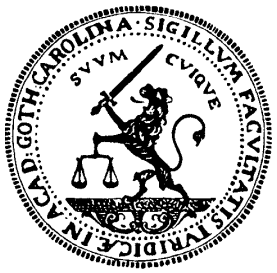

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# The Principle of Non-Refoulement in Swedish Migration Law

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International Human Rights Law and Migration Law

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# Contents

# Summary

The purpose of this thesis is to assess whether Sweden has fulfilled its obligation to implement the principle of non-refoulement in Swedish migration law. The principle of non-refoulement, in general terms, implies an impediment for execution that obliges a state not to permit removal of a person to a county where he or she is at risk of being subjected to torture or persecution. This principle is *inter alia* found in three conventions (the Refugee Convention, the Convention against Torture and the European Convention on Human Rights), which affect the Swedish domestic legislation. In addition, migration and asylum law is part of European Union Law since the adoption of the Treaty of Amsterdam and the European Union, for instance, has produced the Asylum Qualification Directive. When this directive was implemented, the Swedish legislator found that some of the articles of the directive did not necessitate legal reform since they were already part of Swedish law.

My analysis of the international review of Sweden performed by the European Court of Human Rights and the Committee against Torture, however, identifies several inconsistencies between the international regulation and the Swedish law and practice. The identified discrepancies involved the lack of an effective remedy in the special procedure, which was applicable in migration cases that raised national security concerns, and the fact that Sweden applied a standard of proof in the assessment of a personal risk of mistreatment that was too demanding for the applicant. The latter more specifically concerned aspects such as the assessment of previous experience of torture and persecution, the credibility of the applicant and the state's duty to investigate. My investigation of the relevant legal reform that has been adopted during the last decade on these problematical aspects indicates that the discrepancy has been amended to some extent, yet that there still is room for further progress and clarification. The deficiency may, however, be amended if the provisions in the directive possess direct effect under European Union law.

This thesis suggests potential measures that Sweden can take in order to improve the compatibility with the case law established by the European Court of Human Rights and the Committee against Torture. These reform proposals involve an inclusion of Articles 4.4 and 4.5 of the Asylum Qualification Directive as means of clarifying, and potentially lowering, the standard of proof in the Swedish assessment in migration cases. The first proposal involves a presumption of a risk of torture or persecution in the future if an applicant has been subjected to torture or persecution in the past. The second suggestion attends to the general standard of proof when documentary or other evidence are lacking and implies that the standard of proof can be lowered by giving the applicant the benefit of the doubt.

# Sammanfattning

Syftet med denna uppsats är att undersöka om Sverige har uppfyllt sina internationella åtaganden gällande efterlevnaden av principen om non-refoulement i svensk migrationsrätt. I generella termer innebär principen om non-refoulement ett verkställighetshinder mot avvisning och utvisning då personen i fråga riskerar att utsättas för tortyr och förföljelse i det mottagande landet. Denna princip kommer bland annat till uttryck i tre konventioner (Flyktingkonventionen, Tortyrkonventionen och Europakonventionen), vilka utgör grunden för den svenska nationella regleringen. Sedan antagandet av Amsterdamfördraget utgör migrations- och asylrätten även en del av den Europeiska Unionens kompetens och den Europeiska Unionen har till exempel frambringat Skyddsgrundsdirektivet. När detta direktiv inkorporerades i svensk lagstiftning ansåg lagstiftaren att innehållet i flera artiklar i direktivet redan finns i svensk rätt och att det därför inte fanns ett behov av författningsändring.

I min analys av den internationella granskningen av Sverige som utförts av Europadomstolen och Tortyrkommittén identifierar jag dock flera avvikelser mellan den internationella rätten och den svenska rätten. De identifierade skillnaderna inkluderar bland annat avsaknaden av ett effektivt rättsmedel i ärenden som väcker nationella säkerhetsintressen och att Sverige tillämpar ett beviskrav som är för krävande för den sökande. Den senare bristen hänförs mer specifikt till bedömningen av tidigare erfarenhet av tortyr och förföljelse, trovärdighetsbedömningen av den sökande samt statens utredningsskyldighet. Min utvärdering av de identifierade bristerna och de lagreformer som har antagits under de senaste åren antyder att vissa problem har åtgärdats men att det fortfarande finns utrymme för förbättring och klargörande, framförallt vad gäller beviskravet. Denna ofullkomlighet kan dock förbättras om de relevanta artiklarna anses besitta direkt effekt enligt EU-rätten.

Denna uppsats presenterar möjliga åtgärder som Sverige kan vidta i syfte att förbättra förenligheten med Europadomstolens och Tortyrkommitténs praxis. Dessa reformförslag innebär en inkorporering av artiklarna 4.4 och 4.5 i Skyddsgrundsdirektivet som medel för att klargöra, och eventuellt sänka, det beviskrav som tillämpas inom svensk migrationsrätt. Den första framlagda lösningen innebär en presumtion för en risk för tortyr och förföljelse i fall då den sökande tidigare har blivit utsatt för tortyr eller förföljelse. Det andra förslaget behandlar beviskravet i fall då bevismedel är bristande och innebär att beviskravet kan sänkas enligt principen om tvivelsmålets fördel.

# Abbreviations

| | |
|---|---|
| AA | Aliens Act |
| CAT | Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment |
| CmAT | Committee Against Torture |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| EEA | European Economic Area |
| IG | Instrument of Government |
| MIG | Migration Court of Appeal |
| Prop. | Government bill |
| SFS | Code of Statutes |
| UN | United Nations |
| UNHCR | United Nations High Commissioner for Refugees |

# 1 Introduction

## 1.1 Background

International human rights law deals with the relationship between the dominant state and the less powerful individual. The idea behind human rights implies that the power of the state has to be limited and that the state has obligations towards the individual. International human rights are universal and applicable to every individual despite country of origin, culture, sex etcetera. The state has the primary responsibility for the protection of its citizens and residents, yet there are numerous potential reasons why this primary responsibility cannot be relied upon and accordingly, there is a need for international protection. One of the most vulnerable groups of people is asylum seekers who have left their home country in search of a safe haven elsewhere in the world. International law establishes a right to seek asylum, nevertheless there is no right to asylum. By virtue of international law, a country has a right to pass legislation with national rules that address the question of immigration. As an example of this, Sweden approved a new Aliens Act in 2005, which attends to the right of aliens to travel to, reside and work in Sweden. This piece of legislation, for example, involves a new system of instance containing migrations courts and the Migration Court of Appeal. This area of law is still highly influenced by international law, for instance international human rights law, which sets up boundaries for the national legislator. The European Union is also increasing its involvement on migration law and has produced several legal instruments that affect the Swedish legislation.

Prior to the latest Swedish parliamentary elections in 2010 immigration policy was in the centre of attention during the political debate with apparent vibes of xenophobia. At the same time, newspapers publish articles about aliens who claim to be mistreated by the Swedish migration authorities. Additionally, within the academic debate on migration law, earlier surveys of case law and analysis of applications for asylum concerning former versions of the Swedish Aliens Act have argued that equal cases have not been treated equally and that the authorities have enjoyed too much discretion in their assessment of asylum applications.[1] In this context, it is important to remember that Swedish politicians historically have had significant influence on administrative decisions in general[2], and migration matters in particular. This influence was manifested for instance through the fact that the government made precedential decisions on migration matters up until 1992.[3] Moreover, evidentiary questions in refugee law have been somewhat ignored within academia, yet it has been

[1] See e.g. Prop. 2004/05:170, p. 105; Diesen C. *et al*, *Prövning av migrationsärenden. Bevis 8*, Norstedts Juridik, 2007, p. 188.
[2] Warnling-Nerep, W, *Rätten till domstolsprövning*, Jure Förlag AB, 3rd edition, 2008, p. 1.
[3] Diesen, C. *et al*, *Bevis 2. Prövning av flyktingärenden*, Norstedts Juridik, 1998, p. 31.

claimed that the Nordic countries put a high standard of proof on applicants for asylum[4]. The topicality of migration policy and the fact that migration law is regulated on several levels of the legal system, i.e. international law, EU law and domestic law, makes this area of law an interesting subject for further investigation.

## 1.2 Purpose and Main Questions

The purpose of this thesis is to examine the international principle of non-refoulement in Swedish migration law and practice. My aim is to assess whether Sweden has fulfilled its obligation to implement the principle of non-refoulement in Swedish legislation. The purpose is more specifically to investigate the reasons why Sweden has been found to be in violation of the principle in international review by the European Court of Human Rights (ECtHR) and the Committee against Torture (CmAT), and to indentify potential measures that Sweden can take to improve this discrepancy.

I have delineated the following main questions in order to fulfil this purpose. What is the meaning of the principle of non-refoulement in international law and how has Swedish domestic law implemented this principle? Are there any inconsistencies in the implementation? Why has the ECtHR and the CmAT found Sweden to be in violation of the principle of non-refoulement in their reviews? Is there a possibility to improve the Swedish domestic law or practice and eliminate the potential inconsistency?

## 1.3 Method and Material

The method and material are correlating in this thesis. I have used the traditional legal dogmatic method, which involves using traditional legal sources such as laws, preparatory work, jurisprudence and legal commentaries to illustrate the current legal situation. As the principle of non-refoulement emanates from international law, the first part of the thesis will inquire the international origin as well as the Swedish legal implementation. The Swedish legislation is obviously written in Swedish and I have used the English translation of the Swedish Aliens Act as published on the website of the Swedish Government Offices to facilitate this description. As this English version is not an official translation, it is not legally binding. For the Swedish-speaking readers of this thesis, I have written the relevant legal concepts in Swedish within brackets to assist an examination of the original sources for the Swedish-speaking readers of this thesis.

[4] See e.g. Gorlick, B., *Common burdens and standards: Legal elements in assessing claims to refugee status*, International Journal of Refugee Law, 2003, vol. 15, no. 3, pp. 359 and 369.

The second part of the thesis is based on a qualitative study of cases from both the ECtHR and the CmAT with Sweden as state party. The selected cases are all judgements and decisions delivered between 1 January 2000 and 1 January 2011 in which Sweden has been found to infringe the principle of non-refoulement. The last part of the thesis is based on the illustration of the Swedish legal implementation and the international review of Sweden. Here I will answer the main questions presented in subchapter 1.2 of this thesis and finally reflect on whether there are potential measures that can be taken in order to improve the implementation of the principle of non-refoulement in Swedish migration law and practice.

## 1.4 Delimitations and Clarifications

The principle of non-refoulement protects every individual in risk of being sent out of a country and thus appears in different legal contexts. This thesis limits the extent of the investigation to migration law since space is restricted. I will not address the occurrence of the principle in for instance criminal law and agreements on extradition. Since the international review presented in this thesis centres around the prohibition of torture, the presentation will principally focus on situations where there is risk of torture and only to a lesser extent where there is risk of persecution. The judgements and decisions of international review that are included in the case analysis have been limited to a specific period of time as specified in subchapter 1.3 of this thesis. This limitation was made because space is scarce and the thesis should attend to the most recent cases. The term “the Court” in this thesis will refer to the ECtHR and the term “the Committee” will refer to the CmAT. In addition, the word ‘mistreatment’ is used as a common term for torture and persecution.

The activity of the CmAT also contains a report procedure in which the contracting states to the Convention against torture (CAT) on a regularly basis have to submit reports about the measures they have taken to give effect to their undertakings under CAT. The reports submitted by Sweden in this procedure, as well as the findings from the country visit to Sweden by the UN Subcommittee on Prevention of Torture in 2008 are excluded from this thesis since it is peripheral to the aim of the thesis. In addition, this thesis does not include findings from the country visit to Sweden by the European Committee for the Prevention of Torture. Lastly, the European Union has increased its cooperation on migration matters in recent times and, with the Treaty of Amsterdam, migration and asylum law became part of Union Law. European Union law will not be attended to, other than when it is required in order to explain the relevant Swedish legislation. For example, the Charter of Fundamental Rights of the European Union, which became part of primary law with the Treaty of Lisbon, will only be mentioned in general terms.

## 1.5 Disposition

To begin with, chapter 2 will explain the legal basis of the principle of non-refoulement in international law. In particular, this chapter will look at the recognition of non-refoulement in three significant conventions, that is the 1951 UN Convention relating to the Status of Refugees (the Refugee Convention), CAT and lastly the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In chapter 3, the presentation will describe the integration of the principle in Swedish law. Firstly, the Swedish Constitution and incorporation of the ECHR will be addressed and, secondly, the Swedish Aliens Act will be explained. Here the text will attend to both former and current regulation as well as parts of European Union law, as it is necessary in order to understand the rules behind the cases presented in the next chapter. Thirdly, relevant parts of Swedish law and practice on procedural matters will be considered.

Chapter 4 describes international reviews of Sweden and will present selected cases from both the ECtHR and the CmAT. This description comprehends three judgements on Article 3 of ECHR and eight decisions regarding Article 3 of CAT. The thesis is thereafter tied together in chapter 5 and the main questions of presented in this introductory chapter are answered and discussed. Firstly, I will analyse if there are any inconsistencies between the international regulation and the domestic legal implementation of the principle of non-refoulement in migration law. Secondly, I will summarize the reasons why the ECtHR and the CmAT has found Sweden to violate the principle of non-refoulement in their review and try to identify if there is an underlying pattern behind these outcomes. This chapter will lastly include a discussion *de lege ferenda* where I will propose potential measures that would improve the implementation of the principle on non-refoulement in Swedish law and practice. Finally, chapter 6 will conclude the thesis and at this point, I will present my final comments.

# 2 International Law

The principle of non-refoulement is protected by international treaty law and, according to many commentators, also by international customary law.[5] In general terms, the principle comprises an impediment for execution that obliges a state not to permit removal of a person to a county where he or she is at risk of being subjected to torture or persecution. This principle protects every individual that is at risk of being sent out of a country e.g. rejected refugee applicants and asylum seekers and persons subjected to extradition.[6] The different sources of international law that establishes the principle of non-refoulement does not have the exact same scope and precision. The protection of non-refoulement in international treaty law is less disputable seeing as this is codified in writing in several conventions. A convention is binding upon the states that have ratified the convention in accordance with the legal principle of *pacta sunt servanda*. The content of a convention is more or less explicitly stated even though there may be room for different interpretations. The recognition of the principle in international customary law is on the other hand more debatable. A norm is considered international customary law when there is "evidence of a general practice accepted as law", as codified in Article 38(1)(b) of the statute of the International Court of Justice. The requirements are thus twofold; there must be a certain general behaviour and so-called *opinio juris* i.e. the conviction among states on the binding nature of the principle.[7] The majority of legal doctrine confirms that the principle of non-refoulement is binding on states by customary international law. The basis for this conclusion is the fact that the principle is recognised in numerous conventions and declarations on both global and regional level in combination with statements made by world leaders.[8] The advantage of establishing the principle as customary international law is that the principle is binding upon all states, with two exceptions of special and local customary law, and not only upon countries that have ratified the different conventions.[9] Another related aspect of this discussion is whether the principle of non-refoulement is among those rare customary rules to which no derogation is acceptable, in other words a *jus cogens* rule. The source for this type of rule is found in Article 53 of the 1969 Vienna Convention on the Law of Treaties, which establishes that such a rule can only be modified by a subsequent norm having the same character. Hence, there is a hierarchy between the different rules of international law and jus cogens norms are of highest dignity since they are

[5] E.g. Chan, P., *The protection of refugees and internally displaced persons: non-refoulement under customary international law?*, The International Journal of Human Rights, 2006, vol. 10, no. 3, pp. 231-239; Coleman, N., *Non-refoulement revised: Renewed review of the status of the principle of non-refoulement as customary international law*, European Journal of Migration and Law, 2003, vol. 5, no. 1, pp. 23-68.
[6] Diesen, C. *et al*, 1998, *supra* note 3, p. 91.
[7] Evans, M., *International Law*, Oxford University Press, 3rd edition, 2010, pp. 98-102.
[8] E.g. Chan, P., 2006, *supra* note 5, pp. 231-239; Coleman, N., 2003, *supra* note 6, pp. 23-68.
[9] Evans, M., 2010, *supra* note 7, p. 106.

considered to be essential to the international system as a whole. The benefit of successfully claiming a jus cogens norm is that states are precluded from disobeying this norm in any way.[10] Human rights tribunals have until recently shunned away from claiming jus cogens norms, yet there are now some signs of recognition from for example the ECtHR and the Inter-American Court of Human Rights. One of the international norms that have been claimed to be of jus cogens character is the prohibition of torture that arguably can include the principle of non-refoulement.[11] However, this thesis does not have to investigate this notion in depth since Sweden has ratified the three conventions that are attended to in this chapter. I will now turn to the recognition of the principle of non-refoulement in three different conventions, namely the 1951 UN Convention relating to the Status of Refugees, the European Convention for the Protection of Human Rights and Fundamental Freedoms and lastly, the UN Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. The next subchapter will present the development and width of the protection of the principle of non-refoulement in the three selected conventions that form the basis of the regulation of non-refoulement.

## 2.1 The Refugee Convention

The 1951 UN Convention relating to the Status of Refugees (hereinafter the Refugee Convention) came into force in 1954 and, at the time of writing, 144 countries have ratified the convention.[12] The Refugee Convention establishes the definition of a refugee and the legal protection that refugees enjoy in the contracting states. The treaty was at first limited in time to events occurring before 1 January 1951, however, the 1967 Additional Protocol on the Status of Refugees has removed this limitation. The Refugee Convention was the earliest international legal instrument to refer to the principle of non-refoulement.[13] The principle of non-refoulement is found in Article 33 of the Refugee Convention and is formulated as follows:

> ‘1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however be claimed by a refugee whom there are reasonable grounds for regarding as a

[10] Evans, M., 2010, *supra* note 7, pp. 146-147.
[11] E.g. Evans, M., 2010, *supra* note 7, pp. 150-152; Allain, J., *The jus cogens nature of non-refoulement*, International Journal of Refugee Law, 2001, vol. 13, no. 4, pp. 533-558; Skoglund, L., *Diplomatic assurance against torture – an effective strategy?*, Nordic Journal of International Law, 2008, vol. 77, no.4, p. 324.
[12] Website of the United Nations, http://treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en, as accessed 2011-05-01.
[13] Diesen, C. *et al*, 1998, *supra* note 3, pp. 91-93 and 109.

> danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particular serious crime, constitutes a danger to the community of that country.'

Article 33 is evidently applicable to individuals that fall under the definition of refugee under the convention, but also to asylum seekers, which claim to be refugees according to the conditions set up by the convention and whose claim have not been formally approved. This article of the Refugee Convention therefore protects an asylum seeker until the asylum seeker gets a final refusal of their asylum claim.[14] Article 33 is applicable when the refugee or asylum seeker is outside its own country of nationality or country of residence. It covers every action that can be referred to a state party and which can result in a removal of a person to a territory where his or her life or freedom is threatened or where the individual is at risk of persecution. The provision applies to the official state territory as well as any other territory within the effective control and authority of that state, e.g. in cases of military occupation. It is applicable to any form of forcible removal including non-admission at the border. The provision protects direct refoulement, as well as indirect refoulement, i.e. sending a person to a country that in turn will send the person to another country where he would risk maltreatment as described above.[15] The prohibition that is prescribed in this provision is nevertheless not absolute and there is room for two types of exceptions according to the second paragraph of Article 33. These exceptions should be interpreted restrictively and the principle of proportionality is vital in this assessment. There must be a rational connection between refoulement and the elimination or alleviation of danger. The danger has to be supported by credible and reliable evidence. Refoulement have to be the last resort in order to prevent or reduce the threat that the asylum seeker or refugee constitutes in the country of asylum. Lastly, the danger that the person constitutes to the national security of the country of asylum must outweigh the risk of the person if refoulement is executed.[16]

The Refugee Convention revolves around the concept of persecution, which is central to both the definition of non-refoulement and the refugee definition. Nevertheless, there is no generally accepted definition of persecution. Article 33 establishes that treat to life or freedom on account of race, religion, nationality, membership of a particular social group or political opinion always constitute persecution, but also other serious violations of human rights, on the same stated grounds, would amount to persecution. The latter will depend on the specific circumstances of the case

[14] UNHCR, Executive Committee Conclusion no. 82 (1997) on Safeguarding Asylum, para (d)(i).
[15] UNHCR, Advisory Opinion on the Extraterritorial Application of non-refoulement obligations under the 1951 Convention relating to the status of refugees and its 1967 Protocol, 2007, pp. 2-4 and 17-19.
[16] UNHCR, Advisory Opinion on the scope of the national security exception under article 33(2) of the 1951 Convention relating to the status of refugees, 2006, pp. 1-8.

where the decision-maker has to look at the objective part, the action of the alleged perpetrator, as well as the subjective part, the feelings and opinions of the person. Actions that in themselves would not constitute persecution might in conjunction with other actions cumulatively amount to persecution. These cumulative grounds vary and the assessment will inevitably depend on all the circumstances of the case, for instance the geographical, historical and ethnological context.[17] However, the exceptions to the principle of non-refoulement that are made possible in Article 33.2 do not effect a state's obligations under international human rights law, which permits no exceptions if the person would be at risk of torture. This will be explained later. The principle of non-refoulement as established in Article 33 of the Refugee Convention is non-derogable, which means that the convention permits no reservations by the contracting states.[18] Lastly, the burden of proof is, to begin with, on the person claiming to be in need of international protection, while the decision-maker has an obligation to investigate the case. When there are statements that cannot be proved, the applicant should be given the benefit of the doubt if the applicant's account seems credible, unless there are good reasons to the contrary. The applicant's story must not run contrary to generally known facts and the story must be coherent and plausible.[19]

## 2.2 The European Convention of Human Rights

ECHR entered into force in 1953 and the contracting states have the primary responsibility to ensure compliance with the convention.[20] Following from Article 19 of ECHR the implementation of the convention is protected by the ECtHR. The contracting parties have the right to control the entry, residence and expulsion of aliens as a matter of international law and subject to their treaty obligations as acknowledged in for instance *Üner v. the Netherlands*[21]. The convention does not include provisions affecting the right of a state to send a person out of the country, yet it contains articles, which the contracting state has to take into consideration when making a decision on this matter.[22] The principle of non-refoulement is comprised in Article 3 of ECHR, a provision stated as follows:

> 'No one shall be subjected torture or to inhuman or degrading treatment or punishment.'

[17] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited 1992, paras 51-53.
[18] UNHCR, Advisory Opinion, *supra* note 15, 2007, pp. 4-5.
[19] UNHCR, Handbook, 1992, *supra* note 17, paras 196 and 204.
[20] Cameron, I., *An Introduction to the European Convention on Human Rights*, Iustus förlag, sixth edition, 2011, pp. 41 and 47.
[21] Üner v. the Netherlands, Judgement of 18 October 2006, Appl. no. 46410/99.
[22] *Ibidem*, paras 54 and 57.

The provision evidently involves a prohibition of torture and also indirectly contains the principle of non-refoulement.[23] The reasoning behind this interpretation is that the aim of the convention is to offer an effective legal protection and not just a formal protection. An inquiry into a potential violation of this provision after a person has been sent out of the territory of a contracting state and thereafter been subjected to torture would not provide effective protection. Hence, there is a need for preventive action and an early examination of the case.[24] The formulation of the principle of non-refoulement that has been acknowledged is for instance found in the case *Chahal v. United Kingdom*[25] where the ECtHR has declared the following:

> 'It is well-established in the case law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country.' [26]

The protection of non-refoulement is absolute and there is no room for exceptions even in times of state emergency consistent with Article 15.2 of ECHR. The provision protects both direct and indirect refoulement to additional countries. The standard of proof is expressly stated as 'substantial grounds'. When deciding this matter the Court will consider all the relevant evidence, yet the assessment of a potential violation of the convention, i.e. the existence of a risk, will focus on the those facts which where known or ought to have been known by the state at the time of the expulsion.[27] The meaning of the concept "torture or to inhuman or degrading treatment or punishment" is essential to the protection under Article 3 of ECHR and it has been discussed in several cases from the Court. In the case of *Ireland v. United Kingdom*[28] the court recognized the following:

> 'Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.' [29]

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[23] E.g. Cruz Varas and others v. Sweden, Judgment of 20 March 1991, Series A no. 201, p. 28, paras 69-70; H.L.R v. France, Judgement of 29 April 1997, Reports of Judgments and Decisions 1997-III, p. 757, paras 33-34.
[24] Danelius, Hans, *Mänskliga rättigheter i europeisk praxis*, 2007, 3rd edition, Norstedts Juridik, pp. 78-79.
[25] Chahal v. United Kingdom, Judgement of 15 November, Appl. no. 22414/93.
[26] *Ibidem*, para 74.
[27] Cruz Varas and others v. Sweden, *supra* note 23, para 76.
[28] Ireland v. United Kingdom, Judgement of 18 January 1978, Appl. no. 5310/71.
[29] Ibid, para 162.

The definition is noticeably not clearly defined and there is room for interpretation. Furthermore, the consideration of the death penalty and the relationship between Article 3 and Article 2, which establishes the right to life, is quite complex. Article 2 does not involve a prohibition of the death penalty, but this type of punishment is forbidden in the sixth and thirteenth protocol of the ECHR. In the case *Soering v. United Kingdom*[30], the Court in plenary assessed the case concerning the expulsion of a German citizen named Soering from United Kingdom to USA. The receiving country wanted to charge him for murder for which he feared being sentenced to death. The Court found that the long period of time spent on death row under emotional distress, i.e. the so-called 'death row phenomenon', as well as the age and mental state of the applicant at the time of the offence would cumulatively amount to a breach of Article 3.[31] This principle has been acknowledged by the Grand Chamber in *Öcalan v. Turkey*[32], which implies that the significant degree of human anguish and fear owing to sentencing a person to death after an unfair trial, in circumstances where there exists a real possibility that the sentence will be enforced, would bring the treatment within the scope of Article 3 of the Convention.[33]

The ECtHR has jurisdiction to examine all matters concerning the interpretation and application of the convention under Article 32 of ECHR. The contracting parties to the convention, pursuant to Article 33, are qualified to refer cases to the court on any alleged breach of the convention even though this is an unusual occurrence. [34] In addition, according to Article 34 of ECHR, any individual, non-governmental organisation or group of individuals has a right to refer applications to the court on alleged violations of ECHR and this possibility is frequently used. Two important prerequisites have to be fulfilled in order for a case to be admissible to the court in accordance with Article 35.1 of the ECHR. The applicant has to have exhausted all domestic remedies and the application has to be submitted to the ECtHR within a period of six months from the date on which the final decision was taken. The judges of the Court is organised in different compositions with different responsibilities. Pursuant to Article 26 of ECHR, the Court can make decisions as a single judge, a Committee of three judges, a Chamber of seven judges or as a Grand Chamber of seventeen judges. A case for instance, in accordance with Articles 30 and 31 of ECHR, can be referred to the Grand Chamber if it raises a serious question of interpretation or application or a serious issue of general importance. All final judgements of the ECtHR are binding on the responding state concerned. It is also important that other countries follow these judgements in order to lessen the burden of cases referred to the court. The Court does not have a doctrine of precedent in formal terms yet it is reluctant to overrule or deviate from an earlier judgement. This somewhat precedential effect of decisions is clearly stronger in case of Grand Chamber

[30] Soering v. United Kingdom, Judgement of 7 July 1989, Appl. no. 14038/88.
[31] *Ibidem*, paras 11-12 and 111.
[32] Öcalan v. Turkey, Judgement of 12 May 2005, Appl. no. 46221/99.
[33] *Ibidem*, paras 169 and 175.
[34] Cameron, I., 2011, *supra* note 20, p. 67.

decisions than other decisions by the ECtHR.[35] With regards to the application of the convention, in contrast to the interpretation, the states are in some situations given a margin of appreciation. This means that a certain amount of discretion must normally be left to the states when determining in a specific case whether there has been a violation of the convention. This principle is nonetheless not found in the case law regarding Article 2 and 3, due to the absolute nature and the strict wording of these provisions. In conclusion, there is no room for this principle in the subsequent review analysis in this thesis.[36]

## 2.3 The Convention Against Torture

CAT came into force in 1987 and, at the time of writing, 147 states have ratified the convention.[37] The convention includes an absolute prohibition against torture and establishes different mechanisms in order to guarantee this right. The fundamental part of the system of implementation is the establishment of the CmAT. [38] By virtue of Article 19 of CAT, the contracting states have to report to the Committee every fourth year about the measures they have taken in order to implement the convention. In addition, pursuant to Article 22 of CAT, a contracting state voluntarily can agree through a declaration to allow the Committee to receive and consider communications from individuals that claim to be victims of a violation of the provisions contained in CAT. One of the counties that have made such a declaration is Sweden. The result of this kind of review will be examined later in this thesis.

Article 3 of CAT contains the principle of non-refoulement and the provision reads as follows:

> ‘1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.’

The provision explicitly protects the principle of non-refoulement. The protection is absolute and there is no exception to this article in CAT. Article 2.2 of CAT confirms this notion since it highlights that no exceptional

[35] *Ibidem*, pp. 55-58 and 65-66.
[36] Van Dijk, P. *et al*, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, 1998, pp. 82-83 and 86.
[37] Website of the United Nations, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en, as accessed 2011-05-01.
[38] Diesen, C. *et al*, 2007, *supra* note 1, pp. 21 and 118.

circumstances whatsoever may be invoked by a contracting party to warrant acts of torture and ill-treatment. Hence, there is no room for successfully conducting a line of argumentation on whether the person in question has committed crimes and the seriousness of those crimes in order to justify torture.[39] Article 3 of CAT covers both direct and indirect refoulement.[40] The regulation revolves around the concept of torture and Article 3 of CAT does not refer, unlike the initial drafts to the convention, to inhumane and degrading treatment or punishment. [41] Article 1.1 of CAT establishes the definition of torture and formulates this as follows:

> 'Article 1
> 1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

The definition clearly addresses the types of acts and the agents that the definition of torture comprises. The agents of torture need a connection to the public sphere. This restricts the applicability of this provision to private agents, however, it does not exclude it completely. Further, the determination of the risk of torture has to be based on all relevant considerations. The reference to "the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights" also has a public element and only refers to breaches by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[42] The existence or absence of such a situation in a country is also not determinative of a claim, but a factor that has to be included in the determination.[43]

The CmAT plays a fundamental role in order to ensure state compliance with CAT and the vast majority of individual communications under Article 22 have invoked violations of Article 3. The Committee is nonetheless a monitoring body and not an appellate, a quasi-judicial or an administrative body. The Committee therefore has the power of free assessment of the facts based upon the full set of circumstances in every case referred to it through

[39] CAT General comment no 2, 39th session, 2007, paras 5-6.
[40] CAT General comment no. 1, 16th session, 1996, para 2.
[41] McAdam, J., *Part III – Rights and remedies: The Convention against Torture*, International Journal on Law and Psychiatry, 2004, vol. 27, no. 6, pp. 629-630.
[42] CAT General comment no. 1, 1996, *supra* note 40, para 3.
[43] E.g. Njamba and Balikosa v. Sweden, Decision of 14 May 2010, Comm. No. 322/2007, para 9.3; Güclü v. Sweden, Decision of 11 November 2010, Comm. No. 349/2008, para 6.3.

an individual communication.[44] The decisions of the Committee are not binding under international law; however, they are usually complied with according to state practice.[45] In order for an individual communication to be admissible, the applicant has to meet the requirements of Article 107 of the Rules of Procedure of CAT[46]. The key prerequisites for admissibility are exhaustion of all available domestic remedies and that the same matter is not, or has not been, under consideration in another procedure of international investigation or settlement. The Committee, in accordance with Article 108 of the Rules of Procedure of CAT, can request the responding state to take interim measures, such as not to remove a person from its territory when he or she has lodged a communication with the Committee. The burden is on the author of the communication to establish a *prima facie* case for the purpose of admissibility.[47] With respect to the application of Article 3 of CAT to the merits of the case, the burden of proof and standard of proof are somewhat different. The burden is then on the applicant to present an arguable case, in other words there has to be a factual basis for the applicant's position sufficient to require a response from the responding state. The evidentiary standard implies that there are substantial grounds for believing that the person behind the communication would risk being subjected to torture if refoulement is executed. It is recognized that the risk of torture must be evaluated on grounds that go beyond mere theory and suspicion, yet the risk does not have to meet the test of being highly probable. The grounds for believing that the person would be in danger have to be substantial and the risk has to be both personal and present. Both parties may introduce all pertinent information to support its position. For instance, such information can be evidence of previous subjection to torture or data on the topic of a consistent pattern of gross, flagrant or mass violations of human rights in the receiving state.[48] Finally, the extent of protection that Article 3 of CAT offers is an impediment to execution. The provision does not disclose the rights of the person allowing him or her to exist and subsist in the responding state, hence this is decided on a national level.[49]

[44] CAT General comment no. 1, 1996, *supra* note 40, para 9.
[45] Wikrén, G. & Sandesjö, H., *Utlänningslagen med kommentarer*, Norstedts Juridik, 9th edition, 2010, p. 186.
[46] CAT Rules of Procedure, CAT/C/3/Rev.4, 9 August 2002.
[47] CAT General comment no 1, 1996, *supra* note 40, para 3.
[48] *Ibidem*, paras 5-8.
[49] McAdam, J., 2004, *supra* note 41, pp. 635-636.

# 3 Swedish Domestic Law

The three treaties that have been presented in the previous chapter oblige the contracting states to refrain from practicing refoulement, but they do not include any provision that require the contracting state to pass national legislations on non-refoulement.[50] Sweden has chosen to incorporate the principle of non-refoulement in several Swedish laws and the principle can for instance be found in migration law and criminal law. This chapter will firstly describe the inclusion of the principle in the Swedish Constitution and incorporation of the ECHR. Secondly, the Swedish Aliens Act will be illustrated where both the current regulation and parts of the earlier regulation will be addressed, as it is necessary in order to understand the rules behind the case law presented in the next chapter. Thirdly, relevant parts of Swedish procedural law will be considered.

## 3.1 The Fundamental Laws and the Incorporation of ECHR

Human rights in Sweden are primarily protected by three fundamental laws: the Instrument of Government (*Regeringsformen*), the Freedom of the Press Act (*Tryckfrihetsförordningen*) and the Fundamental Law on Freedom of Expression (*Yttrandefrihetsgundlagen*). The second chapter of the Instrument of Government (hereinafter IG) contains regulation on basic rights and freedoms, which limits the action of the public sector of the society. The rules thus affect the state in its legal and executive role. These rules were slightly changed in 2010 due to the adoption of the Treaty of Lisbon in the European Union, in particular the Charter of Fundamental Rights of the European Union. As a result, Chapter 2 of the IG now imply protection for whomever (*var och en*) i.e. every juridical and natural person. One of the rights and freedoms protected in this regulation is the prohibition against corporal punishment and torture in Chapter 2, section 5.[51] This prohibition is absolute and there is no room for exceptions even in time of war. Sweden has moreover subjected itself to regulation on basic human rights and freedoms that is more far-reaching than this constitutional protection through international agreements with other states. One example of this is the ratification of the ECHR.[52] The primary responsibility to secure compliance with the convention is attributed to the contracting states and the international supervision of the ECHR is subsidiary to the domestic application. The contracting states have the obligation to secure that individuals enjoy the human rights established by the ECHR and any fault

[50] Cameron, I., 2011, *supra* note 20, p. 31.
[51] Bull, T. and Sterzel, F., *Regeringsformen: en kommentar*, SNS Förlag, 1 edition, 2010, pp. 61-62 and 75-76.
[52] Strömberg H., & Lundell, B., *Sveriges författning*, Studentlitteratur, 21:a upplagan, 2011, pp. 92, 95 and 104.

that may occur should as far as possible be rectified on the national level through effective legal remedies. Consequently, it is important that the contracting states adjust the domestic legislation as the ECtHR determines the interpretation of a provision in the ECHR.[53]

In Sweden, after the ratification in 1953, the ECHR was not directly applicable under Swedish law. Sweden as a state was bound by the convention and the Swedish legislation was supposed to be interpreted, as far as possible, in accordance with the convention. The Swedish courts were even obliged to deviate from the interpretation of Swedish law that the legislator had initially intended if that understanding was incompatible with the ECHR. Nevertheless, the ECHR was after some debate incorporated into Swedish law in 1994.[54] At the same time, a new statute was enacted in the Instrument of the Government that stated that laws and regulations might not be enacted in breach of Sweden's commitments under the ECHR. After this reform, the Swedish courts has shown to be more sensitive to ECHR and more reluctant to implement Swedish law in a way that might result in a judgement by the ECtHR stating that Sweden has violated the convention.[55] The ECHR does not as such have constitutional status in the Swedish legal system. The new statute in the IG implies that a law or other regulation that contests an article of the ECHR was found to be in conflict with the Constitution. If this is at hand, the rule of constitutional review applies and the courts and administrative authorities are not allowed to apply the rule in question.[56] The original formulation of the provision on constitutional review has, however, been changed since 1 January 2010 and the current wording in Chapter 2, section 19 of the IG implies that the courts and administrative agencies shall pay particular attention to the fact that the constitution has precedence before statutes. The legislator still stresses that the courts and administrative authorities should try to avoid constitutional review and instead interpret the Swedish legislation in consistency with the convention.[57] As a result, the amount of constitutional review will probably remain the same and the small occurrence will most likely deal with norm conflict between Swedish law and EU law (with the previously mentioned Charter).[58]

## 3.2 The Aliens Act

The Swedish Aliens Act comprehends national regulation on the right of aliens to travel to, reside and work in Sweden, and to seek asylum. This piece of legislation also includes rules on the circumstances when an alien can be removed from Swedish territory. The Swedish Aliens Act is,

[53] Danelius, H., 2007, *supra* note 24, p. 33.
[54] Lag (1994:1219) om den europeiska konventionen angående skydd för mänskliga rättigheter och de grundläggande friheterna.
[55] Danelius, H., 2007, *supra* note 24, pp. 34-35.
[56] Bull, T. and Sterzel, F., 2010, *supra* note 51, pp. 271-274 and 290.
[57] Prop. 2009/10:81, pp. 146-147.
[58] Cameron, I., 2011, *supra* note 20, pp. 190-191.

however, not fully comprehensive. There are other pieces of national legislation that address the issue of expulsion, such as the Swedish legislation against terrorism[59], extradition for criminal offences[60] and transfer of enforcement of sentence[61], and consequently parts of these acts will be addressed in the next subchapter.[62] The new Swedish Aliens Act (hereinafter AA) came into force March 31 2006 and this piece of legislation included several important novelties. Two examples of changes in the current AA are the organisation of instance as well as the extensive restructuring of the provisions.[63] Since the introduction of the new Swedish AA, additional reform has been required due to legislative progress on European Union level. The two directives that give effect to parts of the AA are the Asylum Qualification Directive[64] and the Asylum Procedures Directive[65].[66] These two directives were incorporated into Swedish migration law on 1 January 2010 and the relevant substance of this reform will be presented later in this subchapter.

Chapter 12 of the AA contains provisions regarding impediments of enforcement concerning decisions of expulsion. In accordance with Chapter 8, section 17 of the AA, the decision-making authority has to take the rules about impediments of enforcement into consideration when it examines a question of refusal of entry or expulsion. Therefore, Chapter 12 is foremost of importance when an impediment has arisen after the decision of refusal of entry or expulsion has gained legal force.[67] The two provisions in chapter 12 that are relevant to this essay are sections 1 and 2 that incorporate the principle of non-refoulement. Chapter 12, section 1 of the AA addresses the situation that is protected in Article 3 of CAT and Article 3 of ECHR, and the content is in substance the same as in the previous version of the AA from 1989.[68] Chapter 12, section 1 is worded as follows:

> 'The refusal of entry and expulsion of an alien may never be enforced to a country when there is fair reason to assume (*skälig anledning att anta*) that
> - the alien would be in danger there of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment or

[59] Lag (1991:572) om särskild utlänningskontroll; Lag (2003:148) om straff för terroristbrott eller försök, förberedelse eller stämpling till sådant brott.
[60] Lag (1957:668) om utlämning för brott.
[61] Lag (1972:260) om internationellt samarbete rörande verkställighet av brottmålsdom.
[62] Wikrén, G. & Sandesjö, H., 2010, *supra* note 45, p. 62.
[63] Prop. 2004/05:170, pp. 1 and 9-56.
[64] Council Directive (2004/83/EC) on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
[65] Council Directive (2005/85/EC) on minimum standards on procedures in Member States for granting and withdrawing refugee status.
[66] Prop. 2009/10:31, pp. 1-2.
[67] Prop. 2004/05:170, p. 296.
[68] *Ibidem*.

- the alien is not protected in the country from being sent on to a country in which the alien would be in such danger.'[69]

The protection is clearly unconditional and includes both direct and indirect refoulement. The rule is applicable to every alien that risks refusal of entry or expulsion independent of its prospective status as a refugee and irrespective of whether Chapter 12, section 2 would permit execution of the decision.[70] Chapter 12, section 2 of the AA addresses the circumstances that are considered in Article 33 of the Refugee Convention, and the content is in substance equivalent to the previous version of the AA from 1989.[71] The formulation of Chapter 12, section 2 is:

> 'The refusal of entry and expulsion of an alien may not be enforced to a country
> - if the alien risks being subjected to persecution in that country or
> - if the alien is not protected in the country from being sent on to a country in which the alien would be at such risk.
>
> An alien may, however, be sent to such a country, if it is not possible to enforce the refusal of entry or expulsion to any other country and the alien has shown by committing an exceptionally gross offence that public order and security would be seriously endangered by allowing him or her to remain in Sweden. This is, however, not applicable if the persecution threatening the alien in the other country entails danger for the life of the alien or is otherwise of a particularly severe nature.
>
> An alien may also be sent to such a country if the alien has conducted activities that have endangered national security and there is reason to assume that the alien would continue to conduct these activities in the country and it is not possible to send the alien to any other country.'[72]

This provision is applicable to any alien at risk of refusal of entry and expulsion and not just refugees, i.e. it is broader than the protection in Article 33 of the Refugee Convention. The meaning of persecution is accounted for in Chapter 4, section 1 of the AA, which will be explained later in this subchapter. Chapter 12, section 2 clearly states that it encompasses both direct and indirect refoulement, and that the rule can come up at various stages of an alien's stay in Sweden. The two exceptions in the provision became part of the Swedish legislation in 1954 and they are in substance still the same. The protection offered is thus conditional, but the decision-maker has to have the principle of proportionality in mind when the decision-maker put the two exceptions into practice. The two factors that have to be weighed against each other are the crime and danger

[69] English translation from the website of the Government Offices, http://www.regeringen.se/sb/d/5805/a/66122 as accessed 2011-05-01.
[70] Wikrén, G. & Sandesjö, H., 2010, *supra* note 45, pp. 513-514.
[71] Prop. 2004/05:170, p. 296.
[72] English translation from the website of the Government Offices, http://www.regeringen.se/sb/d/5805/a/66122 as accessed 2011-05-01.

to national security, on the one hand, and the seriousness and extent of the risks that are posed to the alien in question, on the other hand.[73]

These two abovementioned rules on impediments of execution that comprise the principle of non-refoulement also have a counterpart in the principal assessment of refugee protection under Chapter 4 of the AA. Chapter 4, section 1 states the definition of a refugee and is formulated follows:

> 'In this Act, refugee means an alien who
> - is outside the country of the alien's nationality, because he or she feels a well-founded fear of persecution (*välgrundad fruktan för förföljelse*) on grounds of race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group and
> - is unable, or because of his or her fear is unwilling, to avail himself or herself of the protection of that country.
>
> This applies irrespective of whether it is the authorities of the country that are responsible for the alien being subjected to persecution or these authorities cannot be assumed to offer protection against persecution by private individuals.'[74]

In addition, this rule applies to a citizen of a certain country as well as stateless aliens under certain circumstances. The assessment of an alien's status as a refugee is forward-looking, yet the establishment of past persecution is a factor that speaks in favour of the claim that the risk of persecution still is present. Persecution by close relatives, friends or colleagues of the alien is also a factor that has to be noted in the assessment.[75] The definition of persecution was explicitly worded in past versions of the AA even though the removal of this definition was not meant to change the definition. In general terms, the concept of persecution aims at the individual. The measures have to be directed against the alien's life or freedom or otherwise be of a severe nature. The measures at issue have to achieve a certain level of intensity to be considered persecution. Persecution can emanate from both public officials and private persons, but the latter is only applicable if the officials assist the private person or do not have the means to intervene and protect the alien.[76] The definition of persecution is consistent in all provisions of the AA, consequently these aforementioned elements of persecution are important under both Chapter 4, section 1 and Chapter 12, section 2.

Chapter 4, section 2 deals with the comparable group of aliens in need of protection as in Chapter 12, section 1 and the former provision has been revised since 1 January 2010.[77] Chapter 4, section 2 states the following:

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[73] Prop. 1954:41, pp. 113-115.
[74] English translation from the website of the Government Offices, http://www.regeringen.se/sb/d/5805/a/66122 as accessed 2011-05-01.
[75] Prop. 2009/10:31, pp. 101, 130 and 259.
[76] *Ibidem*, pp. 101-103.
[77] *Ibidem*, p. 118.

> ‘In this Act, a ‘person eligible for subsidiary protection’ (*alternativt skyddsbehövande*) is an alien who in cases other than those referred to in section 1 is outside the country of as an alien who is outside the country of the alien’s nationality because
> 1. there are substantial grounds (*grundad anledning att anta*) for assuming that the alien, upon return to the country of origin, would run a risk of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, or as a civilian would run a serious and personal risk of being harmed by reason of indiscriminate violence resulting from an external or internal armed conflict and
> 2. the alien is unable or, because of a risk referred to above, unwilling to avail himself or herself of the protection of the country of origin.
>
> The first paragraph, point 1 applies irrespective of weather it is the authorities of the country that are responsible for the alien running such a risk as is referred to there or weather these authorities cannot be assumed to offer protection against the alien being subjected to such a risk through the actions of private individuals.’ [78]

Chapter 4 of the AA also includes two new provisions that limit the scope of the protection in Chapter 4, sections 1 and 2. These confining provisions came into being when the Asylum Qualification Directive and Asylum Procedures Directive were incorporated into Swedish legislation.[79] The new provisions Chapter 4, sections 2b and 2c, exclude persons from the definitions of ‘refugee’ and ‘person eligible for subsidiary protection’ in case of certain specific serious crimes, such as war crimes. Since the result of these two sections can have far-reaching consequences, they have to be applied restrictively.[80] Lastly, Chapter 5 of the AA, in general terms, states that an alien considered a refugee and a person eligible for subsidiary protection are entitled to a residence permit. If an application for a residence permit, on the contrary, is rejected or dismissed or a residence permit is withdrawn, a refusal-of-entry or expulsion order shall be issued at the same time.

The relationship between the previously attended provisions in Chapter 4 and Chapter 12 respectively is quite complex. A person can be excluded from the concept of refugee or a person eligible for subsidiary protection in Chapter 4, while at the same time there is an impediment to execution of the subsequent refusal of entry or expulsion under Chapter 12. As stated previously, in accordance with Chapter 8, section 17 of the AA, the decision-making authority has to take the rules about impediments of enforcement into consideration when it examines a question of refusal of entry or expulsion. If there is an impediment to execution at this point or if an impediment to execution comes up later in the process, a temporary

[78] English translation from the website of the Government Offices, http://www.regeringen.se/sb/d/5805/a/66122 as accessed 2011-05-01.
[79] Prop. 2009/10:31 pp. 1 and 14.
[80] *Ibidem*, p. 261.

residence permit can be granted. Subsequently a permanent residence permit can be granted if the impediment to execution is found to be lasting.[81] The authorities also have the possibility to suspend the enforcement of a refusal of entry or expulsion decision (*inhibition).* One of the provisions that enables a stay of enforcement is Chapter 12, section 12 of the AA that address the situation where an international body, such as the CmAT and the ECtHR, makes a request to Sweden for suspension of the enforcement of a refusal-of-entry or expulsion order.[82] Additionally, the Aliens Board has the duty to examine the matter if an alien invokes new circumstances under Chapter 12, sections 18 and 19 of the AA. If the new situation can be assumed to amount to a impediment under Chapter 12, sections 1 and 2 and these circumstances could not previously have been invoked by the alien or the alien shows a valid excuse for not previously having invoked these circumstances, the authority have to reassess the matter. This new investigation can result in a residence permit.

## 3.3 Procedure in Migration Matters

The Administrative Procedures Act[83] and Chapter 13 of the AA regulate the procedural rights and duties of the Migration Board and the police in migration matters. The procedure in a Migration Court is regulated by the Administrative Judicial Procedures Act.[84] Before the enactment of the current AA, a decision made by the Migration Board (earlier called the Immigration Board) could only be appealed to the Aliens Appeals Board (earlier called the Refugee Appeals Board). With the new system of instance, the decisions of the Swedish Migration Board can be appealed to one of the three Migration Courts according to Chapter 14, section 3 of the AA. Decisions of Migration Courts can in turn be reviewed in last instance by the Migration Court of Appeal pursuant to Chapter 16, section 19 of the AA. This system of instance implies that the review of the decision of the Migration Board take place in a contradictory two-party process in which the Migration Board becomes the opponent of the alien. The role of the Migration Court of Appeal is precedential, in other words the decisions of the higher court by practice serve as guidance for the lower public authorities. Consequently, the Migration Court of Appeal requires a leave to appeal.[85] This area of law has, as mentioned before, been reformed due to the incorporation of EU directives in Swedish law. An EU directive is binding as to the result to be achieved and the national authorities can themselves choose the form and method for the realisation of the result prescribed by the directive.[86] When this directive was implemented in Swedish law, the legislator found that some provisions were already part of Swedish law and that there was no need to implement those provisions into

[81] *Ibidem*, pp. 108-109.
[82] Prop. 1996/97:25, pp. 293-294.
[83] Förvaltningslag (1986:223).
[84] Förvaltningsprocesslag (1971:291).
[85] Prop. 1996/97:25, pp. 155-157; Prop. 2004/05:170, pp. 105-106, 120, 123 and 131.
[86] Prechal, S., *Directives in EC Law*, Oxford University Press, Second edition, 2005, p. 13.

Swedish legislation.[87] Under EU law, however, in case the directive is not properly applied in practice, individuals can still rely directly on the provision of the directive against the state.[88] A provision in a directive can have direct effect if the obligation is unconditional and sufficiently precise.[89] The Asylum Qualification Directive *inter alia* attends to both persecution and torture, and it explicitly includes a provision on the assessment of facts and circumstances in Article 4. The relevant parts of Article 4 are expressed as follows:

> '1. Member states may consider it the duty of the applicant to submit as soon as possible the all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the member state to assess the relevant elements of the application.
>
> […]
>
> 4. The fact that an applicant has already been subjected to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.
>
> 5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:
> (a) the applicant has made a genuine effort to substantiate his application;
> (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
> (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
> (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
> (e) the general credibility of the applicant has been established.'

Lastly then, is important to keep in mind that there is a possibility for an asylum seeker to rely on the provision of the directive if the national court for instance does not assess the asylum application in accordance with Article 4 of the Asylum Qualification Directive.

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[87] Prop. 2009/10:31, pp. 129-131.
[88] C-62/00 *Marks & Spencer plc v Commissioners of Customs and Excise* [2002] ECR I-6325, paras 22-28.
[89] Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1629, paras 22-23.

Under Swedish law, the alien in principle has the burden of proof in migration matters.[90] The starting point is consequently that it is the alien's task to establish its need for international protection.[91] The burden of proof, however, can shift from the applicant to the authorities in a later stage of the process if the applicant has succeeded in proving up to the level of 'probable' (*sannolikt*) in case of an application for a residence permits.[92] In other words, the burden of proof changes when the standard of proof is fulfilled by the applicant, as we will se below. The standard of proof, i.e. the threshold that has to be met by the applicant in persuading the decision-maker of the truth of his or her factual assertions[93], in administrative law is formulated in a large variety of ways in comparison to criminal law and civil law. The reason behind this variation is that administrative law incorporates a large diversity of cases. The standard of proof is disclosed in the material law through expressions such as 'fair reason to assume' in Chapter 12, section 1 of the AA. The principal rule in administrative law, however, has been that the standard of proof should be in line with 'probable' (*sannolikt*). There is consequently no clear range of standard of proof despite the variety of wording in different acts pertaining to administrative law.[94] This principal rule was applicable in the assessment of applications for asylum and the alien's story was approved if it seemed 'credible and probable' under Chapter 4 and Chapter 12 of the AA.[95] The legislator has found no reason to include asylum applications as a general exception to this principal rule. The general difficulty to obtain evidence in migration cases is instead resolved through the authorities' obligation to investigate the case thoroughly, as will be described below.[96] However, Chapter 12, section 1 was changed in 1997 from 'well-founded reason to believe' (*grundad anledning att tro*) to the present formulation 'fair reason to assume' (*skälig anledning att anta*) in order to demonstrate that the standard of proof shall not be set too high.[97] Later the Asylum Qualification Directive implied additional reform of the AA. For instance, as mentioned before, the concept of 'person eligible for subsidiary protection' and a new formulation of the standard of proof were introduced. The standard of proof in Chapter 4, section 2, i.e. 'substantial grounds', intends to be slightly higher than 'fair reason to assume' in Chapter 12, section 1, while it is also meant to be more lenient than previous versions of Chapter 4, section 2 that contained 'well-founded fear'.[98] Hence, there is an opening to a differentiation between Chapter 4 and Chapter 12 and the notion that impediments for enforcement should be included in the exceptions to the principle rule in administrative law. This potential differentiation is nonetheless not easily applied in reality since the impediment for

[90] Prop. 2004/05:170, pp. 154-155.
[91] MIG 2007:9.
[92] MIG 2006:1.
[93] Gorlick, B., 2003, *supra* note 4, p. 367.
[94] Diesen C., 2007, *supra* note 1, pp. 212-214 and 257-258
[95] Prop. 1996/97:25, pp. 98 and 294.
[96] Diesen C., 2007, *supra* note 1, pp. 214-215.
[97] Prop. 1996/97:25, p. 294.
[98] Prop. 2009/10:31, pp. 119 and 260.

enforcement should be considered under the determination in Chapter 4, pursuant to Chapter 8, section 17 of the AA, where the standard of proof is in line with 'credible and probable'. The actual meaning of these concepts contained in the standard of proof is also unclear and a distinction is hard to uphold.

While it is the alien's task to establish its need for international protection, the official authorities simultaneously has an obligation to investigate the matter (*officialprincipen*). This latter obligation comprises both the Migration Board and the Migration Courts.[99] The courts' duty is established by law in section 8 of the Administrative Judicial Procedures Act that states that the courts have an obligation to investigate the matter to the extent required by the nature of the case (*som dess beskaffenhet kräver*). The latter expression implies that the scope of this obligation varies from case to case.[100] The substance of this obligation is found in the UNHCR Handbook, which has been recognized as a source of law in Swedish migration law.[101] The focus of the assessment of migration matters is placed in first instance with the Migration Board since the alien can miss out on a proper review in higher instance if all the facts are not presented in first instance.[102] The alien has to present all relevant facts and cooperate with the official authority in order to discover all accessible evidence that can confirm the grounds to the application. The authority also has to help the alien to bring forward essential evidence if this is possible. The extent of this obligation to investigate is not set in stone and the scope has to be decided on a case-by-case basis. The extent of this obligation is clarified in several cases from the Migration Board of Appeal. The duty is not shared with the alien, quite the contrary it fully belongs to the authorities. The Migration Board and the Migration Courts have to be active in the investigation process, in particular when handling applications for asylum. In this type of cases, it is not enough for the authorities to ask the applicant to supplement its application on certain information. The scope of the obligation is more extensive if the alien's story seems credible and correspondingly less extensive if the story seems unreliable.[103]

The public authorities assess the credibility of the alien's story by analysing the course of events. A coherent story without contradictory facts is found to speak in favour of the conclusion that the applicant is credible. The fact that the story in substance is maintained throughout the process in different instances is also of significance. However, statements that oppose facts of common knowledge do not add to the credibility of the alien. In addition, if there are facts that can be neither proved or dismissed the alien has to be given the benefit of the doubt and the standard of proof is somewhat lessened in favour the alien. This rule of lessening of the standard of proof is only applicable if the alien has made on honest effort to establish its story

[99] Prop. 2004/05:170, pp. 154-155.
[100] Prop. 1971:30, pp. 529-530.
[101] Prop. 1996/97:25, p. 97.
[102] Prop. 2004/05:170, p. 153-154.
[103] E.g. MIG 2006:1; MIG 2006:7.

and the alien's story as to the rest seems credible and reasonable in general. In a situation where a fact cannot be proved or dismissed, the assessment will be based on the story of the alien.[104] The conduct of a case by Swedish public authorities is as a principle rule in writing. The evaluation of the case, in particular the assessment of the credibility of the alien, is in most cases assisted if the alien and the decision-maker meet in person.[105] The Migration Board may not issue a refusal of entry or expulsion order for an alien unless there has been an oral procedure at the Migration Board in accordance with Chapter 13, section 1 of the AA. Additionally, the Migration Courts and the Migration Court of Appeal may include an oral hearing on a particular question to promote a quick resolution of the court action or if it can be considered beneficial for the examination. This procedure can take the form of an oral hearing or some other form, such as phone conversations and meetings.[106] The alien shall be heard when an oral hearing is held pursuant to Chapter 13, section 4 of the AA. The decision-maker also has a duty to give the alien an explanation to the outcome of the assessment and the subsequent decision pursuant to Chapter 13, section 10 of the AA and section 20 of the Administrative Judicial Procedures Act. In accordance with Chapter 13, section 13 of the AA, the Migration Board has an obligation to change a decision that the Board has issued as the administrative authority of first instance if it finds that a decision is incorrect because of new circumstances or some other reason and this change is not to the detriment of the alien.

Lastly, a certain type of migration cases, named security cases, is regulated under special rules that imply another type of procedure. The majority of this type of cases is handled under the provision of the AA. This regulation was slightly reformed in 1 January 2010 due to the implementation of the aforementioned EU Directives. A security case is defined in Chapter 1, section 7 of the AA as a case in which the Swedish Security Police, for reasons relating to national security or otherwise bearing on public security, recommend that for instance an entry, a residence permit or a refugee declaration of an alien should be refused. A security case must be dealt with promptly. Before the reform in 2010, the Migration Board was first instance in a security case and its decision could be reviewed by the Swedish Government. In case of appeal, the decision was handed over to the Migration Board of Appeal that in most cases arrange an oral hearing. The Migration Board of Appeal subsequently had to hand over the case to the Government together with a statement of the courts own view on the merits of the case. The Government was bound by the statement of the Migrations Court of Appeal as regards to an existing impediment to execution in Chapter 12, sections 1 and 2.[107] The Government is not subordinated to the Administrative Procedures Act or the Administrative Judicial Procedures Act since the Government is not an administrative public authority. The Government has stated that it will voluntarily adhere to it, yet it does not

[104] Prop. 2004/05:170, pp. 90-91.
[105] MIG 2006:1.
[106] Prop. 2004/05:170, p. 304.
[107] Prop. 2009/10:31, pp. 77-78.

commit an offence against the law if it deviates from these two laws.[108] Since the reform, however, the security cases processed in accordance with the AA is no longer appealed to the Government and the procedure in these cases are now the same as in any other case handled under the AA.[109]

A remaining minority of security cases are processed in accordance with the Act on Special Control of Aliens[110], which came into force 1 July 1991. This piece of legislation has been called into question, as we will see later on in the case analysis, thus it has gone through some reform over the years. Before 31 March 2006, the Government was the first and only instance and there was no possibility to review the case in Sweden. A security case was initiated on the request of the Swedish Security Police or by the Government itself. Additionally, a Police Authority, a County Administrative Board or the Migration Board had to notify the Security Police if the public authority found reason to assume that a decision on expulsion should be made. The Government had to obtain, except in particularly urgent cases, a statement from the Migration Board and arrange a hearing at a District Court before the Government made a decision on the matter. The Government also had to obtain a statement from the District Court that arranged the particular hearing if there were reasons for it.[111] Since 31 March 2006, the Migration Board is the first instance and its decision can be reviewed by the Swedish Government. The Act on Special Control of Aliens consequently currently emprise a process that previously was applicable under the AA. The reason for maintaining this special process is that the Government has the main responsibility for national security in Sweden. The Government stress that security cases usually involves sensitive issues relating to our relationship to foreign powers and that there is a need to restrict the hearing of the case to a limited number of persons.[112] This law has additionally gone through some reform since 1 January 2010 and at present particularly advanced security cases should be handled under the Act on Special Control of Aliens. Several new provisions are included that address the division of different migration matters between the different public authorities. Another important novelty is section 3d that infers that citizens of EEA-countries have the additional right to appeal the Government decision to the Supreme Administrative Court (*Högsta förvaltningsdomstolen*) in accordance with the Act on Legal Review of Certain Government Decisions[113]. The application for review of the government decision has to be submitted to the Supreme Administrative Court within 3 weeks after the decision of the government.[114] The Act on Legal Review of Certain Government Decisions was adopted due to Sweden's international obligation under Article 6 of the ECHR, regarding the right to a fair trial, and came into force on 1 July 2006.[115] The legal

[108] Diesen, C. *et al*, 2007, *supra* note 1, p. 180.
[109] Prop. 2009/10:31, pp. 233 and 237-238.
[110] Lag (1991:572) om särskild utlänningskontroll.
[111] Prop. 2004/05:170, pp. 89-90 and 245.
[112] *Ibidem*, pp. 245-252.
[113] Lag (2006:304) om rättsprövning av vissa regeringsbeslut.
[114] Prop. 2009/10:31, pp. 233, 237-243 and 290-294.
[115] Prop. 2005/06:56, pp. 8-9 and 22.

review (*rättsprövning*) in this law implies that the Supreme Administrative Court can rescind a decision that violate a rule of law as claimed by the applicant or that clearly can be induced by the circumstances of the case in question.[116] The review involves *inter alia* interpretation of law, assessment of facts and evidence and the compatibility of the decision with obligations of objectivity and impartiality.[117]

[116] Prop. 2009/10:31, pp. 233 and 242-243.
[117] Warnling-Nerep, W., 2008, *supra* note 2, pp. 190-191 and 230.

# 4 International Review of Sweden

## 4.1 European Court of Human Rights

The European Court of Human Rights has delivered judgements in about 90 cases regarding Sweden since the entry into force of the convention. The majority of these cases consider the right to a fair trial in Article 6 of the ECHR and only a small number of cases address the issue of non-refoulement.[118] The following text will address the three chamber decisions, decided between 1 January 2000 and 1 January 2011, in which ECtHR has found a violation of Article 3 of the ECHR. In these three cases, the Migration Board granted a stay of execution of the deportation order because of the application to the ECtHR. Lastly as a reminder, the term "the Court" refers to the ECtHR.

### 4.1.1 Bader and Kanbor v. Sweden

The case *Bader and Kanbor v. Sweden*[119] stems from an application against Sweden lodged on 16 April 2004 by the four Syrian nationals Mr Bader, Mrs Kanbor and their two minor children. They claimed that, in case of deportation to Syria, the first applicant Mr Bader would face a real risk of being arrested and executed contrary to Article 2 and 3 of the ECHR. Mr Bader was of Kurdish origin and a Sunnite Muslim. The applicants arrived in Sweden on 25 August 2002 and applied to the Migration Board for asylum. The Migration Board, and subsequently the Aliens Appeals Board, rejected the family's application since the family had not shown that they faced persecution if the deportation order was upheld.[120] The family lodged a new application for asylum in January 2004 and requested a stay of execution of the deportation order. The alleged impediment for enforcement was a judgement delivered on 17 November 2003 by a Syrian Court, which stated that the first applicant had been convicted, in absentia, of complicity in murder and sentenced to death. The applicants submitted a certified copy of the judgement that asserts that Mr Bader, together with his brother, had planned the murder of their brother-in-law since they thought that he had ill-treated their sister. The authenticity of the judgement was verified by the Swedish Embassy in Syria assisted by a local lawyer. The local lawyer had claimed that the case might be reassessed once the accused had been

[118] Website of the European Court of Human Rights, http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+information+by+year/; the Human Rights website of the Swedish Government, http://www.manskligarattigheter.se/extra/faq/?module_instance=3&action=category_show&id=33&limit_category_ids=4, as accessed on 2011-05-01.
[119] Bader and Kanbor v. Sweden, Judgement of 8 November 2005, Appl. no. 13284/04.
[120] *Ibidem*, paras 1-3 and 9-11.

located, yet also affirmed that the Syrian judicial system was marked by some arbitrariness. The lawyer moreover confirmed the fact that a crime was "honour related" was generally considered a mitigating factor resulting in a lighter sentence. It was rare for the death penalty to be imposed at all in Syrian Courts today and that every execution had to be approved by the president. The applicants now argued that they had a well-founded fear that the first applicant would be executed if he were returned to Syria and that the family would thereby be destroyed. The family's application was again rejected by the Alien's Appeals Board. The majority of the Court stated that it had been established that the case would be reassessed and that, if convicted, he would be given a sentence other than death. Hence, the applicants did not have a well-founded fear.[121]

In the applicants' submission to the ECtHR, they claimed that it was established that Mr Bader's fear of being executed upon return to Syria was real since the judgment was authentic and enforceable. They argued that the statements made by the local lawyer regarding the judgement were unsure and vague. Mr Bader expressed strong doubts about his ability to survive arrest and detention upon his arrival in Syria. In addition, he was exposed to added risks since he had applied for asylum in a third country and was of Kurdish origin. The Court assessed the case by addressing both Articles 2 and 3, yet this text will focus on the reasoning regarding Article 3. It initially noted the relevant principle established by the Grand Chamber in *Öcalan v. Turkey* that implies that the significant degree of human anguish and fear owing to sentencing a person to death after an unfair trial, in circumstances where there exists a real possibility that the sentence will be enforced, would bring the treatment within the scope of Article 3.[122] It points out that Mr Bader's statements of past subjection to torture by the Syrian Security Police was not pursued under the convention, thus the Court limited the assessment to the potential risk due to the death sentence. The Court's assessment with regards to the judgement, firstly, notes that the authenticity of this judgement was confirmed by the Swedish embassy in Syria. Secondly, the judgement was enforceable and a potential reopening of the case or a retrial would entail that the applicant would be detained until this question was decided by the Syrian authorities. Thirdly, the Court agrees with applicant's statements that the embassy report was vague and imprecise as to the reopening or retrial of the case. Here it points out that it finds it surprising that neither the Board nor the embassy contacted Mr Bader's defence lawyer in Syria. The Court notes that the Swedish Government has not obtained a guarantee from the Syrian authorities that Mr Bader's case will be reopened and that the public prosecutor will not request the death penalty at any retrial. For these reasons, the Swedish authorities, in these circumstances, would put the first applicant at serious risk by sending him back to Syria without a guarantee that he will be given a new trial and that the death penalty will not be sought or imposed. Furthermore, the circumstances surrounding the execution would without a doubt bring considerable fear and anguish to the applicant whilst the family

[121] *Ibidem*, paras 17-19, 22-25 and 27.
[122] *Ibidem*, paras 34, 39-40 and 42.

would all face intolerable uncertainty about when, where and how the execution would be carried out, seeing that executions in Syria are carried out without any public scrutiny or accountability. Lastly, the Court regards the proceddings as a flagrant denial of a fair trial because of the summary nature and the total disregard of the rights of the defence in the case at hand. Hence, the relevant principle from *Öcalan v. Turkey* is applicable and the Court finds that the deportation of the applicants to Syria would give rise to violations of Articles 2 and 3 of the Convention if it was implemented.[123]

In conclusion, the first applicant based his claim on him being sentenced to death and he substantiated his claim with a judgement. The Court found that Sweden had violated the ECHR since it had not fulfilled its duty to investigate. The case shows that there was a discrepancy between the interpretation of the scope of the duty to investigate and that the Court, in comparison to the state, found it to be more far-reaching.

### 4.1.2 R.C. v. Sweden

The case *R.C. v. Sweden*[124] stems from an application against Sweden lodged by the Iranian national R.C. on 23 September 2007. The applicant argued that he would face a real risk of being arrested and subjected to inhuman treatment and torture in violation of Article 3 of the ECHR if he was deported from Sweden to Iran. R.C arrived in Sweden on 18 October 2003 and subsequently applied for asylum at the Migration Board. The applicant was a Shia' Muslim and had been involved in activities critical of the governing political regime. Iranian government supporters had for instance destroyed his agricultural land and his car, and told him to end his political activities. The applicant tried to report one of the incidents to the police, but was told not to report since it would lead nowhere. He had later been arrested at a demonstration and subjected to torture while imprisoned. The torture involved stabbing, punching as well as boiling water being poured over the applicant's chest. He had not been formally tried in court, yet there had been a religious trial every third month where a priest had approved his continued imprisonment. The arrest lasted in total for 24 months. He claimed to have managed to escape from detention during one of the religious trials, when one of his friends had distracted the guard. His wife and father had been questioned several times about the applicant's whereabouts after the escape. The applicant was convinced that he would be executed if returned to Iran, seeing as he had escaped from detention and since he would be accused of having co-operated with those who are against Islam. R.C. stated that he continuously suffered from headaches and sleeplessness and had problems with his legs. He lastly submitted a medical certificate where the physician declared that the applicant had injuries that could very well originate from the torture to which the applicant claimed that he had been subjected to in Iran. [125] The Migration Board, and

[123] *Ibidem*, paras 43-48.
[124] R.C. v. Sweden, Judgement of 9 March 2010, Appl. no. 41827/07.
[125] *Ibidem*, paras 1, 3 and 8-10.

subsequently the Migration Court, rejected his application for asylum. Conclusively, the Swedish authorities found it unlikely that the applicant would be of any interest to the Iranian authorities as he had not been a member of a party or an organisation critical of the regime. They also questioned his escape from the trial and found that the applicant had failed to show that he had been tortured in Iran. As a consequence, the authorities found no reason to believe that the applicant would be subjected to ill-treatment or torture upon return to Iran. The applicant appealed the decision of the Migration Court, but the Migration Court of Appeal refused leave to appeal.[126]

The ECtHR initially obtained a forensic medical report from the applicant, in which the physician concluded that the injuries invoked by R.C. could very well have occurred as claimed. He further stated that, in cases like this, alternative causes for the origins of the scars could not be fully excluded, yet the findings in the present case strongly indicated that the applicant had been tortured. R.C. argued that, because of his previous political activities and escape from prison, he would face a real and serious risk of being arrested, tortured and perhaps even executed in Iran. The Swedish Government claimed that there were reasons to call the applicant's credibility into question because he had given opposing statements and presented new assertions at a late stage of the proceedings. The alleged contradictory statements concerned the escape, his role at the demonstration and the form of torture that he claimed to have been subjected to. In addition, the Government did not rule out that the some of the medical findings might have been a consequence of the applicant's earlier activity as a football player in Iran. In summary, the position by the Government entailed that there was nothing to support the applicant's submissions that he would risk treatment contrary to Article 3 of the Convention if returned to Iran.[127] The European Court on Human Rights, on their hand, establishes that there are several reports on serious human rights violations in Iran, yet it is still required to assess the personal situation for the applicant. The Court endorses that the national authorities, in general, are best placed to asses the facts and credibility of witnesses since they have the chance to meet them in person. Nevertheless, the Court does not agree with the Government's opinion concerning the applicant's credibility. It ascertains that the applicant's basic story was consistent throughout the process and that some unsure aspects, for instance the story about his escape from detention, do not weaken the general credibility of his story. The first medical certificate gave a rather strong indication to the authorities that the applicant's scars and injuries may have been caused by ill-treatment or torture. This meant that the applicant had made a *prima facie* case as to the origin of the scars, and it was for the Swedish authorities to direct that an expert opinion be obtained. The Migration Board, as well as the Migration Courts, failed to fulfil this duty. The Court accepts the general conclusion made by the physician, hence the medical evidence and general information on ill-treatment of dissidents in Iran substantiates the applicant's story about

[126] *Ibidem*, paras 12, 16 and 19.
[127] *Ibidem*, paras 23-25, 38, 44-45 and 47.

previous experience of torture.[128] In addition, the Court considers that the findings on past torture lead to that the onus rests with the State to dispel any doubts about the risk of him being subjected again to treatment contrary to provision 3 if expulsion is enforced. When assessing this risk, the Court regards the fact that the respect for human rights in Iran has deteriorated and the circumstance that R.C. left Iran illegally. The Court finds it probable that the applicant, being without valid exit documentation, would come to the attention of the Iranian authorities and that his past is likely to be revealed. In conclusion, the majority of the Court considers that there are substantial grounds for believing that the applicant would be exposed to a real risk of being detained and subjected to treatment contrary to Article 3 of the Convention if deported to Iran in the current circumstances.[129] The Swedish judge Fura of the ECtHR, however, presented a dissenting opinion and did not find that the applicant had made a *prima facie* case. The judge questions the applicant's credibility and does not find that the inconsistencies in the applicant's story are outweighed by the latest medical forensic report. She further states that the fact that the applicant, in all probability, has been tortured in his country of nationality is not sufficient to substantiate that he runs a real risk of being tortured again if returned. She lastly finds it difficult to see how a state, in practice, should proceed in order to dispel any doubts about the risk of the applicant being subjected again to treatment contrary to Article 3.[130]

In a nutshell, the applicant based his complaint on previous experience of torture and substantiated the claim with medical certificates. Sweden questioned the applicant's credibility since he made opposing statements and presented new assertions at a late stage of the proceedings. The majority of the Court found that the applicant had made a *prima facie* case and accordingly that the burden of proof shifted to the state. The Court found that Sweden had not fulfilled its duty to investigate since it did not obtain an expert opinion on the origin of the applicant's scars.

### 4.1.3 N. v. Sweden

The case *N. v. Sweden*[131] originates from a submission against Sweden lodged by an Afghani national Ms N. on 28 April 2009. The applicant argued that an implementation of the order to deport her to Afghanistan would be in violation of Article 3 of the ECHR. The applicant and her husband X applied to the Migration Board for asylum on 16 August 2004. The stated grounds were that the couple had been persecuted because of their political activities, for instance since Ms N. had worked as a teacher for women. The Migration Board rejected their application because the couple had not shown that they would risk persecution upon return to

[128] *Ibidem*, paras 49-55.
[129] *Ibidem*, paras 55-57.
[130] Separate Opinion of Judge Fura in R.C. v. Sweden, paras 2, 4, 10 and 13.
[131] N. v. Sweden, Judgement of 20 July 2010, Appl. no. 23505/09.

Afghanistan.[132] The applicant appealed against the decision. Ms N. maintained her claims and added that she had separated from her former husband and intended to obtain divorce even if X opposed it. She had broken with Afghani traditions and claimed that she would be a social outcast. The Migration Board also rejected the appeal and found that the applicant had not demonstrated that she had a well-founded fear of persecution because of her previous work as a women's teacher since the previous Taliban ban on education for women had been removed. The same conclusion was made about her personal life, as she had not formally divorced her husband. Ms N. appealed against the judgment to the Migration Court of Appeal, which in turn refused leave to appeal. The applicant requested the Swedish District Court to divorce her from X, however, this was refused because the Court was not competent to dissolve her marriage. The applicant requested the Migration Board to re-evaluate her case because she had now started a relationship with a Swedish man. She had consequently committed adultery and risked the death penalty in Afghanistan. The Migration Board refused to reconsider the applicant's case and claim that she had failed to invoke any new circumstances of importance, and subsequent appeals of this decision were rejected. [133]

The European Court on Human Rights firstly established that there are several reports on serious human rights violations in Afghanistan; nonetheless, it is still required to assess the personal situation for Ms N. To facilitate the assessment of the risk of ill-treatment, the Court must look at the foreseeable consequences of sending the applicant to her home country, taking into account the general situation in Afghanistan and her personal circumstances. To begin with, the Court notices that women regarded as not conforming to the gender roles ascribed to them by society, tradition and the legal system, are at particular risk of ill-treatment in Afghanistan. The applicant has only met her husband once since their appeal of the first Board decision and has tried to divorce him without success. The Court therefore finds that Ms N. has demonstrated a real and genuine intention of not living with X. The fact is nonetheless that Ms N. still is formally married to X and that he opposes her desire to divorce. Therefore X may decide to resume their married life together against the applicant’s wish if the spouses are deported to Afghanistan, separately or together, and the applicant would be subjected to the power of her husband in accordance with Afghani law. In this matter the Court, also observes the general risk of violence against women in Afghanistan as shown by statistics and international reports.[134] In addition, the Court addressed the applicant’s claim that he was at risk of being persecuted, and even being sentenced to death, because she had an extramarital relationship. It notices that the applicant did not submit any relevant or detailed information in connection to this claim to the Swedish authorities during the domestic proceedings and thereafter has not even tried to explain why she failed to do so. Despite this, several reports show that she would risk prosecution if X perceived the applicant's filing for divorce

[132] *Ibidem*, paras 1, 3 and 7-9.
[133] *Ibidem*, paras 10-12, 14, 17-19 and 21-24.
[134] *Ibidem*. paras 52 and 54-58.

or other actions as indications of an extramarital relationship. Moreover, should the applicant be successful in living separated from her husband in Afghanistan reports show that she would face limitations on conducting a normal social life due to social rejection and discrimination. The Court finds no reason to question the applicant's claim that she no longer has a social network or adequate protection in Afghanistan. In conclusion, the Court finds that that there are substantial grounds for believing that if deported to Afghanistan, the applicant faces various cumulative risks of reprisals which fall under Article 3 of the ECHR from her husband X, his family, her own family and from the Afghan society.[135]

Lastly in brief, the applicant based her claim of the fact that she had a extra-maritial affair and wanted to live separate from her husband. The proof presented included several human rights reports and the fact that she had tried to divorce her husband. The vital issue is the assessment of a personal risk, in this case the assessment of her intention of not living with her husband. The Court, unlike the state, found that the general risk of violence against women as well as the risk of persecution, and even prosecution, for her extra-marital affair had been individualised.

## 4.2 Committee Against Torture

The Committee against torture has been able to receive and assess individual communications under Article 22 of CAT in relation to Sweden since 26 June 1987. Since then, 108 cases against Sweden have been registered with the Committee and in 15 of those communications, the Committee has found a violation of the convention. [136] In this part, I will present the eight cases, decided between 1 January 2000 and 1 January 2011, in which the Committee has found a violation of Article 3 of the CAT. In these cases, the Migration Board granted a stay of execution of the deportation order because of the communication to the CmAT. Lastly, as a reminder, the term "the Committee" refers to the CmAT.

### 4.2.1 A.S. v. Sweden

The case *A.S. v. Sweden*[137] stems from an individual communication against Sweden lodged on 6 November 1999 by an Iranian national Ms S. The claimant argues that she would risk torture and execution if returned to Iran and that her expulsion would comprise a violation of Article 3 of CAT. Ms. S. and her husband belonged to secular-minded families who contested the religious Iranian regime. The husband of the author of the communication had been a high-ranking officer within the Iranian Air Force and had died

[135] *Ibidem*, paras 59-62.
[136] Website of the Office of the United Nations High Commissioner for Human Rights, http://www2.ohchr.org/english/bodies/cat/procedure.htm, as accessed on 2011-05-01.
[137] A.S. v. Sweden, Decision of 24 November 2000, Comm. No. 149/1999.

during training. The Iranian Government had three years later declared the applicant's husband a martyr and consequently she and her two sons had to submit to strict religious rules. She was forced to remarry an ayatollah, an Iranian religious leader, and was expected to be at his disposal for sexual services. Later she started a relationship with a Christian man and when this was discovered by the Iranian authorities the couple was arrested. The applicant has not seen the man since and she claims that he was sentenced to stoning after confessing to adultery under torture. The complainant claims that she was harshly questioned during detention and brought to her husband, the ayatollah, where she had been severely beaten by him. Due to her husband's influence, the applicant got off criminal proceedings and she was allowed to leave her husbands home after two days. The applicant left Iran with her younger son and the two subsequently applied for asylum in Sweden.[138] The Swedish Migration Board rejected their application and the Aliens Appeals Board later dismissed their appeal.

The complainant claims in her submission to the CmAT that, since her departure from Iran, she has been sentenced to death by stoning for adultery. This was known to her because the ayatollah had contacted her sister-in-law in Sweden to let her know that Ms. S. had been convicted. Hence, the author of the communication claims that she risks being subjected to torture if returned to Iran.[139] The Swedish Government, on her part, acknowledges that violations of human rights are widespread in Iran. However, it observes that the complainant has not been politically active in Iran. The state party questions her credibility since she has not been able to submit verifiable information concerning her marriage to the ayatollah, her relationship to the Christian man and the problems emanating from this. The complainant, on the contrary, claims that it is not possible for her to obtain direct written evidence.[140] The CmAT initially observes that the complainant has submitted satisfactory information concerning her marriage and alleged arrest to shift the burden of proof. The Committee finds that Sweden has not made sufficient efforts to determine if there are substantial grounds for believing that Ms. S. would risk of being subjected to torture. Moreover, the Committee notes reports that confirm widespread violations of human rights in Iran, including the fact that married women in recent times have been sentenced to death by stoning for adultery. In conclusion, the Committee finds that the complainant's story together with knowledge of the current human rights situation in Iran and the author's explanation for her failure and inability to provide certain information amounts to a violation of Article 3 of CAT if the complainant is returned to Iran.[141]

In summary, the applicant based her claim on her extra-marital relationship as well as previous experience of violence. The proof presented included several human rights reports. The vital issue is the assessment of the applicant's credibility and the information provided by the applicant.

[138] *Ibidem*, paras 1.1 and 2.1-2.6.
[139] *Ibidem*, paras 2.7-2.8 and 3.1.
[140] *Ibidem*, paras 4.3, 4.5-4.13 and 7.8.
[141] *Ibidem*, paras 8.6-9.

Sweden questions her credibility since she had not been able to submit verifiable information. The Committee finds that she has submitted sufficient details to shift the burden of proof to the state.

### 4.2.2 Karoui v. Sweden

The case *Karoui v. Sweden*[142] stems from an individual communication against Sweden submitted on 25 June 2001 by a Tunisian national Mr. Karoui. The complainant claims that his expulsion to Tunisia would amount to a breach of Article 3 of CAT. Mr Karoui was involved in the Islamic movement in his country of origin and participated in demonstrations against the Tunisian government. He was arrested and detained several times while attending demonstrations and subsequently sentenced to imprisonment twice, which in total amounted to more than three years of incarceration. He was prohibited from taking employment in Tunisia as well as forbidden to leave the country, yet he still illegally managed to pursue his studies in Algeria. In 1992 Mr. Karoui and 11 other persons associated with Islamic movements were expelled to Tunisia. The complainant managed to escape pre-trial detention and fled to Algeria where he applied for asylum. The asylum application was rejected and he was once again sent to Tunisia. In Tunisia, he was imprisoned for being involved in an illegal organisation and he claim to have been subjected to torture in detention. The alleged acts of torture include hitting, burning and pouring water over his body. Three years later, he was once more sentenced to one and a half year of imprisonment for anti-governmental activity and following his detention, he had to report to the police every day. He fled from Algeria in 1999 and later submitted an application for asylum in Sweden. While in Sweden, Mr. Karoui claims to have been sentenced in absentia to imprisonment for eight years on account of agitation, disturbing the public order and collecting funds.[143]

The Swedish Immigration Board rejected the complainant's application because it questioned his credibility, *inter alia*, due to several discrepancies in the applicant's story. Subsequently, the Refugee Appeals Board rejected his application. The latter authority based the refusal on the same grounds as the previous instance, yet added that the complainant's political activities had been at a low level, date far back in time and also that the political organisation that he was involved in had dissolved. Later, another application was additionally rejected by the Swedish authorities.[144] In his communication to the CmAT, the author argues that he would be arrested and tortured for his former political involvement. He adds that this is confirmed by the judgement and the fact that violations of human rights are widespread in Tunisia, especially against political opponents. Hence, Mr. Karoui claims to be at risk of being subjected to torture if returned to his country of origin and *inter alia* submits medical records, support letter from

[142] Karoui v. Sweden, Decision of 8 May 2002, Comm. no. 185/2001.
[143] *Ibidem*, paras 1.1 and 2.1-2.8.
[144] *Ibidem*, paras 2.9 and 2.11-2.13.

Amnesty International and an attestation from the chairperson of the Islamic organisation. The CmAT, to begin with, observes reports that indicate a prevalence of actions of torture by Tunisian police and security forces, and that the victims of this ill-treatment include persons accused of anti-governmental activities. The Committee disagrees with the state party's questioning of the credibility of the complainant since he has given explanations for these inconsistencies and finds it unfeasible to validate the authenticity of some of the documents submitted by Mr Karoui. The Committee establishes that the complainant has provided sufficient reliable information for the complainant to be given the benefit of the doubt and for the burden of proof to shift to the state party. It further finds the medico-legal reports of past torture particularly significant and concludes that there exists substantial grounds for believing that Mr Karoui may risk being subjected to torture if expelled to his country if nationality owing to the latest judgement against him or his recurrent political involvement in the past.[145]

Concisely, the applicant founded his on experience of torture in the past and presented medical reports, judgements and several human rights reports. The essential issue is the assessment of the credibility of the applicant. Sweden questioned the applicant's credibility due to several discrepancies in the applicant's story. The Committee, on their hand, found that the applicant should be given the benefit of the doubt. Hence, the applicant had made a *prima facie* case in order to shift the burden of proof to the state.

### 4.2.3 Agiza v. Sweden

The case *Agiza v. Sweden*[146] originates from an individual communication against Sweden submitted on 25 June 2003 by an Egyptian national Mr Agiza, incarcerated in Egypt at the time of submission of the complaint. The complainant argues that his deportation from Sweden to Egypt violated Article 3 of CAT. Mr Agiza applied for asylum during a transit stop in Stockholm, Sweden, on 23 September 2000. The stated ground for asylum was that the applicant claimed that he had been sentenced to 'penal servitude for life' in absentia on account of terrorism, and that he would, if expelled, be executed as other accused in the same trial supposedly had been. During the investigation, the Migration Board sought the opinion of the Swedish Security Police on the case. The Security Police informed the Migration Board that the complainant held a leading position in an organisation guilty of terrorist acts and was in charge of the activities of the organisation. Mr Agiza denied these allegations. The asylum case was treated as a security case under the AA and the Migration Board forwarded the complainant's case to the Swedish Government. The Migration Board stated that the complainant could be considered entitled to claim refugee status, yet the Security Police's assessment, which the Board found no

[145] *Ibidem*, paras 3 and 9-11.
[146] Agiza. v. Sweden, Decision of 20 May 2005, Comm. no. 233/2003.

reason to call into question, indicated a differing conclusion. The Aliens Appeals Board, whose opinion the Government had sought, agreed with the assessment of the Migration Board. It considered that the Government should decide the matter and settle the question of balancing between Mr Agiza's need for protection and the State's national security. On 18 December 2001, the Government rejected the asylum application and the complainant was deported from Sweden on the same day. Before the expulsion, Sweden had received diplomatic assurances on that the applicant would not be subjected to torture.[147] About one month after the deportation, the Swedish Ambassador to Egypt and the complainant's parents visited the complainant in Egyptian prison. The parents claim that the applicant, mentally and physically, was worn out and that the complainant told them that he had been roughly treated upon arrest by the Swedish authorities. The acts, to which the applicant claims to have been subjected to, included electric chocks. After these first two visits, the complainant's parents and Swedish diplomats visited him regularly. On 5 March 2003, Mr Agiza supposedly told the Swedish diplomats for the first time that he had been subjected to torture.[148]

The CmAT firstly made a substantive assessment under Article 3. It establishes that the issue in question is if the removal of Mr Agiza to Egypt breached Sweden's duty under Article 3 of CAT not to expel or return an individual to another country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. The Committee states that this question has to be decided in the light of the information that was known, or ought to have been known, to the state party's authorities at the time of the removal. Later events are relevant to the review of the state party's knowledge, actual or constructive, at the time of removal. The Committee regard that the state party knew, or should have known, at the time of the complainant's removal that Egypt, consistent and widespread, exercised torture against detainees and that the risk of such handling was especially high in the case of inmates held for political and security reasons. This fact was confirmed by numerous sources, such as reports published in relation to the Committee's own work. Sweden was aware of that its own security intelligence services considered the applicant to be involved in terrorist activities and thus posing a threat to Sweden's national security. In addition, Sweden knew that the intelligence services of two other states had an interest in the applicant since the first foreign state offered through its intelligence service an aircraft to transfer the complainant to the second state, Egypt, where he had been sentenced in absentia for involvement in terrorist activities. Hence, the Committee concludes that, in view of these combined elements, the complainant was at real risk of torture in Egypt in the event of expulsion. This was subsequently confirmed after the removal when the complainant was subjected to treatment amounting to torture or cruel, inhuman or degrading treatment or punishment. The acquisition of diplomatic assurances, that did not provide a mechanism for enforcement, was not adequate to protect against the

[147] *Ibidem*, paras 1.1, 2.3-2.5 and 12.20-23.
[148] *Ibidem*, paras 2.6-2.10 and 4.14.

manifested risk. As a result, the state party's removal of the complainant was in violation of Article 3 of CAT. [149]

The Committee thereafter made a procedural assessment under Article 3. The Committee observes that the right to an effective remedy underlies the whole convention and that it has to interpret a substantive provision to enclose a remedy for its breach, where the convention itself does not set out a remedy. The Committee concludes that the prohibition of non-refoulement in Article 3 of CAT should be interpreted to include a remedy for its breach. In case of an allegation of torture or cruel, inhuman or degrading treatment having occurred, the right to remedy calls for an effective, independent and impartial investigation of such allegations. Yet the nature of refoulement, i.e. the notion that it relates to a future expulsion or removal, implies that the right to an effective remedy contained in Article 3 necessitates a possibility for effective, independent and impartial review of the decision to expel or remove the person in question when there is a plausible allegation that concerns relating to Article 3 will arise. In the case at hand, a special procedure was used because of the national security concerns and the Government took the first and final decision to expel the applicant with no possibility for appeal. The Committee in this context recollects that the prohibition of torture protected by the convention is absolute and that national security concerns stress the significance of a proper review system. National security concerns might justify a special process of review, yet the chosen mechanism must still entail an effective, independent and impartial review required by Article 3 of CAT. Consequently, the Committee concludes in the present case that the lack of any possibility of judicial or independent administrative review of the Government's decision to expel the complainant does not meet the procedural obligation under Article 3. [150]

In conclusion, the applicant *inter alia* based his claim on several human rights reports and subsequent subjection to torture. In the substantive assessment, the Committee establishes that the review has to be decided in the light of the information that was known, or ought to have been known, to the state party's authorities at the time of the removal. The CmAT found that the risk of torture was individualised seeing as the intelligence services of Sweden and two other states had an interest in the applicant and that this personal risk was confirmed by the applicant's experience of torture after the removal. In the procedural assessment, the Committee established that the prohibition of non-refoulement in Article 3 of CAT should be interpreted to include a remedy for its breach and thus that the national review process must entail an effective, independent and impartial review.

[149] *Ibidem*, paras 13.1-13.4.
[150] *Ibidem*, paras 13.6-13.8.

### 4.2.4 T.A. and S.T v. Sweden

The case *T.A. and S.T. v. Sweden*[151] stems from an individual communication against Sweden submitted on 16 January 2003 by a Bangladeshi citizen Ms. T.A. on behalf of herself and her daughter S.T. The applicant states that their expulsion decision to Bangladesh, if executed, would amount to a violation by Sweden of Article 3 of CAT. T.A. and S.T. arrived in Sweden on 13 October 2000 on a tourist visa and subsequently applied for asylum. The complainant stated that she and her husband were active members of the Jatiya Party in Bangladesh, and in 1999, after the split of the party, she and her husband remained in the faction led by Ershad. She had for example been arrested while attending a demonstration and members of the Awami League had vandalised her and her husband's home. During the vandalism, the perpetrators questioned the applicant about her husband's whereabouts, since he had then gone into hiding. Ms. T.A. reported the incident to the police, who refused to investigate the complaint when they understood that the persons behind it belonged to the Awami League. Four months later that applicant and her daughter was arrested and abused by the police. S.T., at the time 4 years old, was pushed so hard that she fell and wounded her forehead. Ms T.A. was subjected to torture in order to make her confess the crime of illegal arm trading. The torture included acts such as hitting, burning with cigarettes and rape. She was released the subsequent day after signing a document by which she promised not to take part in any political activity and not to leave her town or the country. T.A. submitted one medical report to verify the torture and rape, as well as two medical certificates to confirm her worsening mental condition.[152]

The Migration Board later denied the application for asylum. The Board did not contest that she had been subjected to torture, however, the authority stated that these acts were not attributable to the state but regarded as the actions of individual policemen. The Board also stated that the Jatiya Party was in alliance with the Bangladesh National Party (BNP), currently in government, and that she did no longer sympathise with the opposition. The Aliens Appeals Board, for their part, also considered that the torture was not attributable to the State but to the action of some individual police officers. It also found that due to the applicant's noticeable influence in the party and because of the political change, there were no reasonable grounds for believing that she would be subjected to torture by the police if returned to her country. The Aliens Appeals Board upheld the decision of the Migration Board. In addition, three new applications for a resident permit on humanitarian grounds and an application for stay of execution of the expulsion order were subsequently denied by the Aliens Appeals Board. The state party maintained the argumentation of the national authorities and added that the state questioned the credibility of the applicant since her

[151] T.A. and S.T. v. Sweden, Decision of 6 May 2005, Comm. no. 226/2003.
[152] *Ibidem*, paras 1.1-2.5.

application for asylum was not submitted until two months after her arrival to Sweden.[153]

The CmAT, with regards to the merits, firstly noted that the state party had not contested that the Ms T.A. previously had been subjected to persecution and torture. It noted that the complainant claimed to belong to the faction of the Jatiya Party led by Ershad, which is in opposition to the ruling party. It also notes the circumstance that torture of political opponents is frequently practiced by state agents in Bangladesh. Moreover, the Committee found that the torture to which the applicant was subjected, seems to have been inflicted as a reprimand for her participation in political activities, but also as a reprisal for her husband's political activities and his alleged involvement in a political crime. The Committee also observes that her husband is still in hiding, that her previous experience of torture occurred in a recent past and the torture has been medically certified, and lastly that T.A. is still wanted by the police in Bangladesh. The Committee as a final point considers that, in the above situation, there exist substantial grounds for believing that Ms T. A. may risk being subjected to torture if returned to Bangladesh.[154]

In conclusion, the author of the communication based her claim on previous subjection to torture and *inter alia* presented a medical report. The state questioned the applicant's credibility and had a differing view on the human rights situation in her home country. The vital matter was the weight attached to the previous subjection to torture. The Committee, unlike the state, found that she had substantiated her claim on risk of torture.

### 4.2.5 C.T and K.M. v. Sweden

The case *C.T. and K.M. v. Sweden*[155] derives from an individual communication against Sweden submitted on 7 September 2005 by a Rwandan national C.T. and her son K.M. The two complainants claim that their awaiting deportation from Sweden to Rwanda gives rise to issues under Article 3 of CAT. C.T came to Sweden on 17 October 2002 and applied for asylum. Before coming to Sweden, the first complainant had lived in Kigali, Rwanda. She and her brother were members of the PDR-Ubuyanja party and attended political meetings. They were both later arrested and the first applicant was imprisoned with others. Since the day of the arrest, she has not seen her brother. While in detention, C.T. was questioned about her and her brother's political activities. She was raped numerous times and became pregnant with her son K.M. After about six months of detention, the first applicant managed to escape with help from a soldier and flew to Sweden. In Sweden, her son K.M., the second applicant, was born. The Migration Board refused her application for asylum due to

[153] *Ibidem*, paras 2.1, 2.6-2.11 and 4.7.
[154] *Ibidem*, paras 6.1-7.4.
[155] C.T. and K.M. v. Sweden, Decision of 17 November 2006, Comm. No. 279/2005.

lack of credibility and the political development in Rwanda, and this was later confirmed by the Aliens Appeals Board. [156]

The complaint to the Committee comprised two grounds for the applicant's claims to result in a violation of Article 3 of CAT. C.T. firstly states that she would be tortured, once again, by Rwandan authorities due to her political involvement in the PDR-Ubuyanja party. Secondly, she claims that she would be tried in the Gacaca courts, which were established nationally to take legal proceedings against the perpetrators in the genocide of 1994. The Committee initially dismisses the latter ground since the fear of a future trial before the Gacaca courts is in itself inadequate to give rise to a reasonable fear of torture. The assessment of the other ground, however, is more elaborated. Regarding the issue of past torture, this was supported by two medical certificates submitted by the first applicant and additionally has never been disputed by the state party. Hence, the Committee considers that the first applicant was raped in detention and for that reason was subjected to torture in the past.[157] The Committee discards the state's argument that the first applicant is not credible. The state had claimed that her description of her political involvement had been vague and that she, for instance, had changed her statement regarding at what point in time she joined the political party. The Committee, on the contrary, finds that these potential inconsistencies do not raise doubt to the general veracity of the first complainant's claim, in particular seeing as it has been demonstrated that she was repeatedly raped in detention. Moreover, the Committee considers that information provided by the complainants, for instance a report from UNHCR, shows that ethic tensions still exist, which consequently increases the likelihood that the first applicant would be subjected to torture if returned to her home country. I conclusion, the Committee considers that substantial grounds exist for believing that the complainants would be in danger of being subjected to torture if expelled to Rwanda.[158]

In summary, the claim was based on past subjection to torture and this was supported by medical certificates. The vital issue was the assessment of the credibility of the applicant. The state party questioned the applicant's credibility due to inconsistencies in the story. The Committee found that the potential inconsistencies did not raise doubt to the general veracity of the first complainant's claim, in particular seeing as she had demonstrated that she was repeatedly raped in detention.

### 4.2.6 Njamba and Balikosa v. Sweden

The case *Njamba and Balikosa v. Sweden* originates from an individual communication against Sweden submitted on 11 June 2007 by the Congolese national Ms Njamba and her daughter Ms Balikosa. Ms Njamba's husband had provided support for the rebels in the Equateur

[156] *Ibidem*, paras 1.1 and 2.1-2.2.
[157] *Ibidem*, paras 3.1-3.2 and 7.4-7-5.
[158] *Ibidem*, paras 4.5, 5.3 and 7.6-7.7.

province and thus had been involved in acts of treason and espionage on behalf of the rebels. The family's small business served as a cover for her husband's real activities. Ms. Njamba was aware of her husband's involvement and was therefore regarded to have been his partner in crime and, herself, involved in these activities. She claims that the family had been threatened due to this political involvement and that the police would not protect her. In December 2004, fighting broke out in DRC and the two complainants went into hiding for a few days. During this period, Ms. Njamba's husband and three of her children disappeared and they have not been seen since. The complainants in consequence fled the country and applied for asylum in Sweden on 29 March 2005.[159] The Swedish Migration Board rejected their application and concluded that there was no personal treat to the applicants' lives. Ms. Njamba and Ms. Balikosa appealed against this Board decision adding that Ms Njamba was HIV positive and that no medical treatment was available in her home country. The appeal was rejected by the Migration Court who confirmed the conclusion made by the Board and stated that her medical decision did not call for a change of outcome. The Migration Court of Appeal moreover denied leave for appeal.[160]

The communication to the Committee comprised two grounds that, according to the applicants, would give rise to a violation of Article 3 of CAT. The authors claim that they fear torture by the national security services or other government supporters if they were to be returned to her country of nationality. In addition, the first applicant state that she is HIV positive and that the insufficiency of treatment in her home country would result in suffering and, finally, her death. The state, on the contrary, argues that the political situation in the applicant's home country has improved and confirms the conclusions made by the Swedish authorities. The state party considers that the risk of torture has not been substantiated and that the applicants can avoid the hostilities by moving to the Equateur province, which was the first applicant's place of residence up until her last year in DRC. Regarding the first applicant's health problems the state party considers that she does not suffer from any HIV-related illnesses and has not reached the stage of AIDS. The medical certificate submitted by the applicant states that she would not be needing medication within the next few years, moreover anti-retroviral are available in DRC, in principle free of charge, if the need would arise.[161] The Committee initially considers that the first applicant' health problem that might occur following her return to DRC is in itself insufficient to substantiate the claim, and thus finds this ground inadmissible. The Committee observes that some facts of the case are disputed, yet it observes numerous recent reports, for instance from the UN, that confirm the widespread occurrence of sexual violence in DRC. The Committee also establishes that there are no safe zones in DRC and in consequence eliminate the possibility of internal alternative of refuge. The Committee, as a result, finds that substantial grounds exist for believing that

[159] Njamba and Balikosa v. Sweden, *supra* note 43, paras 1.1 and 2.1-2.3.
[160] *Ibidem*, paras 2.3-2.4.
[161] *Ibidem*, paras 3.1-3.3 and 4.3-4.7.

Ms. Njamba and Ms. Balikosa are in danger of being subjected to torture if expelled to their country of nationality.[162]

In conclusion, the first applicant based her communication on political persecution in the past. The issue is the assessment of a general as well as a personal risk. The state argues that the first applicant has not substantiated a risk of torture in her original place of residence. The Committee establishes a general risk of violence against women in the applicant's home country and concludes that there is no possibility of internal refuge.

### 4.2.7 Güclü v. Sweden

The case *Güclü v. Sweden* stems from an individual communication against Sweden lodged on 29 July 2008 by a Turkish national Mrs Güclü. She claims that her deportation to Turkey would constitute a violation of Article 3 of CAT. She had been an active member in the Kurdish Worker's Party (the PKK) in Turkey and her primary undertaking was to write articles for magazines. After about 10 years of working for the PKK, the complainant started questioning the ideas behind the organisation. This view had been uncovered in 2002 when she was detained by the PKK for several months because the party thought that she had helped a member escape. She was questioned frequently by the PKK and brought before the PKK's court. She was later able to continue her work for the organisation, but she was continuously kept under supervision. Two years after the detention, the complainant was able to escape the PKK during a visit to a refugee camp in Iraq. She came to Sweden and lodged an application for asylum on 14 April 2005. During her stay in Sweden, the complainant got married and the couple had a child in 2007.[163] Her husband is also a former PKK member who fled the organisation and his case is descried later. Mrs Güclü fears that she is wanted by the Turkish authorities because of her involvement in the PKK and that she risks imprisonment as well as torture in detention. The complainant also believes that she would be at risk of reprisals by the PKK due to her escape and that the Turkish authorities would not protect her. The Migration Board, and subsequently the Migration Court, rejected her asylum application because the applicant failed to establish that she was wanted by the Turkish authorities. The Board acknowledged that she was at risk of being tried in court due to her involvement in PKK, but claimed that torture only occurred in exceptional cases and that this was no such case. The Board argued that the complainant had not proven that the PKK would come after her because of her escape. Lastly, the complainant was denied leave to appeal to the Migration Court of Appeal.[164]

In her complaint to the CmAT, the author claims that she is at risk of being subjected to torture by the Turkish authorities and/or the PKK. Mrs Güclü claims that she will not get a fair trial and subsequently will be imprisoned.

[162] *Ibidem*, paras 7.3 and 9.5.- 9.6.
[163] Güclü v. Sweden, *supra* note 43, paras 1.1 and 2.3-2.4.
[164] *Ibidem*, paras 2.5-2.8.

She also claims that while imprisoned she would not be protected from the PKK by the authorities. The state party insists that the complainant likely will be incarcerated, since she was involved in a terrorist organisation, but that the Turkish authorities will protect her from reprisals while imprisoned. The Committee initially observes that the state party did not dispute the claim that the complainant had been a member of the PKK, yet it argued that her involvement had been at a low level. The Swedish Government also found it likely that the complainant would face a long-term imprisonment if returned to Turkey. The state's view in this regard, in conjunction with the information provided by the applicant on a criminal case pursued against her, is sufficient for the Committee to conclude that the complainant is likely to be arrested if returned to Turkey. The Committee notes that several recent reports maintain that acts of ill-treatment and torture by the police forces still occur in detentions centres in Turkey as well as outside official premises. The outflow of acts of torture from detention centres to other non-official sites results in poorer detection and documentation. Finally, the Committee recognizes that the author of the communication had been a member of the PKK for 15 years. Although her involvement had been at a low level, her work included contact with high profile PKK leaders. She was wanted by the Turkish authorities due to her involvement in the terrorist organisation and likely to be arrested upon arrival. Hence, the Committee finds that Mrs Güclü has provided sufficient evidence to show that she personally runs a real and foreseeable risk of being subjected to torture if returned to Turkey.[165]

Conclusively, the applicant based her claim on past political involvement and possible prosecution for anti-governmental activities. The central matter is the assessment of a general and personal risk of torture. The state argued that the Turkish authorities would protect her from reprisals while imprisoned for anti-governmental activities. The Committee, on their hand, found that there was a general risk of ill-treatment and torture by the police forces in the applicant's home country and that the risk was personal owing to her involvement in a terrorist organisation.

### 4.2.8 Aytulun and Güclü v. Sweden

The case *Aytulun and Güclü v. Sweden*[166] originates from an individual communication against Sweden lodged on 29 January 2009 by a Turkish national Mr Aytulun on behalf of himself and his daughter Ms Güclü. The first applicant claims that his deportation to Turkey would constitute a violation of Article 3 of CAT. The wife of Mr Aytulun also has submitted a similar complaint, a case described in the previous subchapter. The fist applicant had been an active member of the PKK. He had worked with the fighting forces in PKK and as a PKK teacher. He was detained for one month by the PKK because he had started a relationship with a fellow

[165] *Ibidem*, paras 2.9-3.2 and 6.5-6.7.
[166] Aytulun and Güclü v. Sweden, Decision of 19 November 2010, Comm. No. 373/2009.

member, his future wife Mrs Güclü. After about 14 years of involvement in the PKK, he escaped and subsequently flew to Sweden. The first applicant argues that he is wanted by the Turkish military and police, and that he will be imprisoned and tortured by security forces if returned to Turkey. The applicants applied for asylum in Sweden, yet their claims were rejected by the Swedish Migration Board and subsequently also by the Migration Court. A majority in the Migration Court held that the first applicant had not held a prominent position in the PKK and had not played a part in combat on its behalf. It was therefore unlikely that he would be of interest of the Turkish authorities and if so, he would be protected against ill-treatment by the authorities. Moreover, the Migration Court of Appeal decided not to grant leave for appeal.[167]

The CmAT observes that the Swedish Government does not dispute Mr Aytulun's association to the PKK, yet it states that his involvement had been at a low level. It also acknowledges that he would risk imprisonment if returned to Turkey and does not dispute that the Turkish authorities has initiated a criminal case against the first applicant. The Committee finds that the first complainant is likely to be arrested if returned to his country of nationality. The Committee furthermore notes that several reports maintain that security ad police forces still resort to use of torture in detention centres and outside official premises. It also notes a report written by the Swedish Ministry of Foreign Affairs, which claims that members of the PKK are at particularly high risk of being subjected to torture by individual civil servants. In addition, it notes a report that states that members who defected from PKK are subjected to enforced confessions to reveal the identity of former compatriots. In summary, the Committee considers that Mr Aytulun has provided sufficient evidence to show that he personally runs a real and foreseeable risk of being subjected to torture, if returned to Turkey, due to his involvement in the PKK and because he likely will be arrested and tried under anti-terrorist laws and subjected to enforced confessions. The Committee does not consider the case of the second applicant separately since her, as a minor child of the first applicant, is dependent upon the case of the first.[168]

In summary, this case is significantly similar to the previous case *Güclü v. Sweden*. The first applicant based his claim on past political involvement and possible prosecution for anti-governmental activities. The central issue is the assessment of a general and personal risk of torture. The state argued that the Turkish authorities would protect him from reprisals if he was to be imprisoned for anti-governmental activities. The Committee, on their hand, found that there was a general risk of ill-treatment and torture by the police forces in the applicant's home country and that the risk was personal since it was likely that the applicant would be imprisoned because of his involvement in a terrorist organisation.

[167] *Ibidem*, paras 1.1 and 2.1-2.5.
[168] *Ibidem*, paras 7.5-7.8.

# 5 Discussion

In this chapter, I will discuss and answer the three main questions presented in chapter 1.2. Firstly, I will analyse in short if there are any inconsistencies between the international regulation and the domestic legal implementation of the principle of non-refoulement. Secondly, I will consolidate the reasons why the ECtHR and the CmAT has found Sweden to violate the principle of non-refoulement in its review and try to identify if there is an underlying pattern. Finally, the presentation will address if the legal reforms that have been made since the publication of the selected cases are sufficient and, additionally, if there are any measures that can be taken in order to improve the Swedish domestic law or practice.

## 5.1 Implementation in Legislation

The display of the principle of non-refoulement in different legal instruments of international law is not completely coherent or over-lapping. This notion becomes apparent when comparing the CAT, ECHR and the Refugee Convention with one another. An obvious remark that can be made is that the Refugee Convention revolves around the concept of persecution, while the regulation in ECHR and CAT is constructed around the concept of torture. Another clear difference is that Article 3 in CAT involves an explicit prohibition of expulsion when there is a risk of torture, while such a prohibition is interpreted as integrated in the prohibition of torture under Article 3 of ECHR. The Swedish domestic law implements the two parts of non-refoulement, i.e. the protection against persecution and torture, in the Aliens Act. The implementation of the principle of non-refoulement in Swedish domestic law aims to comply with the country's international obligations[169] and for example, the UNHCR Handbook has been recognized as a source of law in Swedish migration law.[170] The burden of proof is initially with the applicant but can shift to the state if the applicant fulfils the standard of proof according to both international law and Swedish domestic law. However, the conformity of Swedish law with international law regarding the level of the standard of proof, i.e. the amount of evidence required by a person claiming protection in accordance with non-refoulement, is uncertain. The Refugee Convention does not expressly state a standard of proof, yet it establishes the notion of the benefit of the doubt. The ECtHR as well as the CAT establishes the burden of proof as 'substantial grounds'. In Swedish domestic law, on the other hand, the standard of proof is in line with 'credible and probable'. The different expressions suggest a potential discrepancy in the evidentiary standard. This will be discussed in the next subchapter.

[169] Prop. 2009/10:31, pp. 1-2 and 75-82.
[170] Prop. 1996/97:25 p. 97.

In addition, as mentioned before, the legislator considered that some provisions were already part of Swedish law when the Asylum Qualification Directive was to be implemented in Swedish law and that these provisions did not necessitate a legal reform in the legislator's view. My analysis of the international review of Sweden performed by the ECtHR and the CmAT, suggests that this opinion was faulty, an idea that will be attended to later in this chapter. However, it is important to remember that a provision in a directive can be relied upon by an asylum seeker if the national court in case the directive is not properly applied in practice and the obligation is unconditional and sufficiently precise. Consequently, a potential discrepancy between the regulation at EU level, on the one hand, and at domestic level, on the other hand, can be amended through the principle of direct effect.

## 5.2 Conclusions From The International Review

### 5.2.1 General Situation on Human Rights and Personal Risk

Every judgement or communication in the case review involves a substantive assessment of Article 3 of ECHR or CAT. In this substantive assessment of non-refoulement, the risk of upcoming torture is clearly in the spotlight. The two conventions entail protection from torture by state actors as well as non-state actors when the state cannot give the individual sufficient protection. The selected cases in this thesis confirm this notion seeing as it comprehends cases where both state actors and private individuals are claimed to pose a threat to the complainant. A majority of the selected cases initially attend to the general situation of human rights in the country in question since it is important to understand the context of the complaint. This is manifested through references to reports on human rights by all parties concerned: the complainants, state party and the Court or Committee. These reports are written by numerous different governmental and non-governmental organisations such as the UN, US State Department and Human Rights Watch. There are sometimes diverging opinions on the general situation on human rights and in two of the selected cases, *Güclü v. Sweden* and *Aytulun and Güclü v. Sweden*, the state did not agree with the applicants and the Committee regarding the assessment of a general risk of persecution and torture in the country in question. The applicants, in the respective cases, founded their claim on previous political activities in their home country. The state argued that the previously difficult situation in the countries had improved since the applicants had left the country and that the national authorities in the country of origin would protect the applicants form torture if they were charged for terrorism involvement. The Committee found that there was a general risk of mistreatment by the police forces in the applicants' country of origin and that the applicants faced a personal risk owing to their previous political involvement. In addition, in *Njamba and*

*Balikosa v. Sweden* the applicant founded her claim on their previous political involvement in their home country. The state party questioned the claimed political involvement of the applicant's husband, yet this argument was not addressed by the Committee. The Committee attaches great importance to the general situation on human rights and specifically emphasise reports on widespread occurrence of violence against women before concluding that the applicant would be in danger of being subjected to torture. This reasoning suggests that every removal of a female asylum-seeker to the country in question at this time would violate CAT and that there was no need to establish a personal risk in this case according to CmAT. It is uncertain whether this is a new stand deliberately taken by the Committee or if the Committee only forgot to state that it did not question the political involvement of the applicant's husband. In my opinion, the Committee, if it intended the former alternative, has made a too far-reaching interpretation of the principle of non-refoulement and touched upon a part of the international protection that is outside the scope of the principle of non-refoulement.

A general situation of human rights violations in the country in question is not sufficient in order to establish a breach of Article 3 in ECHR or CAT as the determination of the risk has to be individual. In the three last attended cases, *Güclü v. Sweden*, *Aytulun and Güclü v. Sweden* and *Njamba and Balikosa v. Sweden,* the state, obviously, had also contested the claim that the applicant would face a personal risk of torture or persecution. In *Güclü v. Sweden* and *Aytulun and Güclü v. Sweden,* the state party contested the existence of a personal risk by stating that the political involvement had been limited. As mentioned before, in these two cases, the Committee found that the applicants faced a personal risk owing to their previous political involvement. In addition, the vital question in *N. v. Sweden* was the assessment of the personal risk, in other words the assessment of her intention of not living with her husband. The applicant founded her claim on her extra-marital relationship and that she wanted to divorce her husband. The state argued that the risk was not personal since she had not formally divorced her husband. The Committee, on the contrary, found that the general risk of violence against women and the risk of persecution, and even prosecution for adultery, were personal since she had made it clear that she did not intend to live with her husband. In conclusion, this indicates that Sweden did not fulfil the duty to investigate in regard to the general situation on human rights and may apply a standard of proof that is too high in the assessment of a general and person risk of mistreatment in the receiving country. The following account will more closely attend to the some specific aspects of the assessment of a personal risk.

### 5.2.2 Past Experience of Mistreatment and Credibility

Statements of previous experience of mistreatment, that is torture or persecution, is presented by the complainants in six of the selected cases as

means of proving that there is a risk of mistreatment in the future.[171] In five of these cases, the previous acts of torture were performed by public officials, in contrast to private actors. This division is nonetheless sometimes difficult to maintain, as for instance in the communication *A.S. v. Sweden*. In this borderline case, the ill-treatment was committed by the complainant's husband. The husband was a religious leader that the complainant had been forced to marry. The complainant, after having been arrested by the state authorities, had been brought to her husband where she had been severely beaten by him. The complainant then avoided criminal proceedings due to her husband's influence. In my opinion, the base of the argument is that the complainant's husband acted as a private individual, while the husband's profession and influence suggest that he may have acted in an official position. This categorisation is, however, subordinate to the establishment of previous experience of torture or persecution overall. Both the Court and the Committee consider past experience of mistreatment to be of great importance in the assessment of the risk of torture. These two international bodies have both explicitly stated that there is a presumption of risk of mistreatment in case of previous experience of mistreatment. This presumption is expressly put into practice in *R.C. v. Sweden*, *A.S. v. Sweden*, and *Karoui v. Sweden* and implies that there is a shift of the burden of proof from the complainant to the state party if the complainant makes a *prima facie* case on that he or she has been subjected to torture or persecution in the past. In these three cases the Court and Committee, respectively, find that the complainant has provided sufficient information as to the origin of injuries and scars, and that the state party has the responsibility to obtain all relevant information, e.g. an expert certificate, to contest this claim.

Furthermore, in five of the selected cases the state party questions the credibility of the applicant.[172] In other words, the state does not find that the applicants in the individual cases have fulfilled the part of the standard of proof that refers to credibility. The stated reasons for this doubt is, for instance, that the complainants have presented opposing statements, the application for asylum was delayed after the arrival of the applicant to the asylum country, the complainants introduced new statements at a late stage in the proceedings and that they have not been able to submit verifiable information. The state party acknowledges the opinion of the national authorities and argues, under both CAT and ECHR, that the national authorities are best placed to assess the credibility of witnesses since they can meet the individual in person. This general idea on a particularly favourable position held by the national authorities with regard to the assessment of the credibility of the applicant is expressly confirmed in *R.C v. Sweden* by the ECtHR. Nonetheless, both the Court and the Committee disagree with the state party's conclusion in the relevant four cases and does

[171] R.C. v. Sweden, *supra* note 124; A.S. v. Sweden, *supra* note 137; Karoui v. Sweden, *supra* note 142; T.A. and S.T. v. Sweden, *supra* note 150; C.T. and K.M. v. Sweden, *supra* note 155; Njamba and Balikosa v. Sweden, *supra* note 43.
[172] R.C. v. Sweden, *supra* note 124; A.S. v. Sweden, *supra* note 137; Karoui v. Sweden, *supra* note 142; T.A. and S.T. v. Sweden, *supra* note 150; C.T. and K.M. v. Sweden, *supra* note 155.

not give the unclear aspects in the applicant's account the same significance as the state party. The Court and Committee do not find that the stated reasons for questioning the veracity of the applicant's story are enough to undermine the general credibility of the applicants. In *A.S. v. Sweden,* the state argued that the applicant had not submitted sufficiently reliable information, such as phone numbers, addresses and names of persons mentioned in the applicant's account. Sweden further stated that she had not presented written evidence, such as a judgement of medical certificate, in support of her claim. The Committee, however, concluded that she had submitted sufficient details regarding her forced marriage and the arrest to shift the burden of proof. The Committee further expressly stated the principle of the benefit of the doubt in *Karoui v. Sweden* and considered that the complainant had given sufficient explanations for the inconsistencies in the information provided by the complainant in the domestic asylum process. The Committee restates its jurisprudence that an individual that has been subjected to torture rarely can render his or her own background story with complete accuracy, which is reaffirmed once again in *C.T. and K.M. v. Sweden*.

Lastly, in *T.A. and S.T. v. Sweden,* the state party did not contest the fact that the first applicant had been subjected to torture and rape in the past. Instead, Sweden disputed the evidentiary weight the Committee attached to the previous subjection to mistreatment and tried to argue that the general situation on human rights in the applicant's home country had improved and that she did not have to fear the authorities due to the political change in the country. This argument was not successful and, consequently, it indicates that the state party does not award previous experience of torture the same value as the ECtHR and the CmAT in the assessment of a personal risk of mistreatment in the future. In conclusion, this indicates that the Swedish domestic practice departs from the international interpretation with regard to the assessment of past experience of mistreatment and the credibility of the applicant.

### 5.2.3 Evidence in Writing and the Duty to Investigate

Statements of previous experience of torture, ill-treatment or general mental and physical health problems are usually supported by written documents, e.g. judgements and medical certificates.[173] Both the Court and the Committee acknowledge a good deal of reliability to the medical certificates regarding previous experience of torture even though the medical certificates cannot prove the alleged torture and exclude alternative reasons for the origin of scars etcetera. As an example, in the medical certificate used in *R.C. v. Sweden* the physician declared that the applicant had injuries that could very well originate from the torture to which the applicant

[173] E.g. Bader and Kanbor v. Sweden, *supra* note 119; R.C. v. Sweden, *supra* note 124; Karoui v. Sweden, *supra* note 142; T.A. and S.T. v. Sweden, *supra* note 150.

claimed that he had been subjected. In this case the Court assert that if the state party suspects that injuries and scars emanate from events other than torture, the state has to obtain a professional medical assessment of the matter with this claim in mind. The Court recognises that the certificate obtained by the complainant was not written by an expert specialising in the assessment of torture injuries, and imposes on the state to obtain an expert opinion. In my view, I presume that an expert on torture injuries, in comparison to a general practitioner, can execute a more definite investigation, in particular with both the complainant's and state party's assertions in mind. However, I find it impractical for the expert to prove the torture and eliminate all other potential causes. This view is elaborated in the dissenting opinion of judge Fura in *R.C. v. Sweden* who did not consider that the applicant had substantiated his claim. The judge noted that she found it difficult to see how a state in practice should proceed in order to dispel any doubts about the risk of torture in the future. The majority in this case, however, found that the state had not fulfilled its duty to investigate since it did not obtain an expert opinion on the origin of the scars.

Moreover, a related matter is brought into light in the communication *Bader and Kanbor v. Sweden,* where the complainants based their application on the argument that the first applicant had been sentenced to death. The applicant argued that the execution would bring considerable fear and anguish to the applicant and his family in breach of Article 3 of ECHR and the claim was supported by a judgement decided by a Syrian Court. The authenticity of the judgement was verified by the Swedish Embassy in Syria, yet the complainants and the state party had divergent opinions on the prospect of review of the judgement in Syria. The Court questions the investigation made by the Swedish authorities and concludes that the complainants have substantiated their claim. The Swedish authorities, the Court and the Committee all acknowledge that the state party has an obligation to investigate, but the Court and Committee conclude a more far-reaching outcome from this since they infer a shift of the burden of proof from the applicant to the state. The obligation to investigate is recognised under Swedish domestic law even though it is the alien's task to establish its need for international protection. The scope of the obligation to investigate assigned to the authorities is decided on a case-by-case basis, hence, there is also a potential risk that the assessment becomes discretionary. In *Bader and Kanbor v. Sweden,* the ECtHR finds that the obligation to investigate was not fulfilled by the state. In my opinion, this is in substance the same argumentation as saying that the applicant had made a *prima facie* case and that the state failed to avert the burden of proof. In conclusion, this reinforces the notion that the Swedish domestic practice departs from the international regulation with regard to the standard of proof, in particular in the assessment of written evidence and the state's duty to investigate.

### 5.2.4 Subsequent Experience of Torture

The selected case *Agiza v. Sweden* stands out since the expulsion had already been executed when the communication was lodged with the Committee. This case establishes that the assessment, in such a case, is to be made in the light of the information that was known, or ought to have been known, to the state party's authorities at the time of the removal. Further, the Committee states that subsequent events are relevant to the review of the state party's knowledge, actual or constructive, at the time of removal. The assessment made by the Committee is made in a similar manner to the other cases even though the complainant *inter alia* based his claim on subsequent experience of torture as means of proving that there was risk of torture at the time when the issue of expulsion was decided by the Swedish Government. The Committee initially finds, with support from reports on human rights, that there is a general risk of exercise of torture against detainees in the receiving country and furthermore that this risk was personal owing to the complainant's suspected involvement in terrorist activities. It subsequently establishes that the personal risk was confirmed after the removal when the complainant was subjected to treatment amounting to torture or cruel, inhuman or degrading treatment or punishment. The assessment is affected by the recognized subsequent experience of torture, as claims supported by previous subjection to torture, yet the Committee seems, in my opinion, to consider this notion to be of less importance. This is not surprising seeing as the moment for the assessment is the time for the removal. Past subjection to torture, contrary to future subjection to torture, can be investigated into at the time of the removal and accordingly the preceding factor becomes more significant than the latter. The risk in this kind of assessment is that it may become too biased by the fact that the person was subjected to experience of torture after the removal. This is in my view, however, not a large problem because the fact is a confirmation of the previously existing risk. Lastly, this case also deals with diplomatic assurances, yet this attempt to eliminating the risk was not highly valued by the Committee. The Committee dismissed the diplomatic assurance as it did not provide a mechanism for enforcement and thus was not adequate to protect against the manifested risk. One can argue that a diplomatic assurance is legally binding[174] still the general problems of enforcement of state obligations under international law persist and I find it questionable that a diplomatic assurance can be effectively enforced.[175]

### 5.2.5 Persecution

Both ECHR and CAT attend to the concept of torture, yet the concept of persecution is mentioned in several of the selected cases in the case review. In the case *T.A. and S.T. v. Sweden*, the complainants based their claim on

[174] Noll, G., *Diplomatic assurances and the silence of human rights law*, Melbourne Journal of International Law, 2006, vol. 7, pp. 10-11.
[175] Skoglund, L., 2008, *supra* note 11, p. 354.

both risk of persecution and torture. The Committee found *inter alia* that that the ill-treatment of the first complainant was based on her and her husband's political activities in Bangladesh, and thus stated that she was at risk of being subjected to torture. The claim of persecution, however, was not mentioned by the Committee in its conclusions of the decision. In the case *N. v. Sweden*, the author claimed risk of persecution seeing as she wanted to divorce her Afghani husband and had started an extramarital relationship with a man in Sweden. The Court found that the complainant faced a cumulative risk of reprisals that fall under the protection of Article 3 of ECHR. The court *inter alia* bases this on the general occurrence of violence against women in Afghanistan and that she would face social rejection and discrimination if she was successful in living separated from her husband. In my opinion, since the conception of persecution, in general terms, involves serious violations of human rights, the protection under Article 3 of ECHR and CAT embrace persecution in some forms. In the latter case, the Court, for my part, seems to detect a risk of future activities that relates to persecution since the acts of torture feared in the future in this case are quite vague. Hence, this indicates that the international regulation of non-refoulement, in particular Article 3 of the ECHR, may embrace protection against torture as well as persecution in some cases. The benefit of arguing a risk of torture is nonetheless inevitable because this protection, contrary to the protection in case of risk of persecution, is absolute and does not permit any exceptions.

### 5.2.6 Procedural Assessment

One case, *Agiza v. Sweden*, stands out since it, besides the substantive assessment, also involves a procedural assessment under Article 3 of CAT. In addition, this case stands out on the national level since it was a security case handled under the Swedish Act on Special Control of Aliens and not the AA. In this case, the Committee interprets the article as containing a remedy for its breach in consistency with the right to an effective remedy. This interpretation is required since the convention itself does not set out a remedy. The special procedure in which this security case was handled was heavily criticised by the CmAT, which gave prominence to the fundamental notion that the prohibition of torture is absolute. The significance of this decision, although it is not explicitly stated, is evident and the Government bill, proposing changes involving a review process under this specific law, was presented six days after the delivery of *Agiza v. Sweden.*[176] This legislative change, previously presented in chapter 3, will be analysed in the next subchapter when I discuss reform proposals.

[176] 2004/05:170, p. 1.

## 5.3 Reform

In summary, the analysis of the international review of Sweden suggests several indicated discrepancies between the international and domestic regulation on the principle of non-refoulement. Firstly, that the special procedural rules in security cases violate the obligation under CAT, and secondly, that the Swedish interpretation on several aspects relating to the standard of proof is inconsistent with the international regulation. I will initially discuss if the legal reform that has been made in recent time is sufficient, and moreover comment and discuss potential measures that can be taken in order to bring the Swedish legislation and practice in improved compliance with the international regulation.

### 5.3.1 Procedure in Security Cases

Initially, the special procedure in which this security case is handled was heavily criticised by the CmAT in the case *Agiza v. Sweden*. To sum up in general terms, the Committee stated that Article 3 of CAT requires a possibility for effective, independent and impartial review of a decision to expel or remove a person when there is a plausible allegation that concerns relating to Article 3 will arise. Accordingly, the Committee disapproved with the, then applicable, procedural rules in the Act on Special Control of Aliens applied in the case where the Government took the first and final decision to expel the applicant without the opportunity of appeal. The Court, at the same time, did not rule out the option of having a special procedure in cases that raise national security concerns. Hence, Sweden can still choose to have a separate procedure for security cases, as it has in the current legal system, yet the specific rules have to entail an effective, independent and impartial review. The reform of the Act on Special Control of Aliens that followed this criticism has previously been presented in chapter 3.3. In brief, the present procedure involves the Migration Board making a decision in first instance, which can be reviewed by the Swedish Government. In addition, citizens of EEA-countries have the right to appeal the Government's decision to the Supreme Administrative Court in Sweden. This competence is given to the Government owing to the national security concerns that are dealt with in these particularly sensitive security cases. The advantage of this is, in my opinion, understandable. This new procedure can, however, still be questioned since there is no possibility of review by a legal entity under an inquisitorial proceeding. In addition, the competence of the government, as a decision-maker in migration matters, is debatable with good reason after *Agiza v. Sweden*. The government is a political entity that has to consider numerous varying interests when deciding a matter and, thus, more easily than a court, can give preference to national interests at the expense of individual human rights. In this context, it is important to notice statements made by the government itself when commenting in the preparatory work on previous legislation where the government was able to make precedential rulings on migration matters. The government then

recognized that it should not decide a case when the person that risk deportation claim to risk subjection to torture or to inhuman or degrading treatment or punishment and this claim does not appear to be obviously unfounded. The reason behind this was the notion that such a procedure would violate the right to review in ECHR.[177] The complexity of the problem for the government is to a certain degree understandable since a person can be suspected of constituting a threat to national security while the information is not sufficiently reliable or concrete in order to take legal action. In this situation, in the Government's point of view, it is probably easier to remove the person in question from Sweden than to address the problem via criminal law. However, this pragmatic view of human rights, for instance visible in *Agiza v. Sweden,* does not comply with international law. Lastly, the possibility of review by the Supreme Administrative Court granted to citizens of EEA-countries implies an improvement of the legal protection in these cases, albeit the division between citizens from EEA-countries, on the one hand, and remaining countries, on the other hand, is undesirable in my view. A widening of the access to this special review process to citizens of countries outside the EEA-area would involve a significant improvement, as this would entail a final trial of the case before court.

### 5.3.2 The Standard of Proof

The preceding analysis of the international review of Sweden suggests that there is a discrepancy in the interpretation of the standard of proof between Sweden, on the one hand, and the Court and Committee, on the other hand. The indentified inconsistency in the standard of proof adhered to the assessment of previous experience of mistreatment, the credibility of the applicant, written evidence and the scope of the state's duty to investigate. Here I will propose, firstly, an inclusion of a presumption of a risk of torture in case of previous subjection to torture and, secondly, a clarification of the notion of the benefit of the doubt. These aspects are attended to in the Asylum Qualification Directive, which, to some extent, has been implemented in Swedish legislation. The substance of the two potential reforms that will be presented was at the time of the implementation considered already to be part of Swedish law. For that reason, the legislator did not find a need for a legal reform. My analysis of the international review suggests, on the contrary, that there is a discrepancy between the international regulation and the Swedish domestic regulation and I think that an explicit inclusion of Article 4.4 and 4.5 in the Swedish legislation would improve the situation. It is nevertheless important to remember, as stated before, that the directive can already be part of Swedish law since the provisions in the directive may have direct effect under EU law. In other words, individuals may rely directly on the provision of the directive against the state in case it is not properly applied in practice and if the obligation is unconditional and sufficiently precise. Lastly, these two reform proposals

[177] Prop. 1991/92:30, pp. 23-24.

would bring more clarity to the potential differentiation of the standard of proof in Chapter 4 and Chapter 12 of the AA as the standard of proof in Swedish legislation would be more precisely expressed.

The first potential legal reform entails that the legislator explicitly implements Article 4.4 of the Asylum Qualification Directive in the Swedish legislation, see citation chapter 3.3 of the thesis. This article involves a presumption of a risk of torture or persecution in the future if an applicant has already been subjected to torture or persecution in the past. This presumption, however, can be waived by the state if there are good reasons to consider that such persecution or torture will not be repeated. This suggestion is in substance similar to the case law established by ECtHR and CmAT, respectively, which implies a shift in the burden of proof from the complainant to the state party if the complainant makes a *prima facie* case on that he or she has been subjected to torture in the past.[178] When the Swedish legislator implemented Article 4.4 of the Asylum Qualification only a minor change of Chapter 4, section 1 of the AA was presented in order to clarify that the assessment is forward-looking.[179] Nevertheless, the analysis of the international review of Sweden suggests, in my opinion, that there is a need for clarification of the existence of this presumption and that the government's conclusion was flawed. An inclusion of the presumption would clarify the evidentiary weight attached to the previous subjection to mistreatment by both ECtHR and CmAT and therefore slightly defuse the forward-looking aspect of non-refoulement that has been emphasized by the Swedish government. This reform would entail greater weight of past subjection to mistreatment as means of proving a risk of mistreatment in the future. The difficulty with this suggestion is that it deviates from the general legal principle that implies that people who benefit from a claim have the burden to prove the grounds for the claim. The basis for this is the notion that it is easier to validate that an event has happened than to prove that an event has not happened. This reform, however, would be reasonable, in my opinion, owing to the seriousness of the outcome in case of a faulty assessment. The price the state has to pay in case a residence permit is given to a person who does not risk torture or persecution is significantly less than the price the individual has to pay if the decision on expulsion is upheld and the person becomes subjected to torture or persecution. Anyhow, a noteworthy objection to this presumption was presented in the separate opinion of *R.C. v. Sweden* when the judge suggested that it is, most probably, hard for the state to dispel any doubts about the risk of torture in practice. The majority, on the other hand, put forward that if the state party suspects that injuries and scars emanate from events other than torture, the state has to obtain an expert assessment on the matter with this claim in mind. Thus, the lesson to be learned from ECtHR is that the state party may be able to dispel the presumption by obtaining a medical certificate from an expert on torture injuries that contradict a previous medical certificate. In other words, this case implies a far-reaching

[178] E.g. R.C. v. Sweden, *supra* note 124; A.S. v. Sweden, *supra* note 137; Karoui v. Sweden, *supra* note 142.
[179] Prop. 2009/10:31, pp. 129-130.

burden on the state with regard to its duty to investigate. A similar conclusion was made by the ECtHR in *Bader and Kanbor v. Sweden* in which the Court, in comparison to the state, found the state's duty to investigate to be more extensive. The duty to investigate is however already part of Swedish law. A more specifically defined scope of this obligation is, in my view, not practicable since the assessment has to made on a case-by-case-basis due to the different factual circumstances that can dealt with under the principle of non-refoulement.

The second potential legal reform involves that the legislator explicitly implements Article 4.5 of the Asylum Qualification Directive in the Swedish domestic legislation, see citation chapter 3.3 of the thesis. This article attends to the general standard of proof in cases of applications for international protection where aspects of the applicant's account are not supported by documentary or other evidence. In such a case, the standard of proof can be lowered in line with the idea of giving the applicant the benefit of the doubt. This means that the applicant is not obliged to confirm aspects that are not supported by documentary or other evidence under certain explicitly stated conditions, e.g. when the general credibility has been established. This suggestion is in necessitated in my view as both the ECtHR and the CmAT, respectively, have found that Sweden has violated Article 3 when the standard of proof was set too high in the assessment of the personal risk of torture or persecution in cases where evidence was scarce.[180] When the Swedish legislator assessed the need for implementing Article 4.5 of the Asylum Qualification Directive into Swedish legislation it stated that the principle was not part of Swedish legislation, yet it had become part of Swedish law owing to statements in previous preparatory work and in cases from the Migration Court of Appeal.[181] The case law from ECtHR and CmAT that have been presented previously in this thesis suggest that this assessment by the legislator was faulty. Furthermore, the assessment under Article 4.5 *inter alia* is affected by the assessment of the general credibility of the applicant. The case law suggests that Sweden is too strict in the assessment of the credibility of the applicant.[182] The state party claims to base the doubt on factors such as opposing statements made by the complainant, the introduction of new statements at a late stage in the proceedings and the complainant's failure to submit verifiable information. The Court and the Committee, however, acknowledge that an individual who has been subjected to torture rarely can retell his or her own background story with complete accuracy. Traumatic memories can be hard to recollect and repeated traumatic memories may result in generalized memories in which it can be hard to distinguish between separate occasions. The period when traumatic experiences become as generalized as everyday events is personal and depends on individual factors such as the mentality of

[180] N. v. Sweden, *supra* note 131; Güclü v. Sweden, *supra* note 43; Aytulun; Güclü v. Sweden, *supra* note 166.
[181] Prop. 2009/10:31, pp. 130-131.
[182] R.C. v. Sweden, *supra* note 124; A.S. v. Sweden, *supra* note 137; Karoui v. Sweden, *supra* note 142; T.A. and S.T. v. Sweden, *supra* note 150; C.T. and K.M. v. Sweden, *supra* note 155.

the person, the surrounding environment and past experiences. In addition, powerful speakers can successfully tell lies if they are not subjected to elements of surprise and powerless speakers can find it difficult to present their story spontaneously. Hence, inconsistencies in smaller parts of the story or less important sections of the story should not undermine the general credibility of the applicant and the Swedish migration authorities should thus give the complainant the benefit of the doubt when this is called for. In other words, it is not a question that induces either an affirmative or a negative answer, but an outcome that can range on a scale from complete accuracy to complete unreliability.[183] Knowledge of basic facts on psychology of memory is particularly important in first instance seeing as the national authorities are best placed to assess the credibility of applicants and witnesses. This potential legal reform would consequently be assisted if the national authorities provided their staff with more training in order to improve the possibilities of making a correct assessment of the credibility of the applicant. This accompanying need for training would not require a legislative change, yet a change in attitude and practice among legal practitioners might take some time. This is nonetheless an important change since the credibility of the applicant plays such a large role in the assessment of the applicant's need for international protection. This second legal reform may also amend, to some extent, the problems with establishing the credibility of the applicant since the standard of proof may be lowered if some facts cannot be proved.

In conclusion, the two legal reform proposals both involve a lessening of the standard of proof and would to some extent, amend the fact that Sweden in some cases apply a standard of proof that is too high. The inclusion of the presumption as well as the benefit of the doubt would, in my opinion, concretise several aspects of the standard of proof and thus bring some clarification into the Swedish evidentiary assessment in migration cases.

[183] See Diesen, C. *et al*, 2007, *supra* note 1, pp. 236-238; Christianson, S-Å., *Traumatiska minnen*, Bokförlag Natur och Kultur, 3rd edition, 2002, pp. 209-210, 215-216 and 222-223.

# 6 Concluding Remarks

The analysis of the international review of Sweden demonstrates some discrepancies between Swedish law, on the one hand, and international law and EU law, on the other hand. The indentified discrepancies concern the procedure in security cases and the standard of proof in migration cases in general. The legal reform that has come into force in recent years is not sufficient in order to bring the Swedish legislation in compliance with the country's international obligations even though the possible direct effect of the Asylum Qualification Directive may reduce the scope of the discrepancy. Further, the reform proposals that I have presented in this thesis would entail an improvement of the Swedish implementation and bring some clarification into the evidentiary assessment in migration cases. The impending change, in my view, is a change of the assessment of the credibility of the applicant since this aspect is of great importance in a majority of asylum applications and the initial impression of the Migration Board is of particular importance since it affects the following investigation. A working climate within the Migration Board and the Migration Courts consisting of constant distrust of asylum seekers would be highly problematic and any signs of this must be counteracted. The two reform proposals, however, would contribute to a solution of this problem since it would bring some clarification into the Swedish evidentiary assessment in migration cases. The assessment of the risk is nonetheless inherently difficult to make seeing as it is forward-looking and the decision-makers do not possess supernatural powers. Moreover, proof of previous experience of torture and persecution is not easily obtained and asylum applicants, as people in general, do not always tell the truth, hence certain degree of doubt is awarded. It is also important to note that a broad interpretation of the principle of non-refoulement is more easily made by international institutions, such as the ECtHR and the CmAT, because they do not pay the social and economic price of immigration. The international documents are furthermore written in English and there may be linguistic barriers to overcome when interpreting and implementing the international conventions and the judgements and decisions of the ECtHR and CmAT. However, this does not justify deviation from the international obligation in Swedish law and practice since legal protection in migration matters is of utmost importance due to the severity of the consequences of a faulty decision. The traces from the past of strong political influence and extensive discretion must be counteracted.

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