otherwise setting the bar at a very high threshold. In half of these cases, the Migration Court explicitly noted that the applicant *may not* be given the benefit of the doubt, because they had not submitted to a medical age assessment. The courts argued that the applicants may not be given the benefit of the doubt because they had not done what is in their power to prove their claim. As we may recall, a requirement for the benefit of the doubt to be given is that the applicant has made a *genuine* effort to substantiate their claim. Thus, according to Swedish Migration Courts, not submitting to a medical age assessment is *disingenuous* and denies the applicant the prospect of being given the benefit of the doubt[205]; regardless of whether the applicant did not submit to the medical examination because of the substantive criticism that the method has received.

In summary, we may conclude that all applicants in the study were considered adults because they were unable to make their age credible due to a lack of accepted evidence. Furthermore, we may conclude that for those who submitted to a medical age assessment, the results of said examination were given decisive weight, regardless of criticism of the method. Lastly, we may conclude that when not submitting to a medical age assessment due to the criticism, the applicants were not given the benefit of the doubt because it was

[200] E Johansson, 'Överklaganden av tillfälliga åldersbeslut för asylsökande, en kvantitativ studie' (2019), *supra* n 193, 13.
[201] Ju2016/03931/Å, 7-9.
[202] *Ibid.* 200, 11.
[203] MIG 2014:1.
[204] See Chapter 2.2.
[205] *Ibid.* 200, 11.

considered disingenuous not to submit to the examination; despite the criticism.

It should not necessarily be seen as particularly controversial that no applicant was able to 'prove' their age. As we have seen, it is generally accepted that it is rarely possible to prove all aspects of an asylum-seeker's story to a sufficient standard of proof. Instead, what keeps the process from being impossibly difficult is that the *benefit of the doubt* may be given.[206] This principle hinges on the acknowledgement of *doubt*. That is the acceptance of uncertainties which the decision-maker may look past due to the difficulties of ascertaining said uncertainties. Without acknowledgement of doubt, no benefit may be given. In the cases above, we see an almost blatant disregard of the criticism that established scientists have voiced against the method used for medical age assessment. Criticism that *should* incur doubt. Yet the criticism is either now acknowledged, or it is addressed by referring to the method itself, an example of circular reasoning; *i.e.* a logical *fallacy*. In the one case where the criticism is acknowledged, the applicant is still not considered to have fulfilled her burden of proof. Disregarding the burden of inquiry and benefit of the doubt.[207] As I have said before, if the risk that *every third child* is erroneously classified as an adult does not constitute *doubt*, then what in the world does? Regarding those who do not submit to a medical age assessment, it is indeed a requirement that the applicant make a *genuine* effort to substantiate their claim.[208] That is, a genuine effort to prove your age. When scientists agree that the method used for medical age assessment is not accurate enough, it is *disproportional* to consider it disingenuous to refrain from submitting to the examination. Forcing applicants to submit to a criticised process has direct negative consequences for the legal certainty of unaccompanied minors as the risk of erroneous classification instantaneously rises when they undergo the examination.

We may conclude that one of the largest issues at hand regarding age assessment in Sweden is the absent acknowledgement of doubt. When authorities are of the full belief that the method used to conduct medical age assessments is both accurate and reliable to a sufficient scientific standard, then it is impossible for the child who is erroneously classified to upturn that decision. Behind this issue is the fact that the statements from the 'expert authority' RMV are viewed without reflection and considered 'true', despite criticism. Possibly due to medically and legally trained officers speaking 'different languages', where perhaps the suggestion of an age means different things in different fields. However, just as it is important to assess the credibility of an oral testimony, it is equally important to assess scientific results by reviewing the method used to obtain those results. Granted, the latter is a much more difficult task, yet nevertheless crucial for ensuring legal certainty for unaccompanied minors. Thus, in conclusion, I ask that decision-makers not only look at the results in front of them, but also at the method

[206] C Diesen *et al.* 'Prövning av migrationsärenden. BEVIS 8' (Norstedts juridik 2012), 207; UNHCR, *Handbook*, [203].
[207] Migration Court in Malmö, UM 2701–18.
[208] UNHCR, *Handbook*, [203].

used to obtain them. Does it strike you as *scientific* that the method in question was based on two studies of 13 seventeen-year-olds in total? I should hope not.

Going forward, I argue that the biggest issue is the lack of acknowledgement of doubt, which relates to the question of whether the inquiry has been fulfilled to its required standard. Currently, the Migration Agency as both decision-maker and party to the matter, decide themselves whether they have fulfilled the standard of inquiry to a sufficient degree and whether doubts remain. From a legal certainty standpoint, this should not be considered satisfactory. Thankfully, in the second instance, the Migration Courts instead shoulder the responsibility of decision-maker and may decide whether the standard has been fulfilled. However, as of autumn 2018, in no case concerning age assessment had a Migration Court reached the conclusion that doubts remain. Thus, indicating that every single applicant was in fact an adult, or that doubts are not acknowledged as they should be, and that the quality of the inquiry is not scrutinised.

The most preferable solution to the conundrum of age assessment would be to address the problem at its core; that being the unvalidated medical age assessments. Concerning radiological age assessments, it may however be impossible to validate such a method, due to the inherent problem of civil registration lacking in countries of origin.[209] For this reason, I tend to lean with the scientists who believe that a system of age assessment 'based on a thorough psychological assessment, rather than imprecise medical methods, is probably the best existing model today'.[210] A psychological age assessment would show greater consideration to the mental immaturity of the child, in line with the preamble to the CRC, and should be further studied.

[209] G Noll 'Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum' International Journal of Refugee Law, 2016, Vol. 28, No. 2, 234–250, 238 f.
[210] A Hjern, H Ascher, M Vervliet and I Derluyn 'Identification: age and identity assessment' Research handbook on child migration, (Edward Elgar Publishing 2018), 292.

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