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# Separated children seeking asylum

-with focus on the evidentiary assessment  
within Swedish refugee law

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# Summary

Separated children are children under 18, who are outside their country of origin and have been separated from their parents, or other previous legal/customary primary caregiver. Although the reasons for these children's separation from their primary caregiver may vary, the phenomenon is not a recent occurrence. As for refugees in general, the number of asylum applications from separated children has varied in accordance with the size and number of conflicts around the world. The procedure for separated children and asylum also varies from one country to another and there seem to be no completely satisfactory procedure for requesting asylum and assistance to separated children. Since the asylum procedure, as legal procedures in general, appears to be created for adults, problems arise when dealing with a child applicant. As a consequence of a child's minority, s/he may need someone who can represent him/her during the procedure. Moreover, a child may have problems with meeting with those criteria that have to be fulfilled, in order for a claimant to be recognised as a refugee. In addition, existing prejudice opinions regarding a child's ability to provide reliable information may prevent an adjudicator from taking a child witness with sufficient gravity. As the testimony of a separated child in general is the main evidence to support the refugee claim, this may create great difficulties. The aim of this thesis is to analyse the situation of separated children in the Swedish asylum procedure, with special attention given to the evidentiary assessment. Separated children in an international context are used as a basis for comparison; references are also made to the evidentiary assessment in cases of adult asylum seekers. A comparison is also made with the practice of evidentiary assessment in child cases within family and criminal law.

As to the prejudice opinions regarding children being less capable than adults in providing reliable information, the question of credibility comes into focus. In order for a testimony to be reliable, it has to be ascertained that the narrative has solidity when confronted with other evidence. According to the MB, a decision of the credibility of the applicant should not solely be based on the age of the applicant. Neither is a child to be looked upon as more or less credible compared to an adult. Regardless of the type of the case, it appears to be extremely difficult to find a testimony reliable if the witness is considered to lack credibility. Analysed decisions made by the MB shows that child applicants sometimes are considered as not credible witnesses. The decisions also show that lack of confidence in an applicant, owing to uncertainty in parts of the narrative, may affect all parts of information coming from that applicant. This despite the fact that the disputed parts of information may have no relevance whatsoever, regarding the applicant's right to refugee status.

The Swedish refugee definition is in accordance with the 1951 Convention relating to the Status of Refugees. Hence to obtain asylum in Sweden, the

applicant has to show that s/he owes a well-founded fear of persecution for reasons of race, nationality, membership of a particular social group, or religious or political opinion in his/her country of nationality.<sup>1</sup> Since there are no specific regulations on refugee status concerning children, this definition applies to children in the same way as to adults, regardless age. Whenever making a determination on refugee status the problem of proof is great. A child that is accompanied by his/her parents is in the majority of states granted refugee status if one of the parents is considered a refugee. As a consequence the test of well-founded fear normally does not become a problem in such cases. When dealing with separated children however, the test may become a great problem as a child often is considered to be unaware of his/her surrounding situation. If the child applicant is unaware of his/her surroundings – how may that child owe a well-founded fear, owing to those surroundings?

It is obvious that not all children are aware of their own situation, or why their parents/family fears for their lives. In these situations it is for the caseworker handling the case, and the adjudicator, to make an investigation on the applicant's situation and thereby obtain sufficient basis for a decision. The UNHCR Handbook specifically points out that the question of whether a separated child may qualify for refugee status must be determined in the first instance according to the degree of his/her mental development and maturity. This guidance has been criticised on the grounds that there is no necessary connection between a person's level of maturity and the existence of a well-founded fear of persecution, as anyone can be persecuted, regardless age. Furthermore, although a child might not clearly understand the grounds for his/her fear, s/he is as capable of feeling fear as an adult. Still, the age and maturity of a child appears to be of great importance, not only within refugee law, but also within family and criminal law. Even when a child is considered mature enough to *owe* a well-founded fear of persecution, the child might have problems *verbalising* that fear. A child may also have a different way of *expressing* his/her fears than an adult; s/he may also apprehend his/her situation different from an adult. Swedish case law on statutory care confirms that a child's apprehension of his/her situation may be of great diversity from that of an adult apprehension. In a case of statutory care concerning a 7-year-old child, the Swedish County Court defined violence from a child perspective and came to the conclusion that the prerequisite criteria of assault were fulfilled. The *child's* apprehension of his/her situation was decisive in this case. For Swedish case law in administrative cases to be consistent, an analogy should be made between above mentioned case law and the decisions in the asylum procedure. A child perspective could hence be decisive when determining

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<sup>1</sup> The applicant also has to be unable or, owing to such fear, unwilling to avail him of the protection of that country. This applies irrespective of whether persecution is at the hands of the authorities of the country or these cannot be expected to offer protection against persecution by individuals. A stateless person who for the same reason is outside the country of his former habitual residence and who is unable or, owing to such fear, is unwilling to return to that country, shall also be deemed a refugee. The Aliens Act chapter 3 § 2.

what actions may constitute persecution. Furthermore, as the term well-founded fear is considered to include a subjective element within Swedish refugee law, the personality of the child should be taken into great consideration, when determining whether the individual child owes a well-founded fear. Moreover, it is important that child specific forms of persecution are recognised. One problem that may arise when trying to assert if a child is subjected to child specific forms of persecution in his/her country of origin is that, in general, such persecution is exercised by non-governmental actors, i.e. private individuals in the society. For a successful claim, the applicant has to show that the persecutor holds the intent to persecute, that the persecution is linked to one of the reasons prerequisite and that the government in the country of origin is unwilling, or unable to protect the child from the persecution. If the child is unable to provide sufficient evidence in such cases, it is up to the caseworker and adjudicator to fill in possible gaps.

The reason for the persecution feared by the applicant has to be for one of the reasons mentioned above, i.e. race, nationality, membership of a particular social group, or religious or political opinion. A question that arises is whether a child qua child, may be recognised as a member of a particular social group. There are indications that such interpretation can be made and even should be made. If a child owes a well-founded fear for persecution *because* s/he is a child and the state is unable or unwilling to protect the child from the persecution, that child *could* be recognised as a refugee. Minors that are forcibly recruited into international sex trade or armed militias, *because* they are *minors/children*, may consequently be recognised as refugees, provided that no effective state protection exists. They are discriminated for reasons of their membership to a particular social group and thereby prevented from enjoying their inherent, basic human rights and freedoms, all in accordance with case law on the area.

My analysis indicates that children have great problems in proving that they are persecuted for one of the reasons stated. For instance, although the MB has an ambition to establish a child applicant's political opinion and activity, these seem in general not to substantiate sufficient ground for a positive claim for asylum. Furthermore, in some of the analysed decisions the reason for the persecution feared was a family member's political opinion. The fact that the persecutor may have believed the whole family to hold the same political opinion is not mentioned in any of these decisions. Despite the fact that this may have been the actual reason for the persecution feared. In other words, even though the MB appears to acknowledge children as capable holders of political opinions, they may in reality not be accepting children as political actors. In addition, girls suffering from FGM are not given refugee status; they are instead recognised as aliens in need of protection. This practice clearly reduces many female child applicants' ability to obtain refugee status.

In conclusion, there are several factors that have to be taken into consideration when dealing with a separated child seeking asylum. The

person interrogating the child has to be free from prejudice opinions regarding children. If the child is unaware of the reasons for his/her fear, it is for the adjudicator to make a thorough investigation. If the child is unable to verbalise his/her fears, psychiatric expertise on children may be necessary during investigation. Additionally, a wider interpretation of the prerequisite criterion of refugee status may be necessary as to include children.

# Abbreviations

AAB	Aliens Appeals Board
CRC	UN Convention on the Rights of the Child
EU	European Union
FGM	Female Genital Mutilation
MB	Swedish Migration Board
OAU	Organisation of African Unity
SCEP	Separated Children in Europe Programme
UN	United Nations
UNHCR	Office of the United Nations High Commissioner for Refugees

# 1 Introduction

Separated children seeking asylum are asylum-seekers under the age of 18, who are separated from their primary legal/customary caregivers.<sup>2</sup> The reasons for a child's separation from his/her parents/guardians vary. Sometimes a child has been separated during the escape itself and has thereafter been unable to find his/her family again. However, a lot of the time the flight has been arranged *by* the parents or other primary caregivers to ensure the child's safety.<sup>3</sup> Furthermore, sending a child to apply for asylum alone may benefit the whole family in other ways than to protect the individual child; if the child obtains a residence permit, the family may have a better chance of obtaining residence permits in that same country, owing to an established family connection.<sup>4</sup>

The phenomenon of separated children is not a recent occurrence and, as for refugees in general, the number of asylum applications from this group of applicants has varied, in accordance with the size and number of conflicts around the world. In 2000, it was estimated that 16 100 separated children applied for asylum in twenty-four European countries; these children constituted 4 % out of the total applicants for asylum that year in those countries. Predominantly, the applicants were male and between 16 and 17 years old. The number of separated children applying for asylum in Sweden that year amounted to 350, constituting 2 % of the total number of applicants.<sup>5</sup> As for the number of asylum-seekers in general<sup>6</sup>, the number of separated children applying for asylum in Sweden has gradually increased, compared to the last few years. 460 separated children applied for asylum in 2001 and last year the number of such applications amounted to 550.<sup>7</sup> Out of the 460 applicants in 2001, 170 were granted residence permit owing to humanitarian grounds, 32 were recognised as aliens in need of protection and only 3 were granted refugee status. Last year 179 of 550 applicants obtained a residence permit on humanitarian grounds, 27 were recognised as

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<sup>2</sup> See section 3.1 for a more thorough explanation of the definition "separated children".

<sup>3</sup> Report from the Social Welfare Board and the MB, *Förbättringar av mottagandet av barn från annat land som kommer till Sverige utan medföljande legal vårdnadshavare (s.k. ensamkommande barn)*, 2002, p 20.

<sup>4</sup> A child that is sent away for the purpose of creating a connection between a country of asylum and the rest of the child's family is sometimes referred to as an 'anchor child'. See Aliens Appeal Board, case UN 413-01. (The abbreviation UN is here used in the context of Swedish refugee case law as a Swedish abbreviation of the AAB.)

<sup>5</sup> The countries were Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Lithuania, Luxemburg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. Year 2002 an estimated 7.7 million children were under the care of the UNHCR. It is uncertain how many out of these were separated from their parents or other primary legal guardians. [www.unhcr.ch/cgi-bin/texis/vtx/home?page=search](http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=search), 1/8-03, 13.40.

<sup>6</sup> According to statistic from the MB the number of asylum-seekers in Sweden has gradually increased; 16 283 applied for asylum in 2000, 23 515 in 2001 and 33 016 in 2002. [www.migrationsverket.se](http://www.migrationsverket.se). 10/11-03, 12.00.

<sup>7</sup> Statistics from the MB.

aliens in need of protection and 2 required asylum owing to their refugee status.<sup>8</sup> Two thirds of the applicants last year were male and only thirteen child applicants were under the age of 6.<sup>9</sup> The figure of separated children seeking asylum the first six months of 2003 amounts to a total of 249, of which 167 children have obtained residence permits on humanitarian grounds, 11 were recognised as aliens in need of protection and 2 as refugees.<sup>10</sup>

The fact that separated children arrive without their primary legal/customary caregiver puts them in a unique position. Not only are they in a country to which they, in general, have no actual, natural connection. They are separated from their families and have no one who can represent them in legal matters; neither do they have someone who can help telling their story, by explaining the situation in their countries of origin and their individual positions in society. Such matters may not always be clear to children as, one may assume, they normally have been dependant on the adults in their families before the separation. Hence, separated children appear to be in need of a treatment different than that owed to adult asylum-seekers and children who arrive with their families to apply for asylum.

## 1.1 Subject and aim of thesis

The situation of a child in the legal system is somewhat different than that of an adult; owing to the legal incapacity of the child s/he is in general dependant on an adult to plead his/her cause. In addition, a child is often considered to be unaware of the surrounding situation, not being able to give a reliable testimony on a course of events. The imagination and vulnerability of a child may create a problem in a legal procedure, leading to disbeliefs on account of the narrative of a child.

The asylum procedure, as legal procedures in general, appears to be created for adults. As a consequence, problems may arise when a separated child claims refugee status. Not only may such child need legal representation; those criteria that have to be fulfilled, in order for a claimant to be recognised as a refugee, may not be interpreted as applicable on a child applicant. Moreover, the testimony of a separated child has, in general, no support from an adult; hence the child's testimony is the main evidence to support the refugee claim. Given the existence of prejudice on the diminished credibility of children in general, interrogation of a separated child may necessitate child expertise in those who perform the interrogation and the investigation.

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<sup>8</sup> One separated child in 2001 obtained residence permit for other reasons than above mentioned, the corresponding number for 2002 was 22. Statistics from the MB.

<sup>9</sup> [www.rb.se/NR/rdonlyres/27A4B1ED-2521-44D7-A753-EB5801AFE88A/0/Ensamkommandebarn\\_faktablad.pdf](http://www.rb.se/NR/rdonlyres/27A4B1ED-2521-44D7-A753-EB5801AFE88A/0/Ensamkommandebarn_faktablad.pdf), 1/8-03, 14:00.

<sup>10</sup> 17 separated children obtained residence permits for other reasons. Statistics from the MB.

The aim of this thesis is to analyse the situation of separated children in the asylum procedure in Sweden, with special attention on the above mentioned problems regarding evidentiary assessment. To be able to give a relevant description, a comparison has been made with the practice of evidentiary assessment in child cases within family and criminal law. References are also made to how questions of proof and credibility are handled when dealing with adult applicants of asylum in general. Furthermore, separated children in an international context are used as a basis for comparison.

## **1.2 Sources and methods**

In pursuit of the aim stated above, a desk study on separated children has been carried out. The sources that have been used for descriptive purposes and analysis are those of doctrinal texts, articles, legal instruments and relevant preparatory works, other relevant literature and information from Internet sources.

The desk study was complemented with an empirical study of how cases of separated children are handled in the Swedish procedure. To this effect, I have twice visited a specialised unit of the Swedish Migration Board (hereafter referred to as the MB), located in Alvesta, which deals with cases of separated children seeking asylum in the Southern region.

In the course of my first visit I obtained twenty decisions made in 2002/03 for analysis of the situation of these children. I made the selection as an attempt of obtaining a variation with reference to age, gender, country of origin and the outcome of the decisions. On my second visit, I was allowed to attend an interrogation of one of the separated children seeking asylum. As decisions from the MB are documents not accessible to the public, these visits were of importance in order to obtain sufficient basis for investigation. In addition, I interviewed several members of the staff at the MB on the situation of these children.

## **1.3 Limitations**

The aim of this thesis is to analyse the situation of separated children in the Swedish asylum procedure. In order to accomplish a relevant analysis, I have touched on other legal areas than that of refugee law. The selected areas have been chosen on basis of the fact that they bring out relevant questions, regarding similarities and lack of similarities in comparison with refugee law.

I have made an attempt to make a general analysis of the situation of separated children internationally. Nevertheless, the main aim of the analysis is the present situation in Sweden, and of decisions made by the MB.

Decisions on applications of separated children are made by adjudicators and caseworkers at the MB, dealing specifically with such matters. Today there are a total of 7 adjudicators who specifically work with applications from separated children and, in addition, most regions also have access, as far as availability admits, to adjudicators who otherwise work with adult cases. Investigations of the cases of separated children are made by 27 caseworkers. In one unit there is also an expert on issues concerning separated children available.<sup>11</sup> It is rare that decisions on separated children made by adjudicators at the MB are overturned by the Aliens Appeals Board (hereafter referred to as the AAB).<sup>12</sup> Investigations on appeals in general, are executed only if considered necessary i.e. if the investigation made by the MB appears to be defective or insufficient. Such incomplete investigations are returned to the MB for correction, hence the caseworkers at the AAB never, in general, perform interviews with the applicants.<sup>13</sup> The AAB has two caseworkers who are responsible of supplying information, internal and external, on issues regarding child asylum seekers. These two caseworkers do not necessarily handle the appeal of a separated child; such an appeal is dealt with by any of those caseworkers available at the AAB. Consequently, the appeal of a separated child is not handled by separate caseworkers and, also, there are no adjudicators at the AAB that specifically deal with asylum applications from children.<sup>14</sup> As a matter of course, the most detailed investigations are made by caseworkers and adjudicators at the MB, who in general only deal with separated children. This is the reason for my choice of limitation on the area.

## 1.4 Outline

The following chapter consists of a description of children in the legal system, with special attention given to selected areas of family and criminal law, regarding children and evidentiary assessment. Chapter three focuses on separated children in general; it provides a definition, and elaborates on

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<sup>11</sup>In the Northern region, there are two caseworkers dealing with separated children specifically. However, the decisions on the applications made in the Northern region are made by adjudicators from the Stockholm region, where they have twelve caseworkers and three adjudicators. In the Central region there are five caseworkers and two adjudicators, in the Western region there are four caseworkers and one adjudicator. The Southern region has four caseworkers, one adjudicator and the expert mentioned above. Information from the MB.

<sup>12</sup>In 2001, 6 decisions of expulsion were cancelled and changed to decisions of granted residence permit by the AAB. The corresponding figure of 2002 was 12 and for the first six months of 2003 the number is 6. The number of successful appeals to the AAB is relatively low in general; in 2001 17% out of the total appeals on decisions of expulsion were overturned by the AAB. The corresponding figure of 2002 was 9% and for the first six months of 2003 13%. Statistics from the MB.

<sup>13</sup> Only in specific cases the alien is summoned to a hearing.  
[www.un.se/unenglish/workProcedures.asp](http://www.un.se/unenglish/workProcedures.asp), 10/11-03, 12:20. According to the Aliens Act chapter 11 § 1, a hearing with the alien *may* be executed if specifically requested by the alien him/herself. Due to the limitations of this thesis this area is not dealt with further.

<sup>14</sup> Telephone interviews with Karin Emsgård, 13/8, 11.00 and Sofia Kalin, 12/11-03, 14:40, the two caseworkers at the AAB responsible of supplying information on child issues.

their right to apply for asylum, relevant reasons for persecution and questions of evidentiary assessment. The fourth chapter on case law consists of an analysis of the twenty decisions from the MB, in light of the areas earlier discussed in the thesis. Concluding remarks are made in the final chapter, chapter five.

## 2 Children in the legal system

The legal status of a child has developed over the centuries; a child has gone from being considered exclusively as a property of his/her father, to becoming a separate legal person.<sup>15</sup> Still, even today, a child is often considered to lack the capability of being able to determine and act in his/her own best interest. Nevertheless, a child *may* be involved in a legal process, despite his/her minority. Examples of child involvement within family law (civil cases) might be custody cases or cases of statutory care. Examples of child involvement within criminal law may be cases of different types of child abuse, severe enough to constitute criminal offences. These examples of trials that concern a child all have in common the fact that the testimony of the child may be decisive for the outcome of the trial.

This chapter will give an overview of problems that may arise when a child participates in a legal procedure, with focus on issues of legal representation, the importance of the age and maturity of a child and how a child's testimony is interpreted in a court of law. It should be noted that the legal procedures discussed in this chapter in general feature two parties, claiming different legal consequences. Furthermore, the questions that are discussed concern a child having a firm connection to the Swedish legal system, due to his/her status as Swedish citizen. In general, information given by such child is supported by other sources, such as testimonies given by parents, teachers, psychologists or other adults that may have had an insight into the everyday life of the child. When dealing with a separated child, the situation is somewhat different owing to the fact that a separated child, in most cases, has no one to support his/her testimony. The presence of testimonies from adults, to support the testimony of a separated child seeking asylum, appears in general to be non-existent.<sup>16</sup> Also, one should keep in mind that the asylum procedure is not a trial in the sense of the examples discussed in this chapter; it is administrative in character, with an applicant applying for the benefits flowing from a right before the authorities.<sup>17</sup>

### 2.1 The Convention on the Rights of the Child

International treaties set standards and, a state that has ratified such treaty has committed itself to the international community, implying that the state

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<sup>15</sup> Van Bueren, G, *The International Law on the Rights of the Child*, 1<sup>st</sup> ed., Martinus Nijhoff, The Hague, 1998, p 36.

<sup>16</sup> These issues will be discussed in chapter 3 and 4.

<sup>17</sup> Diesen, C et al, *Bevis 2 – Prövning av flyktingärenden*, 1st ed., Norstedts Juridik, Stockholm, 1998, p 157f. Also see section 3.6 in this thesis.

will act in accordance with the standards in the treaty.<sup>18</sup> Almost every country in the world has ratified the UN Convention on the Rights of the Child (hereafter referred to as the CRC).<sup>19</sup> The CRC contains *general rights*, such as the right to life, the prohibition against torture, freedom of expression, thought and religion, the right to information and to privacy. The CRC also includes *rights that require protective measures*, measures to protect a child economically and sexually, and *rights concerning the civil status of a child*, such as the right to acquire a nationality, to preserve an identity and the right to remain with his/her parents, or to be reunited with his/her family. In addition to these rights, the CRC contains *rights concerning the development and welfare of a child*. *Rights concerning children in special circumstances*, especially difficult circumstances, are also included in the CRC. These rights aim at such children as children with special needs, refugee children and orphans; among these rights one can find the prohibition on recruitments of soldiers under the age of 15.<sup>20</sup> It should be noted that the CRC exclusively deals with the rights of a child, and not with questions such as a child's lack of legal capacity. This area is left to the state to regulate within its national legislation.<sup>21</sup> Also, as Sweden is a dualist country, the CRC does *not* have the status of law within the Swedish legal system; today it is merely used as an instrument for interpreting the best interest of the child, a principle confirmed in article 3 CRC.<sup>22</sup> Article 3 is a so called portal paragraph i.e. it is to be used as guidance, when interpreting remaining articles of the Convention. The state must weigh all interest against each other, to come to a conclusion on decisions where a child may be affected. Still, it is important to notice that the best interest of the child, according to the CRC, only is *a* primary consideration, not *the* primary consideration. Hence, the best interest does not have to be *the* dominating factor when making decisions affecting children in general.<sup>23</sup> However, as the interest must be a primary consideration this requires that government policy on development, administration and resourcing, must be assessed in accordance with the principle.

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<sup>18</sup>The Vienna Convention on the Law of Treaties, adopted by the UN on 23 May 1969. The principle of *pacta sunt servanda* is confirmed in article 26; “-Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.

<sup>19</sup> The UN Convention on the Rights of the Child was adopted by the UN on 20 November 1989. It is the dominating international document concerning the rights of a child and was ratified by Sweden 1990. The CRC is binding on 192 countries; the only two countries that have not adopted the CRC are the US and Somalia. [www.unicef.org/crc/crc.htm](http://www.unicef.org/crc/crc.htm), 1/10-03, 10:00.

<sup>20</sup> Freeman M et al, *Children's Rights: A Comparative Perspective*, 1<sup>st</sup> ed., University College London, Dartmouth Publishing Company Limited, England, 1996, p 4.

<sup>21</sup> Report from the Migrationboard, *Barn i utlänningsärenden*, Norrköping, 2001, p 4.

<sup>22</sup> Edenhammar K et. al., *Respekt för barnet*, 1st ed., Scandbook, Falun, 1995, p 22.

<sup>23</sup> Freeman, p 95.

## 2.2 Legal representation

According to article 1 CRC, a child is a person below the age of 18 unless, under the law applicable to the child, the age of majority is reached at an earlier stage. In most European states the age of majority is set at 18, and this is a widely accepted age of legal majority, although there are states around the world where majority is reached at a younger age.<sup>24</sup> A person who has not yet reached the age of majority does not have the legal rights of an adult and is in legal terms also defined as a minor. In the Swedish legal system, minors do not have full legal capacity. They cannot enter into certain contractual relationships or dispose of certain parts of their property.<sup>25</sup>

According to the Swedish Code of Procedure, anyone can be a party to a trial although not everyone has a right to plead his/her own cause.<sup>26</sup> As a consequence of the lack of full legal capacity, a legal representative is to plead the cause of the child in most legal matters concerning the child. A principal rule is that a child obtains rights of advocacy at the age of 18.<sup>27</sup> This limited capacity of the child to protect his/her own interests, necessitates special rules regarding the rights of advocacy of a child, legal aid and the need of a representation in a legal process.<sup>28</sup> In situations where a child is in need of legal aid from a person other than his/her primary legal guardian, a public counsellor can be appointed.<sup>29</sup> The task of the public counsellor is not regulated by law but, according to the preparatory work of the pertinent Swedish laws, the counsellor should act as a mouthpiece on behalf of the child in the process.<sup>30</sup> In accordance with Swedish social legislation, there are situations where a child has rights of advocacy at the age of 15 and is thereby able to plead his/her own cause, despite age of minority.<sup>31</sup> The reason for this exception is that the child at this age is considered having reached a stage of maturity, where the wishes of the child

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<sup>24</sup> Van Bueren, p xxi.

<sup>25</sup> The Parental Code, chapter 9 § 1.

<sup>26</sup> The Code of Procedure, chapter 11 § 1.

<sup>27</sup> The Parental Code, chapter 9 § 1. Mattsson, T, *Barnet och rättsprocessen. Rättssäkerhet, integritetsskydd och autonomi i samband med beslut om tvångsvård*, 1<sup>st</sup> ed., Juristförlaget, Lund, 2002, p 172.

<sup>28</sup> Mattsson, p 164.

<sup>29</sup> In some situations, due to the circumstances, the primary legal guardian/guardians are considered unsuitable for the task of representing the child. This is the case in matters where the interests of the child and the guardian are in conflict with each other. For more reading on this subject see Mattsson, p 164. The Particular Representative for Children Act (1999:97) § 1 deals with situations where a guardian of a child is suspected of having committed a crime against the child. Under such circumstances, none of the primary legal guardians (if the child has more than one guardian) are considered suitable to represent the child.

<sup>30</sup> Prop. 1994/95:224, *Barns rätt att komma till tals*, p 24, prop.1996/97:113, *God man för ensamma flyktbarn*, p 12.

<sup>31</sup> The Social Welfare Act, chapter 11 § 10, The Care of Young Persons Act (1990:52) § 36, Mattsson, p 173.

are to be fully respected.<sup>32</sup> The task of a counsellor/legal representative appointed to a child in such cases therefore varies, depending on the age of the child. The younger the child, the greater the need of legal aid appears. When dealing with a child under the age of 15, the counsellor should function as the representative of that child and thereby plead the cause of the child. When dealing with an older child, the counsellor is to assist, rather than represent the child.<sup>33</sup> In matters regarding children and criminal law, the cause of the child should in general be pleaded by a legal representative.<sup>34</sup>

### 2.2.1 Age and maturity

The decision of giving a child of 15 rights of advocacy within parts of Swedish social legislation is, as mentioned above, based on the assumed maturity of such child. Another example of a situation, where the age and maturity of the child has a great impact on the child's ability to influence a decision, is that of custody cases. According to case law on the area of custody matters, the age of 12 is in general the age where the wish of the child has a decisive influence, and is considered relevant proof in a case.<sup>35</sup> Modern research on the development of a child is the basis for age ratings within the legal system; at the age of 12, a child is considered to have achieved a necessary degree of maturity, starting to liberate from the parents, develop social competence and the ability to unite his/her own interests with other interests.<sup>36</sup>

Article 12 CRC confirms that;

“ -states shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity of the child”.

Hence a child's ability to exercise choice and control over his/her life increases as the child develops and matures. One of the most applied perspectives on the development of a child in child psychology, is the perspective where the development of the child is related to the age of the child i.e. focus lies on the age of the child when determining the maturity of

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<sup>32</sup> Mattsson, p 175-176.

<sup>33</sup> Mattsson, p 182-183.

<sup>34</sup> If the child is the plaintiff a prosecutor automatically represents the child. In matters concerning young offenders a public counsellor should be appointed a person under the age of 18, unless it is obvious that this is unnecessary owing to the character of the crime for example if the crime is a less serious offence or if the indictment supposedly will be withdrawn before trial. Prop. 2000/01:56, *Ändringar i handläggning av ungdomsmål, m.m.* p 32.

<sup>35</sup> SOU 1987:7, *Barnets rätt 3. Om barn i vårdnadvister – talerätt för barn m.m.*, p 88ff.

<sup>36</sup> SOU 1996:111, *Bevakad övergång – Åldersgränser för unga upp till 30 år*, p 320f. See the section on legal counsellor, section 2.2 above, regarding age rating in a legal procedure. To read more about age ratings also see Mattsson, p 156f with references.

the child.<sup>37</sup> This perspective assumes that a child has developed in a certain direction, where the earlier stage is always to be followed by a more developed stage; the child is being looked upon as an undeveloped adult, who gradually receives physical and psychological qualities, concurrently with approaching the age of an adult.<sup>38</sup>

One problem that can be associated with this perspective is that too much attention is paid to the *age* of the child, when deciding whether or not the child is to be heard in questions concerning the child. Instead of putting so much focus on the age of the child, the child should be looked upon as an individual and, every assessment should be made from looking at the individual development of each child and not the age of that child.<sup>39</sup> Mattsson, author of the dissertation *Barnet och rättsprocessen* (eng. *The Child in Statutory Care Proceedings*)<sup>40</sup> points out that set age limits within the legal system, where children have a right to express their opinions in matters concerning them, gives a certain degree of security within the legal system. When attaining a certain age, the child has a right to express his/hers opinion and, that opinion should be taken into consideration when making a decision affecting the child. Mattsson continues by explaining that the criterion of maturity, existing alongside the criterion of age, should work as a way for a child to, at an age lower than that set in the law, be able to make him/her heard. Even though it might be difficult to estimate the degree of maturity, lack of maturity should never be an obstacle for a child who has reached the necessary age, according to the law.<sup>41</sup>

## 2.3 General analysis of evidentiary assessment

When a party in a trial claims a certain legal consequence that party has to prove that the prerequisite criteria are fulfilled i.e. the facts in the case have to correspond to the rule of law invoked. For example, if a person is accused of assault, the prosecutor has to show that the criteria in the paragraph on assault are fulfilled, in order to prove that the crime (assault) has been committed. To what level it has to be proven that a certain criterion is fulfilled, *the standard of proof* depends on the type of case.<sup>42</sup> It is in general up to the party claiming a certain legal consequence to confirm that the criteria are fulfilled<sup>43</sup>; consequently, the *burden of proof* lies on that party.

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<sup>37</sup> Hartman S G, *Barnets rätt att få vara sig själv. Appendix, "Barnets Bästa – en antologi"*, SOU 1997:116, *Barnets bästa i främsta rummet. FN: s konvention om barnets rättigheter förverkligas i Sverige.* p 34ff.

<sup>38</sup> Mattsson, p 155.

<sup>39</sup> Hartman, p 36. Also see Mattsson, p 155f.

<sup>40</sup> See note 26 for complete title and bibliography.

<sup>41</sup> Mattsson, p 155ff.

<sup>42</sup> Ekelöf, P O and Boman, R, *Rättegång IV*, 6th ed., Norstedts Juridik, Gothenburg, 1992, p 55ff, 116f. See under respective headline in this thesis regarding explanations on the standard of proof in civil, criminal and asylum cases.

<sup>43</sup> If necessary, to make a judgement in the case, the Court may in certain cases bring forward evidence. The Code of Procedure, chapter 35 § 6.

In a civil case, the burden of proof is usually divided between the parties; hence it is up to both parties to prove who has the law on their side.<sup>44</sup> In a criminal case, the burden of proof lies on the prosecutor alone.<sup>45</sup> The assessment of evidence in a Swedish court of law is free, i.e. it is up to the court to determine the *value of evidence*. This principle, the principle of freedom of proof, is applicable in administrative cases as well as in civil and criminal cases.<sup>46</sup> A witness is a *means of proof*, and the testimony of the witness is *evidence* of whether or not the prerequisite criteria in the law are fulfilled.<sup>47</sup>

The court needs to determine the evidentiary value of a testimony. This is done by evaluating the *reliability* of the narrative; it has to be ascertained that the narrative has solidity when confronted with other evidence, to convince the judge that the testimony is most likely the truth. When evaluating the reliability of the information given by the witness, it is inevitable to make an assessment of the *credibility* of the witness. This assessment is strictly of subjective character, as the credibility of a witness only can be made based on the impression the judge gets of that witness; this impression, in its turn, is in general based on the judge's values and experiences.<sup>48</sup> Regardless of the type of the case, it seems extremely difficult to find a testimony reliable if the witness is considered to lack credibility.

## **2.4 Evidentiary assessment within Swedish family law**

Family law includes several legal areas, such as parental responsibility and custody regulations, offering means to secure a safe upbringing of a child. In accordance with article 3 CRC, the principle of the best interest of the child should be a primary consideration, continuing with regulations on giving the child a possibility to have an influence on matters concerning the child (in accordance with article 12 CRC).<sup>49</sup>

### **2.4.1 Evaluating a child testimony in cases of statutory care**

An area of administrative character regarding children within family law is that of statutory care of a child. The question of statutory care arises if consent to measures of care of a child, decided by the Social Welfare Board, is not given by the parents (or from the adolescent him/herself if s/he is over

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<sup>44</sup> Ekelöf and Boman, p 60.

<sup>45</sup> Ekelöf and Boman, p 113.

<sup>46</sup> Mattsson, p 300, referring to The Code of Procedure, chapter 35 § 1.

<sup>47</sup> Ekelöf and Boman, p 17f.

<sup>48</sup> Diesen, C et al., *Bevis 6 – sexuella övergrepp mot barn*, 1st ed., Norstedts Juridik, Stockholm, 2001, p 67.

<sup>49</sup> The Swedish Parental Section, chapter 6 §§ 2a, b.

15<sup>50</sup>). Such measures of care are considered necessary in situations where parents are abusing the child, or for other reasons are incapable of taking care of the needs of the child (environmental cases). Moreover, a child that is considered a hazard to him/herself can be a subject to statutory care (behavioural cases). A decision on statutory care of a child is taken by the County Court, on initiative of the Social Welfare Board.<sup>51</sup> To be able to place a child in statutory care, the Social Welfare Services have to show that there is an obvious risk that the development or health of the child will suffer severe harm, if care is not provided.<sup>52</sup> Once an investigation is started, an evaluation of the evidence obtained has to be made. As the evaluation of evidence is free in administrative cases, as well as in civil and criminal cases, an exact value of a piece of evidence in general cannot be set. To give a child the possibility to have an influence on the outcome of such matter, information coming from the child itself, or his/her legal representative, is handled as evidence in the case, although the impact of the wishes of a child varies depending on the circumstances.<sup>53</sup>

Mattsson has researched on the evidentiary value of a child's testimony, both in environmental cases and in behavioural cases.<sup>54</sup> In environmental cases, where the court has been able to attain a testimony from the child itself, case law shows that the age of the child does not seem to matter when evaluating the value of evidence of the testimony.<sup>55</sup> Still, when dealing with a young child, it can be difficult to attain information from the child; in practice there is a need of experts to understand and to interpret the statements of a young child. A testimony of an expert in these cases is especially important; however the value of evidence of a testimony from an expert varies, depending on the statement made. A statement of general character only has a limited value as such a general statement is not directly referable to the individual case.<sup>56</sup> The information/testimony from a child in environmental cases never seems to be admitted as the exclusive, decisive, evidence in a court case. It is in general combined with other means of proof, such as testimonies from adults, statements from different experts, or prosecution for a crime committed against the child in a criminal case on the side. Though, the testimony of a child is not used only to attain proof as of need of protection; it can also show how a child apprehends his/her situation, the wishes and emotions of the child and function as a way of finding out the child's degree of maturity. Mattsson shows that a child's

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<sup>50</sup> See section 2.2 regarding the rights of advocacy of a 15-year-old child.

<sup>51</sup> The Care of Young Persons Act, §§ 1-4.

<sup>52</sup> Diesen, Bevis 6, p 28.

<sup>53</sup> Mattsson, p 303f, refers to case law from the European Court of Justice.

<sup>54</sup> Such cases are documents not accessible to the public. Due to the main aim of the thesis and time limitations I have decided to use Mattsson's conclusions as basis for analysis on this area.

<sup>55</sup> Mattsson p 405.

<sup>56</sup> Mattsson, p 311ff. For further discussions regarding the impact a child's apprehension may have, see section 3.7.

apprehension of the situation can have a great impact on the judgement of the character of actions, taken by the parents.<sup>57</sup>

In behavioural cases the compulsory care is meant to protect the child from him/herself, not from the parents, hence the behaviour of the *child* dominates the investigation. In general, a child in this situation has reached the age of 15 and his/her attitude towards the situation is relatively clear. Furthermore, at the age of 15, the child may represent him/herself which allows him/her to participate to a higher extent than a younger child.<sup>58</sup> When determining whether there is a need of statutory care in behavioural cases, the testimony of the child *may* be decisive for the outcome of the case. As the child's testimony may be used as *the* main evidence, an assessment of the credibility of the child is done by the court. If the court finds that the child has given a credible impression and provided the court with reliable information, this may be evaluated as conclusive evidence.<sup>59</sup>

## 2.5 Evidentiary assessment within Swedish criminal law

When suspecting that a *crime* has been committed against a child, an investigation is to be carried out by the police and prosecutor. The standard of proof is set high. To get a conviction of the child abuser, the evidence has to be strong; it has to be proven beyond reasonable doubt that the accused has committed the alleged crime.<sup>60</sup> This threshold of standard of proof is higher than in civil cases where, to obtain requested legal consequence, it may be enough with a 51% balance of probability.<sup>61</sup> It is in general difficult to obtain proof that a child has been a victim of a crime. In many cases there is no proof other than the testimony of the child, whereas that statement becomes the most important form of evidence when trying to interpret and understand what has happened.<sup>62</sup>

### 2.5.1 Interview technique

To obtain a statement from a child that is sufficiently detailed to constitute a basis for a criminal trial in a court of law, the person interrogating the child should have a great deal of competence on how to perform child interviews.<sup>63</sup> This is important when interpreting the essence of the information given by the child; if the interview is carried out inaccurately,

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<sup>57</sup> Mattsson, p 402ff.

<sup>58</sup> Mattsson, p 415.

<sup>59</sup> Mattsson, p 421.

<sup>60</sup> Ekelöf and Boman, p 117.

<sup>61</sup> Gorlick, Brian, RWI Report No. 33, "*Common Burdens and Standards. Legal Elements in assessing Claims to Refugee Status*" in *Asylum in Europe: Strategies, Problems and Solutions*, Lund, 2001, p 26.

<sup>62</sup> Diesen, Bevis 6, p 17.

<sup>63</sup> Diesen, Bevis 6, p 46.

there is a great risk of misjudgement on the result.<sup>64</sup> Research has been done in connection with investigations concerning children, leading to a number of guiding principles regarding methods in interviewing a child.<sup>65</sup> The guidance on the area emphasises the importance of using a language that is adjusted to the linguistic development of the child. If the child is unable to understand the questions asked, it will be difficult to receive an answer that is relevant to the question put forward. Besides the use of language, the interviewer should keep in mind to be patient and await the answer, trying not to cut in whenever the child pauses in his/hers narrative. It is also important that the person conducting the interview avoids prejudice opinions on what the child has been subjected to, as far as possible; the interviewer should be aware of the great influence s/he can have on the child. A prejudice opinion on the occurred can easily result in leading questions or suggestive remarks that may affect the outcome of the interview, in a wrongful way.<sup>66</sup> Although leading questions are not recommended, these can be an important instrument to test the credibility of the witness during a police questioning.<sup>67</sup>

The Notification on Preliminary Investigation gives further guidance on how to interview a person under the age of 18, in relation to *committing* a criminal offence.<sup>68</sup> Notice should be taken to the fact that a child under the age of 15 is not to testify under oath.<sup>69</sup> In addition, when it comes to criminal law, there is normally a minimum age for criminal responsibility i.e. a person below that age is not to be punished for his/her actions. In Europe the age varies between 7 in Ireland up to 15, which is the age of criminal responsibility in Sweden.<sup>70</sup> The notification above confirms that a hearing with a child should be performed by a person who has sufficient competence in the area. In situations where the testimony of a child is of decisive importance, an expert should be engaged if considered necessary regarding the age and maturity of the child, and the nature of the crime.<sup>71</sup>

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<sup>64</sup> Cederborg, A-C, *Barnintervjuer, vägledning vid utredningsarbete*, 1st ed., Falköping, 2000, p 27f

<sup>65</sup> Cederborg, p 18f.

<sup>66</sup> Cederborg, p 55ff. In case 1993:118 of Svea Hovrätt a ten-year-old girl accused her stepfather of sexual abuse and rape. The questions the girl was asked during interrogation were considered to be too suggestive. Hence the credibility of the information coming from the girl did not constitute sufficiently strong evidence for a conviction of the accused. Also see Granhag, P A, *Vittnespsykologi*, 1<sup>st</sup> ed. Studentlitteratur, Lund, p 117ff.

<sup>67</sup> Diesen, Bevis 6, p 41; leading questions should be avoided as for obtaining information from the witness, they should only be used as a complement to other questions, as a way of questioning the statement of the witness.

<sup>68</sup> Notification on Preliminary Investigations ( 1947:948). This notification deals with questioning of persons suspected for committing a crime, an analogous interpretation has been done to be applicable on child victims in accordance with a judgement from the Supreme Court of Sweden, NJA 1986 s. 821.

<sup>69</sup> The Swedish Court of Procedure, chapter 36 § 13. The same rule is applicable on persons who suffer from a mental disorder.

<sup>70</sup> van Bueren, p 173, the Swedish Criminal Code, chapter 1 § 6.

<sup>71</sup> Notification on Preliminary Investigations, §§ 18, 19.

The development of guiding principles on how to perform an interview with a child, in combination with recommendations of expert help, shows an acknowledgement of the difficulties involved when interviewing a child. Application of the guiding principles, in combination with expert help appears to be of great importance, especially when dealing with younger children.

## 2.5.2 Evaluating a child testimony in cases of sexual abuse

Once the court has obtained a testimony from the child it has to decide the testimony's value of evidence, by making an evaluation of the reliability of the narrative. Case law shows that when dealing with *very* young children as witnesses, the statement of the child could never alone constitute sufficient evidence for a conviction in a rape trial.<sup>72</sup> Still, if the child has sufficient verbal knowledge, his/her statement could be enough to get a conviction, as long as the interrogation/questioning, has been carried out in accordance with legal security.<sup>73</sup>

To only make an evaluation of the credibility of a witness, is too subjective and shallow as, Gregow, a Justice of the Supreme Court, points out. All circumstances should be taken into consideration. To facilitate the determination on the reliability in cases of sexual abuse, established criteria may be applied when evaluating a testimony. These criteria have been summarized by Gregow as follows;

1. An essential change in the testimony speaks against the original accusation being accurate.
2. If the child has given information in matters of importance that turns out to be incorrect, this should affect the reliability of all information given from the child in a negative way. This should also be the case if the information given is contradictory.
3. The judge needs to decide if the information given by the child seems probable; details in the narrative on the course of events can give an indication.
4. Does the child have a motive for giving incorrect information?
5. The credibility of the child during questioning.
6. The personality of the witnesses can indicate whether the testimony is fabricated or not. Does the child have a great sense of imagination, or a big interest in sexual matters?
7. How did the child act during the time of the alleged crime?
8. Other means of proof has to be taken into consideration, such as technical or medical means of proof.<sup>74</sup>

These criteria are built on experiences of judges in combination with psychological sources, and may provide a judge with guidance when evaluating the reliability of the information given by a child witness.

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<sup>72</sup> NJA 1994 s. 268. The child in question was 2 years old.

<sup>73</sup> NJA 1986 s. 821, NJA 1993 s. 68, NJA 1993 s. 616.

<sup>74</sup> Gregow T, *Några synpunkter på frågan om bevisprövning och bevisvärdering i mål om sexuella övergrepp mot barn*, Svensk Juristtidning, no.5, 1995, p 517ff. Also see NJA 1993 s. 616

However, they have to be applied with caution, as they are not scientifically conclusive.<sup>75</sup> For instance, witness psychology shows that the inability of giving details in a narrative does not necessarily prove the child to be a liar.<sup>76</sup> When a person is to describe something that s/he performs regularly, it is not uncommon that that narrative is short of details.<sup>77</sup> Besides, if the witness has experienced a trauma, this may have great impact on the witness's ability to provide coherent information. A trauma may *impair* the ability to give coherent information, especially if interrogations are carried out repeatedly with the witness. Once the witness has begun a search in memory, that search continues in between interviews. As a consequence, the witness may be able to give further details in a second interview, discrepant to the information given in the first interview. Clinical anxiety due to the trauma may in addition prevent the witness from giving coherent information; as the personal negative memories may be too depressing to recall, the witness may suppress such memories in favour of more positive memories. For these reasons, incoherency in a narrative from a traumatised witness does not necessarily mean that the witness is lying.<sup>78</sup> Moreover, Gregow's criteria are originally to be applied on adults; hence an accurate application of the criteria on a narrative of a child, especially a very young child, might not be possible. Also, one always has to see to the individual case when evaluating proof, as a set scheme for evaluation might not always be appropriate depending on each situation.<sup>79</sup> Case law shows that the court takes into consideration, the fact that children might find it difficult to estimate the exact time of an event, referring to other events in the child's life when trying to establish the time loop.<sup>80</sup> Nonetheless, despite the fact that one might assume that a judge in general holds plenty of experience<sup>81</sup>, the most outstanding problem appears to be that of the judge's insufficient expertise on children. In addition, there seem to be a prejudice opinion that the information coming from a child is less reliable.<sup>82</sup>

In conclusion, the more decisive the testimony is for the outcome of the case, the more important the assessment of the credibility of the witness becomes. As mentioned, in sexual abuse cases, the child is often the main witness (if not the only witness, apart from the accused). Therefore, the

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<sup>75</sup> Diesen, Bevis 6, p 65.

<sup>76</sup> Granhag, p 123.

<sup>77</sup> Granhag, p 57ff; the author explains the function of the brain's ability to store different events in different ways.

<sup>78</sup> Herlihy, J et al., *Discrepancies in autobiographical memories – implications for the assessment of asylum seekers: repeated interviews study*, British Medical Journal, vol. 324, 2002, pp 324-27.

<sup>79</sup> Diesen, Bevis 6, p 65.

<sup>80</sup> NJA 1993 s. 68. Here the Court found the time loop established by letting the child refer to other events such as here age at the time, what grade she was in school and having a test in school that particular day.

<sup>81</sup> The profession demands four and a half years of legal studies, two years services as a law clerk, roughly two years as judge referee and thereafter services as assistant judge in while applying for the post of ordinary judge.

[www.yrken.ams.se/beskrivning\\_utskrift.asp?yrken=Domare](http://www.yrken.ams.se/beskrivning_utskrift.asp?yrken=Domare), 20/9-03, 12:00.

<sup>82</sup> Granhag, p 136.

child's testimony is extremely important to the case. This can be compared to behavioural cases in statutory care where, as in cases of sexual abuse, the testimony of the child is allowed as conclusive evidence. In these cases, the credibility of the child is essential and, taken from the examples given above; special competence on children and trauma clearly facilitates the possibility of making a correct assessment of the credibility of such a child witness.

# 3 Separated children seeking asylum

As the legal procedure for civil and criminal cases, the asylum procedure appears to be originally created for individuals who have reached the age of majority. This implies that some adjustments may be necessary, when dealing with a child making a claim for asylum. This chapter addresses aspects of the asylum procedure which are of special importance when a separated child applies for asylum; the issues are discussed in an international context, with special references to Swedish legislation and practice in the area. In addition to the main questions of evidentiary assessment and the child's ability to meet the legal criteria, issues of legal representation, age assessment and the impact of a child's age and maturity are dealt with.

## 3.1 Definition of separated children

The UNHCR Guidelines on Protection and Care for Refugee Children of 1994, stress the importance of never assuming that an unaccompanied refugee child is an orphan, and underscore that careful investigation is required before a child is determined to be an orphan.<sup>83</sup> Instead of looking upon refugee children that are unaccompanied or separated from their parents (or other primary legal caregiver) as orphans, these children are nowadays mostly referred to as 'separated children'.<sup>84</sup> The UNHCR Guidelines use the definition 'unaccompanied children' on refugee children who have been separated from both of their parents, or any other adult who has the legal responsibility of the children.<sup>85</sup> This term, or the term 'unaccompanied minors', were the main terms in use when defining these children up until relatively recently.<sup>86</sup> In Statement of Good Practice, published by the Separated Children in Europe Programme (hereafter referred to as the SCEP) 2000<sup>87</sup>, the term 'unaccompanied' has been replaced with the term 'separated';

““-Separated children” are children under 18 years of age who are outside their country of origin and separated from both parents, or their previous legal/customary primary caregiver. Some children are totally alone while others...may be living with extended

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<sup>83</sup> The UNHCR, *Guidelines on Protection and Care for Refugee Children*, 1<sup>st</sup> ed., UNHCR, Geneva, 1994, p 122.

<sup>84</sup> Separated Children in Europe Programme (SCEP), *Statement of Good practice*, 2<sup>nd</sup> ed., The UNHCR and Save the Children, 2002, p 1.

<sup>85</sup> The UNHCR Guidelines, 1994, p 121.

<sup>86</sup> Ruxton, S, (SCEP) *Separated children seeking Asylum in Europe: A Programme for Action*, Save the Children, Stockholm, 2000, p 32

<sup>87</sup> A project that is a joint initiative of the International Save the Children Alliance and the UNHCR.

family members. All such children are separated and entitled to international protection under a broad range of international and regional instruments.”

The SCEP continues by pointing out that although it might appear as if some of the separated children are accompanied on arrival to Europe, those adults who are accompanying the children are not always competent to take care of a child appropriately, and are thereby unsuitable as legal guardians of a child.<sup>88</sup> The change in terminology was made to ensure that these children would receive appropriate care and protection. In a report published by the SCEP, the author Ruxton explains the importance of using the same definition all through Europe, as it affects the treatment and approach towards the children in question.<sup>89</sup> Ruxton suggests that there is a variation around Europe in defining who is a separated child and who is not. This leads to a large diversity in how these children are in fact being treated on arrival.<sup>90</sup> Also, there is a large diversity between European states regarding statistics (and recording methods) on separated children and, as long as the definition varies from one country to another, the data received cannot always be compared to each other.<sup>91</sup> The author therefore recommends the European states to use the definition set by the SCEP, when developing new legislation and administrative regulations within refugee legislation and child law, in order to protect the rights of separated children across Europe.<sup>92</sup>

### **3.2 Separated children and the CRC**

The CRC applies to refugee children, as it is a universal treaty that should be applied to all children within the jurisdiction of a contracting party, without discrimination. This is confirmed in article 2 CRC, establishing that all Convention States are to give a child within its jurisdiction all the rights of the Convention, irrespective of the child's or his/her parents or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Hence Sweden is obligated to take care of refugee children to the same extent as to the children already living in the country. A state that is not a party to any refugee treaty whatsoever may consequently use the CRC as a primary basis on how to treat refugee children.<sup>93</sup>

The Swedish Aliens Act, chapter 1 § 1, specifically states that special attention should be paid to the principle of the best interest of the child, established in article 3 CRC. Although it can be very difficult to determine

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<sup>88</sup> The SCEP, Statement of Good Practice, p 1

<sup>89</sup> Ruxton, p 32. The report consist research made by the author on the situation for separated children in Europe.

<sup>90</sup> Ruxton, p 33.

<sup>91</sup> Ruxton, p 22.

<sup>92</sup> Ruxton, p 14.

<sup>93</sup> The UNHCR Guidelines 1994, p 18f. See section 3.4 for further reading on instruments on refugees.

the best interest of a child, this has to be put in focus when trying to reach a solution regarding a separated child. Difficulties may arise, and sometimes there is a need of finding a balance between rights in conflict; this could be the case if a child separated from his/her parents does not want to be reunited with his/her family. In this situation, the wishes of the child conflicts with the principle of family unity<sup>94</sup>. When deciding whether or not a separated child should be returned to the country of origin, it is also important to realise that the opinion and wishes of the child strongly may have been influenced by expectations of his/her family and that of the home community.<sup>95</sup> This creates an even more delicate situation since what appears to be the wishes of the child, might in fact be the complete opposite.

The right to participate in article 12 CRC gives a refugee child a possibility to affect his/her case directly, provided that s/he is considered old and mature enough.<sup>96</sup> This right is included in the Aliens Act chapter 11 § 1 a. According to Ruxton, attempts are made around Europe to incorporate the principle of the right to participation into the process evolving refugee and asylum determination and, normally, a child has the right to have his/her views represented during interviews. In most states there is an age limit above which a child should, and in some cases must, be consulted.<sup>97</sup> But still, the right of participation for a child in this area is marginalized in some countries and it is sometimes argued that the participation of a child impose a burden on the child at too young an age. This reasoning continues by pointing out that a child should not be given rights until s/he has the capacity to accept responsibility and, furthermore, a child does not have the capacity to be involved in decision-making.<sup>98</sup> In my opinion, when dealing with a separated child in the asylum procedure, it is necessary to secure the right of participation on behalf of the child in the best way possible, as the child usually is the main source of information at hand; without the views and wishes of such child, it may be impossible to make an accurate decision. Even though all children should be heard, it is especially important to have a separated child giving his/her story. This is in general the only way for the

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<sup>94</sup> The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to Refugee Status*, Geneva, UNHCR, 1992, refers to the principle of family unity in par.181-188. The principle is confirmed both in the Universal Declaration of Human Rights; GA Resolution 217a (III) adopted by the UN General Assembly on 10 December 1948, par. 16.3 and the International Covenant on Civil and Political Rights, adopted by the UN on 19 December 1966. par. 23; “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”. The right of family reunification is included in the SCEP, Statement of Good Practice, p 9; “separated children seeking asylum...sometimes have family member(s) in other European states. European States should positively facilitate family reunion for the child...” Also see article 22 CRC and the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, article 8.

<sup>95</sup> Ruxton, p 6.

<sup>96</sup> See section 2.2.1 regarding the impact of the age and maturity of a child in a legal procedure.

<sup>97</sup> Ruxton, p 7.

<sup>98</sup> Ruxton, pp 7 and 56.

adjudicator to find out the child's situation, if no relatives or other acquaintance to the child are reachable.

Article 22 CRC confirms that states should take appropriate action to secure children applying for asylum suitable protection and humanitarian support, regardless of whether they are accompanied or not. When a state is dealing with separated children seeking asylum, article 22 should always be taken into consideration;

“1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.”

This article confirms the principle of non-discrimination in article 2 CRC, reminding the contracting parties that all the rights of the Convention are applicable on refugee children within their jurisdiction. In consequence, when dealing with child asylum seekers, the asylum procedure should be performed in accordance with the CRC. In addition to the CRC, there are several non-binding international instruments on treatment of separated children, developed by the UN and EU.<sup>99</sup>

### 3.3 Age assessment

Sometimes it can be difficult to determine whether a young person seeking asylum is a child or a young adult and, just like adults, a separated child

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<sup>99</sup> The Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries consists of guiding principles on how to handle a separated refugee child seeking asylum in a member state, including guidance on the procedure of asylum. Specific guidance on separated children is also given by the Council in The Council resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures. The UNHCR has a number of instruments applicable on separated children, including the UNHCR Handbook of 1992 and the UNHCR *Guidelines on Policies and Procedures in dealing with Unaccompanied Children seeking Asylum*, 1997. These guidelines, in addition to the Guidelines on Protection and Care for Refugee Children of 1994 and above mentioned Statement of Good Practice, published by the SCEP may provide an adjudicator some guidance when making decisions on a separated child's asylum requests.

might sometimes travel with false documents, in order to escape. A person who claims to be a child might not always have the appearance of a child. Therefore it can be difficult just by looking at, or talking to that person, to determine if the person in question is under the age of majority or not. Consequently, it is sometimes necessary to carry out an assessment to establish the age of the child. The SCEP stress in its Statement of Good Practice that;

“If an age assessment is thought to be necessary, it should be carried out by an independent paediatrician with appropriate expertise and familiarity with the child’s ethnic/cultural background. In cases of doubt there should be a presumption that someone claiming to be under 18 years of age will provisionally be treated as such. Examinations should never be forced or culturally inappropriate. It is important to note that age assessment is not an exact science and a considerable margin of error is called for. In making an age determination separated children must be given the benefit of the doubt.”<sup>100</sup>

UNHCR also emphasises the importance of giving a child the benefit of the doubt, when the exact age of the child is uncertain.<sup>101</sup> According to the Council Resolution on Unaccompanied Minors, an unaccompanied asylum-seeker must, in principle, produce evidence of his age; if such evidence is unavailable, an age assessment may be carried out.<sup>102</sup> In his report, Ruxton has worked out recommendations on the age assessment procedure, so that when developing legislation in European states and the EU, the risk of incorrect assessment can be minimised. He suggests that an age assessment should not be based only on appearance, as physical ageing can have many different reasons, for example starvation, poverty, child labour and conflict. In addition, x-rays should be avoided as these may have a damaging effect on the health of a child. Also, those directories on bones that are likely to be based on the physical measurements of white people should not be used, as they neglect the impact of geographical, environmental, nutritional, social and ethnic factors. If a test is to be carried out, it should be made as soon as possible to avoid periods of waiting in uncertainty on behalf of the child, as it can be crucial on how the application of the individual is to be dealt with. Ruxton emphasises the importance of applying the benefit of the doubt, pointing at the effects a wrongful assessment may have; an incorrect assessment identifying a child as an adult leads to a loss of those rights a child is entitled to under international law.<sup>103</sup>

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<sup>100</sup> Section C, par. 6.

<sup>101</sup>The UNHCR Guidelines, 1994, p 103, the UNHCR Guidelines, 1997, par. 5.11, 1997.

<sup>102</sup> The Council Resolution on Unaccompanied Minors who are Nationals of Third Countries, art. 4.3. COM (2002)326, Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status confirms that medical examinations to determine the age of a child are allowed as long as the child is informed of the performance and purpose of the examination in advance, article 15.

<sup>103</sup> Ruxton, p 51.

### 3.4 Separated children and the asylum procedure

The SCEP confirms that

“Separated children and young people, regardless of age, should never be denied access to the asylum process. Once admitted they should go through the normal procedures and be exempt from all special procedures including those relating to “safe third country” (admissibility), “manifestly unfounded” (accelerated) and “safe country of origin” and from any suspension of consideration of their asylum claim due to coming from a “country in upheaval”.”<sup>104</sup>

If a separated child is to go through the same asylum procedure as an adult, it may seem important that the particular vulnerability of a child in general is acknowledged by those dealing with the application. The report by Ruxton shows that back in 2000, some countries seemed familiar with this delicate situation, but the solutions of the problem had a large diversity.<sup>105</sup> For example, in Germany a child under the age of 16 had no legal capacity in the asylum procedure; such child could not apply for asylum without legal representation. However, a child over 16 had full legal capacity in terms of the asylum procedure. In Denmark, a separated child was supposed to go through the normal procedure, but in practice a child under the age of 15 rarely entered the normal procedure of determination. The reason for this was the assumption that a child is incapable of expressing fear of persecution, and was therefore in general not granted asylum. Instead the child was granted a residence permit because of his/her status as a separated child.<sup>106</sup>

The procedure for separated children and asylum accordingly varies from one country to another, and there seems to be no completely satisfactory procedure for requesting asylum and assistance to separated children. These children are often expected to be independent, even though they as children do not have access to all facilities that are available to adults.<sup>107</sup> In some countries in Europe separated children may themselves make a request for asylum, while in others the children are in need of a legal guardian or a counsellor to make a request for asylum.<sup>108</sup> In the EU resolution on Minimum Guarantees for Asylum Procedures, the Council confirms that in those Member States where a child is in need of a guardian to apply for asylum, measures should be taken to assure that a separated child is represented by an organisation or a designated adult responsible for the

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<sup>104</sup>The SCEP, Statement of good practice, section 3, par. 11.

<sup>105</sup> Due to the limitation of this thesis no new research has been done by me.

<sup>106</sup> Ruxton, p 65. See section 3.5 and 3.6 regarding the term ‘well-founded fear of persecution’.

<sup>107</sup> See chapter 2 on how the minority of a child affects the child in a legal procedure.

<sup>108</sup> The UNHCR and Save the Children, *Documentation of the European Conference, “Children First and Foremost – Policies towards Separated Children in Europe”*, Save the Children, Stockholm, 2000, p 53ff.

child.<sup>109</sup> This is reaffirmed in the EU resolution on Unaccompanied Minors who are Nationals of Third Countries.<sup>110</sup> An EU proposal for a Council directive on minimum standards on procedures for granting and withdrawing refugee status suggests supplementary guarantees, applicable in cases of unaccompanied minors. These include appointment of a legal guardian/adviser as soon as possible, to help prepare a child for the interview and, adjudicators with sufficient knowledge on the special needs of unaccompanied minors.<sup>111</sup>

### 3.4.1 Ability to apply for asylum in Sweden

A separated child arriving in Sweden is normally in need of someone who can represent the child, when dealing with the authorities. According to international legislation concerning guardianship, there is a possibility to appoint a separated child in Sweden a guardian, who is to assist the child in economic matters mainly.<sup>112</sup> The task of the guardian does not include making a request for asylum on behalf of the child, as separated children arriving in Sweden have a right to make a request for asylum themselves. They *are not in need* of a legal guardian, as the MB today considers children of all ages to have adequate legal capacity to make their own request for asylum.<sup>113</sup> Still, the Swedish government has declared that a counsellor should *always* be appointed when dealing with separated minors who, even with assistance by an interpreter, cannot be expected to plead his/her own cause, in accordance with legal security.<sup>114</sup> In practice, a counsellor is always appointed to a separated child, irrespective of the age and maturity of the child.<sup>115</sup> This practice is in accordance with UNHCR guidelines in the area, emphasising the importance of legal aid being available to all children, including those aged between 16 and 18 years.<sup>116</sup> The appointment of a counsellor should take place as soon as the child's application of asylum has reached the MB.<sup>117</sup> The question of authority to apply for asylum regardless of age has been debated; it has been proposed that legal representation for minors should be necessary in order to apply for

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<sup>109</sup> EU Resolution on Minimum Guarantees For asylum Procedures, par. 26.

<sup>110</sup> In article 4 the Council reaffirms that;

“Every unaccompanied minor should have the right to apply for asylum. However, Member States may reserve the right to require that a minor under a certain age, to be determined by the Member State concerned, cannot apply for asylum until he has the assistance of a legal guardian, a specially appointed adult representative or institution”.

<sup>111</sup> COM (2002)326, proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, article 15.

<sup>112</sup> The Act on Certain International Legal Relations Concerning Marriage and Guardianship (1904:26) chapter 4 § 3 refers to the Parental Section chapter 11 § 1 with its regulations on appointment of a guardian.

<sup>113</sup> Report from the Social Welfare Board and the MB, *Förbättringar av mottagandet av barn från annat land som kommer till Sverige utan medföljande legal vårdnadshavare (s.k. ensamkommande barn)*. 2002, p 65.

<sup>114</sup> Prop. 1996/97:113, p 12.

<sup>115</sup> Information from a MB caseworker handling cases of separated children.

<sup>116</sup> The UNHCR Guidelines, 1997, par 8.3.

<sup>117</sup> Prop. 1996/96:113, p 12

asylum, as such rules on rights of advocacy are applicable to children in other legal areas in Sweden.<sup>118</sup>

The purpose of appointing a counsellor to a separated child is to secure the position of the child, by admitting the counsellor to act as the mouthpiece of the child and also to assist the child with legal advice and support.<sup>119</sup> A lawyer, an assistant lawyer at a law firm, or someone else suitable for the task may be appointed as counsellor in these situations.<sup>120</sup> The Aliens Act specifically confirms that the person appointed to be the counsellor of a separated child during the asylum procedure, is to perform legal representation of the child in all matters concerning the request of asylum.<sup>121</sup> The main reason for handing over the representation of the child from the guardian to a counsellor is that of legal knowledge, a guardian is usually not appointed on account of his/her juridical merits.<sup>122</sup> According to the SCEP's Statement of Good Practice, the legal representative assisting the child should possess expertise on the asylum procedure, be skilled in representing children and also be aware of child-specific forms of persecution.<sup>123</sup> In Sweden, the MB does not have any formal demand that a public legal representative of a separated child possesses particular qualifications on children. According to one of the legal counsellors with commissions in the Southern region, expertise on the subject is something you learn through the work, although education is available to those interested.<sup>124</sup>

### 3.4.2 Interviews

When interviewing a separated child, it is important to remember that the applicant is just that; a child. As the SCEP's Statement of Good Practice puts it

“Where interviews are required they should be carried out in a child-friendly manner (breaks, non-threatening atmosphere) by officers trained in interviewing children. Children should always be accompanied at each interview by their legal representative and, where the child so desires by a significant adult (social worker, relative etc.)<sup>125</sup>

Research shows that the way of interviewing children varies widely around Europe, and in some countries the interviews are conducted in the same manner as when interviewing an adult.<sup>126</sup> Many states are not taking those

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<sup>118</sup> Report from the MB, Barn i utlänningsärenden, p 40.

<sup>119</sup> Prop. 1996/97:113, p 12.

<sup>120</sup> The Act on Legal Aid (1996:1619) § 26.

<sup>121</sup> The Aliens Act, chapter 11 § 1b.

<sup>122</sup> SOU 1996:115, *Barnkonventionen och utlänningslagen*, p 74

<sup>123</sup> The SCEP, Statement of Good Practice, p 11. For further reading on child specific forms of persecution see section 3.7 below.

<sup>124</sup> Telephone conversation with Sven Bünger, Advokathuset Kronoberg, 5/8-03, 11.45.

<sup>125</sup> The SCEP, Statement of Good Practice, p 11.

<sup>126</sup> Ruxton, p 75.

guidelines available at hand<sup>127</sup>, although these might be useful as they contain the most fundamental matters that should be taken into consideration when dealing with refugee children. Many children may therefore be subjected to a hostile way of questioning, in an alien environment not suitable for a child. The education for those interviewing a separated child is rarely sufficient, if available at all, and not seldom the children are interviewed without any support whatsoever from an adult.<sup>128</sup> Still, in some parts of Europe, the officials interviewing separated children seem aware of the fact that they are dealing with children, hence they have adjusted their way of interviewing.<sup>129</sup> In Sweden, the government has acknowledged the advantages of using adjudicators and caseworkers who have specific knowledge and experience of children. A report from the MB shows that there is a motivation to use such adjudicators when dealing with separated children. The report includes suggestions on education and development in competence regarding the adjudicators and caseworkers, indicating that such measures are not taken today. It appears as if experience and knowledge on children today is obtained from working at the MB i.e. it is not a requirement for obtaining a position as an adjudicator/caseworker dealing with separated children.<sup>130</sup>

### 3.5 Criterion for granting asylum in Sweden

In Sweden, the determination on an application of asylum is made by an adjudicator of the MB. If the applicant receives a negative decision on his/her application, an appeal can be made to the AAB<sup>131</sup> Under certain specific circumstances, the MB or the AAB may hand an appeal over to the Swedish government.<sup>132</sup> In order to make a successful claim for asylum the applicant has to show that s/he is a refugee.<sup>133</sup> To obtain refugee status it has to be ascertained that the applicant meets with the *theme of proof* i.e. that the prerequisite criteria on refugee status are fulfilled. According to the UN Convention relating to the Status of Refugees of 1951, a refugee is a person who:

“as a result of events occurring before 1 January 1951 and owing well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or not having a

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<sup>127</sup> Guidelines such as the UNHCR Guidelines of 1997 and the SCEP Statement of Good Practice.

<sup>128</sup> Ruxton, p 77.

<sup>129</sup> Ruxton, p 76.

<sup>130</sup> Report from the MB, Barn i utlänningsärenden, p 44ff.

<sup>131</sup> The Aliens Act, chapter 7 § 3.

<sup>132</sup> The Aliens Act, chapter 7 § 11 confirms that a determination on an application of asylum can be handed over to the government if, for example, it is of importance due to the safety of the country, or it is judged to be of particular importance as guidance to the implementation of the Aliens Act.

<sup>133</sup> The Aliens Act chapter 3 § 1.

nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear is unwilling to return to it".<sup>134</sup>

The 1967 Protocol on the Status of Refugees widens the definition by including persons suffering a well-founded fear of persecution as a result of events occurred after 1951, as well as before.<sup>135</sup> The 1951 Convention and the additional Protocol are the principal international instruments on refugees, and their definition has been adopted by several regional instruments.<sup>136</sup> These two instruments are mainly concerned with the legal status of refugees in general, not with specific rights of certain categories, including refugee children.<sup>137</sup> Sweden ratified the 1951 Convention and its additional protocol in 1954<sup>138</sup> hence the Swedish definition on who is a refugee correspond essentially to the definition above.<sup>139</sup> The Aliens Act chapter 3 § 2 confirm that:

“The term refugee as used in this Act refers to an alien who is outside the country of his nationality owing to a well-founded fear of being persecuted for reasons of race, nationality, membership of a particular social group, or religious or political opinion, and who is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. This applies irrespective of whether persecution is at the hands of the authorities of the country or these cannot be expected to offer protection against persecution by individuals.

A stateless person who for the same reason is outside the country of his former habitual residence and who is unable or, owing to such fear, is unwilling to return to that country, shall also be deemed a refugee.”

As there are no specific regulations on refugee status concerning children in the Swedish Aliens Act chapter 3 either, this chapter applies to children in the same way as to adults, regardless of age.

### 3.5.1 Residence permit on other grounds

If an applicant does not meet with the criteria above, s/he may obtain a residence permit on other grounds. Chapter 3 § 3 of the Aliens Act refers to ‘aliens in need of protection’. This is a definition of persons who, for reasons other than those mentioned in § 2 have escaped their country of origin/habitual residence;

“The term ‘alien in need of protection’ otherwise used in this Act refers to an alien who has left the country of his nationality because he:

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<sup>134</sup> The 1951 Convention relating to the Status of Refugees adopted by the UN on 28 July 1951, article 1A (2).

<sup>135</sup> The 1967 Protocol relating to the Status of Refugees, adopted by the UN on 4 October 1967, article 1(2).

<sup>136</sup> Goodwin-Gill, G, *The Refugee in International Law*, 2<sup>nd</sup> ed., Clarendon Press, Oxford, 1998, p 20.

<sup>137</sup> The UNHCR Handbook, par. 213.

<sup>138</sup> Diesen, C et al., *Bevis 2 – Prövning av flyktingärenden*, 1st ed., Nordstedts Juridik, Stockholm, 1998, p 85.

<sup>139</sup> Prop. 1988/89:86, *Ny utlänningslag m.m.*, p 74, Prop. 1996/97:25, *Svensk migrationspolitik i globalt perspektiv*, p 97.

1. has a well-founded fear of being sentenced to death or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment,
2. due to an external or internal armed conflict needs protection or, on account of an environmental disaster, cannot return to his country of origin, or
3. because of his gender or homosexuality has a well-founded fear of persecution.”

The third category has been debated; the question is whether these categories could fall in under the definition of membership in a particular social group in § 2, or not.<sup>140</sup> An alien may also obtain a residence permit on humanitarian grounds, according to the Aliens Act chapter 2 § 5, par 5 a.<sup>141</sup> The MB considers it impossible to make a complete enumeration of what constitutes humanitarian grounds. However, it is clear that the concept is principally applicable to a person with ‘absolute individual humanitarian grounds’. The MB expressively points out that special attention should be paid to the best interest of a child involved in the procedure. Furthermore, if there is no country to expel an alien to, who has received a decision of expulsion, that alien may be granted a residence permit on humanitarian grounds. The obstacle for executing the decision of expulsion in this case cannot be temporary or possible to set aside; it has to be an obstacle that appears to last in the foreseeable future. Country information supplies the MB with information regarding what countries can be considered safe for return. Depending on the situation in a country, established practice regarding the country is created.<sup>142</sup>

### 3.6 Evidentiary assessment

To what level an applicant of asylum has to prove that s/he owes a well-founded fear of persecution for reasons mentioned in section 3.5, i.e. the *standard of proof* set for a positive claim of asylum, can be debated. However, the threshold of standard of proof is lower than in criminal cases. In general the applicant has to prove that there is a serious possibility/good reason, for owing a well-founded fear of persecution.<sup>143</sup>

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<sup>140</sup> Prop. 1996/97:25, p 94.

<sup>141</sup> The MB expressively points out in its policy information that, from the word ‘may’ follows no ‘right’ to a residence permit.

[www.intra.migrationsverket.se/info/handbok/utl\\_hand/d/flik0904.html](http://www.intra.migrationsverket.se/info/handbok/utl_hand/d/flik0904.html), 4/6-03, 12:45. This is an internal homepage of the MB.

<sup>142</sup> [www.intra.migrationsverket.se/info/handbok/utl\\_hand/d/flik0904.html](http://www.intra.migrationsverket.se/info/handbok/utl_hand/d/flik0904.html), 4/6-03, 12:45.

According to a caseworker handling applications of separated children, state politics have may have an impact on the MB’s established practice regarding a country i.e. maintaining a diplomatic relation between Sweden and a country may be an important factor.

<sup>143</sup> Gorlick, B, *RWI Report No. 33, “Common Burdens and Standards. Legal Elements in assessing Claims to Refugee Status” in Asylum in Europe: Strategies, Problems and Solutions*, Lund, 2001, p.26. Also see Diesen, Bevis 2, p 175ff; refers to standard of proof in other cases of administrative character. According to Diesen predominant reasons speak for a common usage of standard of proof regarding refugee law and other administrative legal areas. Hence, comparison can be made with that of statutory care in chapter 2. Due to the limitations of this thesis I will not go further into this subject. For more reading see, for example, Gorlick, B, p 23ff, Goodwin-Gill, p 349ff, UNHCR’s *Note on Burden and Standard of Proof in Refugee Claims*, 1998.

The *burden of proof* in a case of asylum lies on the applicant i.e. it is for the applicant to prove his/her right to asylum. The fact that the burden of proof lies on the applicant, does not necessarily mean that it is for the applicant to provide sufficient basis for a decision.<sup>144</sup> In Sweden, the asylum procedure is a matter of administrative character hence, *the principle of officiality* is applicable. The principle of officiality is a principle of procedure, implying that in administrative matters, the authority making the decision on the case is obligated to assure that the matter is sufficiently investigated, before making a final decision i.e. it is for the authority to provide sufficient basis for the decision.<sup>145</sup> The applicant has an obligation to provide information on his/her case, by accounting for all circumstances of importance and, to the greatest extent possible, present other forms of evidence, such as legal documents supporting the narrative. Once this obligation is fulfilled by the applicant, it is up to the authorities to fill in possible gaps. If the basis for a decision is insufficient, this lack of investigation should therefore not be to the detriment of the applicant i.e. if information from the applicant is impossible to investigate, this lack of investigation should be interpreted to the advantage of the applicant, indicating that s/he has told the truth.<sup>146</sup> This principle of giving the applicant the benefit of the doubt seems to be of great importance within refugee law, as it is in general difficult for an applicant seeking asylum to provide conclusive proof of his/her well-founded fear of persecution.<sup>147</sup> Before giving the applicant the benefit of the doubt, the adjudicator has to ascertain the credibility of the applicant. If the applicant gives an impression that is *not* credible s/he should not be given the benefit of the doubt.<sup>148</sup>

The phrase ‘well-founded fear’ has been, and is still, debated. According to some viewers, the phrase contains both a subjective and an objective element, fear being the subjective one and well-founded the objective, while others claim that the phrase is exclusively objective.<sup>149</sup> If considering the phrase as to include a subjective element, an assessment of the applicant’s personality may be necessary, in order to establish whether the fear expressed by the applicant originates from the persecution invoked. As to

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<sup>144</sup> Diesen, Bevis 2, p 158f.

<sup>145</sup> Diesen, Bevis 2 p 155. in civil and criminal cases it is up to the parties to provide sufficient basis for a decision.

<sup>146</sup> Diesen, Bevis 2, p 163.

<sup>147</sup> The UNHCR Handbook, par. 196-197, 203-204. The Handbook uses the term “benefit of the doubt” somewhat different from Diesen. According to the latter the principle is applicable when there is a lack of investigation. The Handbook uses the principle in the light of evaluating evidence; once all available evidence is obtained from the applicant, lack of evidence should be interpreted to the applicant’s advantage. Diesen, Bevis 2, p 163.

<sup>148</sup> Diesen, Bevis 2, p 163, the UNHCR Handbook, par. 204. As the narrative of the applicant is means of proof it has to be evaluated by the adjudicator to determine the evidentiary value of the testimony. As explained in section 2.3 the principle of freedom of proof is applicable on administrative cases hence it is for the adjudicator to decide whether the narrative is sufficient evidence for a positive result on the claim or not. Also see the UNHCR’s Note on Burden and Standard of Proof, par. 1, confirming that the final decision ultimately is to be made by the adjudicator.

<sup>149</sup> See for example Hathaway, p 65f. Further discussions on the subject are left out owing to the limitations of this thesis.

the fear expressed being well-founded, there has to be an actual ground for the fear expressed.<sup>150</sup> With reference to an applicant's credibility, a determination has to be made both with regards to the 'fear' and to the facts determining 'well-founded'. Moreover, whether the applicant gives an overall credible impression or not, appears to be of great importance, as it seems extremely difficult to find a testimony reliable if the applicant, in general, is considered to lack credibility.<sup>151</sup>

### 3.6.1 Well-founded fear

Whenever making a determination on refugee status, the problem of proof is great, regardless of the age of the applicant. A child that is accompanied by his/her parents is in the majority of states granted refugee status if one of the parents is considered a refugee. This is based on the right to respect family life; when the head of the family meets with the criteria of refugee status, the rest of the family may be granted refugee status as well. Accordingly, the test of well-founded fear normally does not become a problem in such cases.<sup>152</sup> When dealing with separated children however, the test may become a great problem. As shown earlier, children are sometimes considered less reliable as witnesses.<sup>153</sup> Also, a child applicant in general has difficulties providing evidence to support his/her claim; hence the testimony/narrative of the child becomes the most important evidence, originating from the applicant him/herself.<sup>154</sup>

When determining if a well-founded fear of persecution exists, the maturity of the child applicant seems to be of the greatest importance. According to the UNHCR Handbook;

“The question of whether an unaccompanied minor may qualify for refugee status must be determined in the first instance according to the degree of his mental development and maturity. In the case of children, it will generally be necessary to enrol the services of experts conversant with child mentality.”<sup>155</sup>... “Where a minor is no longer a child but an adolescent, it will be easier to determine refugee status as in the case of an adult, although this again will depend upon the actual degree of the adolescent's maturity, It can be assumed that-in the absence of indications to the contrary-a person of 16 or over may be regarded as sufficiently mature to have a well-founded fear of persecution. Minors under 16 years of age may normally be assumed not to be sufficiently mature. They may have fear and a will of their own, but these may not have the same significance as in the case of an adult.”<sup>156</sup>

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<sup>150</sup> Here one has to see to the applicant's background situation and the circumstances in his/her country of origin. UNHCR Handbook, par. 37-42.

<sup>151</sup> See section 4.3 for further discussion.

<sup>152</sup> Van Bueren, p 363f. The principle of family unity, see the UNHCR Handbook, par. 181-188.

<sup>153</sup> See chapter 2.

<sup>154</sup> Sadoway, G, *Canada's Treatment of Separated Refugee Children* in the European Journal of Migration and Law, 3, 2001, p 370ff.

<sup>155</sup> The UNHCR Handbook, par. 214.

<sup>156</sup> The UNHCR Handbook, par.215. However, the Handbook underlines that these are only general guidelines; hence an individual assessment of the maturity of a child should always be done, par. 216.

Goodwin-Gill is critical towards to the UNHCR guidance, pointing out that there is no necessary connection between a person's level of maturity and the existence of a well-founded fear of persecution. Moreover, he continues, although a child might not clearly understand the grounds for his/her fear, s/he is as capable of feeling fear as an adult. In addition to this he declares that anyone can be persecuted, regardless of age and maturity.<sup>157</sup> If guidance is taken from the UNHCR Handbook despite this criticism, it seems important to notice that those traumas a refugee child might have experienced before and during flight, could have forced the child to mature much earlier than other children his/her age. Even when a child is considered mature enough to *owe* a well-founded fear of persecution, the child might have problems *verbalising* that fear.<sup>158</sup> According to the SCEP's guidelines, it is necessary to have an independent expert performing an evaluation on the child's ability to verbalise a well-founded fear of persecution when dealing with younger children.<sup>159</sup> Ruxton suggests that a child may have a different way of *expressing* his/her fears than an adult. The reasons for a separated child having problems with articulating feelings and fears, may be the cognitive ability of the child, but it may also depend on who the adult interviewing is (referring to gender, race and age), style of questioning, environment for questioning and the language of the interview. The inability to verbalise persecution and to tell a story with continuity may further be a consequence of those traumatic experiences the child have experienced.<sup>160</sup> In addition to difficulties in *recalling* a traumatic event, the child might also be afraid to tell the truth for different reasons and, sometimes, the child may even have been provided with a readymade testimony.<sup>161</sup> The fear of persecution of a separated child might further be based on stories told to the child, instead of being based on personal experiences of the child. To the official dealing with the interrogation, this might appear as if the fear of persecution is only based on suspicion and is therefore not real.<sup>162</sup> A proposal for a Council directive on minimum standards for the qualification and status of those seeking asylum within the EU, confirms an awareness of the fact that children may manifest fears differently from adults.<sup>163</sup>

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<sup>157</sup> Goodwin-Gill, p 356-8. Goodwin-Gill also calls attention to the fact that the Handbook was drafted about ten years before the CRC and this explains why the Handbook focuses on refugee status of separated children instead of the best interest of the child. He is of the opinion that such a child should not have to go through the asylum procedure at all, since it invokes uneasiness for the child.

<sup>158</sup> Van Bueren, p 360.

<sup>159</sup> The SCEP, Statement of Good Practice, p 11. The UNHCR Guidelines of 1994 establishes that preferably the expert should speak the language of the child fluently and also come from the same cultural background, p 100-101.

<sup>160</sup> See section 2.3.2.2 regarding traumatised witnesses.

<sup>161</sup> Ruxton, p 73.

<sup>162</sup> Ruxton, p 79.

<sup>163</sup> COM(2001)510, proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection, article 7.d(a-c).

In accordance with the UNHCR Handbook, once decided on the maturity of the child, a decision can be made on how to deal with the application; a child who is able to have and to express a well-founded fear of persecution can be treated like an adult. A child, who is not considered mature enough to have and to express a well-founded fear of persecution in the same way as an adult, has to be treated in a different manner. The person handling the case needs to look more to the objective factors in the matter, and examine these in more detail. Such other factors could include the situation in the country of origin, and also the circumstances of family members, inside or outside the country of origin.<sup>164</sup> The EU Council Resolution on Unaccompanied Minors establishes that consideration should be taken to the age, maturity and mental development of the child when examining his/her application of asylum. The resolution also acknowledges the fact that a child may have limited knowledge of the conditions in his/hers country of origin.<sup>165</sup> This is also confirmed in the Council proposal for a directive on minimum standards for the qualification and status of those seeking asylum within the EU.<sup>166</sup>

In Canada, guidelines have been developed for adjudicators dealing with children's asylum claims. These guidelines emphasise the importance of taking notice of the age and maturity of the child, when determining what evidence the child is able to provide. The adjudicator should be aware of the fact that a child in general is unable to present evidence to the same extent as an adult in a similar situation, referring to the timing, context and details of the occurred.<sup>167</sup> The Canadian Guidelines was the first document of its kind, issued by a country operating a system for refugee determination. The US issued a similar memorandum for its staff working with refugee children in 1998.<sup>168</sup> According to the UNHCR Handbook, when making a determination on a child's application and having problems deciding on whether or not a well-founded fear of persecution does exist, this might call for a liberal application of the principle of the benefit of the doubt.<sup>169</sup> This

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<sup>164</sup>The UNHCR Handbook, par. 217-218.

<sup>165</sup> The EU Council Resolution on Unaccompanied Minors, article 4.6. This is also confirmed in the EU Resolution on Minimum Guarantees for Asylum Procedures par.27; "When an application for asylum from an unaccompanied minor is examined, his mental development and maturity will be taken into account".

<sup>166</sup> COM(2001)510, article 7.d(a-c).

<sup>167</sup> The Board's Guideline 3, section I-II under Evidentiary Issues. According to the guidelines the adjudicator also has to consider the capacity of the child to recall past events and the capacity of the child to communicate his/her experiences, remembering that a child may manifest his/her fears in a way different from an adult. Consideration to the child's age, gender and cultural background has to be taken as well, as the affect a trauma can have on a person referring to fear, memory difficulties, and post-traumatic stress disorder amongst others.

<sup>168</sup> *The US Guidelines for Children's Asylum Claims*, December 1998, p 4. The guidelines were written for Asylum Officers, Immigration Officers and for Headquarters Coordinators (Asylum and Refugees), issued by the Acting Director of the Office of International Affairs. According to the US Guidelines, when determining what weight to give the fear expressed by a child, focus lies on the age and maturity of the child and a reference is made to the UNHCR Handbook on the subject, p 19.

<sup>169</sup>The UNHCR Handbook, par. 219.

implies that, whenever doubt arises, the child should be given the benefit of the doubt to a greater extent than an adult applicant.<sup>170</sup> Ruxton shows in his report that, although there is a strong argument for a liberal application of the principle of benefit of the doubt in child cases, this is not always done in practice. He points at the situation in the Netherlands in year 2000, where separated children at that time seemed to be treated in a more strict way than earlier. The children were in general still given the benefit of the doubt, but the approach to their narratives had changed; the view that an inaccuracy in the testimony of a child was a result of the child's immaturity was much less accepted, amongst the officials.<sup>171</sup> According to Ruxton, this shows how the political pressure to limit granting of refugee status has affected individual decision-makers and their practice, resulting in a more restrictive approach on who is a refugee and who is not. Furthermore, the national policies on what factors should be relevant when making a decision on the case of a separated child seem unclear. The lack of clear policies may in fact lead to a large diversity in decision-making, as the official handling the application is left with a wide scope for his/her own prejudice, leading to decisions based on subjective and sometimes unfair criteria.<sup>172</sup>

### 3.6.2 Persecution

The 1951 Convention does not define the term persecution and, even though various attempts have been made to establish a universal definition, it is still unclear what measures persecution consists of. Violations of human rights, such as a threat to the life and freedom of a person for reasons of race, religion, nationality, political opinion or membership to a social group, is considered to constitute persecution.<sup>173</sup> Measures that prevent the enjoyment of other fundamental human rights (for the reasons enumerated in article 1 in the 1951 convention) should also be classified as persecution if the violations are considered serious.<sup>174</sup> According to the UNHCR Handbook, when determining whether violations of human rights other than threat to life and freedom constitute persecution, one has to look at the circumstances in the individual case. As the opinions and feelings of different persons are of great variation, the definition of the term persecution may vary somewhat, depending on the personality of the applicant.<sup>175</sup> This interpretation of the term persecution is equivalent to that of the definition

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<sup>170</sup> See under section 3.4 regarding proof and credibility in the asylum procedure in general.

<sup>171</sup> Ruxton p, 80.

<sup>172</sup> Ruxton, p 79-81. For further reading on child specific persecution, see section 3.7 in this thesis.

<sup>173</sup> The UNHCR Handbook, par. 51 refers to the 1951 Convention, article 33.

<sup>174</sup> Goodwin-Gill, p 77ff, Hathaway *The Law of Refugee Status*, 1<sup>st</sup> ed., Buttersworhts, Toronto, 1991, p 108ff, The UNHCR Handbook, par 51, Grahl-Madsen, *The status of Refugees in International Law*, 1<sup>st</sup> ed., A.W. Sijthoff's Uitgeversmaatschappij, Netherlands, 1996, p 197ff.

<sup>175</sup> The UNHCR Handbook, par 52.

of persecution within the meaning of the Swedish Aliens Act chapter 3 § 2.<sup>176</sup>

Evidence show, that in some countries the persecution on one member of a family might lead to other members of that family being persecuted; despite the fact that there is no actual connection between the persecuted and the reasons of persecution.<sup>177</sup> Ruxton suggests that many times facts and details about a family member's political activity have been kept from the child, in order to protect the child.<sup>178</sup> Officials making decisions on a child's application does not always acknowledge this circumstance. They seems to think that, if the parents are still alive, they should be able to protect their child from harm, not bearing sufficiently in mind the fact that the child might have been sent away on initiative of the parents, in order to do just that; to protect the child.<sup>179</sup> A problem that seems to arise in these situations is that of determining whether or not a child directly is at risk of being persecuted i.e. has a personal fear of being persecuted. Also, Grahl-Madsen points out, if the provider of a family is persecuted and maybe even killed, the rest of the family might suffer severely. He continues by saying that "it seems that a person may justly claim well-founded fear of persecution if he may prevail in his country of origin only at the cost of losing the head of the family or some other family member, or of losing the bread-winner's capacity to earn a decent livelihood. The persecution in such a case is not to be taken more lightly because it is 'indirect'".<sup>180</sup>

### 3.6.2.1 Reasons for persecution

If the applicant is unable to verbalise the *reasons* for the persecution s/he fears, it is up to the adjudicator to investigate the facts in the case, and thereafter make a decision on the particular case. It is not unusual that an applicant fears persecution for more than one of the reasons stated.<sup>181</sup> *Persecution on racial grounds* refers to discrimination of a person because of his/her race, colour, descent, or national or ethnic origin.<sup>182</sup> *Persecution for religious reasons* may contain serious discriminatory measures against a person because of his/her religious practice or membership of a religious group.<sup>183</sup> *Persecution for the reason of nationality* refers not only to the citizenship of a person, but also to a membership of a linguistic, religious, cultural or ethnic group.<sup>184</sup> For an applicant to show that s/he has a well-grounded fear of *persecution for reasons of political opinion*, it has to be shown that s/he is of a political opinion that is not tolerated by the

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<sup>176</sup> SOU 1951:42, *Utlänningslag m.m.*, p 170, Prop.1996/97:25, p 90, Prop. 1988/89:86, p 154f.

<sup>177</sup> Ruxton, p 80.

<sup>178</sup> Ruxton, p 79.

<sup>179</sup> Ruxton, p 80.

<sup>180</sup> Grahl-Madsen, p 424.

<sup>181</sup> The UNHCR Handbook, par 66-67.

<sup>182</sup> Goodwin-Gill, p 43, (refers to the 1965 Convention on the Elimination of All Forms of Racial Discrimination).

<sup>183</sup> The UNHCR Handbook, par 72-73.

<sup>184</sup> The UNHCR Handbook, pr 74-76 and Goodwin-Gill, p 45f.

government, and might therefore be persecuted. It is not enough to hold a certain opinion; if the authorities are not yet aware of the political opinion of the applicant, there has to be a risk that they will find out one way or another.<sup>185</sup>

*Persecution because of membership of a particular social group* may overlap some of the other grounds for persecution, as it refers to persons who come from a similar background, or have similar habits or social status.<sup>186</sup> In the case *Ward v. Canada (Attorney General)*, persecution owing to membership in a particular social group is defined as persecution directed toward individuals, who are members of groups of persons sharing common, unchangeable characteristics such as sex, colour or kinship ties. Though, a determination has to be made on a case-by case basis.<sup>187</sup> The judge in the case of *Ward*, expressively points out that the category of particular social group is not to be given an interpretation too wide, as this was not the intent of the drafter of the 1951 Convention; the intent was not to protect everyone who owes a well-founded fear for persecution for any reason, whatsoever. Rather, the intent was to assure individuals their inherent, basic human rights and freedoms, without discrimination. Hence, when interpreting the meaning of a particular social group, inspiration can be found in concepts of discrimination.<sup>188</sup> By interpreting earlier case law on the subject, the court identified three possible categories;

“1. groups defined by an innate or unchangeable characteristic;  
2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and  
3. groups associated by a former voluntary status, unalterable due to its historical permanence”.<sup>189</sup>

Mere membership of a particular social group will, in general, not be enough for a successful claim for asylum.<sup>190</sup> The group must exist independently of the persecution and, also, the applicant has to establish that s/he is persecuted *because* s/he is a member of the group.<sup>191</sup> In the US Guidelines for Children’s Asylum Claims, an analogy is made between children and women regarding the recognition of membership of a particular social group. A claim solely based on the gender of an individual is not accepted by the courts; consequently a claim based solely on the applicant’s status as a child, or as a child from a specific country, is unlikely to be accepted.<sup>192</sup> A common denominator of importance regarding women and children is the lack of recognition of the rights of these two groups, through

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<sup>185</sup> The UNHCR Handbook, par 80-83.

<sup>186</sup> The UNHCR Handbook, par 77-79.

<sup>187</sup> *Patrick Francis Ward v. The Attorney General of Canada* 30 June 1993, p 737.

<sup>188</sup> *Ward v. Canada (Attorney General)*, pp 732-734.

<sup>189</sup> *Ward v. Canada (Attorney General)*, p 739.

<sup>190</sup> UNHCR Handbook, par. 79.

<sup>191</sup> *Islam (A.P.) v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)* (Conjoined Appeals), House of Lords, Lord Steyn, 25 MARCH 1999.

<sup>192</sup> The US Guidelines, p 25f.

times. It was not until relatively recently, if comparing with white males in general, that women obtained fundamental human rights within legislation around the world.<sup>193</sup> Although the CRC strengthens the rights of a child, the fact that parents in many countries around the world are legally excused to cane their children, puts children in a somewhat subordinated position, even to women.<sup>194</sup> The question of giving children the rights equivalent to an adult can be discussed to infinity. What is more, the mere existence of child specific rights does not automatically imply that children in general, constitute a particular social group within the meaning of the 1951 Convention. However, the fact that at least one of the characteristics shared by children, the age of minority, is unchangeable is obvious. Hence, if a child owes a well-founded fear for persecution *because* s/he is a child, and the state is unable or unwilling to protect the child from the persecution, that child *could* be recognised as a refugee. Minors that are forcibly recruited into international sex trade or armed militias, *because* they are *minors/children*, may accordingly be recognised as refugees provided that no effective state protection exists. They are discriminated for reasons of their membership to a particular social group and thereby prevented from enjoying their inherent, basic human rights and freedoms, all in accordance with the Ward-criteria.

### 3.7 Child specific reasons for persecution

An issue that has been discussed by many is that of *child specific forms of persecution*, i.e. forms of persecution that only a child can be subjected to. The CRC provides a child with specific human rights and, serious violation of such rights may constitute persecution within the meaning of the 1951 Convention. Violations of child specific rights could constitute recruitment of a child into armed forces, subjection to forced labour, or even, according to some commentators, denied access to education.<sup>195</sup> Female genital mutilation (hereafter referred to as FGM) is a ritual generally done to girls under the age of 18. This might be a relevant factor to a female separated child, as it may be the main reason to make a request for asylum for girls coming from areas where FGM is customary.<sup>196</sup>

One problem that may arise when trying to assert if a child is subjected to child specific forms of persecution, in his/her country of origin is that, in general, such persecution is exercised by non-governmental actors, i.e. private individuals in the society. For a successful claim, the applicant has

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<sup>193</sup> Van Bueren, p xxi.

<sup>194</sup> For instance, it is frequent, legal and socially accepted to cane a child within the family in many countries around Europe; some countries even have laws expressly defending the right of a parent to use violence against their children, however with moderation. [www.bo.se/adfinity.aspx?pageid=3099](http://www.bo.se/adfinity.aspx?pageid=3099), 20/9-03, 10:00.

<sup>195</sup> The UNHCR Guidelines 1997, par. 8.7, Wright David, "A "Hostile" Climate for 100,000 Children, Working for the Rights of Separated Children in Europe, International Children's Rights Monitor, 13, 2000, p 17.

<sup>196</sup> Article 19 CRC.

to show that the persecutor holds the intent to persecute, that the persecution is linked to one of the reasons prerequisite and that the government in the country of origin is unwilling, or unable to protect the child from the persecution. According to the US Guidelines, the adjudicators should not undermine the case of a child only because the child has failed to seek protection from the private persecutor in the country of origin; the adjudicator has to establish if such protection is available. Depending on the age and maturity of the child, the child may be able to provide the adjudicator with some information. But, the adjudicator also has to see to the existing objective evidence of laws and enforcement of the government, regarding protection of children in general in that state.<sup>197</sup> The Guidelines continue by explaining that a child might not necessarily have to understand the intent of the persecutor, in order to be persecuted.<sup>198</sup> Both in the US and in Canada, children have been granted refugee status, owing to membership of a particular social group consisting only of children. For example, a 12-year-old girl who had been sold to traffickers by her parents was granted asylum; the court found that she had a well-founded fear for persecution, owing to membership of the particular social group of 'Indian children sold and abandoned by their parents'.<sup>199</sup> Another example is that of a 13-year-old Chinese boy who had been smuggled into Canada, on initiative by his parents; the court found that the boy, if returned, had a well-founded fear of future trafficking and, as he was a minor he had no legal capacity to consent to such trafficking. Therefore he was granted asylum as well.<sup>200</sup> Claims based on suffering from physical violence as a street child, child abuse by parents and a minor recruited in international sex trade have also been successful.<sup>201</sup> In these cases the children were recognised as victims of child specific forms of persecution, hence their minority was of great relevance to the claim for asylum.<sup>202</sup>

The definition of the term persecution within Swedish refugee law may, as mentioned under section 3.6.2, be of some variation, depending on the personality of the applicant and the circumstances in the individual case. The impact the applicant's opinions and feelings may have on the interpretation of his/her situation, is thereby acknowledged. To allow the applicant's apprehension of the situation as evidence whether persecution exist or not, is of great importance as his/her testimony may be the only evidence supporting the claim. Swedish case law within family law shows

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<sup>197</sup> The US Guidelines, p 26.

<sup>198</sup> The US Guidelines, p 19-21.

<sup>199</sup> Bhabha, J, *Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-seekers*, European Journal of Migration and Law, 3, 2001, p 308, referring to a decision taken by Immigration Judge Zerbe, 13 March 1998, Executive Office for Immigration Review, Chicago, USA.

<sup>200</sup> Bhabha, p 308-9, referring to decision *Bian v. Canada (Minister of Citizenship and Immigration)* Federal Court of Canada-trial Division, Judgement of Gibson J, 11 December 2000 – IMM-1640-00, IMM-932-00.

<sup>201</sup> Bhabha, p 307-308, referring to decisions *Santos Ramon Zepeda Campos*, Arizona II, 28 December 2000, USA, *Aguirre-Cervantes v. INS*, No. 99-70861 (9<sup>th</sup> Cir. 21 March 2001), USA, Y.C.K (re) (1997) C.R.D.D.No. 261 No. V95-02904, Canada.

<sup>202</sup> Bhabha, J, p 307.

that the apprehension of a *child* may have great importance for the outcome of a case.<sup>203</sup> In behavioural cases regarding statutory care, the child's apprehension of his/her home environment may even be decisive. This is confirmed in a case of suspected assault within the home of a 7-year-old child. The assault could not be proven and was by the Court not considered likely to have occurred. Still, the child apprehended the situation differently, experiencing the actions of the parents as a source of great uneasiness. The Court defined 'violence' from a child perspective, and came to the conclusion that in the eyes of the child, the actions of the parents fulfilled the prerequisite criteria for assault; the actions of the parents were judged by the child's apprehension of those actions.<sup>204</sup>

A comparison can be made to a child seeking asylum, when determining whether that child owes a well-founded fear of persecution or not. The US Guidelines emphasise that the harm feared or suffered by a child, can be comparatively less than that of an adult, and still constitute persecution.<sup>205</sup> The opinion that, besides violations of child specific rights in the CRC, severe discriminatory measures that are considered mere harassment of an adult may constitute persecution if pointed at a child, and no effective state protection exist, is also expressed by the UNHCR.<sup>206</sup> Hence the perception that a child is more vulnerable than an adult is allowed to affect the definition of persecution. Nevertheless, an adult perception of a child's vulnerability may not always be on equality with a child's perception of his/her situation. The question is whether the individual child's apprehension of his/her situation, is allowed as decisive evidence, in the evidentiary assessment within refugee law. In the case of the 7-year-old child above, the Swedish County Court defined violence from a child perspective, and came to the conclusion that the prerequisite criteria of assault were fulfilled. For Swedish case law in administrative cases to be consistent, an analogy should be made between above mentioned case law and the decisions in the asylum procedure. A child perspective could accordingly be decisive, when determining what actions may constitute persecution. In addition, as the term well-founded fear is considered to include a subjective element within Swedish refugee law, the personality of the child should be taken into great consideration, when determining whether the individual child owes a well-founded fear.<sup>207</sup>

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<sup>203</sup> Mattsson, p 402ff. Also see section 2.3.1.1.

<sup>204</sup> Mattsson, p 406.

<sup>205</sup> The US Guidelines, p 19-21.

<sup>206</sup> The UNHCR Guidelines, 1997, par. 8.7.

<sup>207</sup> The Swedish legislators seem to have left out a definition of their own of the term "well-founded fear". However, according to the preparatory works of the Swedish Aliens Act, guidance should be taken from the UNHCR Handbook indicating that an interpretation of the term 'well-founded fear' should focus both on a subjective and an objective element, prop.1996/97:25, p 97.

# 4 Case study of selected practice in Sweden

This chapter consist of an analysis of twenty decisions made by adjudicators of the MB, analysed in the light of the areas discussed earlier in this thesis. Fifteen of the decisions originate from the Southern region, made by five different adjudicators, assisted by four different caseworkers. Four of the decisions are from the Western region and are made by two different adjudicators, with the help of three caseworkers. The remaining decision is from the Stockholm region.

## 4.1 The decisions

The time elapsed between handing in the application, to the time of decision, diverges greatly. The average processing time is nine months; the quickest decision took only two months, whereas the most drawn-out case took about 17 months. The separated children in the decisions chosen originate from Somalia, Iraq, Afghanistan, Bosnia-Herzegovina, Macedonia, Mongolia, the Democratic Republic of Congo, Cameroon and Albania. The age and gender of the applicants vary, alongside with the outcome of their cases. In order to protect the applicant's integrity, de identification has been necessary. For the same reason the applicant's country of origin has been left out. Consequently the following systematic is used when referring to the decisions;

Case	Age	Gender	Outcome of decision
A	4	Female	Humanitarian grounds <sup>208</sup>
B	12	Female	Humanitarian grounds
C	14	Female	Expulsion
D	15	Female	Humanitarian grounds
E	15	Male	Humanitarian grounds
F	15	Male	Expulsion
G	15	Male	Expulsion
H	15	Male	Expulsion
I	16	Female	Humanitarian grounds
J	16	Male	Humanitarian grounds
K	16	Male	Alien in need of protection <sup>209</sup>
L	16	Male	Expulsion
M	17	Male	Humanitarian grounds
N	17	Male	Humanitarian grounds
O	17	Male	Alien in need of protection

<sup>208</sup> For an explanation on the concept humanitarian ground, see section 3.4.

<sup>209</sup> For an explanation on alien in need of protection, see section 3.4.

P	17	Female	Expulsion
Q	17	Male	Expulsion
R	17	Male	Expulsion
S	17	Male	Expulsion
T	17	Male	Expulsion

#### 4.1.1 Legal counsellor

In seventeen out of the twenty decisions, it is made clear that a petition from a legal counsellor has been handed in. Two of the decisions that lack a petition from the counsellor originate from the Western region, cases J and O. The remaining decision that lacks a petition, originates from the Southern region, case H; this applicant received a decision of expulsion. Still, the reasons for a decision of expulsion in this case might not owe to the lack of the presence of a legal counsellor. This applicant's claim was not based on facts that would normally lead to a successful claim of asylum i.e. his reasons for escaping the country had no actual connection with the criteria that have to be fulfilled, in order for him to be recognised as a refugee. Furthermore, a legal counsellor may have been appointed to the child; the counsellor may also have been present at the time of interrogation, only s/he may have abstained to hand in a petition regarding the child. Admittedly, this could be due to negligence on behalf of the counsellor. The reason for abstaining to hand in a petition could also be, that the counsellor considered it not necessary, due to the circumstances; if the counsellor was present at the time for interrogation, s/he may have been able to prepare the applicant before the interview. The counsellor may also have been allowed to ask additional questions during the interrogation; helping the applicant on the spot, hence further explaining on the applicant's situation may have been superfluous, in the eyes of the counsellor.

To sum up, it seems impossible to draw the conclusion that these three applicants have had no access to a legal counsellor, or that such a person has not been present at the time of interrogation, only from the lack of petition from a legal counsellor.

#### 4.1.2 Residence permits on humanitarian grounds

It is difficult to establish the exact cause of the different out-come of the applicants' claims, as the decisions are very brief and somewhat meagre. However, most of the separated children that *are* granted a residence permit are granted such on humanitarian grounds.<sup>210</sup>

In the policy information of the MB regarding humanitarian grounds, a reference is made to the Aliens Act chapter 1 § 1, confirming that special

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<sup>210</sup> See statistics in the introduction, chapter 1.

attention should be paid to the health and development of the child, along with the best interest of the child in other aspects.<sup>211</sup> All of the twenty decisions include a reference to the principle of the best interest of the child, in one version or another. Although the versions vary, the gist of the written is almost always the same; the best interest of a separated child is, in general to be reunited with his/her parents at their domicile. It appears as if the main reason for disregarding this policy, is that of the established practice regarding a country; if the parents of the applicant are to be found in a country that is regarded as safe for return, the best interest of the child is considered to be reunification with the parents in that other country.<sup>212</sup> In cases C, F, G, H, L and P, the applicants had at least one of their parents still living in the country of origin and, the country of origin was a country to where expulsion was executed at the time. As these applicants were considered as not having sufficient need for protection in Sweden, family reunification in the country of origin was determined to be the best alternative. The reverse practice seems to be applied, if the parents of the child are living in a country that is considered to be unsafe for return; the best interest of such a child is to remain in Sweden on his/her own. This practice was used on the applicants in cases E, I, J and M.

It is not clear whether the established country of origin in general is the same for adults and separated children. In addition, it is possible that the *age* of the child affects the practice regarding some countries; difficult situations in a country, may be considered as affecting young children worse than older children and adults. The 4-year-old girl in case A was not to be returned to her country of origin, although a reunification with her mother appears to have been possible. The MB pointed out, that citizens of that country in general were to be returned, disregarding existing problems of execution. Still, the MB found that it would be inhuman to expose such a young person to a possible drawn-out process, owing to the mentioned difficulties of returning a person. Yet, this *may* be an exception, not standard.<sup>213</sup>

## **4.2 Proof on the applicant's identity**

### **4.2.1 Determination of country of origin**

If an applicant of asylum lack documents of identity, it might be difficult to determine if s/he actually originates from the country stated. To determine the country of origin of the applicant in such situations, the MB caseworker

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<sup>211</sup> [www.intra.migrationsverket.se/info/handbok/utl\\_hand/d/flik0904.html](http://www.intra.migrationsverket.se/info/handbok/utl_hand/d/flik0904.html), 4/10-12:45.

<sup>212</sup> See section 3.4. on established practice regarding a country.

<sup>213</sup> As the 17-year-old boy in case N was an orphan and further, came from a country considered unsafe for return for applicants in general, a relevant comparison can not be made. Owing to the circumstances in the remaining decisions of humanitarian grounds, case B and D, a comparison appears irrelevant as well.

sends a tape with the applicant speaking his/her alleged mother tongue, to private companies for analysis. One of the companies is Scandinavian Language Analysis (SPRAKAB), a company which primarily works with language analysis, on the commission of migration authorities and police departments.<sup>214</sup> Another company used by the MB is Eqvator.<sup>215</sup> When making an analysis of the language to determine the country of origin of the applicant, it is important to notice that this is not a way to confirm the identity of the applicant, only a way for the adjudicator to establish if it is likely that the applicant originates from the country stated.

Out of the twenty applicants, the applicants in cases C and P were the only ones in possession of valid passports from their country of nationality. The applicant in case K had a certificate of citizenship and, an identity card confirming the identity, whilst the applicant in case F was able to produce other documents such as birth certificate and a refugee card. The adjudicators established that it was likely, although not confirmed, that the identities given by these two applicants were accurate. In sixteen out of the twenty cases, the applicants had no valid forms of identification on arrival to Sweden. In nine out of these cases, cases D, E, H, I, M, N, R, S and T, an analysis of the applicant's language was performed, supporting the information given regarding country of origin. In cases G and L, the analysis indicated that the applicants had been lying regarding the country of origin. As a consequence, their applications were tried against the situation in other countries than asserted by the applicants. In one decision, case O, an investigation was made of the stated place of origin, leading to the decision that the applicant had shown it to be likely that he originated from the country stated. In two decisions, cases J and Q, there are nothing mentioned on how the country of origin of the applicants was established. In cases A and B the establishing of country of origin is neither mentioned, although I assume that the fact that these applicants had relatives in Sweden helped clarifying possible uncertainties.

#### 4.2.2 Age assessment

At times, the adjudicator or the caseworker are uncertain of the age of the applicant, either because the applicant appears to be older than stated, or due to the fact that the applicant him/herself is unaware of his/her own age.<sup>216</sup> To determine the age of the applicant in such cases, the MB takes help from the forensic medicine unit of dentontology.<sup>217</sup> Dental x-rays are used primarily, taken by a dentist with sufficient equipment. An x-ray of the whole row of teeth is thereafter sent to the above mentioned unit, to obtain a

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<sup>214</sup> [www.sprakab.com](http://www.sprakab.com), 5/8-03, 14.07.

<sup>215</sup> This company has been criticized by media for taking advantage of refugees for profitable reasons and for making errors in their determinations. [www.svt.se/granskning/repotage](http://www.svt.se/granskning/repotage), [www.aftonbladet.se/nyheter/9804/flykt5.html](http://www.aftonbladet.se/nyheter/9804/flykt5.html), 5/8-03, 15.00.

<sup>216</sup> Information from a MB caseworker handling cases of separated children.

<sup>217</sup> [www.rmv.se](http://www.rmv.se), 5/8-03, 13.00.

report on the probable age of the applicant. The final decision on whether the applicant is older than s/he has stated, is made by the adjudicator. If a dental examination is insufficient for a determination, bone x-rays are performed. The age of the skeleton is assessed by an x-ray specialist at a hospital, determining whether the skeleton is still developing or not, making an estimation on the age with this information as the basis.<sup>218</sup> If looking at these procedures in the light of the recommendation made by Ruxton<sup>219</sup>, the MB ought to change their practice on this area as, according to Ruxton, x-rays may harm the child physically. Still, the question is how great the harm inflicted on the child is, as one may assume that modern equipment for x-rays today has a relatively low radiation rate. Also, lack in resources may prevent a development of new methods on the area of age assessment, performed on commission of the MB.

The question of the applicant's age was debated in two of the decisions examined. Case B concerned a girl who, during the interrogations, stated that she was going to turn 13 on her following birthday. This information was supported by the girl's aunt. The decision did not clarify whether an age assessment had been performed or not, but the adjudicator clearly pointed out that the girl may be a few years older than stated. The second case, case D is discussed under section 4.3.1.

### **4.3 The issue of credibility**

It is not possible to, merely by analysing the decisions at hand, determine whether or not the MB treats children differently than adults. However, some problems that may arise when dealing with children of all ages are detectable. One of the decisions, case A, concerns a girl who was only 4 years old at the time of decision. This girl had no documents of identification on her on arrival; therefore information of the girl's background, and reasons for asylum, was given to the adjudicator through the girl's aunt, as the girl was considered too young to tell her own story. The aunt was from the same country of origin as the applicant, but now lived in Sweden. Apart from the testimony/narrative of the girl's aunt, no other evidence seems to exist in this case and, instead of making a determination of the credibility of the applicant, such determination seems to have been made of the aunt's credibility. There are no signs indicating that the caseworker made any attempts in questioning the girl; neither are there any signs indicating that such attempts were made with the help from a child psychologist. Nevertheless, I have been assured that attempts are made on behalf of the caseworkers to question young children, as well as the older.<sup>220</sup> Still, these attempts are, as I understand, not made with the assistance of a child psychologist. The applicant in case A, received a residence permit on humanitarian grounds, as the adjudicator found it to be

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<sup>218</sup> Information from a MB caseworker handling cases of separated children.

<sup>219</sup> See section 3.3.

<sup>220</sup> Information from a MB caseworker handling cases of separated children.

inhuman to expel a child of such young age, to a country with a certain degree of disturbances. Hence age, in combination with the established practice regarding that country, constituted grounds enough to stay in Sweden. Questions that arise are; what would have happened if the girl had had no relatives or acquaintances in Sweden, if there was no one to identify the girl and explain her origin? Would there have been any attempts at all, trying to determine the girl's refugee reasons, maybe with the help of a child psychologist? Or would she have been granted a residence permit on humanitarian grounds, due to her young age alone?

A decision that proves that a determination on a child applicant's credibility is made is that of the 15-year-old girl in case D. This girl also lacked in providing valid documentation of identity, but had a sister living in Sweden who was able to provide the MB with information on the applicant's identity. The information given by the applicant on her age and family situation were discredited, as her sister gave contradictory information on these subjects; neither in this case (as in case B described under section 4.2.2) did the adjudicator find the applicant credible, regarding information given by the applicant on her age. The question that arises here is how this disbelief affected the rest of the information, given by the 15-year-old girl. She stated during the interrogation that she was a member of a certain clan and, this in particular caused her great trouble. She also stated that she belonged to a certain class of society. From the decision, it is clear that there has been a confusion regarding the clan and class concepts. Instead of focusing on the clan membership, the adjudicator seems to focus on the class belonging, pointing out that this class of society in general does not suffer to an extent that would constitute persecution. Thus, the real basis of the claim of the girl, persecution for reason of race, appears to be ignored by the adjudicator. In this case, what appears to be a mix up might in fact be neglect on behalf of the adjudicator, due to earlier disbeliefs regarding the girl's credibility. The fact that the adjudicator clearly found the applicant to be untruthful, pointing out that the applicant had failed in showing her identity, her age, and to give a clear picture of her family structure, indicates that the adjudicator held great disbelief towards the girl. The lack of confidence in the applicant, owing to uncertainty in parts of her narrative, may have clouded the mind of the adjudicator, to disbelieve the intents of the girl consistently. If considering an applicant as not credible, based on information given by the applicant, it seems very difficult to find other parts of information coming from the same applicant as reliable, as it is difficult to find a testimony reliable if the witness is considered to lack credibility.<sup>221</sup> To be able to disregard a negative opinion of a person, in order to make an objective decision, appears to demand a great deal of experience and, above all, education on how the psyche of a person works.

In four of the decisions, cases F, L, M and Q, the adjudicators expressively pointed out the fact that the applicants had not been able to provide neither proof, nor credible information, regarding the travel route to Sweden. This

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<sup>221</sup> See section 2.3 regarding the connection between credibility and reliability.

behaviour on behalf of the applicants was interpreted as an attempt to conceal circumstances of importance, regarding the applicants' right to protection in Sweden. The applicants in these cases were all male, one of them of the age of 15, one of 16 and two of 17; only the applicant of case M received a residence permit due to the established practice regarding the country, the remaining three were to be expelled. The fact that the adjudicators believed the applicants to withhold information seemed to, as in case D described above, permeate all parts of the decisions, affecting information given on other areas as well. Despite the fact that the disputed information may have had no relevance whatsoever, regarding whether the applicants owed well-founded fear of persecution in their countries of origin, or not. However, in cases F, L, M and Q, it is difficult to decide whether it was the information on the travel route, or other information given by the applicants that aroused suspicions. Nonetheless, these decisions clearly show that teenagers *can* be found not credible. The fact that they are young, and may not ever have been outside their village in the countries of origin, does not seem to affect the judgement of the adjudicator.

The final decision discussed in the light of credibility is that of a 17 year old boy in case R, who in his application claimed that his parents and sister were killed, because of his father's political activity. Therefore he feared the same fate if returned to his country of origin. It is uncertain in this case, as well as in the above described decisions, what triggered the suspicions of the adjudicator, regarding the applicant's credibility. But, it is obvious that the story of the applicant was found to be untrue; the adjudicator did not even believe the boy on the count of his parents and sister being killed.

On the whole, from merely reading the decisions, it *is* difficult to establish what actually goes on in the mind of the adjudicator. When receiving some of the decisions I have analysed, my first reaction was that of uncertainty; the formulations were vague and the reasoning seemed inconsistent. After some investigation on the matter, I realised that in many of the cases the vague formulations and indistinctness owed to the fact that the caseworker, and the adjudicator, did not find the applicant as an all together credible witness. In terms of credibility, focus lied on the adjudicator's impression of the applicant as a person, not only with regards to the fear invoked or the facts determining well-founded. Even though, as I have tried to show above, an applicant may be suspected of lying, this is rarely expressively pointed out in the decision as being a decisive factor for the outcome of the decision. Instead, in general, the reason for denying an applicant refugee status, according to the decisions, is that of insufficient grounds for asylum, period. Despite the fact, that these reasons have been dispatched merely owing to the fact that the applicant in general appears to be a witness of little credibility. In other words, even though vague hints are made regarding the credibility of the applicant in general, this never appears to be the reason for an unsuccessful claim. If the adjudicator, in these cases where the credibility of the applicant has been more or less decisive for a negative decision, were to admit that they did not believe the applicant, this would facilitate for the applicant. Especially if the determination procedure is as

dependant on the subjective judgement of an adjudicator as it is today. If the adjudicator were to write what s/he really thought of the applicant's situation *and* personality, some questions might go away, clarifying the real problem, and thereby giving the applicant a chance of making an appeal based on correct foundation. It appears as if all relevant circumstances affecting the decision have to be included, in order for an appeal to be successful. If not, the AAB may easily come to the same conclusion as the MB, owing to the fact that one particular caseworker or adjudicator at the MB apprehended the applicant as not credible.

#### **4.3.1 A comparison on the issue of credibility within family, criminal and refugee law**

In the asylum procedure, the narrative obtained from a separated child appears in general to be the sole evidence provided by the child, to support his/her claim for asylum. In other legal areas, such as statutory care cases, custody cases and criminal cases, the story of a child is rarely enough to prove a circumstance decisive for a case; in general it appears as if other means of proof has to support such a testimony. Furthermore, the difficulties of interviewing a child have been recognised and, guidance has been developed in order to obtain as correct and detailed information as possible, from a child witness.<sup>222</sup> When interviewing young children in the two later legal areas, child experts are of great relevance, providing the court with opinions that may indicate whether the child is telling the truth, or not. It would be rash to draw the conclusion from merely reading one decision of a four year old child, case A, that child psychologists or other forms of child experts are never used, when interpreting the testimony of a young child seeking asylum. Besides, it is possible that the caseworkers handling the interrogations of separated children hold sufficient knowledge in interview technique, and are capable of determining the credibility of a child, with sufficient expertise. Nevertheless, one may assume that separated children seeking asylum, in general, have problems verbalising their fears, in front of a complete stranger with the authority to make vital decisions regarding the future of the applicant's life. Therefore, expertise on children *may* be necessary. The question is whether or not it is fair to pass a judgement on the MB for failing in having a system of employing child experts, when determining the case of a separated child. Considering the general lack of resources, this may be a demand that is impossible to meet. However, caseworkers with knowledge on how traumas experienced by the witness may affect the capability of giving coherent information *are* necessary. As described under section 2.3.2.2, incoherency and discrepancies in a testimony, may be a result of those traumas a witness has experienced. If a caseworker is unaware of the impact a trauma may have on the applicant's memory, a wrongful assessment of the credibility of the applicant is more

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<sup>222</sup> See chapter 2.

likely to be made, as such incoherency and discrepancies easily may be taken for lies.<sup>223</sup>

According to the MB, a child's testimony in an asylum case is to be treated equally to that of an adult in a similar situation i.e. a decision of the credibility of the applicant should not solely be based on the age of the applicant, and a child is not to be looked upon as either more, or less credible than an adult.<sup>224</sup> The age and maturity of a child appears to be of great importance within all legal areas, as is the question of credibility. There are indications that judges in general are prejudiced towards a child testimony, believing that a child may be less able to provide a reliable testimony than an adult, and also that a child in general is of little credibility. This may be another reason for the composing of guidelines for usage when interrogating a child. One of the most cited scholars on the area of evaluating proof, Ekelöf, expressly writes that children are of little credibility. Still, he points out, it can be of importance to obtain a child testimony in some cases, for example on sexual offences.<sup>225</sup> It is difficult to determine whether or not a child in reality, in general, is considered as less credible than an adult. There are those agreeing with the opinion above, just as there are those considering a child in general, more honest than an adult. The question that arises from all this, is to what extent the caseworkers and the adjudicators of the MB are able to disregard from these prejudices.

In addition to the policy of treating children and adults equally, the MB has a policy that somewhat contradict the policy first mentioned. This second policy implies that a child is relieved from responsibility regarding his/her testimony/narrative, to a certain degree. An adult applicant who has deliberately told lies during the investigation, in order to obtain a residence permit, stands the risk of having his/her residence permit withdrawn, if the lies are detected.<sup>226</sup> A child under the age of 15 on the other hand, is not to be held responsible for such deliberate false information, i.e. a lie from a child regarding his/her possible reasons for remaining in the country, is not considered to constitute grounds enough for a cancellation of the child's residence permit.<sup>227</sup> This policy indicates that a child testimony *is* treated somewhat different regarding proof and credibility, than that of an adult. Whether this diversity is positive or negative for a child, is difficult to tell; it is possible that children under the age of 15 are not to be taken as seriously; as a consequence their refugee reasons may not be taken as seriously as

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<sup>223</sup> Herlihy, J et al., pp 324-27. This is also confirmed by Ruxton, p 73; discussed under section 3.6.1 in this thesis.

<sup>224</sup> Information from a MB caseworker handling cases of separated children.

<sup>225</sup> Ekelöf and Boman, p 173. The author is also of the opinion that apart from being of little credibility a child may suffer from harm if questioned. One has to balance the importance of obtaining the child's narrative on the case with the possibility of causing the child damage. The legislator seems to be of the same opinion, see the Court of Procedure, chapter 36 § 4.

<sup>226</sup> The Aliens Act, chapter 2 § 9.

<sup>227</sup> Information from a conversation with Rigmor Långström at the Unit of Practice at the MB. Långström works with child specific matters. The 31/7-03, 13.20. Compare with section 2.2.3 regarding 15 being the age for criminal responsibility.

well. It may also be an indication that the standard of proof is somewhat lightened when dealing with a child, owing to the belief that a child refugee is in bigger need of protection than an adult. I have not been able to ascertain whether there is a difference between a child applicant over, respectively under, 15 years of age. Though, the policy of treating a child over 15 different from a child under 15 is consistent with practice in other legal areas. When dealing with older children within cases of statutory care and criminal proceedings, the situation *is* somewhat different from that of the handling of a young child. The fact that a child is dependant on adults in most areas is naturally reflected in legal matters concerning a child; the older the child, the more the rights of advocacy increases and thereby the dependency on adults is reduced. The age of 15 is of great importance, regarding the ability of the child to act as an individual of his/her own; within family law a 15-year-old child may have full rights of advocacy, while in criminal proceedings such a child is to testify under oath. From these facts, it appears as if a child of the age of 15 to some extent may be considered to be on equal footing with an adult. Still, this is no proof of whether a child over 15 is considered more or less credible than adults, it only proves that the closer to the age of majority, the more the system relies upon a person to be able to make decision for themselves, without help from others.

Despite the fact that the adjudicators have found some of the child applicants described above not credible on certain issues, many of these applicants still have obtained residence permits. It is uncertain whether this is on account of the established practice regarding the country of origin, or owing to the age of the applicant and, the fact that s/he has been separated from his/her parents who cannot be traced. Still, as mentioned in the introduction, only three separated children out of 460 in year 2001, and two out of 550 in year 2002 were granted asylum for refugee reasons. Hence, the practice of the MB does not seem to be favouring separated refugee children by recognising them as refugees.

#### **4.4 Child specific forms of persecution – do they exist?**

My two visits to the MB unit South in Alvesta, supplied me with experiences and knowledge I never would have been able to obtain only by *reading* decisions from the MB. Such decisions are, as described above, in general very meagre in providing information on how the adjudicator has reasoned, when making a determination on a case. From a mere reading of a decision, one can easily draw the conclusion that there is a lack of investigation i.e. that the principle of officiality has not been fulfilled. Due to my visits in Alvesta, I am not able to agree with this criticism at all times, at least not regarding the cases of separated children in the Southern region. From my experiences, the investigations are done to a much higher extent than one can tell from the decisions themselves. Questions that seem to have

been left out have in general been asked, only not included in the decision part. Nonetheless, it is difficult to establish whether the MB has a policy of taking child specific forms of persecution into consideration, when determining a child applicant's refugee status, or not. It is also difficult to determine if they take the *reasons* for a child's separation from, and dependency on the parents or other primary caregiver, into consideration.

The decision on the 12-year-old female applicant in case B is indicative of the problem of separated children, who are sent to a country at the initiative of a family member. According to the applicant, it was her uncle who made the decision that she was to be sent to Sweden; the girl herself did not know the reason for her own flight. It is obvious that not all children are aware of their own situation, or why their parents/family fears for their lives. In such situations it is up to the caseworker handling the case, and the adjudicator, to make an investigation on the applicant's situation, and thereby obtain sufficient basis for a decision, all in accordance with the principle of officiality.<sup>228</sup> It is difficult to determine to what extent such an investigation is done, with focus on child specific forms of persecution. One of the caseworkers that handled some of the decisions I have analysed, provided me with a questionnaire consisting of some of the questions the caseworker considered relevant, when interrogating a separated child. This questionnaire was composed, and used by that individual caseworker as a way to secure that all, according to the caseworker, relevant questions for the investigation were asked. The questionnaire includes questions such as background and family, travel route, ethnic belonging and religion, particular reasons for asylum, the issue of military service, the applicants or his/her relatives political activity and if the applicant or his/her relatives had been subjected to deprivation of freedom. Additional questions on whether the applicant had been outside his/her country of origin prior to this event, if s/he had applied for asylum previously, what would happen to the applicant if returning to the country of origin and, would s/he be at risk of being subjected to death or other corporal punishment or torture, are not to be left out. If all caseworkers performing interrogations with separated children ask similar questions, attempts *are* made to clarify the applicant's situation as thoroughly as possible. However, the fact that three of the girls in the decisions originated from areas where FGM is a ritual performed on girls under the age of 18, is not mentioned in those relevant decisions. Furthermore, even though I believe that at least some of the male child applicants have been asked if they are at risk of being forcibly recruited as child soldiers, this is not mentioned in the decisions. The questions provided in the questionnaire are relevant for the investigation, and they also appear to be sufficiently thorough to constitute a basis for a decision, *provided that all the questions are given relevant answers*. To obtain answers that will give adequate information regarding the applicant's actual situation in his/her country of origin, presupposes that the applicant fully understands the questions at hand. If the applicant does not understand the relevance of him/her giving correct and thorough answer, the caseworker and the

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<sup>228</sup> For further explanation of the meaning of the principle of officiality see section 3.5.

adjudicator making the final decision are left with incorrect information, as basis for that decision.<sup>229</sup>

The fact that a child may apprehend a situation differently than an adult is not mentioned in any of the twenty decisions. I find it impossible to draw the conclusion that an analysis of the term well-founded fear of persecution in a child perspective, never is carried out by the caseworkers and adjudicators at the MB. The decisions at hand are further to meagre on information to make a relevant analysis. Even so, as mentioned in section 3.7, in order for refugee case law to be consistent with Swedish case law, such analysis ought to be done when dealing with child asylum seekers.<sup>230</sup>

#### **4.4.1 Political opinion and membership to a particular social group**

In case R described above, it was clear that the adjudicator found that the applicant had no political reasons of his own that could lead to a well-founded fear of persecution. This notwithstanding the fact, that the boy's father's political opinion was allegedly the reason for the boy to escape his country of origin; if the boy was telling the truth, he was forced to escape in order to survive, despite the fact that he himself had not personally been politically active. The applicant of case N, that claimed that his parents were killed for reason of their political opinion, was not considered having a past of politically activity, despite his work helping his father delivering papers critical towards the government. In addition, the applicant of case M claimed he had been persecuted because of his brother's political involvement; his brother's death put the applicant in a position of target for revenge for his brother's action. The fact that the persecution of one member of the family, might lead to the persecution of other members of that family for revenge, does not seem to be a policy/practice the MB has as starting-point, by looking at these separate cases. Additionally, the possibility of the persecutor imputing a political opinion on an individual, even though it might not exist, is neither mentioned.<sup>231</sup> The applicants in cases M, N and R, all claimed that they had to escape their countries of origin in order to survive. They did not claim that the reason for the persecution feared was their own political opinion; the reason for flight was a family member's political opinion. The fact that the persecutor may have believed the whole family to hold the same political opinion is not mentioned in any of these decisions, despite the fact that this may have been the actual reason for persecution of the applicant.

Even though neither imputed political opinion, nor the persecution of family members for revenge appears to be accepted as ground enough for refugee

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<sup>229</sup> See section 2.4.2.1. for a comparison.

<sup>230</sup> See section 3.7 regarding the impact of the child's apprehension of his/her situation.

<sup>231</sup> In situations where the authorities have wrongly attributed a certain political opinion to a person leading to persecution of that person this should also substantiate reason enough for refugee status, Goodwin-Gill, p 49.

status, establishing the applicant's own political activity in the country of origin seems to be of great importance. In ten decisions out of the twenty, the fact that the applicant had had no political activity was expressively pointed out in the decision. Three of these applicants were 15 years old (cases D, G and H) two were 16 (cases I and L) and five were 17 years old (cases M, N, Q, R and T). It appears as if it was only the applicants in cases L, M and R that gave information regarding any political activity whatsoever, in the remaining seven cases the applicants claimed a right to asylum on other grounds. It is not clear why the non-existing political activity of the applicant is referred to in these decisions; the non-existence of other forms of persecution is seldom mentioned. Yet, this may indicate that a child applicant is considered to be able to him/herself have a political opinion *that could lead to* persecution in the country of origin, constituting ground enough for asylum in Sweden.

If the MB accepts the fact that a child is able to hold a political opinion, the question is; could the political opinion and the political activity of a child constitute reason enough for persecution, in the eyes of the MB? The boy in case N was not considered as politically active himself, despite the fact that he helped his father delivering newspapers critical towards the government, supposedly the same newspapers that were the reason for his father's death. If making a comparison with the situation of children claiming persecution for political reasons in the US and in Canada, the definition of political activity appears to create similar difficulties for those child applicants. According to Bhabha, writer of the article *Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-seekers*, political activities performed by a child, are rarely recognised as real political activities. Bhabha suggests that the reasons for political acts performed by children, such as street protests, stone throwing and school strikes, are considered as not being genuinely political, is because the definition of political activity emanates from an adult male norm. Thus, the predominant judicial conception of adult men's political activities as standard undermines other political activities performed in different ways, both by women and children. This standard may be very difficult to be met, by actors other than men.<sup>232</sup> The practice of not accepting those political actions of a child as genuine political actions does not prevent the US from holding a policy of accepting that a child may have a political opinion. The US Guidelines establish that asylum officers never should assume that "age alone prevents a child from holding a political opinion for which s/he may be persecuted".<sup>233</sup> So, if assuming that the MB has the same policy of *acknowledging* children as capable holders of political opinions, however *in reality not accepting* children as political actors, there appears to be great similarities between US practice and Swedish practice on the area.

A comparison can further be made to those girls who escape their countries of origin, in order to avoid being subjected to FGM. According to Swedish

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<sup>232</sup> Bhabha, p 311.

<sup>233</sup> The US Guidelines, p 20.

practice, a girl who owes a well-founded fear for persecution for the reason of FGM may obtain a residence permit in Sweden. But such an applicant does not obtain a residence permit for reasons prerequisite in the Aliens Act chapter 3 § 2 i.e. for refugee reasons. Instead the applicant obtains a residence permit for the reason of being at risk of persecution because of her gender i.e. she is recognised as an ‘alien in need of protection’, under chapter 3 § 3(3).<sup>234</sup> The fact that gender has been separated from the categories in chapter 3 § 2 is, as mentioned under section 3.4 debated. In the article *Affirmative Exclusion? Sex, gender, persecution and the Reformed Swedish Aliens Act*, Folkelius and Noll suggests that chapter 3 § 3(3) is discriminating towards women, undermining their ability to be recognised as refugees in accordance with chapter 3 § 2, criticising the solution of treating applicants differently because of their gender.<sup>235</sup> If FGM is interpreted as a political action, protected and accepted by the state, escaping to avoid FGM should be considered as a political action as well i.e. a woman escaping genital mutilation is of a political opinion different from that of society, leading to persecution. If not accepting FGM as a political action, girls subjected to the mutilation may be recognised as members of a particular group, constituting female children subjected to FGM. This interpretation has been accepted in the US and in Canada, where fear of FGM has been recognised as a reason for persecution leading to a successful asylum claim.<sup>236</sup>

As shown above and under section 3.7 children in the US and in Canada have been recognised as refugees, owing to their membership of a particular social group consisting of only children. I am fully aware of the fact that practice and legislation around the world is not identical, hence a comparison between Sweden, USA and Canada may seem somewhat unfair. However, all three countries have adopted the 1951 Convention; consequently our national legislation reflects the same. If the two Northern American countries are able to interpret the criterion membership of particular group as including children as possible members of a particular social group, so could Sweden. The EU proposal for a council directive on minimum standards for qualification of those seeking protection, acknowledges the fact that child specific forms of persecution does exist. In addition to this acknowledgement, the proposal expressively points out that the five grounds for persecution, within the 1951 Convention, should be “sufficiently broadly defined as to potentially include refugee children”.<sup>237</sup> Hopefully this may lead to a wider interpretation of the five grounds for persecution in all of Europe. Still, the possibility of the MB accepting

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<sup>234</sup> Aliens Appeal Board, UN 328-97.

<sup>235</sup> Folkelius, K and Noll, G, *Affirmative Exclusion? Sex, Gender, persecution and the Reformed Swedish Aliens Act*, International Journal of Refugee Law, Vol. 10 No. 4, 1998, p 607-636.

<sup>236</sup> According to the US Guidelines FGM may constitute persecution, although one has to see to the circumstances i.e. on a case-to-case basis, p 19. Also see Sadoway, p376-77; referring to C.R.D.D. Decision No. U93-09427/8/9, 30 March 1999 and 16 December 1999, Canada.

<sup>237</sup> COM 2001(510) article 7.d (d).

children as members of a particular group seems very unlikely, as long as women are denied the same option. Regarding the possibility of accepting children as capable of performing political activities, the problem appears to be greater, as all three countries appear to have the same restrictive practice on this matter. It is clear that the definition of political activity has to be adjusted to suit all individuals in society, recognising the fact that, holding and expressing a political opinion is an issue of individual character. If a child in reality is not given the benefit of being able to hold a genuine opinion of his/her own, and express the same, this limits the child's chances of fulfilling the criteria in the Aliens Act chapter 3 § 2. In other words, if a child is neither recognised as someone who may be persecuted owing to his/her political activity, nor as a member of a particular social group, the child's possibilities of meeting with the theme of proof (the criteria prerequisite in the paragraph), his/her chances of recognition as a refugee, are reduced.

## 5 Conclusion

The fact that a separated child seeking asylum is in a somewhat unique situation is not to be forgotten. As a *minor* separated from his/her parents, or other primary legal caregiver/guardian, the child is in general in need of legal representation and support from adults, other than those who normally look after the child. As an *alien* s/he has no firm connection to the country of asylum. When applying for asylum in Sweden, a separated child is not in need of legal representation, however such representative is normally appointed to a child applicant, in order to support the child during interrogations and with possible appeals. For a child in a foreign country, such appointment appears to be of great importance, as the child assumingly is unaware of how the Swedish asylum procedure works. In addition to legal advice and support, the child may also be in need of a person to perform as his/her mouthpiece.

Regarding proof, a separated child in general lacks in providing evidence that could help supporting the claim of asylum. Sixteen out of twenty applicants in the decisions I have studied, had no form of documents of identity whatsoever. In order to establish the identity of these children, analysis of the language and age assessments were carried out as a final solution. Still, the results of such investigations are in general not sufficient basis as to the question of establishing a right to asylum. In order to obtain a positive claim for asylum, the child applicant has to show that s/he has escaped his/her country of origin owing to a well-founded fear of persecution, for reasons of race, religion, nationality, membership of a particular social group or political opinion. Unless the applicant has relatives, or other acquaintances in Sweden on arrival, that may help the applicant in supporting his/her claim, the testimony of the child becomes the most important evidence as to whether that individual child should be granted refugee status, or not. The younger the child, the more difficulties seem to be at hand, as such a child may not hold sufficient verbal knowledge, much less be able to explain his/her situation. As of the situation today, most separated children applying for asylum are teenagers on the verge of adulthood; therefore the problems of speech and understanding might not be a greater problem. Though, they are still children who in general were dependant on their parents before arriving to Sweden. As a consequence, their experiences dealing directly with the authorities might not be as great as those of an adult. Furthermore, the traumas these children may have experienced may impair the ability to give a coherent narrative. In addition, as very young child applicants still exist, the MB caseworkers should be familiar with the difficulties that may arise, when interviewing such a young child. Guidance on the area can be taken from Swedish criminal law; to get a conviction of a child abuser in a criminal case it is important that the interrogation with the child victim is performed in accordance with legal security; if the interview is carried out inaccurately, the testimony of the child is considered as not reliable.

Consequently, the interviews should be performed by a person with child expertise, in a neutral manner and with *a language adjusted to the child in order for the child to understand all the questions asked.*

Regarding the question of credibility, the MB emphasis that, when making an evaluation of a child applicant's credibility, it should be made on equal terms with an adult applicant. Yet, a child under the age of 15, who have obtained a residence permit on incorrect grounds based on deliberate lies, will not loose such permit. An adult and a child over the age of 15 however, risk loosing their residence permits if caught with given false information. In my desk study I have come to the conclusion that children of all ages may be considered as not credible. It may only be parts of their testimonies that are disbelieved by the caseworkers and adjudicators. Nevertheless, these parts of the testimony that are considered as not reliable appear to affect all other information given by those applicants, leading to a reduced possibility of obtaining refugee status. This regardless of whether the disputed information has relevance to the actual claim for asylum, or not. Also, one of the greatest problems of the issue of credibility is that of the caseworkers/adjudicators' unwillingness to admit in the decision, how great an impact their over all impression of the credibility of the applicant might have had.

A factor that *clearly* reduces a separated child's possibility of obtaining a positive claim for asylum is the interpretation of the theme of proof. It appears as if the prerequisite criteria for obtaining refugee status may not be interpreted as applicable, on a child applicant. I have not been able to ascertain whether the MB finds it possible for a child to owe a well-founded fear. Neither have I been able to establish if the MB looks at different forms of persecution, from a child perspective. Such a perspective has been allowed to decide the outcome of cases of statutory care, using the child's apprehension of his/her situation as basis for a decision. Hence, in order for refugee case law to be consistent with case law on other administrative areas, those dealing with separated children at the MB and the AAB should be aware of the fact, that such interpretation of the term persecution is necessary. Moreover, whether the MB has a policy of recognising child specific forms of persecution or not, has not been established by this survey. A lack of an established practice of granting residence permits owing to child specific forms of persecution probably makes it very difficult for a separated child to obtain refugee status.

There are indications that the occurrence of imputed political opinion on a child might be ignored by the MB. Also, the political activities normally performed by a child appear to be interpreted as not substantiating a positive claim for asylum; despite the fact, that the caseworkers and adjudicators at the MB appear to have a strong ambition to establish the political activity of a child applicant. Additionally, the MB appears to fail in recognising children as possible members of a particular social group, denying a child applicant who is persecuted owing to his/her status as a child, the status as a refugee. If the criteria within the law are set only by adult standard, it seems

almost impossible for a child to fulfil those criteria. However, many of these children *are* granted residence permits, only not because of their status as refugees but on humanitarian grounds, in general owing to the established practice regarding a country, but also owing to their age. The fact that they are children, might actually put them in a better position than that of adults applying for asylum *as in terms of protection*, however *not in terms of being recognised as refugees*.

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