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**THE BEST INTERESTS OF THE CHILD IN AN
IMMIGRATION LAW CONTEXT**

*A Research Study on How the Best Interests of the Child Has Been Interpreted
in Two Asylum Cases by the Supreme Court*

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Abstract

The focus for this qualitative research is how the best interests of the child has been interpreted in two asylum cases by the Supreme Court. The context is how most liberal democratic states have committed themselves to international human rights laws, binding them to safeguard the rights of the child, while facing extra-legal pressures from constituents to limit migration. This research draws primarily on document research as a method, to show how the Supreme Court has struck a balance between the rights of the child (substance criteria) and the rights of the state to limit migration (procedural criteria) in a Norwegian context. Drawing on key theoretical concepts, the main conclusions of this research are firstly that there are many ways to interpret legal texts, such as the Convention on the Rights of the Child (CRC) and the Article 3 (1) ‘the best interests of the child’. Secondly, by examining the nature of the relationship between national- and international law, this thesis shows that there are different interpretations on the international human rights obligations’ power to direct how states should practice the best interests principle. Thirdly, this thesis indicates that international laws’ indeterminacy gives the states wide latitude to interpret the best interests principle. Fourthly, this thesis clarifies the relationship between law and politics, and indicates that the interpretation of the best interests principle is influenced by political and extra-legal factors.

Key words: ‘best interests of the child’, ‘immigration control considerations’, ‘longstaying children’, ‘human rights’.

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Abbreviations

AVRR – Assisted Voluntary Return and Reintegration

CRC - The Convention on the Rights of the Child

ECHR - The European Convention on Human Rights

ECtHR - The European Court of Human Rights

IOM – International Organisation for Migration

ISF - The Institute for Social Research

UDI - The Norwegian Directorate for Immigration

UNE - The Immigration Appeals Board

UNHCR - The United Nations Human Rights Council

UNICEF - The United Nations Children's Fund

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INTRODUCTION

Most liberal democratic states have on the one hand committed themselves to international laws, binding them to safeguarding the rights of migrants. On the other hand, states tend to face extra-legal pressures from constituents to limit migration. Liberal democratic states need to develop and enforce immigration control policies that safeguards the rights of migrants, and in the past decade, there has been a growth of interest on how liberal democratic states navigate between immigration control policies and securing the rights of migrants (Brochmann, 1999; Brettell and Hollifield, 2008). This thesis sets out to explore how the Norwegian state upholds the human rights of migrant children, while simultaneously maintaining the rights to control immigration. This thesis will explore the balance between these considerations by analysing two plenary Supreme Court judgments, in order to examine how the tension between the rights of the child and competing considerations, including political priorities and other extra-legal factors, is expressed.

The Plenary Supreme Court Judgments

The 21st of December 2012, two Supreme Court judgments, Verona Delic and family, and Hossein Shabazi and family against the State by the Immigration Appeals Board (UNE) were decided in plenary by the Court. The cases concerned the validity of a negative decision based on an application for asylum and residence permit (case 2012/688), and the validity of a denial to reverse a negative decision (case 2012/1042). The plenary judgments broadly concerned three main issues: should the Court assess the cases using a ‘present time assessment’?, were the decisions made by UNE in accordance or in conflict with current law, especially the Convention on the Rights of the Child (CRC)?, and was there a judicial basis to intervene in the considerations UNE had undertaken between the various relevant considerations? (Langbach, 2013). The majority of judges concluded that the Court shall assess the validity of UNE’s decisions from the time the decisions was made, and not a ‘present time assessment’. Furthermore, the majority of the Supreme Court ruled UNE’s decisions valid, and in line with the CRC. Moreover, the judges found no judicial basis to intervene in the considerations UNE had undertaken. On the basis of these questions, a majority of fourteen judges found both decisions to be valid. Five judges found the decisions to be invalid.

By examining how the judges interpret the validity of the two asylum-cases, this research attempts to emphasise the tension liberal democratic states may face, where states have committed themselves to international laws, binding them to safeguarding the rights of migrant children, but are also committed to protect the interests of (legal) members of society. The judges have had to interpret the best interests of the child in light of other competing considerations, including immigration control considerations. Using these plenary judgments as the empirical basis for the research, the intention is to show that there are many ways to interpret legal texts, such as the CRC and the Article 3 (1) the best interests of the child, and that the interpretation is influenced by extra-legal- and political factors.

The plenary judgments are of importance because the judgments had consequences for these two families, but also set the standard for approximately 500 other asylum-seeking children who have been staying in Norway for a long time (longstaying children), and who have a strong connection to Norway. This research can be used to better understand the tension between human rights obligations and immigration control considerations when interpreting the best interests of the child in an immigration context. The research can thus be used to understand the current practice of Norwegian immigration law.

Objectives and Research Question

The issues that are raised in the plenary judgments form the basis for my research objectives. The objectives of this research are to:

- I. Examine how liberal democratic states, in this case Norway, may balance the rights of the child (substance criteria) and the rights of the state to limit migration (procedural criteria), and to
- II. Examine the relationship between politics and law in an immigration context.

More specifically, this thesis proposes to answer the question:

How has the best interests of the child been interpreted in two plenary Supreme Court judgments?

The question will be answered with specific reference to how the Court has struck a balance between the rights of the child (substance criteria) and the rights of the state to limit migration (procedural criteria).

The objectives of this research are vaguer, and much wider than the research question. The first objective concerns whether the plenary judgments express a position where it is through national politics and national (Norwegian) laws, or through human rights obligations, that the best interests principle is managed. Understanding the nature of the relationship between national- and international law on the best interests of the child in the field of immigration is opted for. Understanding the ways in which international human rights obligations influence the interpretation of the best interests of the child, makes it possible to reconstruct states' (power) position to give content to the interpretation of the best interests principle. Furthermore, reasons why international human rights norms, which states have committed themselves to, have little power in deciding how states are balancing procedural and substance criteria, will be explained.

The second objective is aimed at understanding the relationship between law and politics on interpreting the best interests of the child principle in an immigration context. Clarifying the relationship between law and politics will make clear that the interpretation of legal texts, such as the best interests if the child, is influenced by political factors, differences between decision-makers, and other extra-legal factors.

It is hoped that the objectives of this research will help to explain how the best interests of the child has been interpreted by the Supreme Court.

Justification of Research

Current research on the field of migration concerned with the best interests of the child principle tend to take a legal perspective or method as a point of departure, and tend to have a judicial analogy as a starting point for their research (Brekke et. al., 2010). The same is true for research done by Norway, where most of the research on the field of migration on the best interests of the child has been tied to the practice of law and legislative questions (see Haugli, 2003; Einarsen, 2008; Wille, 2008; Stang, 2008a; 2008b; Sandberg, 2008; Haugli and Shinkareva, 2012). Brettell and Hollifield (2008:2) argue there is a risk that when social

scientists do not approach the issue of immigration across disciplines, they consequently ignore research that has been made, and they will not be able to appreciate the different theoretical perspectives. There is a need to bridge the gap between disciplines on the understanding of the human rights of the child in the context of immigration. There exists a compartmentalisation in the study of human rights, where the knowledge is not shared across disciplines. By taking a judicial analogy as a starting point, the sociological perspectives concerning the study of human rights become a second priority, and in worst case, get excluded from the research. On the other hand, sociological theorists are less prone to shed light on the legal aspects of juridical norms. In the application of human rights norms, such as the best interests of the child, existing literature suggests the ‘limits of (human rights) law as a force for social change’ “is in many respects the least well understood and certainly one of the most neglected issues in the entire field” (Alston, 1994). Understanding the limits of human rights law as a force for social change is opted for through an understanding of how the judges have interpreted the CRC and the best interests principle. The plenary judgments have been chosen as the empirical basis for investigation as the judgments make it possible to deconstruct interpretations, and to explore how the different judges’ interpretations are expressed. This research is important as it will show how interpretations of the best interests of the child in the plenary judgments not only involves a legal approach to the interpretations of human rights, but includes looking at how interpretations of legal texts are socially constructed and influenced by a number of societal factors. By focusing on human rights laws this research will show that the plenary judgments are not an independent or isolated event, but a constituent part of a societal context which is influenced by institutional and individual attitudes and behaviour that led to the outcome of the decisions (Shapiro, 2002).

Disposition

This thesis will first present the methodology, where the empirical elements of this research are addressed. My own personal attachment to the issue, and how I arrived at the research topic, will also be discussed. The different methods that have been used will be explained, along with challenges and ethical considerations encountered in the research process. Next, this paper will present an overview of central theoretical concepts to place this research within the current debate. I address the tension between procedural and substance criteria for democratic legitimacy, the paradox of Western democratic states concerning how states navigate between ‘open borders’ and ‘closed borders’, in addition to the relationship between law and politics on

immigration. Next, this paper will present the reader with a contextual framework to better understand the research topic in a Norwegian context. The contextual framework forms a basis for understanding the issues that are addressed in the analysis. I further explain the immigration policy framework in Norway. The following sections on the CRC and on the rights of the child in a Norwegian political context, further explains how the best interests of the child is safeguarded in the Norwegian legal- and political system. Next, a short introduction to the plenary judgments are presented, followed by the research analysis. In the analytical part, the relationship between national- and international law through a discussion on a ‘present time assessment’ and a discussion on the states’ wide space for interpretation of human rights norms, is examined. Next, how the relationship between law and politics is expressed in the Court will be clarified, by examining the ‘decision-makers and their (power) position’, ‘the best interests of the child considerations versus immigration control considerations’, ‘connection to Norway versus illegal stay’ and ‘the best interests of the child versus general prevention considerations’. Then, a discussion will be put forward. Finally a summary of the main conclusions and suggestions for further research are presented.

METHODOLOGY

In the following, the epistemological standpoint, the choice of methods, the choices of sampling and data collection, and limitations of the study will be clarified.

This thesis proposes to study how the best interests of the child has been interpreted in two Supreme Court judgments in a Norwegian immigration context, with specific reference to how the Supreme Court has struck a balance between the rights of the child (substance criteria) and the rights of the state to limit migration (procedural criteria). To conduct this research, social constructionism was used as the epistemological stance, as this thesis attempts to understand how meanings are constructed delimited to the plenary judgments (Schwandt, 2003). In the plenary judgments context, law is a central tool for investigation, and how laws are interpreted is of central importance. The theoretical concepts will make clear how there are many ways to interpret legal texts, and that the interpretations are influenced by extra-legal and political factors (Hydén, 2008). Understanding how extra-legal and political factors influence the interpretation of legal texts makes it possible to study the participation of different decision-makers and their (power) position can thus be reconstructed (Spång, 2008).

Research studies can be both quantitative and qualitative in nature (Bryman, 2008:52-53; 2012). Qualitative research starts with assumptions, and moves from specific reflections to broader generalisations, also known as inductive data analysis (Creswell, 2007). Drawing on the qualitative perspective will enhance the knowledge and understanding of how a set of decisions are constructed in the plenary judgments. This research used three different types of methods: observation, elite interviews and document research, because they together produce differing, but mutually supporting ways of collecting data on the same issue. Using different qualitative methods, also known as triangulation, will contribute to the understanding of the research study in a more holistic and complete fashion as the methods complement each other (Denscombe, 2003; Flick, 2009:25-26). An approach that allows for a corroboration of findings also enhances the validity of the data (Denscombe, 2003).

The sampling in qualitative research is often purposive, meaning that the theoretical purpose of the research, rather than the methodological mandate, determines the sampling process (Marvasti, 2004). Purposive sampling is used here as a way to sample participants and cases

in a strategic way to ensure that what have been selected is relevant for the research (Creswell 2007). The seminars I attended as an observant, the people I interviewed, and the documents I chose to analyse, have all been purposively selected as they have a direct reference to the research.

The choices of sampling have been influenced by my internship at the Norwegian Organisation for Asylum Seekers (NOAS), as a part of my Master's Degree in Development Studies. NOAS works as a 'watchdog' for asylum seekers' rights in Norway, and through my internship I was introduced to the issue of interpreting the best interests of the child principle in asylum cases. The issue involved the balancing between the rights of the child (substance criteria) and the rights of the state to limit migration (procedural criteria) in a Norwegian immigration context. The issue was later on chosen as the topic for my thesis. Through my internship, I was able to attend seminars concerning the balancing between procedural and substance criteria. These seminars were used as a way to better understand the context of the plenary judgments and to get an insight into the opinions and thoughts by people in the field of immigration. Through my internship at NOAS (and from the seminars), I was also able to get in contact with people in the field who had great knowledge of the rights of asylum-seeking children in Norway. These people were selected as interviewee objects based on their knowledge and position in the field. The elite interviews were conducted in order to strengthen my understanding of the plenary judgments and to understand how the balance between procedural and substance criteria is worked out in a Norwegian immigration context. NOAS was a party to help in the plenary Supreme Court judgments, and the cases were purposively chosen as the empirical basis for this thesis. The plenary judgments were chosen because the cases in themselves are relevant; many asylum-seeking families with children live in Norway after exceeded departure deadline. Norway's immigration policy also focuses on the situation for longstaying and child migrants. In addition to the attention immigrant children have received in politics, the plenary judgments also received a lot of attention by the media, and became a public interest. The judgments had consequences for the two families involved, but they also influenced, and set the standard for 500 other asylum-seeking children (Viseth, 2012).

This research draws primarily on the plenary Supreme Court judgments, which are known as second-hand data. The first-hand data from the observations and interviews were collected to get a better understanding of the plenary judgments. A final note must be added relating to the

choice of sampling, and the validity of the research. A challenge concerning the interpretation of the data concerns the issue of language. The empirical material, the seminar notes, interview transcripts and documents have all been written in Norwegian. I have therefore translated the quotes I have used, which means that some of the original meaning may have been lost. Additionally, the documents used in the analysis are written for legal purposes and in an academic manner, which I am not familiar with, and sometimes made it difficult to analyse. I have accounted for this limitation by getting support from one of my interviewee objects, a lawyer, to clarify the juridical context and read through my understanding and translation of the plenary judgments.

As a result of the choices of sampling, there are certain limitations to the current research. The area of research is narrowed down to the field of immigration in Norway in the past decade, as the past decade marks major changes in the Norwegian migration and refugee policy. Norway was chosen as the general context as I learned a great deal about the asylum-process in Norway during my internship at NOAS. This research focused on cases where the child falls under the parents' asylum cases (i.e. accompanying children). Consequently, this research does not consider cases where the child is a single part with their own case. The research concerns one type of migrants¹, namely third country nationality families with longstaying children, meaning families who have been living in Norway for a long period of time, both legally and illegally. In both cases, the considerations 'best interests of the child' (cf. CRC Article. 3 (1)) and the 'connection to Norway' against immigration control considerations are central for the plenary judgments (cf. Immigration Act § 38).

Methods

In the following, the three methods that have been used in the research will be clarified.

Observations

Observation is a widely used method in the social sciences. According to Denscombe (2003:192), observation "draws on the direct evidence of the eye to witness events first hand". Observation is a suitable method when one wants to study situations the researcher would not otherwise have access to. Gaining access to the field can be difficult (Flick, 2009:106). NOAS

¹ A migrant can be understood as "any person who lives temporarily or permanently in a country where he or she was not born, and has acquired some significant social ties to this country" (UNESCO n.d.)

worked as a ‘gatekeeper’ (Gubrium and Holstein, 2002:299), making it possible to attend seminars and to observe discussions between different decision-makers, including administrative immigration authorities, lawyers and NGOs, on how Norway are balancing human rights of the child and immigration control.

The observations took place during the time period from August to January. The seminars were hosted by different decision-makers within the field of immigration, including the Norwegian Directorate of Immigration (UDI), the Institute for Social Research (ISF), Save the Children and the UNHCR in collaboration with UNICEF. These seminars were chosen as they focused on the flows and regulations of migration in Norway and on child asylum claims. The observations made it possible to get first-hand information on how the balance between procedural and substance criteria is worked out. The purpose of the observations was to get a better understanding of the context of the plenary judgments and to get an insight into the opinions by different actors in the field of immigration.

The individual skills as a researcher are of importance to the data-gathering. The data was gathered through note-taking. I took notes during each seminar, and typed up my notes at the first opportunity in order to remember the thoughts and meanings that were expressed (Denscombe, 2003:204). Even though it might have been beneficial to record the seminar, using a tape-recorder might be viewed negatively by those present at the seminars, and might have altered the discussants’ behaviour (May, 2001:137-138).

Interviews

The interview-method is extensively used in the social sciences. Qualitative interviewing is useful when its purpose is to understand the interviewees’ meaning-making and experiences (Gubrium and Holstein, 2002; Kvale and Brinkmann 2009). Elite interviews are interviews where the interviewees are chosen due to their expertise, and because they can give privileged information (Denscombe, 2003; Flick, 2006:165). The one-off elite interviews prepared me for the document research analysis, and were primarily used to get a better understanding of the context of the plenary judgments (Denscombe, 2003). The elite interviews also made it possible to discuss relevant questions more in depth, and to gain a different perspective in addition to the observations, where my role as a researcher was based on observing the situation rather than interacting in the discussion (*ibid.*).

Requests for interview participation were sent out to possible interviewee subjects, which explained in brief what the research was about as well as their rights as participants (see attachment 1) (Denscombe, 2003). A consent form was attached to the email (see attachment 2). A range of participants with differing job positions and backgrounds was opted for. Thanks to the ‘key informants’ at NOAS and the seminars, locating interviewees proved to be easy. These people were then contacted and purposively selected based on their expertise knowledge of the research problem (Creswell 2007:125). The purposively chosen participants also had a unique experience as ‘insiders’, and provided me with interpretations and suggestions for further lines of inquiry (Kvale, 2007).

In total, seven requests for interview participation were sent out via email. Requests were sent to UDI, the central agency on the immigration administration in Norway, UNE, the independent quasi-judicial Appeals Board that handles appeals of rejections by the UDI pursuant to the Immigration Act, ISF within the Department ‘Equality, Inclusion, and Migration’, the Ombudsman for Children, a politically independent state institution, whose task is to ensure that the Norwegian authorities uphold the CRC, a Research Fellow at the University in Bergen at the Faculty of Law, International Law and International Human Rights, a PhD student writing on UDI and UNE’s assessment of the child’s best interests in asylum- and immigration cases, and a lawyer at the Ministry of Justice and Public Security at the Department of Immigration. Of all the requests, three answered positively. The three interviewees were from the ISF, the Ombudsman for Children in Norway and from the Ministry of Justice and Public Security respectively. I arranged to meet the interviewees at a convenient time and suggested they could choose a venue where there would be little disturbance (*ibid.*). Two of the interviews were held at a quiet place at the interviewees’ workplaces, and one via telephone, and they all lasted for approximately forty minutes each.

A semi-structured interview format was used in the elite interviews, which contains a list of fairly specific topics to be covered as well as it allows for questions and further inquiries that are not included in the guide to be discussed and which may be of importance (Flick, 2006:149; May, 2001:123; Barbour, 2008). The interview guide was mostly based on the different opinions that were expressed at the seminars. Odendahl and Shaw (2002:310) argue semi-structured interview format is the most suitable for elite interviews. The same interview-guide was used for all interviews, but modified depending on the interviewee’s expertise as

well as on experiences I had using the guide in previous interviews. I took notes while interviewing which were typed immediately after the interviews (Denscombe, 2003).

There is a possibility for a self-selection bias of my elite interviews. Self-selection bias might occur when the participants decide for themselves whether or not they want to take part in a research (Olsen, 2008). The interviewees might have agreed to take part in the research because they agreed with its aims and purposes, which might have caused a limited set of interpretations. Since only some agreed to speak with me, the interviews may not have been able to capture a wide set of interpretations and opinions concerning how the best interests of the child principle was interpreted in the Supreme Court.

Elite interviews may be difficult to execute as the interviewees may provide the interviewer with too much information on the topic, assuming that the interviewer does not have previous knowledge (Flick, 2006:165). The interviewer should thus be knowledgeable about the topic of concern and master the technical language, as well as being familiar with the area of research (Kvale, 2007). The observations and reading on relevant documents, prepared me for the interviews, and thus decreased the power asymmetry in the interview relationship (*ibid.*).

Document Research

Document research is a widely used method in the social sciences, and “refers to the analysis of documents that contain information about the phenomenon we wish to study” (Mogalakwe 2009, in Bailey). Document research was used to analyse how the best interests of the child has been interpreted in the plenary judgments. The research objectives and research question served the basis for what documents were chosen (Flick, 2009). I analysed two Supreme Court judgments, which are categorised as ‘public records’ (*ibid.*). A public record includes documents that are available for public use.

Identifying the source of documents enables the researcher to determine the purpose of the documents, but also the perspective from which they were created (Olson, 2010). The plenary judgments have not been made at my request as a social researcher, but for other purposes. The documents’ specific purpose was to assess the validity of two asylum cases, Verona Delic and family (2012/1042) and Hossein Shabazi and family (2012/688) against the State by UNE. The decisions made by UNE are not available for the public. It is possible to apply for

access to UNE's asylum cases, but a student rarely gets access to the entire decision, and perhaps only abstracts of the decisions. I filed in an application in late December, and still have not received any response. However, the plenary judgments include abstracts of UNE's decisions, and assessed them in great detail, which verifies its usefulness for the research.

Engaging with the documents involves a contextualisation of the plenary judgments to account for different historical and political factors that influence, and have an impact on the documents (Becker and Bryman, 2012). A theoretical- and contextual framework is necessary in order to analyse and interpret the plenary judgments (May 2001). The different assumptions that are laid down in the theoretical- and contextual framework was used to analyse the plenary Supreme Court judgments (May, 2011).

Using document research as a method requires interpretative skills in order to make sense of the meanings that is expressed in the documents. The readings of social events involves that the researcher engages "with the meanings which are embedded in the document" (May, 2001:176-183). The plenary judgments can be viewed as a source of reality where meanings are socially constructed. Everyone interprets reality in a different manner (Fay, 1996) and this is clear from the plenary judgments where the judges interpret the best interests of the child differently. The judges' interpretations of legal human rights norms such as the best interests of the child are socially constructed and the outcomes of the decisions do not represent 'a' truth, but several truths. The interpretation of these truths poses some challenges. As mentioned, a challenge concerning the interpretation of the texts is its language, and how it was written for legal purposes. To account for these and other challenges this research has followed the ethical considerations in the research process, as outlined in the ethical considerations section.

A possible limitation with the document research method can be that my notions and reflections might steer the analysis when reading the documents, which may weaken the reliability of the findings (Jupp, 2006:298). An attempt to avoid this limitation was made, by keeping myself as neutral as possible (one can never be entirely neutral as a researcher) during the analysis and by elucidating competing arguments to account for the different interpretations of the best interests of the child that are expressed in the plenary judgments. By clarifying competing arguments the reader gains a greater insight into the plenary judgments and the different meaning-making processes (May, 2001).

Research Process

During the analysis of data and conveying of findings from the different methods, it is important to follow the ethical guidelines in the research process. From the information gathered at the seminars, I constructed different themes. I re-read the typed up notes to see whether an alternative interpretation was possible. Based on the constructed themes, the interview-guide was made (Flick, 2006). An important issue in the process of analysis is to structure the data so that it makes sense in relation to the research study. The data from my elite interviews was categorised into themes according to the objectives of the research (May, 2001:139). In addition, the apparent themes from the interviews helped to deconstruct the interpretations that were expressed in the plenary judgments, as well as make it easier to choose what was relevant for the research. When analysing the documents, special attention was given to how the best interests of the child was interpreted, with specific reference to how the Supreme Court is balancing procedural and substance criteria. In this part of the research process, the researcher will make certain choices which are crucial for the research results by choosing what to include and exclude, what is of importance and what is irrelevant. In this sense, the interpretation lies with the researcher, and cannot necessarily be replicated (Flick, 2006).

Ethical Considerations

In the collection of data, in the process of analysing the data, and in the conveying of findings, I as a researcher am expected to “respect the rights and dignity of those who are participating; avoid any harm to the participants arising from their involvement; [and] operate with honesty and integrity” (Denscombe, 2003). Interpreted loosely, the steps concern all three methods. In the collection of data, informed consent is a way to account for the ethical considerations when doing social research (*ibid.*). Regarding the observations, if the data collection is unlikely to involve much personal risk to the informants, as with the seminars, the grounds for not seeking informed consent are partly accounted for (*ibid.*). Regarding the elite interviews, informed consent was signed before any interviews took place (Neuman, 2011). Before the interview took place, and at the start of the interview I stated the purpose of my research, informed them of their rights, ensured anonymity and how they could withdraw at any point (Flick, 2006:50). To ensure validity in the document research method, I had to operate with honesty and integrity, and respect the content of the texts (Denscombe, 2003). In line with the ethical guidelines, the seminar notes and the interview notes were typed up immediately after

the collection, excluding the parts where I was in doubt of what had been expressed in order to ensure validity (Kvale, 2007). In the process of analysing the data, the notes and transcripts were kept out of reach for others (Flick, 2006; Berg and Lunde, 2012). Removing the participants' names maintained the participants' privacy and anonymity (Flick, 2009).

In the following, central theoretical concepts are introduced and defined.

THEORY

This thesis makes use of a set of theoretical concepts in the attempt to explore how the best interests of the child has been interpreted in the plenary judgments. This has been done through a clarification of substance and procedural criteria for democratic legitimacy, as these concepts will help elucidate how states navigate between these criteria. The tension between these criteria is further clarified through the concepts ‘open borders’ and ‘closed borders’. These theoretical concepts shed light on the tension between protecting the rights of the state and its members, and of the state’s commitment to human rights obligations. A theoretical framework on the relationship between politics and law is also put forward. A set of approaches have been used to show that there exists a reciprocal relationship between politics and law in an immigration context. It is important to emphasise that the relationship between politics and law is a highly covered topic for different schools of thought, and to be aware that there are different theoretical approaches and opinions on how the relationship between politics and law look (Shapiro and Sweet, 2002).

Substance - and Procedural Criteria for Democratic Legitimacy

States’ power to control access and residence to the state, and in what ways it limits the rights of non-members, are central issues for democratic legitimacy (Spång, 2008).

“The fundamental idea of democratic legitimacy is that the authorisation to exercise state power must arise from the collective decisions of the members of a society who are governed by that power...It arises from the discussions and decisions of members, as made within and expressed through social and political institutions designed to acknowledge their collective authority” (Cohen, 1996).

These social and political institutions reflect the collective decision-making processes of the members within a given time and space. Many liberal democratic states have committed themselves to safeguarding the rights of migrants through human rights norms at the international, regional and national level (substance criteria) on the one hand, and they face extra-legal pressures from constituents to limit migration (procedural criteria) on the other hand. There exists a tension between these two criteria, and in one way they compete for

authoritative power, but one may also argue the criteria are two sides of the same coin (Söderbergh, 2005; Spång, 2008). While substance criteria opts for the protection and meeting of people's rights, procedural criteria concerns the Storting's role in the decision-making, the ability of citizens to take a stand on parties' position in political processes, but also that decision-makers, as representatives for the members of a society, should try to meet the opinions, claims and interests that are publicly expressed (Spång, 2008).

The tension between the rights of the state to limit migration and the rights of migrants, is worked out in decision-making processes.

"Rather than superseding the ambiguity between the two approaches to immigration, what is possible is a continuous negotiation, play[ing] with both sides of the ambiguity and...preventing any of them from prevailing in an exclusive way" (Laclau, 1996:30, in Vitus and Lidén, 2010).

It is thus important to examine both the case for members' right to limit migration and the rights of migrants, as both arguments bring forth valuable claims. Even if there is no consensus on how this balance should look, it is often observed that the democratic form of governance gives the state and its members a right to control immigration, but not at their own discretion (Spång, 2008). In reference to this research, the general understanding is that states manage the control of immigration through their immigration policy, however the states must also consider the rights of the members when these policies are enforced. "Immigration control refers to the rules and procedures governing the selection, admission and deportation of foreign citizens" (Brochmann, 1999:9), and thus concerns the rules concerning the regulation of the exclusion of migrants. Substance- and procedural criteria for democratic legitimacy seem similar to what theorist Seyla Benhabib calls for porous borders (2004; 2007 in Spång, 2008:27). The thought behind porous border is that no democratic society can close their borders to different groups and types of migrants, and similarly, no democracy can lose their right to decide their immigration policy (Benhabib, 1996; 2002). The balancing between 'open borders' and 'closed borders' is relevant for this research, where the rights of the state's members are limited by a number of legitimate expectations and claims (Benhabib, 1996; Spång, 2008). Migrants' rights must be considered and safeguarded in the state's immigration policy, and in this way, the members' limits to decision-making are specified (Spång, 2008).

One type of criterion for democratic legitimacy is substance criteria, meaning the respect, protection and meeting of individuals' (and groups') rights (Spång, 2008). 'Rights' in this context includes rights granted by constitutional status and those expressed in international and regional human rights laws (*ibid.*). The emergence of regional and international human rights conventions can be seen as a globalisation of basic democratic principles, and have implications for states' immigration policy as the immigration policy has significant consequences for individuals that are not members of the state (*ibid.*). Special weight should therefore be given to the migrants' needs and interests in the decision-making on immigration policy (Bader, 2005:247; Spång, 2008).

Another criterion is procedural criteria, and concerns the Storting's role in the decision-making, and transparency of political processes (Spång, 2008). Procedural criteria also involve the ability of citizens to take a stand on parties' position in political processes, but also that decision-makers, as representatives for the members of a society, should try to meet the opinions, claims and interests that are publicly expressed (*ibid.*). There exists "a tension between the two, at times opposing criteria: the rights of the individual to be given asylum on the one hand, and the right of the state to grant (or withhold) asylum on the other" (Söderbergh, 2005). How states create enforceable, morally defensible criteria for admission decisions, concerns the balance between substance criteria and procedural criteria.

The Paradox of Western Democratic States

Some scholars argue there exists a paradox of Western democratic states, where states have committed themselves to international laws, binding themselves to safeguard the rights of immigrants, but are also committed to uphold the state's interests (Carens, 1987;1996, Weiner, 1996; Brochmann, 1999; Brochmann and Hammar, 1999; Lavenex, 1999; Söderbergh, 2005; Spång, 2008; Brekke and Aarset, 2009; Brekke et. al., 2010). Western democratic states are founded on ideals such as openness, equality and solidarity, but also on the protection of the interests of (legal) citizens (Riise and Øygarden, 1994; Brochmann and Hammar, 1999; Neumayer, 2005; Boswell, 2005; Spång, 2008). Equality between people and openness are ideals that place certain obligations on the states' possibility to control immigration (Brochmann, 1999:3; Shapiro, 2002; Spång, 2008, Hydén, 2008). Such obligations can come from an international level, in the form of conventions and treaties, or national, including laws and national courts (Brochmann, 1999:3). The paradoxical issue

concerning the tension between universal human rights and the rights of the state and its members to control immigration, is broadly divided between what is often referred to as the ‘open borders’ and ‘closed borders’. Much of the underlying moral principles behind this debate are contradictions between substance criteria and procedural criteria (Weiner, 1996:171; Bader, 2005:337, Spång, 2008).

Freedom of movement and the principle of equality are strong arguments against the closing of borders, and the arguments often originate from universal human rights principles (Carens, 1996; Weiner, 1996). The arguments for ‘open borders’ include the states’ moral and legal obligations. Defenders of ‘open borders’ suggest free movement should be a basic human right, which would eliminate the issue of membership to a state (Carens, 1996; Weiner, 1996; Bader, 2005). The argumentation gets problematic when other human rights principles stand in opposition (Bader, 2005:339). Most theorists opting for ‘open borders’ do not support the claim that other basic human rights, more particularly ‘security’ and subsistence’, are subordinate to, or should be given the same status as freedom of movement (*ibid.*). These claims are more important, and should be given more weight (*ibid.*). Critics find that, in the choice between ensuring values, such as freedom and equality in a democratic state, and to insist on open borders that could undermine these possibilities, most of the proponents for ‘open borders’ would select the former (Spång, 2008).

Common arguments for ‘closed borders’ include the ideas that priority should be given to members of the state, that states have an important role in maintaining welfare and social rights, and that closed borders protect the state from great threats (Bader, 2005:348; Spång, 2008). The claims that ‘priority should be given to members of the states’ and to ‘protect the state and its members’ involve how open borders would result in a mass influx of migrants which would pose a great threat to public order and social stability (Bader, 2005:348). These claims are however, constrained by universal human rights obligations because states that have ratified human rights treaties must adhere to the human rights obligations, which restrict the state’s power to control immigration. Human rights treaties however, as will be shown, are often vague and do not provide states with specific instructions or explain how states should interpret the content of the treaties (Bader, 2005:346; Hydén, 2008). Brochmann (1999:1) argues Western democratic countries use policies as a way to better control immigration. These policies are anticipated to fulfill social, economic and security needs for immigration regulation, without going against international conventions and agreements

concerned with human rights (*ibid.*). In view of this research, using policies as a way to better control immigration suggests states largely manage the balancing between the rights of the migrants and the rights of the state to control immigration, with little influence from international human rights law as a consequence of the lack of guidelines and its vague content.

In the following, the relationship between politics and law on immigration will be clarified.

The Relationship between Politics and Law on Immigration

“The process - from politics to law and the implementation of law - is complex” (Hydén, 2008).

Different political parties’ stand on immigration influences the legislative and administrative practice, and will have an impact on the general climate in society (Brochmann, 1999:16-17). The political parties hold a dual position, representing the state’s members, while concurrently exercising a great influence on the same members’ attitudes towards immigration (*ibid.*). That the authority to exercise state power arises from the collective decisions by the members of the society who are governed by that power, is the fundamental idea of democratic legitimacy (Cohen, 1996). NGOs and social movements may also influence the policy-making on immigration, depending on the relative power of these agencies (Brochmann, 1999:17; Spång, 2008). The NGOs’ and other actors’ influence will not be discussed in this research, but it is important to be aware of the significance of these actors in the discussion concerning the tension between universal human rights and the rights of the state to limit migration.

Representing the members of the state, the elected bodies such as the Storting [parliament] and the government take a stand on the political priorities required in a society, including immigration. Law provides an authoritative way to express these priorities, and plays an important role by formalising and communicating the tasks the political system has decided should be executed by the administrative system (Hydén, 1998; 2008). In the Western model, law conveys political messages to the administrative agencies, whose task is to administer the politics (Hydén, 2008). “In the Western model, law becomes the watershed between law and politics” (*ibid*:161). This means that when politics has been established into legal matters

through law and other sources of law, the politicians have to hand over the handling of the issues to public authorities (*ibid.*). In reference to this research, the interpretation of the best interests of the child by the Supreme Court may be construed as a reflection of the political priorities that are expressed through law. The plenary judgments interpret whether the political interests concerning immigration have been executed by the administrative authorities, in this case whether UNE's decisions are in concordance with the political priorities and international human rights obligations, including the best interests of the child.

The implementation, meaning the carrying out of public policy and law, can be expressed in “the body of laws and in the regulations, decisions and actions of government” (Hydén, 2008:148). Problems may occur in the implementation and the legal integration of conventions, as legal cultures are not the same all over the world. Legislation never occurs in a social vacuum, and legal norms might compete in one way or another, thus limiting the effects of the law (Hydén, 2008). A general understanding is that the more detailed laws are, the less discretion policy-makers use in their implementation (Korn, 1995 in Hydén, 2008). The presupposition that states that have ratified a convention or enacted a law agrees with the ‘will-component’ of that specific law could be subject to compromise (Hydén, 2008). It is possible that laws lack complete support (*ibid.*). A lack of complete support is often true for universal human rights, such as the CRC, which is known for its vague content and lack of enforcement mechanisms (*ibid.*). It is feasible that ratification is a way of showing awareness to the plight of children which does not necessarily entail any commitments to the implementation of law (*ibid.*). Tied to this research, the indeterminacy of human rights conventions and lack of enforcement mechanisms, may suggest international laws and bodies have limited power to affect states’ control of immigration. This perspective seems to suggest that states lean more on national law, and giving less priority to international law. Furthermore, the wide space for interpretation of international human rights laws suggests states have wide latitude when it comes to interpreting the CRC and the best interests of the child. Hence, the balancing between procedural and substance criteria for democratic legitimacy seems to be generally managed by states.

The legal system has its own institutions, courts, and public authorities to make it possible to separate law from politics (Hydén, 2008:159). A core function is to set up the division of power in society, between political decision-making, administrative- and judicial functions (Hydén, 2008). The autonomy and independence of law and of the court system are important

indicators of a vital legal system (*ibid.*). There are, however, different opinions on how the relationship between politics and law (as decision-makers) look (Shapiro and Sweet, 2002). Andenæs (2006) points out that the execution of power [maktutredningen] puts too much emphasis on the courts- and the legislative importance. It is conceivable that the courts have been addressing more complex cases than before, but it is not necessarily the case that courts have gained greater importance or power (*ibid.*). “Most scholars would agree, [I think] that a jurisprudence based entirely on general examinations of the nature of law, divorced from analysis of how the law is made and applied and what it actually does, runs the danger of excessive formalism and eventually complete divorce from real law in the real world” (Shapiro, 2002). In view of this research, this suggests that the Court should not be viewed as separate and independent from other institutions, including social and political systems. “Courts were—and, often enough, still are—defined as independent and neutral, with a little bit of political ‘if’ and ‘but’ mixed in” (*ibid.*). This is in some ways similar to Luhmann’s view of law as a social system. Luhmann (2004) views society as a whole, however divided into different systems. The state is such a system that needs clear boundaries to exist (*ibid.*). This boundary could suggest that a clear division must be set, both societal and legal, between members and non-members of the state (*ibid.*). Further, Luhmann (2004) argues social systems consist of, and are based on communication-processes. Politics and law could be seen on as social systems that must deal with each other through a type of communication, and its functional differentiation characterises the social systems (*ibid.*). Because social systems are functionally differentiated and simultaneously characterised by a mutually dependent communication, it will not be possible for a system to obtain power alone (*ibid.*). Luhmann’s approach on the understanding of the relationship between law and politics may suggest that politics and law have a reciprocal impact on each other. Hence, there exists a relationship between law and politics. Law is established as a social system which is influenced by, and dealing with other systems through communication. In reference to this research, both the politics and law give clarity on how to understand and meet the CRC and its human rights obligations.

The general understanding is that political and extra-legal factors, and the decision-makers influence the interpretation of legal texts, including the CRC (Hydén, 1998) This means that several factors are involved in the interpretation of legal decisions beyond the purely legal regulation (*ibid.*). There are several ways to interpret the actual body of legislation (*ibid.*). In reference to this research, the Supreme Court’s task was to establish whether a balancing

between considerations was established by UNE. An important factor is that decision-makers are different; that there are significant variations between judges and courts that judge similar cases is quite convincingly established (*ibid.*). The balancing of considerations will yield different outcomes, as there are multiple realities and different ways of interpreting the law. In view of this research, the interpretations on the best interests of the child establish how decision-makers are different. The interpretations are a reflection of communicative turns, and are also influenced by political and extra-legal factors. It is important here to separate between ‘unjust policies and injustices in the implementation of policies’. While juries and judges may yield unjust verdicts, it does not necessarily follow that the laws the verdict was based on was unjust (Dahl, 1989; Weiner, 1996:193-194; Hydén, 1998). As such, asylum seekers might get an unjust decision by the administrative authorities or the Courts, even though the laws that the decision was based on, is just. In reference to this research, there are many ways of interpreting legal texts, such as the CRC and the best interests of the child.

CONTEXTUAL FRAMEWORK

In the following, the contextual framework is introduced and explained. The contextual framework forms a basis for understanding the issues that are addressed in the analysis. The changes in the immigration policy-making in Norway is explained, as it reveals ways in which Norway has tightened the immigration policy and increased the effort to avoid the burden of illegal migrants, and because it clarifies the relationship between politics and law on interpreting the best interests of the child. This is followed by a discussion on the CRC and on the rights of the child, explaining how the best interests of the child is safeguarded in the Norwegian legal- and political system.

The Immigration Policy Framework in Norway

Norway is considered a country that demonstrates its commitment to the CRC through increased extensive legislation (Høstmælingen et. al., 2008, in Vitus and Lidén, 2010). The CRC also plays an increasingly central role in the Norwegian political rhetoric on immigration, asylum policy and legislation (Vitus and Lidén, 2010). The political trend in Europe the past decade has been to focus on the “tightening of controls rather than advancing individual’s rights” (Smith, 2005). The tightening of immigration policy has undergone several waves in Europe, and the same is true for Norway (Brekke, 2004).

Changes in the immigration policy-making reveal ways in which Norway has tightened the immigration policy and increased the effort to avoid the burden of illegal migrants. One policy initiative concerning longstaying illegal migrants involved the so-called ‘abeyance children project’. In anticipation of the provisions to the Immigration Regulations, UDI and UNE were instructed to stop the processing of cases involving children who had been in the country for three years or more, and who were still in Norway. From 1st of June 2007, the Immigration Regulations changed, so that children's connection to Norway was given particular weight in asylum cases. The amendment was forwarded in the current Regulations § 8-5 (White Paper no.27 (2011-2012) section 6.4.4). From 2006 to 2009, the number of asylum seekers in Norway increased from 5300 to 17.200. There was at the same time an increase of asylum seekers to Europe, but the percentage increase in Norway was about nine times larger than the increase in Europe collectively (*ibid.*). There may be several reasons for

the much stronger increase in Norway than in the other European countries, but the amendment of practice for families with children in 2007-2008 have possibly been significant (*ibid.*). In connection with the 'abeyance children project' UNE stated that:

"...illegal residence seen in isolation speaks against a permit to be granted, but this cannot be given decisive weight in the total residence time, which will form the basis for the assessment of the child's connection to the country...Children cannot be blamed for the parents' choice not to abide by the final decision that involves an obligation to leave the country" (UNE, 2009 Section 7.1.1).

In reference to the cases in this research, this claim can be interpreted as how children cannot be blamed for the parents' choice of exceeding the departure deadline. Illegal stay should then not be given decisive weight when set against the children's connection to Norway. As will be shown in the analysis, illegal stay was in these cases one of the decisive factors against granting the children and their family, residence permit.

Another policy initiative is the International Organisation for Migration's (IOM) Assisted Voluntary Return and Reintegration (AVRR) program for asylum seekers and illegal migrants, which provides beneficiaries for families who contribute to their return. The AVRR program emerged as a response to the growing tendency of illegal migrants. The aim of the AVRR program is to achieve "orderly and humane return and reintegration of migrants who are unable or unwilling to remain in host countries and wish to return voluntarily to their countries of origin" (IOM, n.d.). In the period from 2005-2011, about 1330 children have returned voluntarily through the AVRR program.

For the Norwegian Government, the most important measure to prevent children from being put in a situation of prolonged illegal stay, is an effective return policy (White Paper no.27 (2011-2012) section 1). Families with children must adhere to the obligation to return after a final rejection, and it is the parents that have the main responsibility for their family's situation. The choices the parents make will consequently affect the children, but the Norwegian authorities also have a responsibility to avoid placing families in an unnecessary and difficult situation (White Paper no.27 (2011-2012) section 6.4.5). The government has strengthened the work on effective return considerably in recent years, and now wants to strengthen it further in order to prevent children from being put in a situation of prolonged

illegal stay (White Paper no.27 (2011-2012) section 1). Minister of Justice and Public Security, Grete Faremo, states that “people with a final rejection on their asylum application for residence permit, should return” (*ibid.*). In reference to this research, Norway’s changes in the immigration policy the past decade can be understood as focusing on the tightening of controls, and moving towards more strict immigration, rather than advancing the rights of the migrant children.

How Norway takes into account humanitarian considerations on child migrants’ situation, while maintaining a consistent and coherent asylum and immigration- politics, is a complex policy issue (White Paper no.27 (2011-2012) section 1.1). The government’s migration and refugee policy, defined by the political authorities on the basis of national interests and international and regional obligations, aims for a ‘socially expedient and controlled immigration’, a ‘humane, solidary and judicially safe asylum and refugee policy’ and a ‘comprehensive, effective and user-oriented immigration administration’ (White Paper no.9 (2009-2010) section 1.1). Hagelund (2003) argues Norway’s relatively strict stand on immigration, is nonetheless embedded in the language of humanitarianism, regulation, equality and decency (in Vitus and Lidén, 2010). In reference to this research, Norway’s changes in the policy-making on immigration shows how politics are influencing the interpretation of the best interests of the child. The paradox of Western democratic states apply here, where states need to enforce an immigration control policy that coincides with normative obligations, while at the same time take into account the interests of the state. The following section will further explain how the best interests of the child is safeguarded in the Norwegian legal- and political system.

The Convention on the Rights of the Child (CRC)

On the topic of human rights, and more specifically the rights of the child in an immigration law context, some themes recur in the current research. These themes are the indeterminacy of the CRC and the overarching principle Article 3 (1), the role of international human rights from a national (legal) context, the incorporation of human rights conventions, and the practice of the international human rights conventions and regulations. These themes are often discussed interchangeably, which consequently makes it difficult (and not necessarily useful) to separate between these recurring themes when reviewing the research and the work of investigation that has been made on the issue.

In a number of ways, the CRC marks the culmination of over half a century of international endeavors to set universal standards within the field of human rights (Alston, 1994). The CRC is the most widely and rapidly ratified human rights treaty in history and there are only two countries, Somalia and the United States that have not ratified the CRC (UNICEF, 2005). Norway ratified the CRC in 1991, and it was later incorporated in Norwegian law through the Human Rights Law in 2003. A possible reason why the CRC has been ratified by so many countries can be seen in light of the indeterminacy of its content (Alston, 1994; Brochmann and Hammar, 1999; Lundberg, 2009; Brekke et. al., 2010; Sahitovich, 2012). There is an apparent debate surrounding the interpretation of the CRC and the best interests principle, and despite its generated support, the full complexity of the CRC is often not well understood (Alston, 1994, Schiratzki, 2000; Noll, 2010). Neither is the overarching Article 3 (1), as established in the CRC. The CRC Article 3 (1) states that:

“in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

That the best interests of the child shall be ‘a’ primary consideration, and not ‘the’ primary consideration, consequently means that other concerns, including immigration control considerations, can weigh more than the best interests of the child (Parker, 1994:28; NOU 2004:20, p.92). The general understanding is that the balancing between the best interests of the child considerations and immigration control considerations is value-laden; there is seldom agreement on what should weigh more (Alston, 1994; Smith, 2005). When the balancing between these considerations is value-laden, it means that decision-makers will interpret what is the best interests of the child differently. In reference to the research, the interpretation of the best interests of the child is an outcome of different decision-makers’ understanding of legal texts and of which considerations they feel should be given the most weight.

There is a difference between interpreting national laws and international laws. When it comes to national laws, political, administrative and legal decision-makers can get much interpretative help from the preparatory works to the Immigration Act. International conventions, such as the CRC, does not have specific guidelines on how to interpret the

Convention and its Articles. In view of this research, it means that states have wide latitude when it comes to interpreting the content and thus what is in the best interests of the child. The limited directions on how to interpret international conventions suggest that much of the interpretation is left to states and national laws rather than decided by international laws and obligations. The CRC's- and the overarching principle's indeterminacy may cause difficulties for administrative, legal, and political decision-makers when balancing between universal human rights and the rights of the state to limit migration. The wide space for interpretation is commented on by Alston (1994), stating that:

“one of the paradoxes of international human rights law is that, on the one hand, the norms must be sufficiently clear, comprehensive and inflexible to provide the international community with some basis on which it might seek to constrain a government which undermines or circumvents minimum standards of decent behaviour”.

Norms must be clear in order to provide states with directions on how to interpret and practice the international human rights norms. Any universal treaty that aims to address a wide range of issues “must also be characterised by a significant degree of flexibility and adaptability” (Alston, 1994). The indeterminacy of the CRC can be interpreted as a way to include a number of issues to keep a degree of flexibility, and a way for states to maintain a power to control immigration. This makes the CRC adaptable to various states, and thus limits the problems that may occur in the legal integration of the Convention (Hydén, 2008).

Despite its somewhat limited jurisprudential origins, the CRC and the overarching Article 3 (1) has been established in one form or another in many national legal systems (Alston, 1994; Floor, 2005; Smith, 2005). In Norway, the ECHR and the CRC are incorporated with precedence over other laws (cf. Human Rights Law § 2 (no. 1-4); cf, Human Rights Law § 3; cf. Immigration Act § 3). Søvig (2009) argues that, seen in isolation, the convention provisions will almost never conflict with Norwegian legal rules. That convention provisions will almost never conflict with Norwegian rules is partly a result of the vague wording in the treaties (Søvig, 2009). In view of this research, the vague wording leaves much up to each state's willingness to make sure that the meeting of the rights of the child is ensured in practice. The general understanding is that the implementation of the CRC has improved the rights of the child, but there is no consensus concerning to what degree the best interests of

the child is safeguarded (Ellingsæter, 2008; Sandberg, 2008; Vitus and Lidén, 2010; Haugli and Shinkareva, 2012). Norway tends to be in the forefront when it comes to the child as an actor with participation rights, and is considered a country that demonstrates its commitment to the CRC through increased extensive legislation (Bartley, 1998; Kjørholt and Lidén, 2004, in Vitus and Lidén, 2010).

The securing of children's rights is also reflected in the level of political engagement in supporting bodies and systems, such as the CRC and the Ombudsman for Children in Norway (Lidén, 2004, in Vitus and Lidén, 2010). In Norwegian immigration politics, the CRC has been a significant part of the negotiations between a restrictive and a liberal asylum policy (Vitus and Lidén, 2010). The political engagement on the rights of the child is, however, not always perceived to be administered in practice by the administrative immigration authorities the way the legislators intended to.

“A review of 300 cases selected by the immigration authorities...for the period of 1998-2003...revealed that caseworkers did not always refer to the “best interests of the child” standard or made only superficial reference to the Convention on the Rights to the Child without giving a thorough explanation of how determination was reached when completing the analysis. The existence of this standard answer increases the risk of violation of the child’s right to seek asylum, due process, and right to full consideration of his or her “best interests” as it may be formalistically applied” (Bailliet, 2003:69-72).

Even though this empirical research study was conducted from 1998-2003, this study provides basis for inferring that although Norway has a legal basis for making sure the best interests of the child is secured, there is not always consistency between the intentions and practice of legal rules and provisions. In view of this research, an interpretation will be influenced by the decision-makers themselves and their interpretations on how to balance the rights of the child against other competing considerations.

The Norwegian Immigration Act of 2008, which came into force in 2010, is an important tool for the legal protection (and practice) of the rights of the child. Immigration Act § 38 states that:

“a residence permit may be granted even if the other conditions laid down in the Act are not satisfied, provided there are strong humanitarian considerations or the foreign national has a particular connection with the realm. To determine whether there are strong humanitarian considerations, an overall assessment shall be made of the case...[]. In cases concerning children, the best interests of the child shall be a fundamental consideration. Children may be granted a residence permit pursuant to the first paragraph even if the situation is not so serious that a residence permit would have been granted to an adult...[]”.

The Norwegian Government found it necessary to ensure a more uniform practice concerning longstaying children’s connection with Norway through a clarification of the Immigration Regulations § 8-5, stating that “in the assessment of strong humanitarian considerations under § 38 of the Act, particular importance shall be attached to children’s connection to the realm” (Immigration Act § 38, 2008; Immigration Regulations § 8-5, 2009). The incorporation of particular importance attached to children’s connection with Norway, decreases the administrative authorities’ room for discretion in cases concerning children than as it would otherwise be according to Immigration Act § 38. But, even though particular importance shall be attached to children’s connection to Norway “immigration control considerations can override other considerations, even in cases concerning children” (White Paper no.27 (2011-2012) section. 6.4.6). Children with a residence which in itself suggests that residence permit should be granted will almost always have longer periods without legal residence. The government finds that the Immigration Regulations § 8-5 must be understood in such a way that illegal stay and exceeded departure deadline in itself should be given less weight than active opposition of return when the child’s connection to Norway indicates that residence permit should be granted. Exceeded departure deadline and illegal residence in this context is considered as less weighty immigration control considerations (*ibid.*). In reference to this research, the interpretation of the best interests of the child will yield different outcomes depending on how decision-makers balance between the best interests principle, and other competing considerations. In the following, the rights of the child in a Norwegian political context are clarified.

The Rights of the Child in a Norwegian Political Context

The White Paper ‘Displaced Children’ provides an insight into the political stand on the rights of longstaying asylum-seeking children in Norway. Explaining the context of the White Paper is important for this research as it will form a basis for the understanding of the relationship between politics and law on interpreting the best interests of the child.

In June 2012, the government promoted the White Paper ‘Displaced Children’ to the Storting, because they saw the need get an overview of key issues relating to displaced children, and to gain a comprehensive discussion on the topic (White Paper no.27 (2011-2012) section 1.1).

Part of the need to clarify the provisions was because the government argued there was an inconsistency between the legislators’ intentions and practice when it comes to interpreting the best interests of the child. A clarification specifically involved the understanding of children’s connection with Norway in cases where illegal stay is central. UNE was criticised for overly restrictive practices, where greater emphasis was placed on immigration control considerations than what was intended of the Immigration Regulations § 8-5 (White Paper no.27 (2011-2012), section 6.4.6).

During the preparatory work on the White Paper, the Ministry of Justice and Public Security invited important administrative bodies, ministries and NGOs to come up with suggestions and comments to the immigration policy that Norway leads. The Ministry opted for an open political discussion, where various decision-makers could influence the political decision-making on the immigration policy (White Paper no.27, (2011-2012) section 1.2). The open discussion reflects a transparency of political processes and a way for representative decision-makers to equally participate in, and influence the decision-making on Norway’s immigration policy (Spång, 2008). According to the Minister of Justice and Public Security, Grete Faremo, the purpose of the White Paper was “to ensure equal treatment and a practice that safeguards considerations to the best interests of the child in line with the Storting’s intents” (White Paper no.27 (2011-2012)).

The White Paper received much criticism, and as a response, a number of NGOs came together and wrote an ‘Alternative NGO Report’. The ‘Alternative NGO Report’ included proposed amendments aimed to ensure that the White Paper was based on international and national principles and obligations, including the Immigration Act, the CRC, the Universal Declaration of Human Rights and other treaties. Some of the key suggestions in the hearing statement included that the Storting asks the government for a clarification on how the

principle the child's best interests is understood in relation to legal sources, both national and international, a legal review of the practice of provisions of the Immigration Act to the CRC, and a clarification of the situation for longstaying children, with and without families (NOAS, 2012). The White Paper was discussed in plenary in the Storting. None of the requests and proposed amendments were upheld, and so no changes were made to the original White Paper. In reference to this research, the dissatisfaction with the White Paper that was expressed, and the 'Alternative NGO Report', suggests there are actors in the field of immigration who disagree with the immigration policy that Norway leads. Furthermore, the criticism of the White Paper reveals a disagreement between decision-makers on the interpretation of the best interests of the child by the politicians. The expressed discontentedness supports the claim that there is no consensus on how the balance between substance- and procedural criteria for democratic legitimacy should look. In the following, a short introduction to the plenary Supreme Court judgments is presented.

The Plenary Supreme Court Judgments

The 21st of December 2012, the Supreme Court assessed the validity of two asylum cases, Verona Delic and family and Hossein Shabazi and family against the State by UNE. The plenary Supreme Court judgments broadly concerned three main issues: should the Court assess the cases using a 'present time assessment'?, were the decisions made by UNE in accordance or in conflict with current law, especially the CRC?, and was there a judicial basis to intervene in the considerations UNE had undertaken between the various relevant considerations? (Langbach, 2013).

The plenary Supreme Court judgment on the case Hossein Shabazi and family against the State by UNE concerned the validity of a negative decision on an application for asylum based on humanitarian grounds for an Iranian family that had stayed in Norway for a long time without legal residence permit (case 2012/688). The family sued, alleging that the decision of not granting the family residence permit based on humanitarian grounds was invalid (case 2012/688). The family lost against the District Court and the Court of Appeal. For the Supreme Court, the main issues concerned the interpretation of Immigration Act § 38 regarding residence permit based upon strong humanitarian grounds or connection with Norway and of the CRC Article 3 (1) of acting in the best interests of the child. A majority of

fourteen judges found the decision to be valid. Five judges found the decision to be invalid and in conflict with the CRC Article 3 (1).

The plenary Supreme Court judgment on the case Verona Delic and family against the State by UNE concerned the validity of a denial to reverse a negative decision based on humanitarian grounds for a Bosnian family (2012/1042). The case was assessed by the Supreme Court together with the case 2012/688. UNE did not find basis for granting the family residence based on humanitarian grounds. The case did not win against the District Court or the Court of Appeal. A majority of the Supreme Court, fourteen judges, found the decision to be valid, while five voted the decision to be invalid. In addition to the questions that were raised in both cases, it was in this case also made a claim for declaratory judgment for the violation of ECHR Article 8 and Article 3 (1) of the CRC. The State by UNE was acquitted of the contention.

The majority of the Supreme Court judges concluded that it is the situation at the time of the decision the Court must base their evaluation on, unless otherwise provided by law (Langbach, 2013). The judgments are therefore not assessed from a ‘present time assessment’, which means that the Supreme Court assesses the validity of UNE’s decisions from the time the decision were made. Using the time when the administrative authority made their decisions, the Courts can verify whether administrative decisions are in accordance with current law, including statutes, regulations and conventions, if the case processing have errors of importance to the decisions’ content and if it otherwise have been committed errors (Einarsen, 2008). The Courts cannot overrule the specific considerations in the decisions, put simply, whether the decisions are reasonable or fair (*ibid.*).

Concerning the question whether UNE’s decisions violate the Immigration Act and the CRC, particularly Article 3 (1), the Court’s task is

“to control the administration's overall understanding of the concept of the best interests of the child on the relevant subject matter, and to ensure that considerations are properly considered and weighed against potential opposing considerations” (2012/688 section 146).

The Court's task is to assess whether it is clear from UNE's decisions that the best interests of the child is taken into account as a primary consideration, and the Court have authority to overrule whether the best interests of the child principle is properly weighed against other considerations. The actual weighing of interests however, cannot be overruled by the Supreme Court, this is attributed to the immigration authority UNE (Langbach, 2013) whose task is to administer the politics (Hydén, 2008).

Regarding the issue raised in the Supreme Court concerning who should make these assessments, the administrative authorities or the courts, is an issue that concerns what role the courts should play (Langbach, 2013). The minority of judges provides a comprehensive justification for how this could have been solved, which is rather different than the evaluations made by the majority (Langbach, 2013). This will be further explored in the analysis.

The two asylum cases were discussed in plenary in the Supreme Court by nineteen judges. In relation to the objectives and the research question of this research, the same arguments are asserted in case 2012/1042 as in case 2012/688 (stated in 2012/1042) hence, the analysis refers to case 2012/688. The 2012/688 judgment is structured so that three judges have elaborated in detail their interpretations on the case, while the other sixteen judges have stated their interpretation by agreeing with any of these three judges, stating 'likewise'. These judges are referred to as 'the first voting judge', 'the second voting judge' and 'the third voting judge'.

ANALYSIS

In the following, the research question how the best interests of the child has been interpreted in the plenary judgments, will be clarified. The analysis is broken into two main discussions in order to explain the two main objectives of the research. The first explores the nature of the relationship between international law and national (Norwegian) law, which is further broken into a discussion on a ‘present time assessment’ and the ‘wide space for interpretation’, with the aim of answering how Norway are balancing procedural and substance values. The second discussion concerns the relationship between politics and law. The following subsections ‘decision-makers and their (power) position, ‘the best interests of the child versus immigration control considerations’, ‘connection to Norway versus illegal stay’, and ‘the best interests of the child versus general prevention considerations’ are examined, with the objective of explaining the relationship between politics and law.

The Nature of the Relationship between National Law and International Law

A ‘present time assessment’

The evaluation of a ‘present time assessment’ concerns whether the Supreme Court has the right and the obligation to take into account facts that have occurred after UNE has reached a decision. The Court’s legal practice is a central starting point for the assessment, and previous judgments are therefore discussed by the judges. Through a discussion of the Court’s legal practice, the majority of judges concluded that the Court should not assess the validity of UNE’s decisions using a ‘present time assessment’. Had the majority of judges decided to evaluate the cases using a ‘present time assessment’, it might have changed the judgments that were reached, as a ‘present time assessment’ would further increase the children’s connection to Norway. With a ‘present time assessment’, the Court could have assessed the validity of the decisions on the basis of the connection the children *have* to Norway rather than the connection they *had* at the time the decisions were made. The third voting judge argues:

“a ‘present time assessment’ would mean that the Supreme Court’s case-practice will certainly be more extensive, as the parties must also prepare the case for a possible decision on the merits (cf. Rt. 2001 p.995 and p.1003). The state has made it clear that

this consideration weighs against giving courts the right to build on subsequent facts [rettsfakta]. These are facts that are vital in order to achieve the most fair and just decision” (2012/688 section 239).

The interoperation of the relationship between national law and international law on the best interests of the child is explained by the second and the third voting judge. To achieve the most just decisions, the third voting judge argues that the assessment of UNE's decisions must be based on existing facts at the court proceedings. According to the third voting judge, “the general rule for judicial assessments of administrative decisions must be based on the facts that exist at the time the matter is taken up for adjudication” (2012/688 section 216), and not only in immigration cases. The second voting judge’s argument for ‘a present time assessment’ is based on the execution of Norway’s human rights obligations and with the international enforcement of international laws (2012/688). The second voting judge states that:

“a ‘present time assessment’ by the Courts is the solving that best safeguards the consideration to make sure the judgment in an immigration law context is in accordance with Norway’s human rights obligations” (2012/688 section 177).

These human rights obligations Norway has committed itself to, are best safeguarded if the courts can judge cases from a ‘present time assessment’. The second voting judge argues that “when the ECtHR try out [prøver ut] human rights considerations from a ‘present time assessment’, it may imply that Norwegian Courts shall do the same” (2012/688 section 83-84). The second voting judge states that:

“from the Convention’s [EHRC] system and its presumptions about the interoperation between national courts and the ECtHR, it is in my view unsatisfactory if the national court’s judicial review has a more narrow horizon or is less thorough than any subsequent judicial review by the ECtHR” (2012/688 section 178).

For the third voting judge, the national courts’ legal practice should be in accordance with international courts’ legal practice, and judge cases from a ‘present time assessment’. Using a ‘present time assessment’ would have taken into account the children’s increased connection to Norway since UNE’s decisions were made, and would suggest a stronger case for granting residence permit. The second- and third voting judge’s interpretations of whether the Courts

have the right and the obligation to judge cases from a ‘present time assessment’ suggests a ‘present time assessment’ best safeguards international human rights norms. That the Court did not judge the asylum cases concerning the interpretation of the best interests of the child from a ‘present time assessment’, suggests the balancing between procedural and substance criteria is largely managed by national laws.

The majority of judges reached a different conclusion. The first voting judge finds that “neither the CRC nor the ECHR demand that the Courts must undertake a ‘present time assessment’ in the evaluation of administrative decisions” (2012/688 section 83). The first voting judge argues “the Supreme Court’s case law is clear on the fact that the Supreme Court will assess cases from the time the decisions were made, unless otherwise follows as an interpretation of the law” (2012/688 section 79). Together, the ECtHR judgments that were presented in the plenary judgments are argued by the first voting judge to show that (cf. Kudla v. Poland section 157, Kuric and Others v. Slovenia Section 369, Maslov v. Austria Section 93)

“although new circumstances invoked must be tested, it is not required that it is the Courts that must do it. It is up to each state to decide how to organise the assessment in a safe and proper manner” (2012/688 section 87).

The general rule is that the Court does not pass a judgment, but content themselves to find the decision either valid or invalid (2012/688 section 96). The third voting judge argues that:

“when a case is judged to be invalid it must be reevaluated by UNE regardless, so a potential judgment of invalidity based on alleged new circumstances only implies that UNE gets a duty to consider a request for conversion when new legal facts are invoked” (2012/688 section 96).

Moreover, the first voting judge argues that:

“UNE’s treatment of the cases meets the requirements that are demanded of an effective assessment of rights before a national authority, as the requirements are set out in the ECtHR’s practice. UNE is to be regarded as a Court according to the ECtHR’s system, and UNE’s decisions are based on a ‘present time assessment’. The

administrative immigration authorities also have a duty to treat new conditions that get invoked. Even beyond asylum cases, it is clear that UNE has a duty to treat a request for conversion² if there is a real risk of human rights violations. This ensues from the state's duty to prevent violation of human rights obligations. It is difficult to see what further legal protection can be achieved if the Court first determines that new circumstances are relevant, and thereby finds the decision invalid" (2012/688 section 88).

For the first voting judge, and in line with the majority of judges, a change of the Court's role will not improve the protection and meeting of the child's rights. From international conventions and bodies, including the ECtHR, Norway upholds the human rights obligations. It is up to each state to decide which 'authority' that will ensure that a case gets the effective remedy it is entitled to (2012/688 section 84), which suggests that states have a wide latitude when it comes to interpreting the understanding and practice of international laws, including the CRC. UNE is the authority that ensures that a case gets the effective remedy it is entitled to, and UNE's treatment of cases "meet the requirements that are demanded of an effective assessment of rights before a national authority" (2012/688 section 88). From what is expressed in the plenary judgments, there is disagreement between the judges on the nature of the relationship between national law and international law on the best interests of the child in an immigration context. On the basis of what the minority of the judges express, one could infer that states seem to lean on national laws rather than international laws. How the judges have interpreted the issue 'present time assessment' was of importance, since a 'present time assessment' would further increase the children's connection to Norway. A stronger connection to Norway adds weight to considerations relating to the best interests of the child when balanced against other competing considerations. The judges' different interpretations on the matter support the claim that there are many ways of interpreting legal texts.

In the following, the effect of international human rights treaties' indeterminacy will be clarified.

² A request for conversion is a request for a change in the asylum decision, written by lawyers, NGOs or the asylum seekers themselves (NOAS, 2012).

The wide space for interpretation

The plenary judgments reflect a globalisation of basic democratic principles. The globalisation of basic democratic principles is evident by how the plenary judgments refer to human rights conventions and bodies, such as the CRC, the ECHR and the ECtHR. The judges' reference to international law supports the claim that international human rights treaties are established in one way or another in legal systems, such as in Norway's Immigration Act and the Immigration Regulations. Although the plenary judgments refer to international human rights law, the balance between the best interests of the child considerations and immigration control considerations seems to be managed to a larger degree by states as a consequence of the indeterminacy of international human rights laws. This is expressed in the plenary judgments. The first voting judge expresses that "there is a wide space for interpretation of the CRC and Article 3 (1)" (2012/688 section 127) and that "the best interests of the child is ambiguous" (2012/688 section 111). The indeterminacy of the CRC and the best interests principle could be explained by how international human rights treaties do not provide any clear guidelines on how states should interpret the conventions. Vague guidelines means that states have wide latitude when it comes to interpreting what is in the best interests of the child. The states' wide space for interpretation supports the claim that international laws' level of influence is limited by its indeterminacy. The wide space for interpretation further supports the argument that the balancing of considerations is to a great extent managed by states. The international treaties' vague wording limits its power to take part in deciding how the best interests of the child in the field of immigration should be interpreted.

This wide space for interpretation is also expressed in the plenary judgments by the way the judges interpret the best interests of the child differently. The judges' interpretation of the rights of the child is divided, and the plenary judgments do not provide *one* answer concerning what is in the best interests of the child. The different interpretations supports the view of the balancing of considerations between the best interests of the child and immigration control considerations as value-laden, meaning that the balancing is rarely agreed upon. That there are many ways to interpret legal texts is expressed in the plenary judgments by the dissent. The dissent in the plenary judgments demonstrates that the judges disagree on what is the best interests of the child. For the first voting judge, and the majority of judges, UNE's balancing between the rights of the child and immigration control considerations is done in a considerable manner (2012/688 section 165). In these asylum cases, procedural

criteria are decisive, and immigration control considerations outweigh the rights of the child. The first voting judge expresses that “immigration control can be decisive in the balancing of considerations, even when weighed against human rights considerations such as the best interests of the child” (2012/688 section 134). That immigration control considerations can be decisive seems to suggest that if UNE’s weighing of considerations is validated, then both a granting and a rejection of a residence permit, as established in law, is justifiable (Søvig, 2009). That both a granting and a rejection of residence permit can be justifiable, is because the national courts cannot try out [prøve ut] UNE’s weighing of interests, put simply, whether the decisions were fair and just. One way of interpreting this argument is that, independent of the balancing between procedural and substance values, procedural values in the form of states’ political instructions and regulations, could in a way almost always justify a judgment. That immigration control considerations can always be decisive against the rights of the child, could suggest that states want to secure their power to control immigration. Here, it must be emphasised that although the minority of judges find the judgments unjust, it does not necessarily follow that the judgment is based on unjust laws (Dahl, 1989; Weiner, 1996:193-194; Hydén, 1998). When it is established in national law that immigration control considerations can weigh more when balanced against the rights of the child, the plenary judgments can be justified.

In the following, the relationship between politics and law in the Supreme Court context will be clarified.

The Relationship between Politics and Law

Decision-makers and their (power) position

The Supreme Court expresses a reciprocal relationship between law and politics when it comes to interpreting the best interests of the child in an immigration law context. That there is a reciprocal relationship between politics and law is established in the theoretical framework (Shapiro, 2002; Luhmann, 2004; Hydén, 2008). The Court, as its own legal system, is not entirely independent of social and political systems (Hydén, 2008; Shapiro, 2002). Legal norms, such as the rights of the child, are not only managed by laws, but are also influenced by political and extra-legal factors. In the Supreme Court, the best interests of the child is secured through a clarification of laws. The clarification of laws is expressed in the plenary judgments by how the judges, through previous judgments and legal acts, clarifies

what should lie behind an interpretation of the best interests of the child (2012/688 section 102; 105; 111). The national courts will ensure that the international and national laws that are established in national law are upheld, and can intervene if a statutory provision is in conflict with the CRC or other treaties (2012/688; 2012/1042). Ensuring that international and national laws are upheld is expressed in the Supreme Court by how the judges assess whether UNE's decisions are in accordance with current law, and has balanced between the best interests of the child considerations and immigration control considerations in a lawful manner. How to argue that the best interests of the child is influenced by politics is because much of the decision-making on the best interests of the child are entrusted to administrative immigration authorities through instructions forwarded by the politics. That the politics partly manages the best interests of the child is expressed in the plenary judgments by how judges refer to, and lean on guidelines from preparatory works, White Papers and the Immigration Regulations. That the political system partly manages the rights of migrants is expressed by the first voting judge, citing the White Paper no. 75 (2006-2007) which states that:

“according to the Immigration Act § 75 first paragraph, the Storting must approve the main principles for the regulation of immigration. The provision was proposed omitted in the new Immigration Act, but was retained so that there was no doubt about the Storting’s influence over the regulation of immigration” (2012/688 section 107).

Furthermore, the first voting judge cites Immigration Act § 1 which states:

“the Act shall provide the basis for regulating and controlling the entry and exit of foreign nationals and their stay in the realm, in accordance with Norwegian immigration policy and international obligations” (2012/688 section 109).

The Storting has an authority to influence the control of immigration, and the Immigration Act will ensure that Norway’s immigration control policy and international obligations are safeguarded. The politicians also give instructions to the administrative immigration authorities in their directives and regulations on how the principle should be interpreted. Since the Supreme Court cannot try out the administration’s free use of discretion on the best interests principle, the Court’s role in this context is to make sure that the balancing of interests on the rights of the child has been done in a proper manner by the administrative immigration authorities (2012/688; 2012/1042). The Court cannot overrule the specific

considerations in the decisions; put simply, whether the decisions are reasonable or fair (2012/688 section 142). The authoritative power of political representatives to influence the interpretation of the best interests of the child, which is executed by administrative authorities, suggest politics also gives content to the best interests of the child. Since the politicians give instructions to the administrative immigration authorities on how the principle should be understood and assessed, one may argue that the protection of the children's human rights is partly managed by politics.

As it may seem that both law and politics influence the understanding of the best interests of the child, it could be argued that there is a reciprocal impact between law and politics that is expressed in the plenary judgments regarding how the best interests of the child has been interpreted. Interviewee 2 puts forward a different circumstance of the relationship between politics and law and states that:

"they [the government] would not write a regulation on the balance between immigration control considerations and the best interests of the child considerations. They did not want to specify what lies behind the relationship between these considerations. The government handed over the cases to the Supreme Court instead of making a political decision...The evaluation of what is in the child's best interests turned into a clarification concerning the legal standard, which is much more limited than the extra-legal standard".

Interviewee 2 argues that the government could have turned the understanding of the balancing between immigration control considerations and the best interests of the child considerations into a political matter, through changing the laws or regulations. Leaving the clarification between the considerations up to the Supreme Court, turned the asylum cases into a clarification concerning the legal standard, which is more limited than the extra-legal standard. That the understanding of the best interests of the child was decided in the Supreme Court could possibly be interpreted as an intentional delegation to the courts by the politicians, through reducing risk to themselves by shifting responsibility upon the courts to avoid difficult decisions, and to avoid taking a stand on what should lie behind these competing considerations. It could also be to avoid obstruction to the policy agenda of upholding a restrictive immigration policy. The reciprocal impact between law and politics on giving content to the best interests of the child could here be interpreted as a way for

politicians to escape responsibility and to avoid specifying what lies behind the balance between the best interests of the child considerations and immigration control considerations. What consequences this could have in real life is a judicialisation of international relations, which is defined here as the political reality where “courts gain authority to define what the law means” (Alter, 2011). However, the fact that the cases are addressed by the Courts, as pointed out, does not necessarily mean that courts have gained greater importance or power (Andenæs, 2006). Not specifying what lies behind the balance between these interests could be a way to ensure the individual and subjective assessments are completed in each asylum decision.

The understanding that the cases were addressed in the Supreme Court as a way for politicians to avoid specifying what underlies the relationship between the best interests of the child considerations and immigration control considerations was not shared by interviewee 3, who adds further comments:

“Yes, it is true that the best interests of the child is not only decided by law but also by the politics. However, the Immigration Act § 38 is a ‘may-provision’ which gives UNE freedom to balance between considerations. It is also important to emphasise that if the Storting had not agreed with UNE’s practice, then the Storting would ask the government to make changes to the laws or regulations. The Storting is pleased with UNE’s administration of the politics, except from a small part of UNE’s practice. A White Paper such as the Paper on ‘Displaced Children’ has great significance, but not as great as a change in laws or regulations. Had the Storting disagreed with UNE’s practice, they would have made changes to the laws and regulations [rather than writing the White Paper report]”.

These two claims suggest that there are differing opinions on the relationship between law and politics. It may be difficult to draw any definitive remarks on how the relationship between politics and law look. However, one might argue that in the Supreme Court, there exists a reciprocal relationship between law and politics regarding who provides content to the best interests of the child. This is in line with previous research stating that there are different opinions on how the relationship between politics and law look (Shapiro and Sweet, 2002).

In the following, the relationship between politics and law will be explained in context to the balancing between the best interests of the child considerations and immigration control considerations.

The best interests of the child considerations versus immigration control considerations

The balance between politics and law is expressed in the plenary judgments through a discussion where the judges balance between competing considerations. The best interests of the child is an overarching principle and includes the consideration of the child's connection to Norway. Immigration control considerations include among other considerations illegal stay and general prevention considerations. The first voting judge states that:

“the central competing considerations in these plenary judgments are the best interests of the child and immigration control considerations. Both considerations are discussed in the preparatory works, which show how difficult it is to balance between these considerations” (2012/688 section 110).

The judges have had to balance between competing considerations when assessing the validity of the two asylum cases. When two legal norms, such as the best interests of the child and immigration control considerations compete in one way or another, one legal norm's argumentative power may be restricted (Hydén, 2008). The plenary judgments express a balance between immigration control considerations and the best interests of the child. The majority of judges agreed with UNE's balancing of considerations, and found that immigration control considerations was decisive against the best interests of the child (2012/688 section 163). In reference to this research, when the majority of judges found UNE's decisions to be valid, it may be a consequence of contending legal norms where illegal stay and other immigration control considerations were considered as decisive against the best interests of the child, and connection to Norway. When two competing legal norms are set up against each other, the argumentative power on the rights of the child might have had to give way when upholding the legal norm of immigration control considerations. This means that the legislators' intentions on securing the rights of the child could perhaps then not have been practiced to such an extent as established in law. It further supports the claim that substance and procedural criteria in one way compete for argumentative power. The tension between these criteria is expressed in the plenary judgments through the different interpretations

concerning the balance between the rights of the child and the rights of the state to limit migration.

Connection to Norway versus illegal stay

It is *inter alia* a general understanding that a child should not be punished for the situation the parents have brought them in (2012/688 section 113). As a result of the parents' choice of exceeding the departure deadline and staying illegally, the children have gained a strong connection to Norway. A child's connection to Norway is almost always a result of illegal stay. When the parents exceed the departure deadline, it could be because the parents consider it to be safer for the children to stay illegally in Norway than to return to their home country. In the Supreme Court, the judges have had to balance between the children's connection to Norway, and illegal stay. This tension that is expressed in the plenary judgments between these considerations was also established in the interviews. Interviewee 1 states that:

“parents do everything they can to stay in the country and think they are doing what is best for their children. Yet research suggests that many children suffer as a consequence of living in uncertainty for several years in reception centres”.

The tension concerning the balance between substance- and procedural criteria for democratic legitimacy is apparent from the interviews and from the plenary judgments. How the Supreme Court judges navigate between the rights of the child (substance criteria) and the rights of the state to limit migration (procedural criteria), is of interest as it establishes what is given more weight. For the first voting judge, and for the majority of judges, UNE's decisions are consistent with current law, including the CRC Article 3 (1) (2012/688 section 165). That the majority of judges argue that UNE's decisions are valid, means that they find that the competing considerations in these two cases are balanced in a justifiable manner, independent of whether the judges agree or not with UNE's weighing of considerations. The first voting judge states that when the parents' illegal stay are given more weight than children's connection to Norway, it involves how children cannot be judged in isolation from their parents' illegal stay (2012/688 section 114 and section 133). The first voting judge argues “it concerns that the child could easily be used as a means by their parents as a way to obtain a residence permit by not following up the obligation to leave the country” (2012/688 section 133). Immigration control considerations in terms of illegal stay can be decisive against the best interests of the child. Immigration control considerations can weigh more, as a way to

protect the child from being exploited as a means for granting residence permit. First voting judge also cites governmental papers and argues that while the CRC Article 3 (1) is the overarching principle, other Articles might conflict with the argument that the best interests of the child would be to grant the families residence permit (2012/688 section 111). Living in Norway might not be viewed as the only option. Family roots and heritage justify and protect the child from being used as a means for obtaining residence permit (2012/688 section 111). The understanding of what is in the best interests of the child was also expressed in the interviews. Interviewee 2 holds that:

“the understanding requires an individual and an overall assessment. The understanding invites a number of factors. The child’s connection to the country is defined in a special way. There are certain things that are relevant, such as language comprehension, age, and the formation of social networks, but also the connection to the home country”.

Although the living standards in Norway might be better than the living standards in the asylum-seekers’ home country, it does not necessarily follow that it would be in the best interests of the child to grant the child (and the family) residence permit (White Paper no. 75 in 2012/688 section 111). An argument posed by interviewee 1 challenges the argument concerning age as a defining factor in the understanding of the best interests of the child. Interviewee 1 states that:

“it is assumed that young children have more attachment to parents than to the community, school, friends, the Norwegian language, and more...it's possible to argue that children who are considered to have strong ties to Norway also may connect to society in the same way as older children”.

The argument suggests that it is possible to argue that young children, which are assumed to have more connection to their parents, like with these cases, could have just as strong connection to the country as older children (2012/688 section 156; 164). This adds weight to the best interests of the child considerations in the balancing against immigration control considerations. The second voting judge finds that UNE’s decisions violate the rights of the child, and argues that:

“it cannot be the case that the stronger the connection to Norway, the stronger the immigration control considerations get, which speak against granting a residence permit. In that way, the increased connection to Norway is ‘zeroed’ out” (2012/688 section 208).

In the plenary judgments, immigration control considerations in terms of the severity of illegal stay takes precedence, which suggests the increased connection to Norway is ‘zeroed’ out. It is not enough that the children's connection to Norway in itself (as is clear from UNE's decision in case 2012/688, but unclear in case 2012/1042) suggests that a permit should be granted. The majority of the judges find that the children do not have any independent right to residence when their parents have violated the Norwegian law by staying illegally and not upholding the departure deadline. In reference to this research, by interpreting the law in that way, one could argue that the plenary judgments mirror Norway's immigration policy as the verdicts reflect Norway's political priorities and obligations. It appears as if the political priority of avoiding illegal and longstaying migrants, and the parents' choice of not adhering to national laws and rules, outweighs the best interests of the child and the children's connection to Norway. The majority of judges agree with UNE's decisions that “[in a case like this] immigration control considerations must weigh more and take precedence over the consideration concerning the child's connection to the realm” (2012/688 section 163). That immigration control considerations must weigh more seems to reflect Norway's immigration policy which is established as relatively strict, but nevertheless committed to the human rights obligations such as the CRC through extensive legislation (Høstmælingen et. al, 2008, in Vitus and Lidén, 2010). That immigration control considerations can be decisive against the rights of the child also suggests states want to secure their power to control immigration. In addition, the fact that immigration control considerations is decisive as a result of the parents' choice of exceeding the departure deadline and thus staying in Norway illegally, further supports the claim that both a granting, and a rejection of residence permit can be justifiable if UNE's weighing of considerations is validated. Furthermore, the best interests of the child considerations against competing considerations are interpreted differently in the plenary judgments. For the minority of judges, UNE's decisions are not in line with the political guidelines on how to assess children's connection to Norway as a result of illegal stay. On the basis of the interpretations of the minority of judges, it is possible to argue that the political intentions on safeguarding the best interests of the child have not been administered by UNE. The wide space for interpretation of the CRC and the best interests of child might have

opened up the possibility for illegal stay to be decisive against the children's connection to Norway.

The best interests of the child versus general prevention considerations

General prevention considerations means that the judges consider how much the judgments will deviate from political priorities (cf. Immigration Act 38), and possible effects of the judgments for future practice (2012/688; 2012/1042). The first voting judge states that when assessing the best interests of the child in a case, it cannot be seen in isolation, but must be assessed on the basis of general prevention considerations (2012/688 section 114-115). When judges cannot assess cases without taking into account the possible effects of the decision for future cases, it includes an taking into account whether a decision which is beneficial to one child can lead to other children being exploited by their parents who have a strong desire to ensure the family residence permit (2012/688 section 114). Concerning the possible effects of granting residence permit, the first voting judge states that:

“a number of immigration control considerations are cited from the Immigration Act § 38 fourth paragraph. By letter a, it is possible to place emphasis on consequences for the scope of applications on similar grounds. This means that the weight of immigration control considerations will vary...The consequences of a decision will therefore be central to the weight that should be given to immigration control considerations” (2012/688 section 117-118).

Regarding the consequences for the scope of applications on similar grounds, the first voting judge argues:

“this must be seen in context with the principle of equality in the Norwegian government administration [forvaltning]. When a residence permit is granted in one case, this implies that other similar cases also must be granted a residence permit...This means that the less impact the granting of a residence permit has for other cases, the larger the room for discretion will be to focus on individual considerations” (2012/688 section 118-119).

That similar cases should be treated equally is further supported in the interviews.

Interviewees 1 and 2 maintain that:

2: "I suppose similar cases require equal treatment. If you say 'yes to them' you have to say yes to all the other cases that are similar. [The balance] it depends on how much precedence a case will have".

1: "the children's situation is politically defined. Similar cases are treated equally, and therefore it is unlikely that the so-called 'ordinary' cases will get a residence since the cases will have precedence for future similar cases. It is a general deterrent provision. More 'unique' cases have a greater chance to get residence permit".

When it is possible to place emphasis on consequences for the scope of applications on similar grounds, it means that granting residence permit to a 'unique' case will have less effect on the immigration flows and the number of asylum applications Norway gets than an 'ordinary' case. The first voting judge cites the White Paper no. 75 (2006-2007) where it states that:

"if granting residence does not provide potential increased influx of any significance, or have special implications for other cases that are waiting for a decision, there may be a wider space for granting residence than in cases where immigration control considerations prevail" (2012/688 section 117).

Large flows of immigration to Norway are thus considered a problem for the immigration policy. The Immigration Act should make sure the influx of migration is controlled, and that it is in concordance with Norway's immigration policy (and international human rights treaties) (2012/688 section 109). The control of immigration reflects a state's consideration of possible threats and consequences of granting residence permit in a case which is not considered as 'unique'. The consequence could be that the normal situation is that asylum-seeking families with children with a certain period of residence in Norway would have to be granted a stay based on humanitarian grounds, and in this case connection to Norway. Since the cases in the plenary judgments are not considered 'unique', granting a residence permit according to the principle of equality could imply that a lot more families with children, and with illegal stay in Norway, would also have to be granted residency. It could also suggest that Norway reward illegal stay, meaning that the longer asylum-seekers stay illegally, the more connection they will get to the country, and the greater the chance is of granting

residence permit. Concerning how illegal stay should not be rewarded, first voting judge cites the White Paper no. 75 (2006-2007) p.166):

“a violation of the obligation to leave the country constitutes a violation of the Immigration Act which may result in both a penalty and a deportation. It will send conflicting signals if one operates with ‘fixed arrangements’ so that a residence permit still can be granted in such cases. It will also be perceived as unfair in relation to those who comply with the obligation to leave the country” (2012/688 section 120).

Granting residence permit to asylum-seekers that have exceeded their departure deadline would go against Norway’s political priorities because

“when the different considerations that are relevant are weighed against each other, the department still believe it is necessary to keep a restrictive policy in relation to those who do not cooperate to a return” (2012/688 section 129).

Norway, through an effective return policy, wants to avoid illegal migrants and longstaying children. Being that the judgments had relevance for these two families, but also for approximately 500 other asylum-seeking children, granting residence permit could have implications for future decisions and flows of migration. In reference to this research, it could be argued that the majority of judges’ interpretation of the law reflects the immigration policy Norway leads, being in correspondence with the strict immigration policy, while simultaneously embedded in the rhetoric of humanitarianism and equality between people. That the plenary judgments mirror the political priorities further supports the claim that there is a reciprocal impact between politics and law where both systems can be said to be managing how the best interests principle should be interpreted.

In the following, a discussion concerning how changes in the circumstances for children (by focusing more on substance criteria) may also have its limitations for ensuring the rights of the child, will be explained.

DISCUSSION

Through an analysis of two Supreme Court judgments, it becomes clear that the interpretation of the best interests of the child have been interpreted differently by the judges. More specifically, there are differences between the judges concerning how they have struck a balance between the rights of the child (substance criteria), and the rights of the state to limit migration (procedural criteria). Certain conclusions can be drawn from the document research analysis on the plenary judgments and from the elite interviews, but first a discussion will be put forward, which focuses on how changes in the circumstances for children by focusing more on substance criteria, may also have its limitations for ensuring the rights of the child.

A possible circumstance which might strengthen asylum children's legal security would be more influential universal human rights treaties. More influential human rights treaties means that the obligations followed from ratifying and establishing human rights conventions and treaties would have to become more concrete. Making the universal human rights guidelines more specific could be one incentive to further ensure the best interests of the child (Søvig, 2009). Making guidelines more specific could possibly make those countries that have ratified and implemented the conventions, regulations and treaties more similar when it comes to the relationship between international- and national laws, and there would be fewer disparities between countries. More similar practices would entail a more universal interpretation on the rights of the child. Additionally, more specific guidelines would entail that states would have less discretionary power to interpret international treaties such as the CRC. A tightening of nation-states' interpretative power would mean that political decision-makers, as representatives for the members of states, have less power to control immigration, and there would be less room for discretion when interpreting the best interests principle (Hydén, 2008). International treaties would have more power to influence states' balancing between the rights of the migrants and the rights of the state and its members to regulate immigration (*ibid.*). However, it is important to emphasise the recognised advantages of the wide space for interpretation of human rights treaties, including the CRC. As previous research suggest, a wide interpretation of the best interests of the child opens up for taking into account culture and local customs and account for a wide area of issues relating to the best interests of the child (Schiratzki, 2003; Alston, 1994). A possible consequence of more influential international treaties, and thus the tightening of states' rights to control immigration, would be

that fewer states would sign and ratify the human rights conventions as a ratification limits the states' decision-making power (Alston, 1994). This is similar to what Alston (1994) referred to as the paradox of universal human rights. In reference to this research, the problem is perhaps not the legal security of the best interests of the child, but rather that there needs to be enough will to promote the best interests of the child and to focus on meeting the substance criteria for democratic legitimacy. From the analysis, and in line with previous research, it becomes clear that the issue lies not with the legal protection of the best interests principle, as the best interests of the child is well established in Norway's legal- and political system. There is however, recognised an inconsistency between legislators' intentions and practice on the best interests of child.

A possible solution on how to minimise the inconsistency between legislators' intentions and practice on the best interests of the child, and so strengthen the rights of the child, is to make sure there are measures available to ensure the enforcement of children's rights, and to ensure that the current laws are effectively translated into practice (UNICEF, 2012). Although the Ombudsman for Children works as a watchdog, Norway has inadequate supervisory mechanisms to ensure that practice (not law) is compliant with the CRC (UNICEF, 2012; Søvig, 2009). The UN Committee on the Rights of the Child (Children Committee) is appointed to monitor states' supervision of the CRC. The supervision of the CRC is based on what the states report to the UN in their reports. On the basis of reports and subsequent sessions and discussions, the Children Committee prepares reports³ with concerns and recommendations to the individual state (Søvig, 2009). These recommendations are not legally binding (*ibid.*). The extent to which states comply with the CRC ultimately depends on the individual state's ability and willingness. For the Children Committee's reports to become more influential, it entails a change of legal source material, such as the preparatory works to the Human Rights Law and 'Soria Moria Declaration', which at present cannot be used as an argument for how the Children's Committee's practice should be given greater weight than what is stated in the legal source material (*ibid.*). A change in the legal source material could be seen on as a weakening of the state's room for manoeuvre to make decisions and to control immigration. In view of this research, it is perhaps unlikely that a change in the legal source material would occur, because it might weaken states' power to limit migration. Moreover, a possible consequence of making the Children Committee's reports more influential through

³ The three central types of documents are the 'Concluding Observations', the 'General Comments' and 'Days of General Discussions' (Søvig, 2009).

making them legally binding for the individual state, could be that more weight would be placed on objective claims and the understanding of guidelines, which could compromise the individual and subjective assessment which is completed in each asylum decision. If more weight is placed on objective claims, it could limit the space for interpretation of the best interests of the child, which is not opted for. In reference to this research, not specifying what lies behind the balancing between the best interests of the child and immigration control considerations could be a way to ensure the individual and subjective assessment is completed in each asylum decision. Making the best interests of the child more specific also have implications, which suggests that changing the situation for children for ‘the better’ through a more ‘open border’ or rights-focused approach, is not that straightforward. Clearer guidelines also have its limitations for ensuring that the rights of the child are protected. In view of this research, this discussion further shows the tension that exists in the balancing of procedural and substance criteria. The legislative basis for safeguarding the rights of the child is established in Norwegian law, and the interpretation of the best interests principle is the outcome of how different decision-makers interpret these laws. The outcome of the interpretation is also influenced by political and extra-legal factors.

In the following, a review of the concluding remarks that was made in the analysis, will be clarified.

CONCLUSION

This research set out to find out how the best interests of the child was interpreted in the plenary Supreme Court judgments, with specific reference to how the Court has struck a balance between the rights of the child (substance criteria) and the rights of the state to limit migration (procedural criteria). This was done by a document research analysis on the plenary judgments. The interviews and observations have complemented the understanding of the context of the plenary judgments. From the analysis, some main conclusions can be drawn.

From the analysis of the plenary judgments, there is disagreement between the judges on the way Norway navigates between procedural and substance criteria concerning the nature of the relationship between national laws and international laws. The disagreement between the judges concerns the question whether UNE upholds or violates Norway's human rights obligations. One way this relationship is interpreted by the judges is that Norway seems to lean more on national laws than international laws as national courts do not find it necessary to follow the same judicial review as the ECtHR, and because Norway's human rights obligations imply that the Court on certain legal areas shall evaluate judgments using a 'present time assessment'. The majority of judges disagree, and argue that evaluating cases using a 'present time assessment' is not required by national courts. The disagreement suggests that the nature of the relationship between national law and international law on the best interests of the child in an immigration context can be understood in many ways, depending on how relevant legal texts are interpreted. Based on the interpretation made by the majority of judges, UNE has upheld Norway's international human rights obligations. Based on the interpretation made by the minority of judges, UNE does not uphold Norway's international human rights obligations, and so rely more on national laws rather than international laws when interpreting the best interests of the child.

Further arguments which suggest the balance between procedural and substance criteria is largely managed by states, is expressed in the plenary judgments. From the analysis, it can be concluded that the balancing between procedural and substance criteria is largely managed by national laws rather than international laws, on the basis that international human rights laws have no clear guidelines on how the international laws should be interpreted and exercised by states. It is expressed in the plenary judgments that Norway has great discretionary power

when it comes to interpreting the best interests of the child, since the understanding is ambiguous and value-laden. The wide space for interpretation of international laws and human rights obligations means that international laws exercise few limits on how states that have ratified the international human rights conventions should interpret the conventions. When there is no clear guidelines on how to interpret international human rights, it means that Norway to a large extent decides the balancing between immigration and the best interests of the child.

From the analysis, one can conclude that the plenary judgments reflect a reciprocal impact between politics and law on the interpretation of the best interests of the child. The understanding of the best interests of the child by the Supreme Court was interpreted in relation to immigration control considerations. The balancing between these considerations concerned how to navigate between procedural and substance criteria. The plenary judgments express a reciprocal relationship between politics and law (national), where the Supreme Court determines what is the best interests of the child, but by influences from political and extra-legal factors. As the politics provide guidelines and directives to the administrative immigration authorities on how the best interests principle should be understood and assessed, this thesis finds that the protection of children's human rights is also partly determined by the politics. It is however, difficult to draw any definitive conclusion concerning how the reciprocal relationship between law and politics look, as the plenary judgments express different interpretations on the Court's role to interpret the best interests of the child.

The relationship between law and politics was further expressed in the plenary judgments through a discussion on the balance between children's connection to Norway and illegal stay. The majority of judges found that the political priority of avoiding illegal and longstaying migrants, and the parents' choice of not adhering to national laws and rules, must come before the best interests of the child and the children's connection to Norway. The judgments thus seem to mirror Norway's restrictive immigration policy. That the judgments can be said to reflect Norway's political priorities supports the claim that law and politics have a reciprocal impact, and further support the argument that the best interests of the child is managed by law, but also influenced by political policies. The relationship between politics and law to interpret the best interests of the child was also expressed in the plenary judgments through a discussion concerning the best interests of the child against general prevention considerations. The general prevention consideration is an immigration control consideration, and it was in

these cases decisive against considerations concerning the rights of the child. Finding the decision valid might have affected the flow of immigration and the number of cases that had to be granted a residence permit. The judgments thus reflect Norway's immigration policy of keeping an effective return policy. That the judgments mirror the political priorities supports the claim that there is a reciprocal impact between politics and law and where both systems influence how to interpret the best interests of the child.

The plenary judgments express a balancing of considerations, between procedural criteria and substance criteria, between migrants' rights, and the power and rights of the members to limit migration through democratic decision-making processes. The actual body of legislation can be interpreted in many ways, and the general understanding is that there are significant differences between judges and courts that judge similar cases (Hydén, 1998). This is also expressed in the plenary Supreme Court judgments. The judges as decision-makers come to different conclusions when interpreting the same laws concerning the question of whether UNE had violated Norway's human rights obligations concerning the best interests of the child. The legal arguments posed in the plenary judgments suggest that laws are not that rigid as one might think, as the decision-makers did not come to the same conclusion when interpreting the same set of laws. The outcome depends on the balancing of considerations, between universal human rights and the rights of the state and its members to control migration.

Further Research

Further research should include the participation of actors including organisations and associations that are generally understood as representatives for the protection of human rights, and which often fills an advocacy function in that they establish demands and try to influence political actors and other governmental systems. Establishing their position as decision-makers is called for, in order to draw conclusions on how these actors are involved in interpreting and influencing the understanding of the rights of the child. As human rights organisations directed at immigration related issues generally aim for a more human rights-based approach on immigration, it would be interesting to examine the position they hold to influence how liberal democratic states may navigate between procedural and substance criteria.

In addition, further research should examine if the plenary Supreme Court judgments have had any impact for case law. The Supreme Court's case law may be deemed precedent for future decisions that administrative authorities make in similar cases. Because decisions on asylum cases happens after an individual and subjective assessment, and are rarely exactly the same, the precedent-impact of the individual judgment will at times be limited, but first and foremost, the plenary judgments are important as a source of argument. Regardless of whether decisions have status as precedent or not, the plenary judgments exemplify well the current practice in Norwegian law, and will have an impact on how one interprets laws in subsequent cases.

After this research was conducted, it was in May 2013 decided that Hossein Shabazi and his family (case 2012/688) was granted residence permit. Head of Information in UNE, Bjørn Lyster states that “this is a new assessment that has been made on the basis of new circumstances in the case. This does not mean that we believe the previous resolutions and decisions were incorrect. It is the oldest boy in the family...and his connection with Norway which is the argument for granting the family residence permit” (NRK, 2013). UNE dismiss that this decision will have any impact on the 500 other asylum-seeking children who are staying illegally in Norway (NRK, 2013).

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ATTACHMENTS

Interview Participation Form

Forespørsl om intervjudeltakelse vedrørende masteroppgave ‘How is the ‘Best Interests of the Child Principle’ and ‘Connection with Norway’ Worked Out in Asylum Cases Concerning Children?’

Mitt navn er Julie Bettina Blakstad og tar for øyeblikket en mastergrad i Development Studies på Lunds Universitet i Lund, Sverige. Vårsemesteret 2013 skriver jeg min masteroppgave, og i den anledningen henvender jeg meg til deg.

Tema for avhandlingen er om hvordan prinsippet ‘tilknytning til riket’ blir brukt i asylsaker som omhandler barn. Målet med masteroppgaven er å redegjøre for hva som ligger til grunn bak prinsippet barns ‘tilknytning til riket’ og få frem hvorfor det vil være fordelaktig med en mer heuristisk forståelse av prinsippet. Dette ved å bruke et mikro-perspektiv som redegjør for barnets perspektiv.

For å innhente informasjon ønsker jeg å intervju et representativt utvalg som har tilknytning til temaet asyl og barns rettigheter i lys av prinsippet ‘tilknytning til riket’.

Målet med ekspertintervjuene er å få innsyn fra forskjellige aktører om hva som ligger til grunn bak avgjørelser knyttet til ‘tilknytning til riket’. I tillegg til faglige spørsmål ønsker jeg også å få innsyn av intervjuobjektets egne erfaringer og betraktninger av asylfeltet.

Intervjuobjektet velger selv intervjukonteksten, men erfaringsmessig er det fint å velge et sted hvor det ikke er så mye støy, slik som på et møterom eller kontor. Vi kan avtale tid og sted dersom du vil la deg intervju. Jeg vil ta notater underveis. Jeg vil anta at intervjuene vil vare fra 30 minutter og opp mot en time. Det er helt frivillig å delta og det er mulig å trekke seg når som helst i løpet av prosjektet, uten å begrunne hvorfor. Dersom du bestemmer deg for å trekke deg vil all innsamlet data bli slettet. Det er kun jeg som vil ha tilgang til personidentifisbare data. I den endelige versjonen vil all data bli anonymisert.

Deltar du vil du få muligheten til å opplyse om temaet asyl og prinsippet ‘tilknytning til riket’ når det gjelder barn. I tillegg får du muligheten til å dele erfaringer og egne oppfatninger.

Har du videre spørsmål og/eller ønsker å la deg intervju, kontakt meg på 45273493, eller send en epost til: b.blakstad@gmail.com.

Dersom du har lyst til å delta i prosjektet, vennligst signer på den vedlagte samtykkeerklæringen (se vedlegg), og videresend det til meg via epost.

Med vennlig hilsen

Bettina Blakstad

Masterstudent i Development Studies

Lunds Universitet.

Informed Consent Form

Samtykkeerklæring

Intervjudeltakelse vedrørende masteroppgaven ‘How is the Principle ‘Connection with Norway’ Worked Out in Asylum Cases Concerning Children?’

Jeg har mottatt informasjon om masterprosjektet og ønsker å stille opp på intervju. Jeg har blitt informert om at jeg kan trekke meg når som helst, uten å oppgi grunn. All innsamlet data vil da bli slettet.

Signatur..... Dato.....

Telefonnummer.....

Navn (blokkbokstaver).....

Interview Guide

Hvordan forstås og anvendes prinsippet ‘barns tilknytning til riket’ i individuelle asylsaker?

How is the principle ‘connection to Norway’ understood and assessed in asylum cases?

Hvilke kriterier bør ligge til grunn i vurderingen av ‘barns tilknytning til Norge’?

What should be the basis when interpreting the principle ‘children’s connection to the realm’?

Hvordan blir prinsippet ‘barns tilknytning til riket’ forstått og vurdert i lys av ‘barnets beste’ prinsippet?

How is the principle ‘connection to Norway’ understood in light of ‘the best interests of the child’ principle?

Hvordan er forholdet mellom innvandringspolitiske hensyn og barnets beste?

How is the balance between immigration control considerations and best interests of the child considerations?

Hvor stort rom for skjønnsutøvelse er det i utlendingsforvaltningens beslutningsprosesser?

How is the administrative immigration authorities’ room for discretion’?

Hvilke konsekvenser vil du si det har at Norge spesifikt ikke har oppgitt hvor mange år (minst) som skal til for å kunne si at en person har tilknytning til riket?

What consequences would you say it has that Norway has not specified how many years it would take to consider a person as having a connection to Norway?

Finnes det tilfeller av aldersdiskriminering av barn mellom 0-18 når det gjelder spørsmålet om barns tilknytning til riket?

Are there cases of age discrimination against children between 0-18 in relation to the issue of children's connection to Norway?

Skiller utlendingsbarns rettigheter seg fra barns rettigheter med norsk bakgrunn? Eventuelt på hvilken måte?

Are there any differences between the immigration children's rights and the rights of children that are citizens of Norway?

Kan du si noe om hvordan situasjonen er for lengeværende barn, det å ha livet på vent?

Could you say something about the situation for longstaying children in Norway?

Kan du si noe om konsekvensene av deres foreldres valg av å bo i landet ulovlig og hvordan det påvirker barna?

Could you say something about the consequences of the parents' choice of exceeding the departure deadline and how this affects the children?

Hvordan er oppveksten lagt til rette for asylsøkende barn?

How is the childhood situation for asylum seeking children?

Hvilke konsekvenser tror du Høyesterettsdommen ved Verona med familie og Shabazi med familie vil ha for asylpraksisen av lengeværende barn?

What significance would you think the plenary judgments have for the asylum practice on longstaying children?

Hvilken rolle tror du media har spilt i Høyesterettsdommen?

What role would you say the media has played regarding the Supreme Court judgments?

Hvilken rolle har stortingsmeldingen Barn på flukt hatt for lengeværende barn?

What significance has the White Paper 'Displaced Children' had for longstaying children?