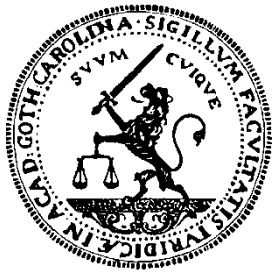

FACULTY OF LAW
Lund University

Nina Hansson

Please state your age

An evaluation of the age assessment of unaccompanied minors seeking international protection in Sweden and whether such practice is in compliance with international and regional obligations.

JURM02 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Matthew Scott

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Contents

Summary

It is common practice for States to conduct age assessments of unaccompanied minors when they lodge applications for international protection. As the Member State receiving the most unaccompanied minors in Europe, the practice is particularly common in Sweden and deserving of a closer examination. The purpose of this thesis is to examine the age assessment of such unaccompanied minors seeking international protection in Sweden and whether such assessment is in compliance with international and regional regulations. This will be done be detailing and deconstructing the legal obligations, such as burden of proof, benefit of the doubt and the rights of the child and highlight in what way they effect the protection offered to the unaccompanied minor.

Being assumed an adult rather than a minor has detrimental effects on the life of the applicant. Not only does it affect the outcome of the application for international protection but it also affects the possibility of family reunification, education, health care, accommodation, not being transferred to another Member State and so forth. The applicant has the burden of proof to make his or her age probable and the methods available to him or her is identification documents, his or her own statement and medical examination consisting of, in Sweden, dental and skeletal radiograms. The evidence put forth by the applicant and the Migration Board must be evaluated and weighed against one other in order to establish whether the applicant has managed to fulfil his or her burden to show that s/he is in fact a minor rather than an adult.

The thesis shows that in regards to age assessment of unaccompanied minors, Sweden's regulations complies for the most part however not it all aspects. After conducting an empirical study of the application of such regulations a varied level of compliance is evident, however all neglected to pay due consideration to the benefit of the doubt, the best interest of the child and further many judgements rewarded the medical examination results a high thus decisive evidential value despite its shortcomings.

Sammanfattning

Det är vanligt förekommande att stater utför åldersbedömningar av ensamkommande barn när de ansökt om internationellt skydd. Då Sverige är den medlemstat som tar emot flest ensamkommande barn i Europa är det särskilt vanligt att åldersutredningar behöver utföras varvid det ämnar sig att närmare granska Sveriges tillvägagångssätt för en sådan åldersbedömning. Syftet med denna uppsats är att utreda den åldersbedömningen av ensamkommande barn som görs i Sverige samt att undersöka till vilken grad bedömningen utförs i förenlighet med Sveriges internationella och regionella åttagande. Med syftet att utföra en sådan bedömning kommer de rättsliga skyldigheterna såsom bevisbörde regler, tvivelsmålets fördel och barnets bästa detaljeras för att undersöka på vilket sätt de påverkar det skydd som erbjuds det ensamkommande barnet.

Att bli ansedd som vuxen i stället för minderårig har allvarliga konsekvenser för det ensamkommande barnet och hens liv. Att bli ansedd som barn kan många gånger påverka utgången på ens uppehållstillståndsansökan, ens möjligheten till familjeåterförening, utbildning, hälso- och sjukvård, boende samt att inte överföras till en annan memlemsstat, för att nämna några. Sökanden har bevisbördan för att göra sin ålder sannolik och de metoder som finns tillgängliga för hen är identitetshandlingar, hens uttalande samt resultatet av en medicinsk ålderbedömning som består av, i Sverige, röntgenbilder av tänder samt handledsskelett. De bevis som tilläggs målet av sökande och Migrationsverket måste Migrationsdomstolarna utvärdera och avväga mot varandra samt fastställa dess bevisvärde.

Uppsatsen visar att gällande till åldersbedömningar av ensamkommande barn, överensstämmer Sveriges förfarande till största del med Sveriges åttagande men dock inte fullt ut. Efter att ha genomfört en empirisk studie av tillämpningen av nämnda åtaganden, visar resultatet en varierad grad av efterlevnad, men sammantaget kan det sägas att alla de fall som studerats försummade principerna om tvivelmålets fördel och barnets bästa samt många domar gav ett högt och ofta avgörande bevisvärde till ressultatet av den medicinska åldersbedömningen trots dess brister.

Preface

I would like to thank Matthew Scott for his constructive guidance and for the amount of interest and effort he has spent on assisting me in my writing.

Jag vill även tacka Annika, Peter och mina fina vänner som gett mig oumbärligt stöd inte bara under den här processen utan även under hela studietiden. Jag är särskilt tacksam för att de trodde på mig även när det kändes som att motvinden blåste som hårdast.

Thank you,

Nina

Abbreviations

CEAS	Common European Asylum System
COI	Country of Origin Information
CRC	Convention on the Rights of the Child
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
Eurodac	European dactyloscopy database
FRA	European Union Agency for Fundamental Rights
MRI	Magnetic resonance imaging
Prop	Government Bill Proposition
RAPD	Recast Asylum Procedures Directive (2013/32/EU)
RDR	Recast Dublin Regulation (604/2013)
RQD	Recast Qualification Directive (2011/95/EU)
RRCD	Recast Reception Conditions Directive (2013/33/EU)
SCEP	Separated Children in Europe Programme
TFEU	Treaty on the functioning of the European Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

1.1 Background

On the heels of the Committee on the Rights of the Child criticizing Sweden for its lack of comprehensive protection of children in its asylum procedure, this thesis highlights a problematic issue which has been heavily criticized by international scholars however sparsely covered by domestic legal doctrine.[1] Such issue at hand is the age assessment carried out in order to establish the age of an unaccompanied minor seeking international protection in Sweden. The burden to make ones identity probable rests upon the applicant, regardless of his or her age. An identity is considered to consist of your name, age and country of citizenship, and to prove such identity may seem like a simple to a Member State citizen however for the unaccompanied minor such burden can prove insurmountable.[2] The difficulty lies in the hierarchy of the evidence demanded in order show ones age, as primary evidence is identification documentations which the unaccompanied minor is most often not in possession of. As the applicant cannot show his or her identity through the use of documentation, the age will have to be assessed based on the applicant's statement and with medical examinations if such have been completed.[3] The age assessment is carried out as an element of the larger asylum investigation regarding the claim for international protection and can often have a decisive impact on the outcome of the claim. [4] Despite the age assessments large impact on the lives of the already vulnerable unaccompanied minors, it cannot be specifically appealed which is very problematic.

Sweden is by far the Member State where most unaccompanied minors apply for international protection and such applications are rapidly increasing, the amount of applications lodged for example doubled between 2013 and 2014, totaling to 7050 applications.[5] Due to such facts, this thesis

[1] Committee on the Rights of the Child, *Concluding Observations: Sweden*, 16 March 2015, CRC/C/SWE/CO/5.
[2] For the definition of *Identity* see Migration Court of Appeal, MIG 2011:11.
[3] The medical examination method used in Sweden is assessing dental and carpal bone radiograms.
[4] Nyström, Viktoria. *Handbok för offentliga biträden i asylprocessen*, Norstedts Juridik: Stockholm, 2014, p. 89.
[5] For example in 2014, the second largest receiver Member State, Germany had 4400 applicants while Sweden had 7050, http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&plugin=1&pcode=tps00194&language=en. (Accessed 20 May 2015).

will look specifically at the Swedish age assessment procedure, both the legal instruments governing it but also the ways in which it is applied.

There is currently no existing medical method of age assessment which produces a 100 % certain age assessment and the scientific base of the results of the medical examination methods used in Sweden is highly questionable, especially when assessing upper adolescents which is the most represented age group in Sweden.[6] Considering the grave legal consequences of being assumed an adult rather than a minor combined with the fact that current migration drivers is likely to produce a steady increase of numbers of unaccompanied minors affected by the age assessment in Sweden, it is apparent that it is a pressing issue and deserving of a critical analysis which this thesis aims to provide.[7]

To offer a contextual point of reference and to show the importance and necessity of highlighting the problematic aspects of the age assessment of unaccompanied minors, the legal implications of being assumed a minor rather than an adult will briefly be presented. If assumed a minor there are more procedural benefits and safeguards afforded to the applicant by the various international, regional and domestic instruments due to children's vulnerability and the particular risks of exploitation which they are exposed to.[8] The result of the age assessment further impacts and sometimes hinders the applicant from being detained, being subject to a transfer to another Member State, facing expulsion or the possibility of family reunification.[9] Being assumed a minor rather than an adult further directly affects the outcome of the applicant's application for international protection. When the applicant is a minor, the reasons for international protection may be less compelling than what would be demanded of an adult applicant and less grave circumstances are demanded of a minor applicant when being granted residence permit in Sweden on the ground of *particularly distressing*

[6] http://www.migrationsverket.se/download/18.39a9cd9514a346077211b0a/1422893141926/Inkomna+ans%C3%B6kningar+om+asyl+2014+-+Applications+for+asylum+received+2014.pdf . (Accessed 20 May 2015). Barnombudsmannen, *Barnombudsmannens underlag till regeringen inför Sveriges femte FN-rapportering*, 2012, p. 95.

[7] http://www.migrationsverket.se/download/18.7c00d8e6143101d166d1aab/1430724490255/Inkomna+ans%C3%B6kningar+om+asyl+2015+-+Applications+for+asylum+received+2015.pdf (Accessed 20 May 2015).

[8] Bhabha, Jacquelina, Young, Wendy. *Not adults in miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines.* 11 Int'l J. Refugee L. 84, 1999, p. 87.

[9] Noll, Gregor. *Junk Science? Four Arguments Against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum*, 7 January 2015, p. 3. Hathaway, James C. *The Rights of Refugees under International Law*, Cambridge University Press: Cambridge, 2005, p. 528. Crawley, Heaven. *Child first, migrant second: every child matters*, ILPA policy paper, February 2006, pp. 13-15.

circumstances.[10] In effect, it is more likely that the unaccompanied minor will be granted international protection if the s/he is assumed to be a minor. There are furthermore many aspects of the life of the unaccompanied minor which will be affected such as the access to education, healthcare, government grants, accommodation and representation which will affect the child's wellbeing and its integration process.[11]

Despite the evident impact the age assessment has on the applicant's life, the regulations and concepts which governs the age assessments are sparsely regulated or are open-ended concepts such the benefit of the doubt or the best interest of the child principle. Both such principles play a central role in the age assessment however they do not allow to be easily defined as to their content or in what way they should be applied. Thus it becomes crucial to examine not only whether Sweden's international and regional obligations are reflected in the text of the domestic law but also to look at the way such provisions are implemented. It is often when examining the application of provisions that the true level of protection offered by the State is revealed. In order to reveal the level of protection offered when applied, one part of the thesis will conduct an empirical study of Migration Court cases reviewing age assessments of unaccompanied minors. Given that current world affairs are increasingly forcing masses to leave their homes and seek international protection, and with the irreversible and grave impact an age assessment has on the life of the unaccompanied minor despite its lack of merit, it is evident that this particular part of the Swedish asylum procedure is in desperate need of attention and reconsideration.

1.2 Purpose and aim

The purpose of this thesis is to examine the age assessment of unaccompanied children seeking international protection in Sweden and whether such assessment is in compliance with international and regional regulations. This will be carried out by assessing the age assessment by applying a critical point of view by highlighting and deconstructing the complexities and weaknesses attached to this aspect of migration law. In

[10] McAdam, Jane. *Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection*, 14 International Journal of Children's Rights 14: 251-74, 2006, p. 260. Schiratzki, Johanna. *The Best Interests of the Child in the Swedish Aliens Act.* International Journal of Law, Policy and the Family, 14(3) pp.206-225, 2000, p.218. Gov Bill prop. 1996:97:25 p.249. Wikrén, Gerhard and Sandesjö, Håkan. *Utlänningslagen: med kommentar,* 10 uppl, Norstedts Juridik: Stockholm, 2014, pp. 49.

[11] European Asylum Support Office (hereinafter "EASO"), *Age assessment practice in Europe,* December 2013, p.12.

effect, the purpose is to examine to whether Sweden is successful in offering the protection that the unaccompanied minor is obliged to be able to enjoy, or is Sweden rather in fact missing the mark in such pursuit.

The aim is to fulfil such purpose by examining and answering the following main questions:

- To what extent does the age assessment of unaccompanied minors comply with Sweden's international, regional and domestic obligations? Is such compliance achieved both in regards to content of the legal framework and its application?

In order to be able to answer such questions, the following minor questions must also be explored:

- What are the international, regional and domestic obligations that Sweden must respect when assessing the age of an unaccompanied minor?
- What methods of age assessment are currently used in Sweden?
- How does the Migration Court apply the international, regional and domestic obligations when evaluating the age assessment claim?

1.3 Methodology

In pursuit of the purpose and aim stated above, initially a desk study was conducted of the topic of age assessments of unaccompanied minors. The result of such desk study has been used as a basis for the legal context chapter primarily in an effort to present the content of the various international, regional and domestic instruments affecting this area of law. The material used for such desk study is from international, regional and domestic sources and include legal instruments, preparatory works, United Nation (hereinafter "UN") documents, legal doctrine, case law, governmental and non-governmental policy papers, statistical data and other relevant sources.

Given that the purpose is to examine the level of compliance and as the age assessment procedure is not greatly regulated in law, policy papers and guidelines from the Migration Board and National Board of Health and Welfare are given more space than they would necessarily otherwise be given. They are however nonetheless authoritative sources and such

documents are relied upon by the Migration Courts when making an age assessment.[12]

For the legal context chapter, I have chosen to apply a traditional legal dogmatic methodology[13] as I felt that such methodology was best suited to give the reader a objective account of the legal instruments governing the age assessment. This chapter is regrettably descriptive but ultimately I feel some descriptiveness is needed when assessing the level of compliance of the text of the law plays a significant role and further it provides a comprehensive oversight. Thus the legal context mostly consists of *de lege lata* arguments however *de lege ferenda* arguments are also offered, primarily in the analysis in chapter 4.4 and forwards. Furthermore, *de lege ferenda* arguments are offered in the analyes of the methods of age assessment and of the empirical study. I have aimed to apply a critical point of view to the whole thesis however such critical arguments are primarily found in the two-part analyses and the empirical study conducted.

To complement the desk study, I have conducted an empirical study of 30 cases from the Migration Court and the Migration Court of Appeal. The main purpose of this empirical study was to examine to what extent the international, regional and domestic obligations are respected when applied by the Migration Courts. In this section emphasis has been put on the way in which the different methods of age assessment are valued by the Courts and here a more critical point of view is taken compared to that of the legal context chapter. The selected cases represents roughly 80% of the Migration Court cases and 100% of the Migration Court of Appeal cases from 2006 onwards as case law prior to 2006 is largely irrelevant due to a extensive reform of the Migration Court system.[14] The search was conducted on Infotorg Juridik and I chose to study cases where the age of the applicant was disputed, a medical examination was carried out and where the Court was reviewing the application for international protection rather than family reunification or allocation of government fund claims.[15] For an overview of the results of the empirical study I have created a chart over the main aspects of my findings.[16]

[12] An illustrative case is Migration Court of Appeal, MIG 2014:1.
[13] Hoecke, Mark van. *Methodologies of legal research: what kind of method for what kind of discipline?*, Hart publishing: Oxford, 2011.
[14] The change was conducted in connection with a reform of the Aliens Act/2005:716).
[15] http://www.infotorg.se/ accessed through the Faculty of Law at Lund University.
[16] See Supplement A. The purpose of the chart is aid the empirical study of this thesis only.

When the framework of the Common European Asylum System (hereinafter "CEAS") is referenced the thesis references the recasts of the different legal instruments as for example the Recast of the Asylum Procedures Directive[17] and the Recast of the Reception Conditions Directive[18] must be complied with by the Member States by 21 July 2015 and 20 July 2015 respectively and if the recast where not used this would have the effect that the content of the thesis would soon be outdated. Although all references to the CEAS instruments are to the recasts unless specifically stated, the instruments will be abbreviated with an initial "R" in order to avoid misunderstandings, the Asylum Procedures Directive will for example hereinafter be abbreviated as "RAPD".

As many of the sources are Swedish legal doctrine, I have had to translate Swedish legal terms into English for the benefit of the flow of the text. To carry out such translation I have relied on a glossary provided by the Swedish Court and the Migration Board. I have had to translate some terms loosely myself however such translation will indicated.[19]

1.4 Previous research

The amount of literature available on the topic of age assessment of unaccompanied minors depends on the chosen aspect of the assessment one chooses to study. If choosing to look at it on a general level there is a substantive body of literature available, however the narrower focus applied, the sparser the body of literature. Most literature consider a single theme such as the best interest principle or credibility assessment, rather than looking at the interrelationship between the different aspects and the way in which they interact and effect the age assessment, which I have aimed to do in this thesis. The literature used to conduct the research for this thesis is written by scholars with experience from different legal traditions, fields of migration law and methods of age assessment for a more comprehensive presentation of the current legal position on the topic of age assessment. I have aimed to use scholars who are prominent and authoritative in their respective fields of law. It can be said that the vast majority of the scholars are critical of the age assessment and the methods use to carry it out. One

[17] Asylum Procedures Directive 2013/32/EU (recast).
[18] Reception Conditions Directive 2013/33/EU (recast).
[19] http://www.domstol.se/Publikationer/Ordlista/svensk-engelsk_ordlista.pdf , http://www.migrationsverket.se/download/18.220d99db144da03853b8c96/1410341469631/engelsk-svensk+ordlista.pdf . (Accessed 25 May 2015).

prominent scholar who has heavily criticized the use of radiological medical age assessments is Gregor Noll and thus his arguments will be examined and more thoroughly discussed in chapter 5. For the rest of the thesis I have chosen, for the benefit of the flow of the text and personal stylistic preference, to reference the scholars in the footnotes rather than explicitly mentioning them and their views in the main text which applies to the both domestic and non-domestic scholars.

As the purpose of the thesis is to examine the Swedish age assessment specifically, emphasis is put on domestic legal doctrine in relevant parts of the thesis. As an area of law, migration is currently sparsely written about in Swedish legal doctrine in regards to age assessment and I have therefore needed to rely, at parts heavily, on a few sources. There is however a positive trend due to increasing attention paid to this particular area of law. Similar to the non-domestic literature, the topic of age assessment is often not the primary focus of the doctrine but rather mentioned in order to paint a bigger picture. Most doctrine look at the issues in an isolated manner and focus is usually not put on the application of regulations and do not offer a compliance perspective of the age assessment issue. Furthermore most domestic doctrine mentions the age assessment as a part of the asylum procedure rather than specifically studying it in depth.

1.5 Delimitations

This thesis will only examine applications for international protection lodged by minors who are unaccompanied. Furthermore it is only those applications which are lodged on grounds for international protection which will be examined and applications on ground of reunification will not be studied. Reunification cases are associated with a different burden of proof than international protection claims and an age assessment is often not deemed problematic or necessary in such applications thus making the topic fall outside of the scope of this thesis. Other types of cases which fall outside of the scope as they deserving of their own examination and are further not directly relevant is transfers according to the Dublin regulation[20], detention of minors and exclusion clauses. It is however to be noted that the age assessment as such is the same as that detailed in this thesis however the specific provisions regulating such areas are not detailed further here. Furthermore the purpose and aim is to detail the age assessment part of the

[20] Dublin Regulation 604/2013 (recast).

asylum procedure thus it will not provide a close examination of the grounds for international protection or the regulations Sweden must respect during the asylum procedure as a whole. The obligations which actualizes once international protection has been granted to an unaccompanied minor will not be discussed in lengthy detail as this too falls outside of the scope of the thesis. Such obligations include for example assuring access to health care, education and accommodation.

1.6 Disposition

The second chapter will then detail the legal context of age assessments on an international, regional (EU) and domestic level in order to examine the obligations which must be respected. This chapter is regrettably descriptive in nature as it is necessary to give a comprehensive account of the issue of age assessment to facilitate a meaningful compliance analysis. The legal context will include both hard and soft law due to the significance of the latter on particularly domestic level. Chapter 3 will then analyze the chapter's content in regards to the compliance of the written law only, as the analysis of the application of the provisions will be analyzed in chapter 5. The analysis is divided into two separate parts in order to provide a more in-depth analysis of the different aspects as they are, although interdependent, two distinguished aspects of the issue. After the legal context has been analyzed, chapter 4 will examine the different elements of the age assessment procedure with emphasis on the evidence evaluation of such elements. This is carried out by closely by examining the asylum investigation, the different methods of age assessment and an extensive analysis of the application of the provisions in the Migration Court is conducted. Although this chapter contains analyses throughout the chapter, it is further detailed in chapter 5 where the focus is on analyzing the evidential evaluation and application of the provisions. In a concluding chapter I will then summarize and comment the questions asked in this thesis.

1.7 Definitions

1.7.1 Grounds for granting international protection

Applicants in Sweden can be granted residence permits on four different grounds for international protection. The regulations are found in and regulated by international, EU and domestic instrument. Such grounds are *refugee status, person eligible for subsidiary protection* or *person otherwise in need of protection* or due to *particularly distressing circumstances.*[21] The latter, *particularly distressing circumstances,* is unique to Sweden and is a humanitarian ground granted to those applicants who are not in risk of persecution but are still in need of protection due to for example physical or mental illness.[22] Regardless of the category of grounds for protection, the applications are processed in a similar manner adhering to the same principles. The ground for protection does not influence the manner in which the age assessment is conducted hence the grounds will not be further explored due spatial limitations as such knowledge will not aid the reader in accessing the information presented by this thesis.

For the purpose of this thesis it is beneficial to define a few key aspects as the terminology in texts concerning migration law can easily be somewhat muddled. The term *refugee* and *asylum* should only technically be used in regards to the applicants for international protection which fulfill the criteria for such status determination as defined primarily by Article 1 of the 1951 Refugee Convention and its 1967 protocol[23] (hereinafter "Refugee Convention") however the use of the term is sometimes misused in order to refer to all applicants regardless of grounds for international protection.[24] This is especially true in Swedish migration doctrine which the reader of such sources should be mindful of, however for the purpose of this thesis an effort has been made not to add to the mix-up of such terms. Therefore I will

[21] In Sweden they are regulated in the Aliens Act (2005:716) ch. 4 1-2a§, ch. 5 6§, ch. 1 3§.
[22] Aliens Act ch. 5 6§. Wikrén, Gerhard and Sandesjö, Håkan, 2014, kommentar till kap 5. 6§. Diesen, Christian, Lagerqvist Veloz Roca, Annika, Lindholm Billing, Karolina, Seidlitz, Madelaine, and Wahren, Alexandra. *Bevis 8: Prövning av migrationsärenden,* 2nd ed, Norstedts Juridik: Visby 2012, p.55-57.
[23] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.
[24] A refugee is defined in Article 1(A)(2) of the Refugee Convention as the following: "Any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country".

call the four different grounds collectively as *grounds for international protection* which then refers to all four grounds for protection unless otherwise specified. However certain terms such as *asylum investigation* and *asylum-seeker* will be used as a collective term and includes applicants regardless of status and applications under all four grounds for international protection unless otherwise stated.

1.7.2 Child and Unaccompanied minor

The concept of childhood and at what age[25] childhood ceases varies from country to country. In order to establish a definition of the term *child* for the purpose of this thesis, a starting point has been taken in the Convention on the Rights of the Child[26] (hereinafter "CRC") which is almost universally ratified and can be said to be one of the most internationally influential instruments when it comes to the protection of children's rights.

According to Article 1 of the CRC, a child is person under the age of 18, unless the national law applicable to him or her sets a lower age for majority which then applies. Also on an European level the age threshold for childhood is set at 18, as can be seen by for example Article 2(k) in Recast Qualification Directive[27] (hereinafter "RQD") and Article 2(l) in RAPD.[28] In line with both internationally and regionally set standards, the Swedish domestic law defines children as those up to 18 years of age, both in the provisions applicable on Swedish nationals and third-country nationals.[29] It is to be noted that the CRC is applicable to all children within the State Party's jurisdiction, regardless of nationality or the status of the child.[30] Thus as for the purpose of this thesis, a child (or minor) will be defined as a person that is under the age of 18 appears most suited for the purpose of this thesis.

Having established a definition of a child for the purpose of this thesis, it must further be defined when such child is to be considered an *unaccompanied minor*. United Nations High Commissioner for Refugees

[25] When the word *age* is used, chronological age is meant.
[26] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3. Ratified by Sweden on 29th of June 1990 and entered into force 2nd September 1990.
[27] Qualification Directive 2011/95/EU (recast).
[28] See further Kilkelly, Ursula. *The Child and the European Convention on Human Rights*, Dartmouth Publishing Company Limited: Aldershot, 1999, pp.21-23. Dublin Regulation (604/2013) Article 2(i), RAPD Article 2(l), RQD Article 2(k), RRCD Article 2(d).
[29] The Aliens Act, 1 kap. 2§, Children and Parents Code (1949:381) 9 kap. 1§, Gov Bill prop. 1996/7:25 p.112.
[30] CRC Article 2.

(hereinafter "UNHCR") has defined an unaccompanied minor as a child under the age of 18 (unless majority is attained earlier) who has been separated from both parents or is not cared for by another adult which is responsible under law or custom to do so.[31] On a regional level, EU law has further specified that the unaccompanied minor is a child under the age of 18 who is on the territory of a Member State without such previously named caregiver.[32] In Swedish legislation a similar provision can be found; defining an unaccompanied minor as a person under the age of 18, who is separated from either parents or another caregiver who has taken over the parental role when arriving to Sweden.[33] As seen, the definition of a unaccompanied minor appears relatively universal thus the thesis will adhere to such definition moving forward.

At times unaccompanied minors are referred to as unaccompanied asylum-seeking children which is for example particularly common in Sweden by the use of the term *ensamkommande flyktingbarn* (roughly translated to unaccompanied refugee-children). When such term is used within this thesis all children are referred to regardless of which ground for international protection is claimed. Moreover, in order to avoid unnecessarily complicated sentence structures, when an *applicant* is referenced in general this is referring to an applicant who is an unaccompanied minor unless otherwise stated.

[31] UNHCR. *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, para. 3.1. See similar definition in Committee on the Rights of the Child. *General comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para 7.

[32]). Dublin Regulation Article 2(j), RAPD Article 2(m), RQD Article 2(l), RRCD Article 2(e). Family Reunification Directive (2003/86/EC) Article 2(f).

[33] Guardian for Unaccompanied minors Act (2005:29) 1-2§. Wikrén, Gerhard and Sandesjö, Håkan, 2014, p. 240.

2 Legal context

2.1 International obligations

2.1.1 The 1951 Refugee Convention and its 1967 protocol

Similar to many other international human rights documents, the development of the Convention relating to the Status of Refugees and its 1967 Protocol took its starting point after the World War II atrocities and the great number of refugees and displaced persons. The humanitarian core of the Convention was already evident at the first session in 1946 when the General Assembly expressed that the cardinal principle of the instrument is that no person with valid objections to returning to their country of origin should be forced to do so.[34] The UNHCR came into effect the 1 January 1951 and is an independent subsidiary organ to the General Assembly.[35] The primary task of the UNHCR is to provide international protection to refugees and further assist State Parties to reach permanent solutions for the refugees' problems.[36]

One of most significant legal documents in the area of International Refugee law is the Convention relating to the Status of Refugees and its 1967 Protocol (hereinafter "Refugee Convention").[37] The Refugee Convention defines who is a refugee and the rights and duties which follow from such status determination.[38] Both the European and Swedish refugee legislation use the Refugee Convention as a starting point for their respective legal instruments as will be evident throughout this chapter. The Refugee Convention does not however specify what requirements such refugee status

[34] Resolution 8 (I) of 12 February 1946. Goodwin-Gill, Guy S. *Convention relating to the Status of Refugees, protocol relating to the Status of Refugees*, The United Nations Audiovisual Library of International Law, 2008, p.1.
[35] UN General Assembly, resolution 428 (V) of 14 December 1950. UN General Assembly resolution 58/153 of 22 December 2003, para 9.
[36] Goodwin-Gill, Guy S, 2008, p. 2.
[37] UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, 22 December 2009, para 1. UNHCR. *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, para 213. Sandesjö, Håkan. *Barnrättsperspektivet i asylprocessen*, Norstedts Juridik: Stockholm, 2013, pp. 46-48.
[38] See *inter alia* The Refugee Convention Article 1(A).

determination procedures must respect, which consequently means that there are no rules regarding the age assessment of an unaccompanied minor as such procedure is carried out as a part of the refugee status determination procedure.[39] The drafters of the Refugee Convention thought it best to assign such task to the State Parties whom could establish procedures attuned to their particular legal traditions depending on the varied domestic constitutional and administrative procedures of the different State Parties.[40] Moreover, the Refugee Convention does not contain any child specific provisions and applies to adults and children alike.[41] As a result of the lack of procedural provisions, it is imperative to look for interpretation guidance from the UNHCR *Handbook on procedures and Criteria for Determining Refugee Status* (hereinafter "UNHCR Handbook"). Although not formally binding, the UNHCR Handbook and its more recent guidelines on international protection are heavily relied upon by State Parties as an authoritative source for interpretation of the Refugee Convention and its protocol.[42] Accordingly the account of the legal context relevant to the focus of the thesis will similarly use the UNCHR Handbook for guidance as to the content of the provisions provided by the Refugee Convention.

A component of the procedural aspect which plays a significant part in the age assessment of the unaccompanied minor, is establishing the facts. While trying to establish such facts, the principle of *burden of proof* plays a central role and is further a general legal principle in the law of evidence. The general meaning of the principle is that the person submitting a claim is the one who has the burden to prove such claim. The principle is also applicable in the refugee context, meaning that the burden of proof falls on the asylum seeking applicant to prove that s/he fulfills the criteria for obtaining refugee status.[43] The principle of burden of proof is not only applicable on adult applicants but also those applicants who are unaccompanied minors.[44] One element of the refugee status determination procedure is establishing the applicant's identity which consists of the applicant's name, age and

[39] Gorlick, Brian. UNHCR Working Paper No. 68, "*Common burdens and standards: legal elements in assessing claims to refugee status*", October 2002, p.1.
[40] Gorlick, Brian, 2002, p.1. UNHCR *Handbook*, paras 189-191.
[41] Sandesjö, Håkan, 2013, pp. 46-48. Bhabha, Jacquelina and Young, Wendy, 1999, p. 88.
[42] Goodwin-Gill, Guy S, 2008, pp. 6-7. Sweeney, James A. *Credibility, Proof and Refugee Law*, International Journal of Refugee Law, vol. 21, no. 4, 2009, p 707. Seidlitz, Madelaine. *Asylrätt - en praktisk introduktion*, Nordstedts Juridik: Stockholm, 2014, p.18. Hathaway, James C., 2005, pp. 114-115.
[43] UNHCR *Handbook*, paras 195-196. UNHCR. *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, paras 1-4. *R.C v Sweden*, no. 41827/07, §§ 50, 53, ECtHR, 9 March 2010. *Saadi v Italy*, no. 37201/06, § 129, ECtHR, 28 February 2008. *N v Finland*, no. 38885/02, § 167, ECtHR, 26 July 2005.
[44] UNHCR *Handbook*, para 213.

citizenship.[45] Hence the burden is upon the unaccompanied minor to make his or her age probable. Due to the particular situation of the applicant[46] and the non-adversarial nature of the claim, the burden of proof principle takes on a different shape in the refugee context by transforming into a "shared" burden of proof. In this particular situation, by "shared burden" it is meant that while the burden of proof in principle lies on the applicant, the duty to ascertain and assess the presented facts of the case is in upon both parties, thus creating this form of shared burden.[47]

Although such shared burden of proof applies to all applicants regardless of age, it is especially important when it comes to unaccompanied minors and the examiner may need to assume a greater role than in adult cases.[48] The evidence which the applicant should provide does not have to be any particular formal evidence thus may be oral or written. Given the situation of the unaccompanied minor and the inherit difficulty in producing written evidence, the requirement of evidence should not be as strict as it would be in for example a criminal law case.[49] The applicant must make a reasonable effort to establish that his or her claim is truthful and has fulfilled his or her burden of proof when s/he has, with reasonable effort, provided truthful accounts of facts upon which a proper decision can be made. This is where the burden of proof then becomes shared with the decision-maker who has to ascertain and assess the facts provided and *ex officio* establish all relevant facts and considerations. The decision-maker will mainly do this by relying of country of origin knowledge, reports from the civil society and by guiding the applicant so that relevant needed facts are provided.[50]

Due to the fact that a claim can rarely be solely supported by clear and reliable documentary evidence, it will in many cases be necessary to give the applicant the benefit of the doubt as s/he will not be able to prove every part of his or her claim. Consequently the applicant is not obliged to prove all facts of the claim to such a level that the decision-makers' doubts are

[45] Migration Court of Appeal, MIG 2014:1 and MIG 2011:11.
[46] By applicant both adult and minor applicants are included.
[47] UNHCR *Handbook*, paras 195-196. UNHCR. *Note on Burden and Standard of Proof in Refugee Claims*, 1998, paras 5-6. *R.C v Sweden*, §§ 50-53. Gorlick, Brian, 2002, pp.4-5.
[48] UNHCR, *Guidelines on International Protection No. 8*, 2009, para 73. UNHCR, *Summary of UNHCR's Executive Committee Conclusion on Children at Risk No. 107 (LVIII)*, 5 October 2000, para g (viii).
[49] UNHCR Handbook, paras 197-2002 Gorlick, Brian. *Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status*, 2003, 15 International Journal of Refugee Law, pp. 360-363.
[50] UNHCR Handbook, paras 197-2002. Gorlick, Brian, 2003, pp. 360-363.UNHCR. *Note on Burden and Standard of Proof in Refugee Claims*, 1998, paras 5-6.

fully eradicated as to demand that of the applicant would be pragmatically unattainable.[51]

The benefit of the doubt may be afforded to the applicant once s/he has made a genuine effort to provide the available evidence to substantiate his or her claim, the provided evidence has been checked and the applicant has been deemed overall credible. Furthermore the statements which the applicant has provided must be coherent, plausible and must not be contradictory to known facts. The statements should not for example be contrary to established country of origin knowledge.[52] This applies to all applicants alike, including unaccompanied minors. Putting the benefit of the doubt principle in the specific unaccompanied minor context, the principle should be applied more extensively than in cases with adult applicants. When all the facts of the case cannot be established or the unaccompanied minor is not capable of presenting his or her claim fully, the examiner must make a decision with background to all the known circumstances and apply the benefit of doubt principle in more liberal manner than in adult cases. Such liberal application applies not only to the unaccompanied minors' refugee status claim specifically but also the general credibility of the claim.[53] Furthermore this entails that the benefit of the doubt should be granted in situations when the exact age of a child is uncertain.[54]

The Refugee Convention does not contain any specific provisions in regards to assessing the age of an applicant who is an unaccompanied minor although some guidance can be found in UNHCR guidelines, as detailed below. The age assessment should be part of a comprehensive assessment, which considers not only physical appearance but also the psychological maturity of the individual.[55] Such assessments should be conducted in a safe, child- and gender-sensitive and fair manner. When medical methods are applied they must be scientific and safe, maintaining a respect for human

[51] UNHCR *Handbook*, paras 196-197, 202-204. UNHCR. *Note on Burden and Standard of Proof in Refugee Claims*, 1998, para 12.
[52] UNHCR *Handbook*, paras 196, 202-204.
[53] UNHCR *Handbook*, paras 196 and 219. UNHCR, *Guidelines on International Protection No. 8*, 2009, para 7. UNHCR, UNICEF et al, *Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, January 2004, p. 61. Committee on the Rights of the Child, *General comment No. 6*, 2005, para 71.
[54] UNHCR, *Guidelines on the Policies and Procedures in dealing with Unaccompanied Children seeking asylum*, February 1997, para 5.11(c). UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994, pp. 102-103.
[55] UNHCR, *Guidelines on International Protection No. 8*, 2009, para 75. UNHCR, ExCom, *Conclusion n. 107*, para (g)(ix).

dignity and avoiding violating the physical integrity of the child.[56] When medical methods are used, a margin of error should be allowed and is in fact inherit to the situation and further in cases where uncertainty remains the applicant should be considered a child thus awarding the applicant the benefit of the doubt if there is a possibility that the applicant is a child.[57] The wording of these recommendations is rather strong, not offering too many derogation possibilities however as will be seen the analyses in chapter 3 and 5, the benefit of the doubt is sparsely afforded to the unaccompanied minor thus the recommendations are not complied with other than perhaps in policy papers. As with any issue and particularly the issue at hand, creating policies containing all the "keywords" and actually applying them can be two very separate things.

Furthermore, before an age assessment is carried out the unaccompanied minor should be appointed a qualified independent guardian and the purpose and procedure of the age assessment should be detailed to the unaccompanied minor in a language which s/he understands.[58] The examiner carrying out the age assessment should be aware of cultural behaviors which may impact the examiners assessment of the applicant's age and credibility. Age is not universally calculated as diverse countries use different calendars and age is further is not always given a significant weight in society like it is commonly done in western countries. In order to avoid misrepresentation, it is recommended by the UNHCR that the legal consequences of certain ages are limited when possible. Rather the level of vulnerability and "immaturity" requiring more sensitive treatment should be the guiding principle.[59] Another principle which also should be guiding in all matters involving children, is the best interest of the child principle found in the CRC which will now be detailed.[60]

[56] UNHCR *Handbook*, para 75. UNHCR, *Guidelines on the Policies and Procedures in dealing with Unaccompanied Children seeking asylum*, February 1997, para 5.11(a)-(b). Committee on the Rights of the Child, *General comment No. 6*, 2005, paras 31(i), 71.
[57] UNHCR Handbook, paras 197-2002. UNHCR. *Note on Burden and Standard of Proof in Refugee Claims*, 1998, paras 5-6. Gorlick, Brian, 2003, pp. 360-363.). UNHCR, *Guidelines*, February 1997, paras 5.11, 6.
[58] UNHCR *Handbook*, para 75. UNHCR, *Guidelines on International Protection No. 8*, 2009, para 75.
[59] UNHCR, *Guidelines*, February 1997, para 5.11.
[60] UNHCR. *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, paras 1.3-1.5. McAdam, Jane, 2006, p. 251.

2.1.2 The Convention on the Rights of the Child

Concerns about the especially vulnerable position of refugee children both during and after conflict, eventually led to the Convention on the Rights of the Child (hereinafter "CRC") which was drafted in 1989.[61] The CRC as an instrument to some extent underpins all international guidance in matters involving children and plays a significant role.[62] The rights within the CRC are interdependent and indivisible hence they should be read as a whole.[63] The CRC provisions establish a minimum standard of rights by containing non-negotiable standards and obligations.[64] The Convention does not allow the State Parties to derogate from any of the provisions thus creating a rather wide range of rights compared to that afforded by the international community to adults.[65]

The CRC further provides all children within the State's territory and subject to its jurisdiction with equal rights regardless of their legal status. [66] Though the rights are universal and must be common to all, the CRC acknowledges different cultural, political, social and economic differences between the State Parties and delegates the responsibility of defining domestic ways of implementation.[67] Guiding the State Parties in their implementation and application are four general principles for the States to respect, namely non-discrimination (Article 2), best interest of the child (Article 3), the right to life, survival and development (Article 6) and respect for the views of the child (Article 12).[68] The principle which is most

[61] Bhabha, Jacquelina and Young, Wendy, 1999, p.87.

[62] Freeman, Michael. *Law and Childhood studies*, vol 14, Oxford University Press: Oxford, 2011, p. 7.

[63] UN Committee on the Rights of the Child (CRC), *General comment no. 5* ,2003, para 18. Sandesjö, Håkan, 2013, p.33.

[64] Price Cohen, C. *The United Nations Convention on the Rights of the Child: Implications for Change in the Care and Protection of Refugee Children*, International Journal of Refugee Law, 3(4) pp. 675-691, 1992, p.676. McAdam, Jane, 2006, pp.251-252.Committee on the Rights of the Child, *General comment No. 6*, 2005, para 6.

[65] McAdam, Jane, 2006, p.253.

[66] Article 1 CRC defines a child as "every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier". McAdam, Jane, 2006, p. 251.

[67] Article 2 CRC. Committee on the Rights of the Child, *General comment No. 6*, 2005, paras 12-13. Sandesjö, Håkan, 2013, p.33.

[68] CRC Committee, *General comment no. 5: General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5. CRC Committee, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, para 1.

relevant to the age assessment of unaccompanied minors is the best interest principle which is why focus will be put on detailing such principle.[69]
Similar to the Refugee Convention, the CRC does not make any specific mention of age assessment in the text of the Convention. The Committee on the Rights of the child has however issued recommendations regarding such issues in regards to for example the benefit of the doubt. The content of such recommendations has been mentioned already in connection with the benefit of the doubt within the Refugee Convention in order to avoid repetition as the closely resemble one another.[70] Having said that, it is however invaluable to examine the guidance given on the content of the best interest principle both on a general level but also more specifically in regards to the unaccompanied minors situation and age assessment.

The best interest of the child principle as found in Article 3(1) of the CRC, requires that in all actions concerning children the best interest of such child shall be a primary consideration. This includes actions and decisions taken not only in the public but also private sphere and includes actions undertaken by social welfare institutions, courts of law, administrative authorities and legislative bodies. It is the obligation of the State Parties to take necessary and deliberate steps in order to ensure that the right is fully implemented.[71] The level of detail required in regards to the procedures depends of the impact of the decision, the greater impact on the child then the greater level of protection and detailed procedures is warranted.[72]
Determining the actual content of the best principle is a complex task and the content is best determined on a case-to-case basis which opens up for flexibility and adaptability when following the individual needs and situations.[73] This content determination includes taking the following into consideration; the unaccompanied minors nationality, upbringing, ethnic and cultural background and any particular vulnerabilities or needs for protection.[74] When the word flexibility and adaptability are used in order to describe the content of a provision, it can most often also be described as

[69] McAdam, Jane, 2006, p.254.
[70] See further chapter 2.1.1.
[71] Committee on the Rights of the Child. *General comment No. 14*, 2013, paras 1, 13-15. The best interest principle is further mentioned in other CRC Articles such as Article 9, 10, 18, 20, 21, 37(c), 40 paragraph 2(b)(iii). UNHCR, *Guidelines on Determining the Best Interests of the Child*, May 2008, p. 15.
[72] Committee on the Rights of the Child. *General comment No. 14*, 2013, para 20.
[73] Lundberg, Anna. *The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights*. Journal of Human Rights Practice, 3(1): 49-70, 2011, p. 54. McAdam, Jane, 2006, pp.255-256.Committee on the Rights of the Child. *General comment No. 14*, 2013, paras 32-35.
[74] Committee on the Rights of the Child, *General comment No. 6*, 2005, para 20. McAdam, Jane, 2006, p.256.

being potentially subjective. Though flexibility in some cases may benefit the applicant, it can just as easily be used in an unfavorable manner for the applicant when there are not strict regulations put in place. As with any provision characterized by subjectivity the decision are often not replicable and thus may be less respectful of rule of law. Applying such flexible provisions in a successful manner also demands that the official applying it has sufficient knowledge not only of law but of cultural, ethnic and child-specific types of vulnerability. This is a rather high standard to demand from the officials and as they most probably do not possess such knowledge, the risk of subjective decision-making increases.

Consequently, inherit in named best interest assessment is that it is completed by qualified professionals and that the unaccompanied minor is speedily provided with both a guardian and public council.[75] The CRC Committee further notes that given the wording of Article 3(1); "a primary consideration", the principle should not be considered on the same level as all other considerations. This is based upon the special situation of the child and their inability to make a strong case for themselves which is hindered by for example their dependency and lack of legal competence. Although the principle must ultimately be weighed against other interests, the principle should no less be given high priority and substantial weight should be attached to it.[76] In most cases the best interest principle will be weighed against the interests of the State rather than against another individual, and the most apparent State interest is concerns regarding migration control. In this regard, the CRC Committee has stated that non-rights-based general arguments of migration control concerns cannot override considerations of the best interest of the child.[77] The Committee does not state specifically which interest which would trump the best interest considerations, but rather this will have to be carried out in a case-to-case basis taking into proportionality and reasonableness considerations as well as the view of the child as stipulated by Article 12.[78] Opposing interests other than migration control can be national security, public order or deterrence of people

[75] Committee on the Rights of the Child, *General comment No. 6*, 2005, paras 20-21, 33-38.
[76] McAdam, Jane, 2006, pp.254-259. Alston, Philip. *The Legal Framework of the Convention on the Rights of the Child,* Bulletin of Human Rights 91/2, 1991, p.9. *Wu v Canada*, 2001 F.C.T 1274, para 9Committee on the Rights of the Child. *General comment No. 14*, 2013, paras 37-40.
[77] Bhabha, Jacquelina. *Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers.* European Journal of Migration and Law, 3(3-4) pp. 284-314, 2001, pp.293-299.Committee on the Rights of the Child, *General comment No. 6*, 2005, para 86.
[78] Committee on the Rights of the Child, *General comment No. 6*, 2005, para 86. Bhabha, Jacquelina, 2001, pp.293-299.

smuggling networks.[79] The Committee further states that in order to ensure that the best interest principle has in fact been taken into consideration, a decision concerning a child should be motivated, justified and explained. This includes for example the elements considered relevant for the assessment and how the different elements have been weighed in the best interest assessment. It should not be carried out in general terms simply stating that other considerations were weighted more but rather such distribution of weight should be specified.[80] The Committee on the Rights of the Child was established by the CRC and serves as the monitoring mechanism of the Convention and it plays a significant role when it comes to interpreting the provisions contained by the Convention which is why the recommendations from the Committee is valuable to take into consideration.[81]

2.2 Regional obligations

The Refugee Convention is considered to be the "cornerstone" of the international refugee regime thusly the content of the European refugee regime is heavily influenced by the Convention as will be evident below.[82] When discussing EU regulations concerning person seeking international protection, the Common European Asylum System plays a significant role thus this body of legal instruments will therefore be detailed below. The focal point of the following section will be the most relevant regulations surrounding unaccompanied minors and in particular the age assessment.

2.2.1 Common European Asylum System

The purpose of the Common European Asylum System (hereinafter "CEAS") is to work towards the European Union's objective of creating a common policy on asylum, whereas establishing an area of freedom, security and justice open to those who forced by circumstance legitimately

[79] CRC Article 10(2). McAdam, Jane, 2006, p.258. Bhabha and Young, 1999, p. 97.
[80] Committee on the Rights of the Child. *General comment No. 14*, 2013, para 97. Alston, Philip. *The Best Interest Principle: Towards a Reconciliation of culture and Human Rights*, Oxford University Press: Oxford, 1994, p.13.
[81] Article 43 CRC. Tobin, John. *Seeking to Persuade: A constructive approach to Human Rights Treaty Interpretation.* 23 Harvard Human Rights Journal 201, 2010. Freeman, Michael. 2011, pp.375-376.
[82] RQD preamble para 4. Seidlitz, Madelaine, 2014, p. 16.

seek protection in the Union.[83] The CEAS applies to the identification of applicants, determination of which State is responsible to examine an asylum application, sets out conditions of reception of asylum seekers, sets rules for the asylum procedures, recognizing refugee status and subsidiary forms of protection, temporary protection and sets out practical cooperation on asylum issues between the Member States. CEAS consists of the Dublin Regulation , Asylum Procedures Directive ("RAPD"), Qualification Directive ("RQD"), Reception Conditions Directive ("RRCD"), Temporary Protective Directive and the Eurodac Regulation.[84] The aforementioned regulations apply to third-country nationals or stateless persons who find themselves on the territory of a Member States, including unaccompanied minors.[85] CEAS sets a minimum standard of rights that all applicants are entitled to but the Member States may also implement standards that are more favourable given that they are still compatible with the Regulations and Directives.[86]

The evidential aspects of the European asylum regime is similar to corresponding aspects within the international asylum regime and will therefore only be mentioned shortly here to avoid repetition. According to Article 4(1) RQD the burden of proof, or burden to substantiate the application as it is phrased, is upon the applicant.[87] This is materialized by having the duty to submit all the elements needed in order to substantiate the application and to do so as soon as possible. Once this has been completed, the duty to assess the relevant elements rests upon the State. Article 4(2) RQD further specifies what constitutes such elements as mentioned in 4(1), namely the applicant's statement and documentation which the applicant is in possession of which can substantiate the applicant's age, background, nationality, relevant relatives, places of previous residence or asylum applications, travel routes and documents and the reasons for seeking international protection.[88] In order to ensure that the decision on international protection is taken after an appropriate examination has been completed; officials with relevant qualifications should examine all

[83] Article 78 §1 TFEU. Such objective can also be found in the preambles of the respective CEAS instruments.
[84] Dublin Regulation (604/2013), Asylum Procedures Directive (2013/32/EU), Qualification Directive (2011/95/EU), Reception Conditions Directive (2013/33/EU), Temporary Protective Directive (2001/55/EC) and Eurodac Regulation (603/2013).
[85]RQD Article 1, Dublin regulation Article 1, RAPD Article 3, RRCD Article 3. Third country national is a person who is not a citizen of the Union as defined by Article 20(1) TFEU.
[86] Article 5 RAPD, Article 3 RQD, Article 4 RRCD.
[87] See further *R.C v Sweden*, §53.
[88] See also Article 13 RAPD regarding the obligations of the applicants.

applications individually, objectively and impartially. [89] Those professionals who work with child specific cases should further receive appropriate training in the rights and needs of children.[90]

As within the international refugee law, the benefit of the doubt can also be found in the CEAS. As has previously been mentioned, the benefit of the doubt principle is applicable in instances where the burden to substantiate ones application for international protection is upon the applicant however the applicant is not able to substantiate the application as his or her statements cannot be supported by documentary- or other evidence. When the conditions established by Article 4(5) RQD are met, the principle is engaged and those aspects of the applicant's statement do to need to be substantiated. According to named Article, the benefit of the doubt should be applied if the applicant has made a genuine effort to substantiate his or her claim, has given all documents at his or her disposal and explained why s/he is lacking other relevant documents and if the applicant's statements are found to be coherent and plausible without being contrary to available information.[91] Further the applicant should have lodged an application for international protection at the earliest possible time or if this has been neglected, then be able to show good reasons for not doing so. Further the general credibility of the applicant must have been established.[92] When an application is lodged on behalf of an unaccompanied minor some allowance should be afforded the applicant due to his or her age, maturity and mental development and also be afforded allowance regarding lacking knowledge of conditions in the applicant's country of origin.[93]

Member States should take into account the specific situation of vulnerable persons, including unaccompanied minors, in the national law which implements the Directives. This includes matters such as the need for special reception needs throughout the asylum procedure.[94] Furthermore the Member State may prioritize its examination of an application for international protection if it was lodged by a vulnerable person, such as an unaccompanied minor which is considered to be a particularly vulnerable person.[95]

[89] Article 10(3)(a) and (c).
[90] Article 25(3) RAPD, Article 24(1),(4) RRCD, Article 31(6) RQD. EASO, 2013, p.21.
[91] Article 4(5)(a)-(c) RQD.
[92] Article 4(5)(d)-(e) RQD.
[93] Article 4(6) Council Regulation of 26 June 1997 on unaccompanied minors who are nationals of third countries (97/C 221/03).
[94] Articles 21 and 22 RRCD, Article 20 (3) RQD.
[95] Article Article 4(2) Council Regulation (97/C 221/03).

2.2.1.1 Age assessment

When an unaccompanied minor arrives on the territory of a Member State, efforts to establish the identity of the unaccompanied minor should be made as soon as possible after arrival.[96] The means to establish the identity may be achieved by various means and there is no standardized approach in place between Member States. The methods can include radiological tests, physical examinations and practical observation using ocular assessments, checking documentary evidence and anamnesis account.[97]

The provisions regulating the use of medical examinations to establish the age of an unaccompanied minor can be found in Article 25(5) RAPD and the preceding Council Regulation of 26 June 1997 on unaccompanied minors who are nationals of third countries (97/C 221/03)[98] and its Article 4(3). The two regulations are applicable on unaccompanied minors who have lodged applications on the basis of being in need of international protection only, not applications on other grounds.[99]

In regards to ones claim of a certain age, the burden of proof upon the unaccompanied minor, phrased as the minor must produce evidence to show the claimed age.[100] If the unaccompanied minor is unable to produce such evidence and the examiner has doubts following general statements or other relevant indications, the Member State may use medical examinations in an effort to determine the age of the applicant. This completed as a part of the examination of the applicant's application for international protection.[101] The wording "after serious doubt" in Council Resolution 1997 suggests that the age assessment should not be carried out as a matter of routine. Furthermore, according to RAPD general statements and other relevant indications must be considered first which suggests that the medical age

[96] Article 31(7)(b) RAPD. Article 3(1) Council Regulation (97/C 221/03).
[97] European Union Agency for Fundamental Rights ("FRA"), *Separated, asylum-seeking children in European Union Member States, Summary Report,* 2010, p. 36. Separated Children in Europe Programme ("SCEP"), *Position paper on Age Assessment in the context of Separated Children in Europe,* May 2012, pp.6-7 and Annex 1. Aynsley-Green, Sir Albert , *The assessment of age in undocumented migrants,* March 2011, p. 11. An anamnesis account is the medical history of a person, such as previous illnesses or other medical information of relevance.
[98] Although the Council Regulation precedes the RAPD, I have still chosen to cite it in the thesis as the Swedish Migration Courts still use if for reference in their decisions, see for example Migration Court of Appeal, MIG 2014:1, p. 10.
[99] Article 3 RAPD. Article 1 Council Regulation (97/C 221/03).
[100] Article 4(3)(a) Council Regulation 97/C 221/03.
[101] Article 25(5) 1st para RAPD. Article 4(3)(b) Council Regulation 97/C 221/03, here phrased as "serious doubt".

assessment should only be carried out when no other evidence exists or available evidence does not support the assertion that the applicant is a child.[102] In addition, according to Article 4 RAPD, when assessing the age, all evidence available should be taken into consideration.[103] In order to decide upon which method to use, the European Asylum System Office (hereinafter "EASO") whose opinion should be taken into account when interpreting the provisions, recommends to base such decision taking into consideration a variety of factors and evidence, such as physical, psychological, developmental, environmental and cultural factors. Moreover, the best interest principle should be a primary consideration when deciding upon which age assessment method to use.[104]

Such medical examination must be carried out by qualified medical professionals, be performed with full respect for the individual's dignity, using the least invasive examination and executed objectively.[105] There is no consensus as to what the least invasive method is, however the EASO recommends that is to be determined by the context of the individual circumstances and a SWOT analysis should be carried out on the method applied.[106]

If the chosen method of age assessment is a medical examination then such examination may not be carried out unless the unaccompanied minor has consented to participate in such examination.[107] Before the unaccompanied minor decides to consent or not to a medical examination, the Member State is obliged to ensure that the unaccompanied minor is informed, in a language which s/he understands, of the possibility of a medical examination being performed and what such examinations entails. The unaccompanied minor should also be informed of the possible consequences of the examination's result as well as the potential consequences of refusing to take part in the medical examination. If a medical examination has been

[102] EASO, 2013, pp. 13, 24.
[103] Article 4 RQD.
[104] Preamble para 9-10 RAPD. EASO, 2013, p.24. The EASO was established through *Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office* and its function is to for example enhance the implementation of the CEAS through interpretative assistance.
[105] Article 25(5) 2nd para RAPD. Article 4(3)(b) Council Regulation 97/C 221/03. Article 3 The Treaty Establishing the European Atomic Energy community "Euratom" (2010/C 84/01). Regarding qualified professionals see further: Article 24(1),(4) RRCD, 25(1),(3),(5) and 31(6) RQD.
[106] SWOT is an analysis technique identifying strengths, weaknesses, opportunities and threats. EASO, 2013, p. 20.
[107] Article 25(5)(a)-(b) and 19 RAPD. Article 4(3)(b) Council Regulation 97/C 221/03. FRA, 2010, p. 54.

carried out and the Member State is still in doubt regarding the age of the applicant, the Member State shall assume that the applicant is a minor, thus affording the benefit of the doubt to the applicant.[108]

When the examiner is to make a decision in regards to an application for international protection where the unaccompanied minor has refused a medical examination, a rejection of international protection claim may not solely be based on the unaccompanied minor having refused to take part in the medical examination. Moreover, the fact that the unaccompanied minor has refused to take part in the medical examination does not hinder the examiner from taking a decision on his or her application for international protection.[109] Before reaching a decision, the examiner should afford consideration to the reasons and justifications behind refusing to undergo the medical examination.[110]

If the unaccompanied minor receives a negative decision regarding the claim for international protection, s/he should be provided by the Member State with information to clarify the underlying reasons for the decision and the ways in which it can be challenged. Should the age assessment decision not be possible to separately appeal, there should at least be the possibility of challenging it through judicial review or as a part of the overall consideration of the applications for international protection.[111] There is no provision within CEAS that grants the right to appeal an age assessment specifically but the provisions are concerned with *inter alia* decisions of the application for international protection as a whole.[112] Given the mentioned extensive and grave legal consequences being considered an adult rather than a minor, the fact the age assessment cannot be appealed specifically is highly problematic and will be discussed in further detail in chapter 3 below.

[108] Article 25(5) 1st para RAPD. European Council on Refugees and Exiles, *Position on Refugee Children*, November 1996. EASO, 2013, p. 16.
[109] Article 25(5)(c) RAPD.
[110] EASO, 2013, p. 18.
[111] Article 19, 25(4) RAPD. EASO, 2013, p. 21.
[112] See for example: Article 46 RAPD, Article 27 RDR, Article 26 RRCD.

2.2.2 Best interest of the Child within CEAS

The best interest of the child principle can be found in numerous EU instruments and is often reiterated in the preambles that the principle should be a primary consideration.[113] The content of the principle in the European instruments is heavily influenced by the CRC principle whose content has been discussed in detail in chapter 2.2.2 and will therefore only be shortly mentioned here, adding relevant regulations. Similar to that of the CRC, what the exact content of the best interest of the child should be is not defined by the EU migration instruments.[114]

The Charter of Fundamental Rights of the European Union[115] became binding on 1 December 2009 through the Treaty of Lisbon Treaty[116], making the Charter legally binding for the EU institutions and Member States, similar to that of the EU Treaties.[117] Being identified as an objective of the EU, Article 24 of the Charter regulates the rights of the child and states after establishing that all children has the right to the protection and care their well-being necessitates, the best interest principle must further be a primary consideration in all actions concerning children taken by public authorities or private institutions.[118] The statement that the best interest of the child is to be a primary consideration in matters concerning children mirrors Article 3 CRC and can also be found in the CEAS instruments.[119] As the principle should be taken into account in all matters concerning children, this includes the decision to engage an age assessment and also when deciding upon which method of age assessment is to be used. In such decision assessment, the Member State should consider the particular circumstances of the child applicant and further consider how a decision would affect the child's rights as afforded to him or her by other instruments.[120] In order to ensure this is complied with, those who work

[113] See for example preambles paras 17 and 25 Eurodac, para 13 RDR, para 18, 38 RRQD, para 9 RRCD, para 33 RAPD, Council Regulation 97/C 221/03.
[114] Stalford, Helen. *Children and the European Union: Rights, Welfare and Accountability*, Hart Publishing: Oxford, 2012, pp. 40, 80.
[115] The Charter of Fundamental Rights of the European Union (2010/C 82/02).
[116] Article 6**,** Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon) 13 December 2007, 2007/C 306/1.
[117] http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm (Accessed 22 April 2015). Stalford, Helen, 2012, p.40.
[118] SCEP, 2012, p. 5.Sandesjö, Håkan, 2013, p. 56.
[119] Article 3.5 Eurodac, Article 6(1) RDR, Article 20(5) RQD, Article 23(1)-(2) RRCD, Article 25(6) RAPD. Also see preamble of the Council Regulation 97/C 221/03.
[120] EASO, 2013, p.16.

with the children should receive ongoing training in the subject and should display relevant expertise.[121]

In order to ensure the children's rights of the unaccompanied minor is respected, it is of importance that s/he is provided with a temporary guardian as well as a public council with relevant expertise free of charge. This should be done with urgency and assigned to the unaccompanied minor as soon as possible.[122] A representative for the unaccompanied minor should be present at interviews held with the minor and the representative should further for example be given due time to explain the process to the unaccompanied minor.[123]

2.2.3 European Convention on Human Rights

The European Convention of Human Rights (hereinafter "ECHR") contains a comprehensive list of civil and political rights, is committed to respecting fundamentals rights and its content can be interpreted through the extensive jurisprudence produced by the European Court of Human Rights (hereinafter "ECtHR).[124] Article 1 ECHR provides *everyone* with the rights that it contains, which means it is not only the citizens of the Member States which may bring a claim to the ECtHR but rather such can be done by all persons on the territory and within the jurisdiction of the Member State.[125] There is however no provisions specifically mentioning children's rights however the ECtHR has in its case law chosen to apply the CRC in for example custody matters.[126]

The ECHR contains procedural safeguards such as the right to fair trial and the right to effective remedy. Namely Article 6 of the ECHR grants the right to a fair trial and having your case reviewed by an independent and impartial tribunal. Article 6 regulates claims concerning civil rights and obligations as well as criminal charges, which could have potential to grant the unaccompanied minor a right to have the age assessment reviewed. To contrary however, The ECtHR has stated in *Maaouia v France* that asylum

[121] Article 24(1),(4) RRCD, Article 25(3) RAPD, Article 31(6) RQD.
[122] Article 25(1)-(2),(4)-(5) RAPD, Article 24(1),(4), 25(1) RRCD, Article 31(2),(6) RQD. Article 6(4) Council Regulation 97/C 221/03. EASO, 2013, p.22.
[123] Article 15(3)(e), 25(1),(3) RAPD.
[124] Stalford, Helen, 2012, p.36.
[125] Seidlitz, Madelaine, 2014, pp. 23-24.
[126] Stalford, Helen, 2012, pp. 37-38. See for example *Sahin v Germany*, no. 30943/96 (2003) ECtHR 340 and *Sommerfeld v Germany*, no. 31871/96, ECtHR 2003-VIII 341. Kilkelly, Ursula, 1999, pp. 3-4.

and migration cases fall out of the scope of civil rights and obligations as defined within the Convention.[127] This means that Article 6 is not applicable on procedural aspects regarding migration matters as the right to reside in a Member State does not fall within the definition of "civil right" within the meaning of the Convention.[128] Consequently Article 6 is not applicable in the case of the unaccompanied minor and the age assessment. Article 13 ECtHR further states that everyone shall have the right to an effective remedy should any of a person's rights or freedoms as established in the Convention have been violated.[129] This also means that the age assessment in itself as a decision (not the method used for example) cannot be appealed on its own, however it could for example be used to challenge the absence of an effective remedy concerning a family life claim.[130] In effect the content of named Articles mean that an unaccompanied minor does not have any possibility to specifically challenge the age assessment which is rather distressing given the uncertain methods used to assess the age and the impacts not being considered a minor has. This will be further discussed in chapter 3.

Another provision which could affect the medical examination is Article 8 and the right to respect for private and family life. Within the scope of *private life* the physical and psychological integrity of the person is included as one's body is an intimate aspect of any person's private life. [131] The essential task of Article 8 is to protect against arbitrary interference by the public authorities, which also entails positive obligations for the States.[132] Furthermore Article 8 is not absolute and infringements are permitted when it is in accordance with law and necessary in a democratic society. A wide margin of appreciation applies with background to the well-established principle of the State being able to control the entry of non-nationals into its territory.[133] The question then becomes whether the State has reached a fair balance between relevant interests in the individual case.[134] The interference

[127] *Maaouia v. France*, no. 39652/98, §§ 40-11, ECtHR, 5 October 2000.
[128] Kilkelly, Ursula, 1999, p.234. Janis, Mark W. *European Human Rights Law: Texts and Materials*, Oxford University Press: Oxford, 3 ed., 2008, pp. 755, 760, 763.
[129] *Maaouia v. France*, para 36.
[130] Kilkelly, Ursula, 1999, pp. 234-235.
[131] *X and Y v The Netherlands*, no. 8979/80, ECtHR 26 March 1985, § 22. Janis, Mark W, 2008, p.390. *Y.F v Turkey*, no. 24209/94, ECtHR 22 October 2003, § 33.
[132] Janis, Mark W., 2008, p. 396. *Johnston and others v Ireland*, no. 9697/82, ECtHR, 18 December 1986, § 55.
[133] *Vilvarajah and Others v. the United Kingdom*, no. 13163-5/87, 13447-8/87, § 102, ECtHR 1991. *Moustaquim v Belgium*, no. 12313/86, § 43, ECtHR 1991. Seidlitz, Madelaine, 2014, p.20.
[134] Janis, Mark W., 2008, pp.407-408. *Dalia v France*, no. 154/1996/773/974, 19 February 1998, ECtHR, para 52. Kilkelly, Ursula, 1999, p. 9. Regarding the balancing interest see

does however have to reach a certain degree of severity before it is a violation of Article 8 and the decision to interfere must be justified by being based on a law and be necessary in a democratic society.[135] Within the scope of *public order* is the Member State's interests of migration control which is well-establish by ECtHR jurisprudence as it has repeatedly found that the Member State has the right to maintain public order by controlling the entry and residence of aliens within their jurisdiction.[136] Given that the inference associated with medical examinations would not probably be seen as reaching the severity degree threshold, this article will not be able to be used by the unaccompanied minor. However if the medical examinations were considered to be medically unmotivated due to their lack scientific base then perhaps this would change the usability of Article 8 in regards to age assessment.

2.3 Domestic obligations

The main domestic source of migration law in Sweden is the Aliens Act (2005:716), the Administrative Procedure Act (1986:223) and the Administrative Procedure Court Act (1971:291) which governs the process of applying for protection as well as the procedure in the Migration Courts. As will be evident in the following chapter, the area of migration law regarding unaccompanied minors and especially age assessment is very sparsely regulated in the text of the law. Some guidance is provided by the preparatory works, the jurisprudence of the Migration Courts and soft law documents such as the recommendations and statements issued by the Migration Board and the National Board of Health and Welfare addressing their legal position on specific topics. Furthermore, the Migration Board has published a handbook which is used by their staff when carrying out asylum investigations that although not a source of law provides insight into their process.[137]

The international and regional obligations as detailed above apply in Sweden and furthermore the Migration Board and the Migration Courts commonly consider international and regional regulations during the

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further *Handyside v United Kingdom,* no. 5493/72, 7 December 1976, ECtHR. *MA, BT och DA v Secretary of State for the Home Department*, case C-648/11, 6 Juni 2013, Court of Justice of the European Union. *Soering v United Kingdom,* no. 14038/88, 7 July 1989, ECtHR.

[135] *Bensaid v the United Kingdom,* no. 44599/98, ECtHR, 6 February 2001, § 46.

[136] Kilkelly, Ursula, 1999, p.226. See for example *Bouchelkia v France,* no. 23078/93, ECtHR, 29 January 1997, § 48.

[137] Migration Board. *Handbok i Migrationsärenden,* 25 August 2014.

different stages of the asylum procedure, such as for example when completing an age assessment of an unaccompanied minor.

2.3.1 International and regional norms' applicability in Sweden

For a broader comprehension, a note will be made on the relationship between the international and regional regulations and Swedish domestic law. Since Sweden adheres to the dualistic legal tradition, after Sweden has ratified an international convention it must be translated into national law in order for the regulations of such conventions to be applicable as Swedish law and apply for persons present on Swedish jurisdiction.[138] This also means that pre-existing law that contradicts the international law must be amended. Once completed, the international law is applied by judges as they essentially apply the Swedish translated version rather than the actual international law itself. Similar to monist legal systems, the international law have precedence over domestic law.[139]

In order to assure that there are no legal norm conflicts between the international obligations and domestic law, three different methods of translation into domestic law are applied in Sweden. The most commonly used method is completing an inventory of the Swedish legislature to see whether existing law is in accordance with international obligations. If the international obligations and the Swedish law are harmonized, no further legislative steps needs to be taken which is called *normharmonisering*.[140] Another method, *transformation*, means that the international obligation is given an equivalent provision in the domestic law. Consequently, new or revised domestic provisions represent the international obligation partly or fully. Once the norms are harmonized and/or transformed, the different State authorities and Courts are obliged to interpret the domestic norms in the light of the International Conventions in order to in so far possible respect the obligations as established by such international documents.[141] This method necessitates that the person applying such norms is familiar with the content of the international documents and in which situations such international considerations are relevant. The third method that may be used

[138] Sandesjö, Håkan, 2013, p.24.
[139] Schiratzki, Johanna, *Barnrättens grunder,* 4 uppl, Studentlitteratur: Lund, 2010, p. 22. Sandesjö, Håkan, 2013, p.35. Goodman, Ryan and Alston, Philip. *International human rights.* Oxford University Press: Oxford, 2013, p. 1058-1060.
[140] Sandesjö, Håkan, 2013, p. 24.
[141] Sandesjö, Håkan, 2013, p. 25.

to avoid norm conflicts is *incorporation*, which means that the exact and unchanged text of the convention is incorporated into the domestic legislation and is then applicable as any other domestic law.
For example, the ECHR was incorporated into Swedish law in 1995 and as a result, Sweden is also bound by the ECtHR case law.[142] With the CRC on the other hand, both the transformation and norm harmonizing methods were applied. Transformation has mainly been used for the overarching cardinal principles, like best interest of the child and the right to be heard as can be illustrated by Aliens Act ch.1 10 and 11§§. Another example of the transformation method is the refugee definition in the Aliens Act that is more or less a word-by-word translation from the definition found in the Refugee Convention and the RQD. As a consequence of the use of such methods, the regulations cannot be directly applied in Swedish Courts. However due to principle of interpretation in conformity with Communion law[143], the regulations should be applied and the Swedish law should be interpreted in the light of the international and regional instruments.[144] According to Swedish doctrine it can however be said for all international law instruments that they have had a limited importance in the Swedish application of law.[145] This will also be evident in the empirical study conducted in chapter 4.4 as the Migration Court was very reluctant to engage with international or EU law and seemed instead to be more comfortable with applying domestic recommendations from the National Board of Health and Welfare.

The implementation process of EU law is different compared to the international regulations. By becoming a Member State of the European Union[146], Sweden is directly bound by EU primary law such as treaties, secondary law such as unilateral acts like regulations and international agreements and inter-institutional agreements.[147] Given that the Member States are bound automatically, this is in effect monism. When it comes to the Directives such as those contained in the CEAS, the Directives have to be implemented in a way that domestic law is in accordance with the Directive, thus creating a form of transformation. Moreover, as an effect of

[142] ECHR is incorporated with lag (1994:1219) om europeiska konventionen om de mänskliga rättigheterna och de grundläggande friheterna and was given constitutional status by Instrument of Government(1974:152). Bull, Thomas, and Sterzel, Fredrik. *Regeringsformen- en kommentar*. Studentlitteratur: Lund, 2010, pp. 94-96. Schiratzki, Johanna, 2000, pp.206-225.
[143] In Swedish: *fördragskonform lagtolkningsprincipen*.
[144] Sandesjö, Håkan, 2013, pp. 25-26. NJA 2007 s. 168.
[145] *Ibid.* Sandesjö, Håkan, 2013, pp.26-27. SOU 2011:29 s. 139ff. Stern, Rebecca and Österdahl, Inger (red.). *Folkrätten I Svensk rätt*, Liber, Malmö, 2012, pp.57, 96.
[146] After a referendum, Sweden became a member of the EU 15 December 1994.
[147] Stern, Rebecca and Österdahl, Inger, 2012, pp.30-31. Mark, Janis W., 2008, part III(B).

the EU membership, States are bound by the case law of Court of Justice of the European Union and the ECtHR as previously mentioned.[148]

EU law has precedence over domestic law meaning that should a domestic provision be in conflict with the EU provision and it is less beneficial than named EU provision, then EU law has precedence and the domestic provision should not be applied.[149] Moreover, as the ECHR has been incorporated, the ECHR rights have a stronger position than the CRC and if a norm conflict arose, the ECHR would overturn the CRC due to this.[150] This is one of the central arguments used by the doctrine that proposes that the CRC should be incorporated to strengthen its legal status which is an ongoing debate in Swedish children rights doctrine.[151]

2.4 The asylum investigation

The procedure for seeking asylum in Sweden as an unaccompanied minor is a more extensive procedure than for the children arriving in the company of their parents. The unaccompanied minor plays a more active role in the procedure and the unaccompanied minor has more frequently meetings with his or her public council, guardian and the Migration Board. This difference in the procedure starts to decrease rather significantly as the claim is brought before the Migration Courts, where the procedure is in effect nearly identical.[152]

When the unaccompanied minor arrives in Sweden, s/he will lodge an application for asylum at the Migration Board at one of the units specialized in handling cases with unaccompanied minors.[153] Due to their lack of legal competence, the unaccompanied minor cannot sign the application but may lodge it and the public council or the guardian, whom ever is assigned first, can then confirm it later. Usually the public council is assigned the fastest as it must be assigned upon the child's arrival and acts as the unaccompanied minors' deputy until the guardian is assigned.[154] Upon lodging the initial

[148] Sandesjö, Håkan, 2013, p. 25.
[149] Seidlitz, Madelaine, 2014, p.25.
[150] Schiratzki, Johanna, 2010, pp. 23-24.
[151] For further discussion see note 305.
[152] Nyström, Viktoria, 2014, p. 17.
[153] They are located in Märsta, Stockholm, Göteborg, Norrköping, Arlanda, Gävle and Malmö.
[154] UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, para 5.7. Nyström, Viktoria, 2014, pp. 20, 26-27. Aliens Act, ch. 18 3-4§§ regarding deputy until guardian assigned.

application, the Migration Board Officer will note down the age as stated by the unaccompanied minor unless it is beyond any doubt that the stated age is incorrect, then the age of the applicant can be changed right away. Another situation is if the unaccompanied minor has identified him- or herself in another Member State with a passport and the age does not correspond to the stated age. The migration officer should then not change the age without making a note in the file about the changed age, thus not changing it immediately without noting that the change that has been done.[155] This can be said for the first part of the age assessment and is purely ocular and based on the documents presented. During the first meeting, emphasis is put on establishing the travel route, the identity of the unaccompanied minor and if the minor is in possession of any identification documents these are handed in to the Migration Board. The Migration Board may quiz the minor regarding the reasons for seeking asylum, however the thorough investigation is not completed until the actual asylum investigation is carried out. Furthermore, if the minor is over 14 years old, fingerprints are recorded and checked in the biometric database in accordance with the Eurodac Directive (Regulation (EU) No 603/2013).[156]

Later on, the unaccompanied minor, the public council (and the guardian if appointed) attend the asylum investigation at the Migration Board unit for unaccompanied minors.[157] The objective of the asylum investigation is to give the Migration Board enough supporting documentation and statements in order for them to be able to reach a decision regarding the application for international protection. The asylum investigation must always be personal and may not be carried out by for example conference call as the personal meeting plays a significant part in the credibility assessment.[158]

If the applicant has not made the age his or her age probable during the asylum investigation, a more thorough age assessment is carried out and is a part of the asylum investigation as a whole. This part of the age assessment is done by mapping the unaccompanied minor's level of maturity and background, by asking questions regarding school, important events in the country of origin and work experiences. The Migration Board also collects information from the guardian, teachers and persons from the accommodation or social workers who have been in contact with the child. The information is valued depending on the expertise and experience of the

[155] Migration Board, RCI 13/2014, chapter 3.1.2.
[156] Seidlitz, Madelaine, 2014, pp. 66-67.
[157] Such units are currently available in Stockholm, Uppsala, Malmö, Göteborg and Boden.
[158] Aliens Act, ch. 13 1§, Administrative Procedures Act, 14§. Nyström, Viktoria, 2014, pp. 42-44. Migration Board, *Handbook*, 2014.

person giving the statement as well as the amount of time spent with the child. Due to the temporal constraints on cases involving the unaccompanied minors, these persons have only had limited contact with the child and will often not provide the Migration Board with a substantial assessment of the applicant's age.[159] Once this information has been gathered, the Migration Board will make a collected assessment to see if the applicant has managed to make his or her age probable. Weighing negatively is for example if the unaccompanied minor has stated another age in another Member State, however consideration must be taken to the fact by outside influences which could've persuaded the child to give another age before. If the Migration Board does not find the age yet probable after a collected assessment, the Migration Board may offer the unaccompanied minor to complete a medical examination in order to establish the age as described below.[160]

After a medical assessment has been completed, the Migration Board evaluates all evidence as part of the asylum investigation to see whether the age has now been made probable or not. This means that the medical assessment is only one part of the overall assessment, albeit having significant weight in the outcome of the asylum investigation.[161] If the Migration Board reaches the decision that the unaccompanied minor has not made his or her age probable, then s/he will be registered as an adult and the reasons for asylum will be assessed as if the applicant is an adult. Hence this is not part of the final decision, but rather a preliminary assessment with the effect that the age assessment is not a decision that can be appealed on it is own merit.[162]

Before the Migration Board reaches a decision regarding the international protection claim, the protocol is sent to the public council so that he or she can go through it with the applicant, to ensure that all the details are correct.[163] The legal representative proceeds by formulating a final statement detailing the applicant's reasons for international protection and may address concerns regarding the applicants age. This statement is used by the Migration Board as basis for their final decision and is of significant importance.[164] Once the Migration Board has reached a decision, the final

[159] Handbook, pp. 686-689. Nyström, Viktoria, 2014, p. 87. Sandesjö, Håkan, 2013, pp. 154-155. Gov Bill prop. 2004/05:170 p. 146. Gov Bill prop. 2009/10:31, p.106. UNHCR, *Guidelines on International Protection No. 8,* 2009, p.66 and 68.
[160] Migration Board, *Handbook,* 2014, pp. 688-690.
[161] Migration Board, *Handbook,* 2014, p. 689.
[162] Seidlitz, Madelaine, 2014, p. 71. Migration Board, *Handbook,* 2014, p.690.
[163] Nyström, Viktoria, 2014, chapter 1.9.
[164] Nyström, Viktoria, 2014, chapter 1.10.

decision will be serviced in person. If the applicant wishes to appeal the decision, s/he must to do within three weeks as the decision then becomes legally binding.[165]

2.4.1 The age assessment

There are no specific regulations in the Aliens Act or any other Swedish legal instrument that stipulates that age assessments may be completed or in which manner such age assessment should be carried out.[166] The existing provisions that regulate the unaccompanied minors' situation are mainly about public council and guardianship however they do not mention the manner in which the assessment should be completed. There is however a general reference to the best interest of the child principle that should be applied throughout every step of the asylum procedure and will be detailed further in 2.4.[167] Furthermore, as the EU law is directly applicable in Sweden, the regulations regarding age assessment, which have been detailed in chapter 2.2 and 2.3, are applicable in Sweden and the Migration Court relies upon and references such EU regulations in their decisions, at least to some extent.[168] As the age assessment is not regulated in Swedish law, the recommendations and statements produced by the Migration Board and the National Board of Health and Welfare can provide guidance concerning the method and evaluation of the age assessment, including the medical examinations and will be used as material for this chapter.

As detailed, it is a cardinal principle of refugee law that the burden is upon the applicant to prove his or her identity, age included, reaching the standard of proof threshold of "reasonable". In most cases, this cannot be done by merely providing oral statements but rather should be substantiated by documental evidence whose authenticity is possible to verify.[169] Although the burden of proof is upon the applicant, the Migration Board has a duty to aid the applicant so that s/he can fulfil his or her burden of proof. This is due

[165] Administrative Procedure Act 23§, Administrative Court Procedure Act 6a§. Seidlitz, Madelaine, 2014, p. 105. Nyström, Viktoria, 2014, pp.125-126. Migration Board, *Handbook*, 2014, chapter "Barn i mottagningssystemet", p.6.
[166] Migration Court of Appeal, MIG 2014:1, p.8.
[167] Regulations regarding public council and guardians, see for example Guardian for Unaccompanied minors Act 2§. Nyström, Viktoria, 2014, p. 104. Seidlitz, Madelaine, 2014, pp. 70-71.
[168] Migration Court of Appeal, MIG 2014:1. Schiratzki,Johanna, 2010, pp. 22-24. Sandesjö, Håkan, 2013, p. 24.
[169] Migration Board, *Rättsligt ställningstagande angående åldersbedömningar*, RCI 13/2014, 11 June 2014. Migration Court of Appeal, MIG 2014:1, MIG 2007:12, MIG 2011:11.

to the "*Official principen*" which is a cardinal principle of the Swedish Administrative Process law.[170] According to this principle, the duty to investigate a case fully is upon the authority, primarily the authority carrying out the investigation but the duty also applies to the Administrative Courts. Put in the context of an age assessment, the Migration Board has a duty to assure that the asylum claim is thoroughly investigated and that such asylum investigation is sufficient to be the basis of a decision. This also applies to the Migration Court, however the duty is primarily upon the Migration Board as it is the authority in charge of the asylum investigation. The extent of the burden to investigate depends on the kind of matter that is being investigated thus it is defined on a case-to-case basis.[171] When there is a strong protection interest, such as asylum cases, the duty is extended.[172] The nature of the applicant's situation, the implication such situation has on the applicant's ability to fulfil his or her burden of proof in combination with the grave impact a negative decision has on the applicant's life, the duty to investigate is a rather extensive duty for the concerned authorities.[173] In an asylum investigation the *Official* principle can entail gathering country of origin information, evaluate the legitimacy of documents, completing dialect analytic investigations, allowing the applicant to answer questions and comment on the content of the asylum investigation and informing the applicant of what needs to be supplemented.

Furthermore, as the material that the asylum investigation is based upon may change over the course of the asylum investigation, a decision concerning the age of the applicant should be taken in connection with the asylum claim decision and not when the applicant initially lodges the application.[174] It is to be noted that a medical examination is not something the Migration Board completes in order to comply with its duty to investigate but rather offers the applicant in order to assist him or her.[175] Or at least that is the view of Government, however it can be discusses whether such medical examination is *de facto* compulsory given the consequences of a refusal, the well-establish heavy weight which the Migration Board

[170] Migration Court of Appeal, MIG 2014:1, MIG 2006:1. Seidlitz, Madelaine, pp. 76-78.
[171] Nilsson, Eva. *Barn i rättens gränsland – om barnperspektivet vid prövning av uppehållstillstånd,* Iustus: Uppsala 2007, pp.60-61. Diesen, Christian, et al, 2012, part III. Administrative Court Procedures Act, 8§. Can also be interpreted from Administrative Procedures Act, 4-7§ and Aliens Act, ch.13 3§. Gov Bill prop. 2004/05:170, pp. 153-155. Gov Bill prop. 2012/13:45, p.115.
[172] Migration Court of Appeal, MIG 2014:1, p.12.
[173] Diesen, Christian, et al, 2012, p.205. Migration Court of Appeal, MIG 2008:5, MIG 2006:7 and MIG 2012:2.
[174] Migration Board, RCI 13/2014, chapter 3.1.
[175] Migration Court of Appeal, MIG 2014:1 and MIG 2007:15. Migration Board, RCI 13/2014, chapter 3.1.4. Parliamentary Ombudsmen ("JO") decision 12 December 2012, dnr 4107-2011.

affords to such examinations and given the imbalanced relationship between the unaccompanied minor and the Migration Board.

In Administrative Court procedures written documentation, such as identification documentation showing the applicant's identity and age should be the primary basis for the Courts' decision and can then be complemented by spoken statements and other documents.[176] Usually it is not until the applicant has made his or her identity probable that the reasons for protection are evaluated in full depth, adding to the significance of establishing the applicant's identity. Although written documentation is preferred, the evaluation of whether the age has been made probable is completed based on an evaluation of all the evidence available.[177] Given the situation of the applicant, s/he will most commonly not be able to produce identification documents and should therefore be given the opportunity to explain why such documents have not been presented.

Furthermore, the Migration Board officer must always complete a personal interview face-to-face with an applicant who is an unaccompanied minor and should have been especially trained in dealing with children. At such verbal investigation, the Migration Board may ask age-related questions about important events in the country of origin, educational background, working experience and family situation. Information may also be gathered from the appointed guardian, social services or another person that may give an indication of the applicant's age.[178] It should further be noted that although the applicant might have an identification document, the Migration Board might not accept it if it cannot be verified. Such is the case for Afghan issued birth certificates, *tazkiras*, and Somali passports issued after 1991 which do not suffice as evidence nor does any other kind of Somali identification documents.[179]

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[176] Administrative Procedure Act, 14§. Administrative Court Procedure Act, 9§, 30§. Diesen, Christian, et al, 2012, pp. 95-97. Migration Board, RCI 13/2014, chapter 3.1. Migration Court of Appeal, MIG 2014:1.

[177] Migration Board, RCI 13/2014, chapter 3.1.

[178] Nyström, Viktoria, 2014, pp. 84-87.Migration Board, RCI 13/2014, chapter 3.1.3 and 3.1.5. According to Social services Act (2001:453), all children without a legal guardian must be must go through an investigation carried out by the Social services in the responsible municipality, which should then be taken into consideration by the Migration Board. The Social services must give such information to the Migration Board when asked for it according to the Aliens Act, ch.17 1§. Due to time limits for asylum applications made by unaccompanied children, this investigation is not thorough and does not usually assess the age of the minor.

[179] Migration Court of Appeals, MIG 2014:1, p. 4 and 15 (regarding tazkira). www.migrationverket.se/Pivatpersoner/Bli-svensk-medborgare/Medborgarskap-for-vuxna/Styrkt-identitet/Migrationsverkets-bedomning-av-identitetsdokument.html (Accessed 23 March 2015).

2.4.1.1 Medical examinations

Although there is not a Swedish provision regulating the use of medical examinations in an effort to assess the applicant's age, there is a regulated duty to inform the unaccompanied minor at the time of his or her application for international protection, that there is a possibility of a medical examination being carried out.[180] Even though the Migration Board has a duty to inform the applicant of the possibility of a medical examination, they do not have an obligation to complete a medical examination. This is rather something that the Migration Board offers to the applicant so that s/he can fulfil his or her burden of proof.[181]

If the applicant has not made his or her age probable by the use of identification documents or statements, the Migration Board can offer the applicant to participate in a medical examination in order to determine his or her age. The medical examination method used in Sweden is an examination by a paediatrician and/or radiological examination of the dental development and carpal bone maturity, producing an age the applicant is estimated to be.[182] Since there is no domestic legislature governing such procedures, guidance can be found in soft law sources such as recommendation from the Migration Board and the National Board of Health and Welfare. The consequence of this is that the content of the recommendations cannot be challenged. In effect the authority which has to respect the recommendations is the same authority which determined the content of such recommendations to start with. Essentially, the Migration Board is setting its own game rules that can be tailored to their goals, only having to fulfil vague international and EU obligations that are not difficult to legislatively comply with.

Nonetheless, the National Board of Health and Welfare recommends that the medical examination should be completed by especially trained radiologists, forensic dentists and paediatricians at a limited number of clinics.[183] Since there is no legislated obligation for the applicant to participate in the medical examination, the applicant must agree to

[180] The Aliens Ordinance (2006:97) ch. 8. 10 g-f§. The origin of this provision is the provisions within CEAS which regulates an age assessment, of particular importance in this instance is Article 25.5(a) RAPD.
[181] Migration Court of Appeal, MIG 2014:1. Migration Board, RCI 13/2014, chapter 3.1.4.
[182] Nyström, Viktoria, 2014, pp. 87-88.
[183] National Board of Health and Welfare, *Medicinsk åldersbedömning för barn i övre tonåren (New Swedish recommendations for age assessment of unaccompanied children),* 26 June 2012, dnr 31156/11.

participate through his or her public council/guardian.[184] Before deciding to participate or not, the applicant must be informed in his or her own language of the potential consequences of participating in the medical examination, including the judicial consequences of the result of the medical age assessment as well as what consequences a refusal may have. The provisions regulating a refusal are found in the CEAS instruments such as Article 25.5(a)-(c) RAPD as mentioned above in chapter 2.2.1.[185]

The result of the medical examination should be reported in a specific template where the physician answers if s/he finds the claimed age probable, and if not then suggest another age.[186] The National Board of Health and Welfare prescribes in its recommendations that the medical age assessment must be objective, of scientific quality and legal security. A reminder is made regarding that the best interest of the child principle should be applied in all matters involving children. Consequently, such criteria reject using unscientific and subjective methods such as an ocular examination unless it is beyond any doubt that the applicant is in fact an adult.[187] The medical examinations that expose the applicant to ionic radiation falls within the scope of the Swedish Radiation Safety Authority regulation however they have ruled that the low risks attached to the amount of ionic radiation exposure.[188]

In order to assess whether the applicant should be assessed as an adult or minor, once a medical examinations has been completed, the result should be valued together with the other available evidence and information gathered in the asylum investigation. Consequently, the results are weighed in as part of the Migration Board's evaluation as it is the deciding body in regards to deciding whether the applicant has fulfilled his or her burden of proof.[189]

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[184] Migration Court of Appeal, UM 3793-11. Migration Board, RCI 13/2014, chapter 3.1.4. Article 25.5 RAPD.
[185] Migration Board, RCI 13/2014, chapter 3.1.4. Nyström, Viktoria, 2014, pp. 87-89.
[186] The template is issued by the National Board of Health and Welfare and can be found through the following links http://www.barnlakarforeningen.se/wp-content/uploads/2014/05/formular-alderbestamning_140310.docx , http://www.tandlakarforbundet.se/globalassets/avara-fragor/pdf/utlatande-for-tandmognadsbedomning--140324---last-formular.docx and http://www.barnlakarforeningen.se/wp-content/uploads/2014/05/Formular-Utlatande-handskelett_140312.docx (Accessed 1April 2015).
[187] National Board of Health and Welfare, 2012, dnr 31156/11, p.2. Migration Court of Appeals, MIG 2014:1.
[188] *Ibid*, p.2. Strålsäkerhetsmyndigheten (Swedish Radiation Safety Authority), SSMSFS 2008:35.
[189] Migration Board, RCI 13/2014, chapter 3.1.4. Migration Court of Appeals, MIG 2014:1, pp. 13-15. Schiratzki, Johanna, 2000, p. 208.

The unaccompanied minor must voluntarily participate in the medical examination which means that the child may refuse to participate. If the child refuses then the age assessment has to be done based on the materials available to the Migration Board. If concerns regarding the age of the applicant have already been raised, then there is inherently a real risk of the Migration Board assessing the unaccompanied minor as an adult. Since the medical assessment is only one part of the multi-faceted evaluation that should be done, taking all parts into consideration, the refusal itself should not be base of a decision alone but rather the statement should be guiding the assessment.[190]

2.4.2 Swedish evidence theory

As repeatedly stated, the burden of proof to make his or her age probable according to international and regional obligations, is upon the applicant or in this particular case, the unaccompanied minor. This is also true in Swedish migration law.[191] It has been described above the different methods that can be used by the unaccompanied minor in order for fulfil his or her burden of proof. Once the unaccompanied minor has done so to his or her fullest capability, the Migration Board (and if appealed, the Migration Court) must evaluate the evidence available in the case. The standard of proof is set at "probable" which not only applies to proving the reasons for asylum/protection but also to show ones identity.[192]

In Swedish Procedure law, one of the central principles is called "*Fria bevisprövningens princip"* (loosely translated to "Free evaluation of evidence principle").[193] According to the principle, there are no restrictions as to what type of evidence the parties use as evidence to prove their claim in Court. The Court is free to evaluate the evidence as it pleases since there is no general rule as to what value should be given to a particular type of evidence but rather this should be done on a case-to-case basis. All evidence brought up in the case must be examined by the Court and each piece of

[190] Nyström, Viktoria, 2014, pp. 88-89. Migration Board, RCI 13/2014, ch. 3.1.4.
[191] Gov Bill Prop. 2009/10:31, p.127.Migration Court of Appeals, MIG 2007:12, MIG 2011:11, 2014:1. Migration Board, RCI 13/2014, chapter 3.1. Carlson, Per and Persson, Mikael. *Processrättens grunder*, 7 uppl, Iustus: Uppsala, 2004, pp. 73-74. Diesen, Christian, et al, 2012, pp.202, 274.
[192] Migration Court of Appeals, MIG 2006:1 and 2007:12. Diesen, Christian, et al, 2012, p. 274.
[193] Code of Judicial Procedure (1942:740), ch. 35 1§. Some pieces of evidence can be excluded, see for example Code of Judicial Procedure ch. 35 7§. Carlson, Per and Persson, Mikael, 2004, pp. 73-74.

evidence given a value based upon its merits.[194] Having said that, in the area of migration law, over time some guidelines can be found in the established practise by the Court and the Migration Board. For example, the evidential value is in correlations to what kind of evidence it is, how it came about and the competence of the person making a statement. When for example identification documents are concerned, they are usually allocated a higher evidential value if the legitimacy can be controlled.[195] The medical examination reports are usually rewarded a certain significant value, given that is has been carried out in accordance with the recommendations from the National Board of Health and Welfare. The greater number of different methods of medical examinations that has been applied, the higher evidential value it is more commonly given.[196] Since the medical examinations are not 100% correct and radiological assessments always involve a margin of error of ±2 and ±4years, for the result to reach the level of "probable" it must be 95%, which is the standard medical accepted level of probability. [197] Therefore, the overall assessment of the evidence in the case should be generous and the principle of benefit of the doubt applies however is not always given when warranted as will be seen in chapter 4.4.

When the Court is assessing the evidential value of the applicant's statement, weight is given to whether the statement is clear, plausible, consistent over time, detailed, coherent and in line with established facts like country of origin information.[198] It is to be noted that no mention or recognition is given to aspects which may affect the unaccompanied minor's ability to deliver a statement which the Migration Board finds credible. These are aspects such as psychological distress, PTSD syndrome and distrusting attitude towards authorities.

According to Aliens Act ch.16 5§ the judicial procedure in the Migration Court should as a main rule be of written character, which has the effect that the applicant is most commonly not heard at the Migration Court. This is also the main rule in other types of Administrative Court procedures. In regards to Migration cases however, an oral proceeding may be held if the

[194] Mellqvist, Mikael. *Processrätt: grunderna för domstolsprocessen,* Iustus: Uppsala, 2010, pp.38-42. Migration Court of Appeals, UM 6147-11, MIG 2011:11. Migration Board, RCI 13/2014, pp. 9-10.
[195] Migration Board, *Handbok i migrationsärenden, 2014,* pp. 111-112.
[196] National Board of Health and Welfare, 2012, dnr 31156/11.
[197] Migration Court of Appeals, MIG 2014:1, pp. 7-11. National Board of Health and Welfare, 2012, dnr 31156/11.
[198] Gov Bill prop. 1996/97:25, p. 98. Migration Board, RCI 13/2014, p. 9. Migration Board, *Rättsligt ställningstagande angående sannolik identitet i asylärenden,* 31 May 2013, RCI 08/2013, pp. 2-4.

applicant demands it, if it is not unnecessary or no special reason speaks against it.[199] But since it is neither possible for the applicant to make his or her age probable solely based on oral information nor is it possible to make an ocular age assessment, an oral proceeding should, if looking strictly at the criteria, most often deemed to be unnecessary and unfruitful method of investigation. It could however be deemed productive in situations where the applicant wants to interview a paediatrician with relevant expertise and in the empirical study many of the unaccompanied minors where in fact nonetheless present which is a positive development and will most likely have a beneficial impact on balancing out the current imbalance in the relationship between the applicant and the Migration Board.[200]

The application of the principle of benefit of the doubt is governed by the international and regional provisions which guides the national application of the principle and it is further not legislated specifically in Swedish law. Although the national application of the principle has been developed further by the jurisprudence of the Migration Court they are heavily influenced by the UNHCR Handbook in their application of the principle.[201] The focus is mostly on establishing when the principle should be applied, rather what an application actually encompasses. For example in the Migration Court of Appeal case MIG 2006:1 it is stated that the principle is applicable and further the principle should be applied when the applicant has not been successful to make the content of his or her statement probable despite all evidence having been collected but the statement as a whole is credible.[202] Further as established by MIG 2014:1, the overall assessment of the evidence in the case should be generous and the principle of benefit of the doubt applies. The Migration Court does not describe what such generosity actually entails or how the principle should be applied.[203]

[199] Administrative Court Procedure Act, 9§. Migration Court of Appeal, MIG 2014:1, pp. 14-15. Wikrén, Gerhard and Sandesjö, Håkan, 2014, pp. 719-723.
[200] Wikrén, Gerhard and Sandesjö, Håkan, 2014, pp. 721-22. Migration Court of Appeal, MIG 2014:1, UM 6147:11.
[201] Wikrén, Gerhard and Sandesjö, Håkan, 2014, pp. 164-165.
[202] See further Migration Court of Appeals, MIG 2007:37, MIG 2007:12. Diesen, Christian, et al, 2012, pp.275-282.
[203] Migration Court of Appeals, MIG 2014:1, pp. 7-11. National Board of Health and Welfare, 2012, dnr 31156/11. Diesen, et al, 2012, pp. 208-210.

2.4.3 Best interest of the Child

The best interest of the child principle as applied in Sweden is heavily influenced by the CRC, thus the extended meaning of the principle in a domestic setting as relevant for the age assessment will be detailed below.[204]

It is stated in the Swedish Constitution that the rights of the child should be respected which includes ensuring that the rights guaranteed by the CRC are respected.[205] Further as means of implementing and ensuring the applications of the rights of the child as stipulated by the CRC, provisions regarding the best interest principle are regulated in specific legislations where for example in regards to the asylum context the principle is regulated in the Aliens Act.[206]

Since 1 January 1997 the Aliens Act ch. 1 10§ contains a so called "*portalparapraph*" which states that special attention should be paid to the well-being and development of the child, or what else the best interest of the child may require. Its characteristic as a *portalparagraph* entails that it describes the overarching purpose of the Act and the provision should be considered when applying all the remaining relevant provisions of the Aliens Act, similar to the function of a preamble.[207] Another *portalparagraph* is Aliens Act ch. 1 11§ which reflects CRC article 12 and the right to be heard. The paragraphs apply to all matters in the Aliens Act regardless of what grounds for international protection and further applies both upon reception and during the asylum investigation.[208] When the best interest principle was added to the Aliens Act, the Government stated that although the best interest principle should be a primary consideration, the principle must still be weighed against other public interests. Despite its strong and meaningful content it must not routinely always outweigh the public interest of migration control which runs contrary to what was previously mentioned in chapter 2.1.3. Despite the need for special attention and consideration, the principle should not be extended to metamorphose into its own criteria for protection but rather the existing circumstances under which residence permits are granted must be kept intact. The act of

[204] Gov Bill prop. 1996/7:25, betänkande 1996/7:SfU5, rskr. 1996/97:80. Gov Bill prop. 1989:90:170 s.28. Wikrén, Gerhard and Sandesjö, Håkan, 2014, p.46.
[205] Regeringsformen (2010:1408) ch.1 2§. Gov Bill prop. 2009/10:80 p.187 Sandesjö, Håkan, 2013, p.70.
[206] See for example: Social services Act (2001:453), Children and Parents Code (1949:381) and Care of Young Persons Act (1990:52).
[207] Wikrén, Gerhard and Sandesjö, Håkan, 2014, pp. 46-49.
[208] Sandesjö, Håkan, 2013, p. 73. McAdam, Jane, 2006, p.260. Lundberg, Anna, 2011, p. 62.

balancing the different interest will ultimately be necessary to complete on an individual case-to-case basis.[209] Consequently, the minor applicant must still make it probable that s/he falls within one of the grounds for international protection contained in the Aliens Act, thus matching the duty of the adult applicant. Furthermore, the claim for international protection is assessed the same way regardless if the applicant is an adult or a minor, with some exceptions such as child-specific forms of persecution.[210] As the principle was included in the Aliens Act, the Government stated that the following elementary needs should be considered in best interest of the child considerations, namely the care and protection to enable survival and development and the respect for the child's integrity. Special consideration should be given to the fact that 'a child is a child' and that warrants special treatment due to the child's vulnerability and special needs, especially those children in an asylum procedure.[211]

Before making a decision or taking an action that involves a child, the decision maker should consider what affects such decision would have on the child by applying a child's perspective on the decision. If it is deemed to have consequences for the child then the child's different human rights has to be considered and respected. This analysis of the consequences should be done in every individual case where the child is affected and it is a prerequisite that the person completing it has the necessary knowledge in order to complete a comprehensive and insightful analysis.[212]

Upon arrival and after an application has been lodged, the unaccompanied minor should promptly be assigned a public council which is selected by the Migration Board and financed by the State in accordance with 4§ the Public Council Act (1996:1620) and should further have special competence in dealing with children.[213] If there has not already been a legal guardian assigned for the minor, the public council acts as deputy in the meantime until one is assigned as the minor lacks legal competence.[214] The legal guardian should be assigned as soon as possible and further it is of

[209] Gov Bill prop. 1996:97:25 pp. 246-249, Gov Bill prop. 2004/5:170 p. 281. Schiratzki, Johanna, 2010, p. 33. Sandesjö, Håkan, 2013, p. 74. Diesen, et al, 2012, pp.101-102. Schiratzki, Johanna, 2000, p.210.
[210] Schiratzki, Johanna, 2000, p.212. McAdam, Jane, 2006, p.260.
[211] Gov Bill prop. 1996:97:25 p. 246. Gov Bill prop. 2004/5:170 pp. 194-195. Schiratzki, Johanna, 2010, p. 32. Sandesjö, Håkan, 2013, pp.73-74. SOU 1997:116 p.125.
[212] Gov Bill prop. 2009/10:232 p.15. Sandesjö, Håkan, 2013, pp. 77-78, 87-90. Ordinance (2007:996) with instructions for the Migration Board 2§.
[213] Sandesjö, Håkan, 2013, chapter 9.7.
[214] Aliens Act ch.18 3-4§§. Legal Guardian for Unaccompanied Minor Act (2005:429) 2§ 1st paragraph. The legal guardianship ceases automatically when the minor turns 18, 5§.

importance that legal guardian assignment matters are handled urgently.[215] There is no criteria that the assigned guardian possesses child-specific knowledge but should be experienced, of good moral character and otherwise suitable for the task which includes being capable of ensuring that the rights of the child are respected.[216] When it comes to the public council, s/he should have a law degree, have experience of working with children and have experience of bringing a claim to court.[217]

There are not any child-specific regulations for when a minor applicant brings a claim before the Migration Court. The procedure is the same regardless of whether the applicant is an adult or minor, however they must of course still respect principles such as the best interest of the child and the right to be heard.[218]

2.4.4 Appeal procedures

The circumstances under which a decision can be appealed, with special attention paid to the age assessment decision in particular, will be detailed below. The appeal procedure and the decisions that are possible to appeal are governed by chapter 14 in the Aliens Act. The possibility to appeal depends on the outcome of the claim for the international protection and the different grounds for protection and that it has been filed within the respite period of three weeks.[219]

If the applicant's claim has been refused, the appeal is sent to the Migration Board who then, after checking it, hands the case over to the Migration Court. It is not however only refusals that are appealed.[220] If the unaccompanied minors claim has been approved, the minor may still want to appeal the decision. This can be for reasons such as the granted ground for international protection is not the one the applicant had claimed, such as not being granted refugee status or being granted protection on the ground of particularly distressing circumstance. If the claim is approved on the latter ground this most commonly rule out successful claims for family

[215] Legal Guardian for Unaccompanied Minor Act, 3§. Gov Bill prop. 2004/5:136 s.49.
[216] Legal Guardian for Unaccompanied Minor Act, § 4. Gov Bill prop. 2004/5:136 s.36. Sandesjö, Håkan, 2013, pp. 143-144.
[217] Migration Board, *Handbok i Migrationsärenden,* 2014, chapter "Offentligt Biträde".
[218] Diesen, et al, 2012, pp.101-102.
[219] Administrative Procedure Act 23§, Administrative Court Procedure Act 6a§. Nyström, Viktoria, 2014, pp.125-126. Seidlitz, Madelaine, 2014, p. 105.
The decisions which may be appealed can be found in Aliens Act ch.14 2-14a§§.
[220] Aliens Act ch. 14 1§ and 3§. Nyström, Viktoria, 2014, pp. 128-129.

reunification if the family where to later arrive in Sweden to lodge an application for residence permit.[221]

The ground for being a person in need of protection can be appealed as according to Aliens Act ch. 14 1§ and 6§. The Migration Court will then only look at the claims for status of protection rather than look at the actual approval of the claim for residence permit and does not have the mandate to change the approval into a dismissal.[222] Furthermore if the applicant has only been granted a limited residence permit for a specific amount of time, such decision regarding the temporal limitation specifically may not be appealed. In such cases only the ground for protection may be appealed.[223] The first instance for appeal is the Migration Court and then that decision may be appealed to the Migration Court of Appeal which is the last instance.[224] The Migration Court of Appeal does not however try all cases which they receive. The Migration Court of Appeal only review the case based on its merits if the case is of judicial precedent value or if there is a extraordinary dispensation at hand meaning that there are particular reasons for reviewing the appeal. A dispensation permit cannot be given for simply changing the judgement that the lower instances has reached which is an effort made to avoid long periods of administration and making the asylum procedure take too long.[225]

2.4.4.1 Appealing an age assessment

If the unaccompanied minor has been assessed as being an adult rather than a child, the age decision is taken before the final decision regarding the actual asylum claim is taken. The age assessment aspect of the decision has immediate legal force and binding effect and is not a decision in the meaning within Swedish Administrative Procedure law. This has the effect that it cannot in itself be appealed.[226] The Administrative Procedure Act stipulates in 22§ the decision which may be appealed; the decision must be documented and have legal implications for the individual. Whether a decision is possible to appeal depends on the level and strength of the legal implications and whether another Authority will be using the decision as a

[221] Nyström, Viktoria, 2014, p. 126.
[222] Nyström, Viktoria, 2014 p. 127. Diesen, et al, 2012, p.84. Aliens Act ch.13 13§.
[223] Migration Court of Appeals, MIG 2007:41 and MIG 2010:20. Gov Bill prop. 2004/05:170, p.307.
[224] Aliens Act ch. 14 1§, ch. 16 9§.
[225] Aliens Act ch. 16 11§ and 12§. Diesen, et al, 2012, pp.84-86. Gov Bill prop. 2004/05:170, p. 132. Nilsson, Eva, 2007, p.54.
[226] Migration Board, *Handbook*, 2014, pp. 690, 997. Migration Court, UM 6896-14.

basis for their own decision regarding other matters.[227] Had this been applicable on migration cases, the age assessment would be a decision possible to appeal, given *inter alia* the legal implications such decision has for the individual.[228] However, as the Aliens Act specifically regulates the appeal procedures in chapter 14, the above mentioned rules regarding the possibility to appeal a decision do not apply as the Administrative Procedure Act is subsidiary to the Aliens Act, meaning that only the mentioned decisions in the Aliens Act are possible to appeal, namely if the legal outcome of the decision is refusal of entry, expulsion or rejection of an application .[229] The effect of this is that the age assessment can only be appealed if the asylum-decision is possible to appeal. For example if the unaccompanied minor has received a positive decision of its application despite being considered an adult, the age assessment can only be appealed if the applicants claim for refugee status or status declaration as a person otherwise in need of protection is rejected, otherwise the age assessment cannot be appealed.[230] Albeit in compliance with international and EU law, there are many issues of concern attached to this practice which will be further discussed in chapter 3 below.

[227] Hellners, Tryggve and Malmqvist, Bo. *Förvaltningslagen med kommentar*, Norstedts Juridik: Stockholm, 2010, comments regarding 22§ Administrative Procedure Act.
[228] See further chapter 1.1.
[229] Administrative Procedure Act, 3§.
[230] Migration Board, *Handbook*, 2014, p.997.

3 Analysis - Legal context

The content of the Swedish domestic regulations regarding age assessment will now be analysed in terms of complying with the content of the international and regional obligations as detailed in chapter 2.1 and 2.2. This compliance analysis is undertaken in regards to the provisions as they are written in the legislation and not in regards to their application as this will be analysed in chapter 4 below. Thus this part is dependent on the second part in order to be comprehensive and encompassing of the actual level of compliance. Emphasis will be put on A *de lege lata* perspective will be the emphasis of the analysis however to some degree a *de lege ferenda* perspective will also be offered.

For the most part, the Swedish laws within the migration regime comply with those international and EU provisions that they are obliged to adhere to and respect when carrying out an age assessment. This is rather expected considering that both the European and the Swedish regime rely heavily on concepts developed with the international refugee regime, which in itself does not offer staggering guidance in regards to the age assessment.[231] Concepts such as the benefit of the doubt and best interest are rather open ended and indefinite, leaving room for and necessitate subjective interpretation on a case-to-case basis. The principles to some limited extent offer guidance as to their application but it is not stated in which manner this application should be completed or the weight different aspects should be given. The outcome of the assessment can hence greatly vary and the compliance can be affected by this.[232] It lies within the interest of the State to have flexible concepts as all migration decisions are ultimately weighed against the interest of immigration control. This is where the application of such concepts becomes invaluable in regards to the detailing the actual scope of the provision and will be analysed separately in chapter X below.

In accordance with international and regional provisions, the Swedish Migration Board is allowed to have qualified officials complete medical examinations to assess the unaccompanied minors' age if the minor is informed of the consequences of the outcome and a refusal provided the minor consents. This practise is however not regulated in the Aliens Act or

[231] Further Sweden is of course obliged to follow the instruments they adhere to, for example according to ch. 2 19§ Instrument of Government (1974:154) Sweden may not legislate provisions contrary to the ECHR.
[232] Schiratzki, Johanna, 2000, pp. 206-207.

any other legislation. In the preparatory works regarding the implementation of Article 17.5 Asylum Procedure Directive[233] in Sweden, it was deemed unnecessary to specifically regulate in the Aliens Act the method of age assessment to be used by the Migration Board. This decision was reached as current practise of the Migration Board is already to use medical examinations and are further offering the examinations to the applicant to alleviate his or her burden of proof rather than using them as an element that they must base their decisions on when determining international protection claims. The duty to inform as mentioned above however was considered necessary to include in the Aliens Ordinance in order to ensure compliance with the rule of law and thus currently is in accordance with international and regional obligations.[234] It is to be noted that Article 25(5) RAPD does not require the Member State to regulate the medical examination in law specifically hence Sweden opting not to do so is not contrary to its obligations although such position may not necessarily be to prefer.

Another aspect where the Swedish migration regime is in compliance with international and regional obligations is for example the unaccompanied minors who lodge applications for international protection in Sweden are assigned to a special unit with officers who are especially trained in dealing with children. Although the staff is trained to some extent, the CRC Committee recommended in their Concluding Comments in their fifth report in March 2015 that more weight is to be put on the need of educating the staff in contact with the children and ensure that the best interest principle guides the process of all decisions.[235]

Although a public council and guardian is assigned to unaccompanied minor which is complying with Sweden's obligations however there is no time limit which regulates how quickly this will have to be done. I think that in order to ensure that the unaccompanied minor's rights are protected, there should be a regulation in the legislation that sets a time limit for the appointment of a guardian. The tasks that the public council have differ rather significantly from that of the guardian, thus it is of significant importance to assign both very promptly. Today it weeks until one is assigned and since the municipality organizes the assignment of guardian

[233] Corresponding Article 25(5) RAPD.
[234] Gov Bill Prop. 2009/10:31, p.199. The medical assessment is governed by recommendations and guidelines provided by the Migration Board and National Board of Health and Welfare. Migration Court of Appeals, MIG 2014:1, pp. 9-10. The duty to inform is regulated in ch. 8 10f§ Aliens Ordinance (2006:97).
[235] Committee on the Rights of the Child, *Concluding Observations: Sweden*, 2015, pt. 17-18. Barnombudsmannen, 2012, p.3.

regional differences may vary greatly. The public council should have child-related expertise however there is no such qualification need for the guardians that are assigned to the minor.[236] This is something that has been criticized by the CRC Committee, namely that not enough training is provided to the guardians, which is also a problem in relation to the interpreters who do not always have the appropriate expertise.[237] Another issue with the appointment of guardians is that there are a few number of guardians to appoint thus every guardian is assigned a high number of unaccompanied minors. This problem will only increase given the increasing trend of unaccompanied minors arriving to Sweden.[238] If the guardian has a high number of unaccompanied minors to look after, it is doubtful that the guardian effectively ensures that the minors rights, as afforded to the applicant by international and regional instruments, are protected. A solution could be to introduce a cap number of applicants per guardian would be introduced combined with more guardians being educated and enlisted, the unaccompanied minor would be provided with greater protection thus ensuring a broader respect of their rights.

As mentioned in chapter 2, the decision on the claim for international protection should be made promptly, especially when children are involved. The Migration Board recommendation is that a decision is to be given within three months of arriving in Sweden.[239] The issue of lengthy waiting periods is especially true when a medical examination is to be completed as there are only a very limited number of qualified physicians in Sweden that are equipped to execute the assessment. Consequently, a backlog is created that delays the decision on the claim for international protection as will be dependent on the outcome of named age assessment. The medical assessments are nearly always carried out when the Migration Board is uncertain about the age of the unaccompanied minor.[240] Based on the backlog and given the best interest principle, one would think that making a decision on whether or not to offer a medical examination should be weighed against the interest of providing the child with a speedy process. Given the many indications of the psychological implications that waiting for the asylum decision have on the minor, it should not be routinely decided to carry out medical examinations when the Migration Board officer

[236] Lag (2005:429) om god man för ensamkommande barn 4§.
[237] Committee on the Rights of the Child, *Concluding Observations: Sweden*, 2015, para 49(d)-(e).
[238] http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&plugin=1&pcode=tps00194&language=en. (Accessed 20 May 2015).
[239] Committee on the Rights of the Child, *Concluding Observations: Sweden*, 2015, para 49(f). Nyström, Viktoria, 2014, pp. 119, 124-125.
[240] Nyström, Viktoria, 2014, p.85.

is in doubt.[241] This would be more in line with the best interest of the child principle which as must considered in all decisions cornering the child and should be a primary consideration when making such decisions.

In order to avoid misrepresentation, it is recommended by the UNHCR that the legal consequences of certain ages are limited when possible. Rather the level of vulnerability and "immaturity" requiring more sensitive treatment should be the guiding principle.[242] As detailed numerous times, the consequence of being considered an adult or a child are significant and cannot be considered to comply with such opinion of the UNHCR. The level of vulnerability is further not recognized but rather focus is put on evidential aspects rather than applying a holistic approach. However, as this applies also to the international and regional instruments which Sweden must comply with, the Swedish regulations are still in compliance irrespectively. This is a reoccurring problem in general, as the regulation which Sweden has to comply with, is actually not demanding very much thus enabling compliance on paper without much legislative effort.

In regards to appealing a decision, the decision taken by the Migration Board to register the unaccompanied minor cannot be appealed without being a part of a bigger claim for appeal and only when the application for residence permit is rejected or if refugee status determination has been rejected as mentioned above. Thus the age assessment cannot be appealed in its own right, however Sweden is not obliged to have such legislation by their international and regional obligations. Such international and regional obligations only regulate that the decision regarding claim for the international protection is possible to challenge, which Sweden complies with. Having said that, being deemed to be an adult rather than a child has detrimental effects on the child's life as mentioned in chapter 1.1. The child is expected to function as an adult despite lacking the maturity or tools to be able to successfully complete such task. Despite this significant effect on the child's life and well-being, the age assessment is only possible to be reviewed in certain cases, cases which are determined on a basis unrelated to the age assessment. It then becomes a lottery as to whether the age assessment will be possible to challenge or not. Such decisions are

[241] One example of the many psychological effects is what in Sweden is called "Uppgivenhetssymptom"(resignation symptoms) which has been examined by the Government: SOU 2006:114. Report from the Coordinator assigned to look at the psychological condition, 2006, http://www.regeringen.se/content/1/c6/07/43/98/9b718606.pdf (accessed 23 April 2015).
[242] UNHCR. *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, para 5.11.

unacceptable as such decision does not respect the rule of law as the outcome of the applicant's application is external and subjective factors, not giving the applicant the equal access to court compared to an applicant who is able to appeal. It is not acceptable that an applicant There are further no regulations which regulates the time period between an unaccompanied minor being considered by an adult and such age assessment is potentially reviewed by the Migration Court. Nonetheless and despite these aforementioned shortcomings, the Swedish legislation is in compliance with its international and regional obligations.

In conclusion, the Swedish legislation complies with the main aspects of its international and regional obligations in regards to the age assessment of unaccompanied minors. To comply with such obligations is however not a very high burden placed on Sweden as the topic of age assessment is not greatly regulated on international or regional level. Furthermore as mentioned, open-ended concepts such as benefit of the doubt and the best interest principle are often decisive factors in claims for international protection and age assessment. Consequently, it is crucial to examine how the principles and provisions are applied rather than looking solely at the text of the law. Thus it is to be noted that analysing the level of compliance gives a one sided view and does not naturally incorporated *de lege ferenda* perspective as the X which the Y is compared to and should comply with is not necessarily a good provision in itself. For example, Article 25(5) RAPD could instead go further and demand that an age assessment should be possible to challenge in its own right, which is motivated by the detrimental effect an incorrect age assessment has on the life of the already vulnerable unaccompanied minor. However, as all issues with migration, such provision would ultimately be weighed against political interests such as migration control. Given the current political climate in Sweden and most of Europe, with xenophobic parties steadily winning ground it is hard to imagine that such change would be backed up by political will supporting it as ultimately a child applicant will be more expensive for the Member State than an adult applicant does.

In conclusion it can be said that for the most part, Sweden's age assessment framework is in compliance with international and regional obligations. Having said that there are still major issues of concern and furthermore simply stating that the framework is in compliance with the international and regional obligations does not necessarily mean that such obligations are of good quality or puts a high demand on the State. In order to truly evaluate the level of compliance, the application of the obligations must be examined

which will be carried out in chapter 4.4. and 5 thus completing the compliance evaluation.

4 Age assessment evidence

The application of the international, regional and domestic obligations plays a significant role when completing a compliance analysis. This section will look at the age assessment methods used in Sweden and the evidential value which they are given when evaluated by the Migration Board and the Migration Courts.

As mentioned when detailing the legal context in chapter 2, what age assessment method should be used is not regulated by either international or regional provisions. Rather such provisions regulate under which procedural rules they need to operate and sets a minimum standard which the method must meet.[243] There is no regional consensus within the EU of which method is to be considered best practice in regards to assessing the age of unaccompanied minors. The methods range from non-medical involving ocular, documentary assessment and social services assessments, to medical methods involving physical examination, anthropometry, sexual development assessment, psychological and emotional development and radiological assessments of skeletal and teeth development.[244] In Sweden a combination of non-medical methods of for example interviewing the applicant and assessing documentary evidence, receiving an opinion from the social services and medical methods such as pediatric examination combined with radiological examinations of the carpal bone and teeth can be used. Thus the main evidence evaluated by the Migration Board is the documentary evidence, the statement of the applicant and, if completed, medical examinations which will be detailed further below.[245]

During the reading of this chapter, one should keep in mind the Swedish evidential legal principle that any evidence may be presented and there is no rules regarding how such evidence should be valued and what evidential weight should be given to them. Ultimately all evidence presented is valued in regards to their merits.[246]

[243] EASO, 2013, chapter 2.9.
[244] Aynsley-Green, Sir Albert, 2011, pp. 8, 13. EASO, 2013, p.23 Roscam Abbing, Henriette D.C. *Age Determination of Unaccompanied Asylum Seeking Minors in the European Union: A Health Law Perspective*. European Journal of Health Law (18) 2011 11-25, p. 15.
[245] Diesen, et al, 2012, pp. 244-245.
[246] Migration Board, RCI 13/2014, chapter 1.3.

4.1 Documentation

For the most part, the unaccompanied minors who lodge an application will not be in possession of any forms of authentic documentary evidence showing their identity or age. [247] Furthermore there is a widespread of issue of lack of functional civil registration systems meaning that birth go unregistered which further complicates the issue as the unaccompanied minor does not even have the possibility of obtaining identification documentation from his or her country of origin.[248] For example in Afghanistan and Somalia which is typically the country of origin of the most unaccompanied minors arriving in Sweden, 63% and 97% respectively births go unregistered.[249]

The primary evidence to show ones identity is however documentary evidence such as a passport or a birth certificate. The evidential value of any written documentation is dependent on whether the authenticity is verifiable.[250] Such verifiable authenticity could be a watermark or magnetic metallic safeguarding thread which allows the Migration Board and Migration Courts to verify that the documents are indeed authentic. An unverifiable document would be a document that is of very rudimentary character and therefore easy to forge. Moreover, the document should also be an original and should have been issued by a State authority in order for the document to be given a high evidential value. The fact that the documents have been provided to the applicant by a people-smuggler (authentic document or not) has in previous case law lowered the evidential value of the document.[251] The Migration Court of Appeal has however recognized that the same high demands cannot be put on documents from developing countries.[252] Nonetheless, the Migration Board sets high standards for the authenticity of identification documents. For example, the Afghan identification document, *tazkira*, is not accepted as credible enough by the Migration Board and further an Afghan passport is issued based on the presentation of a tazkira which renders the evidential value of a Afghan passport low. Similarly, as previously mentioned the Migration Board does

[247] Nyström, Viktoria, 2014, p. 83. Crawley, Heaven, 2006, p. 15. UNHCR *Handbook*, para 197.
[248] Committee on the Rights of the Child, *General comment No. 6*, 2005, para 3. Aynsley-Green, Sir Albert, 2011, p. 6.
[249] UNICEF, http://data.unicef.org/child-protection/birth-registration (accessed 24 April 2015).
[250] Gov Bill Prop. 1997/98:178, p.8.
[251] Migration Board Court of Appeals, MIG 2014:1, MIG 2007:33, UM 1119-06. Gov Bill Prop. 1997/98, p. 8.
[252] Migration Court of Appeals, MIG 2010:17.

not accept any Somali identification papers. The reason for using Afghanistan and Somalia as illustrating examples is due to the fact that most unaccompanied minors arriving in Sweden are from named countries thus the problem of not having identification paper is affecting the majority of the applicants.[253]

When documents can be directly related to the identity and age of the applicant they tend to be given a higher evidential value, such as containing photographs or information relating to the time of birth, the age at the issuing of the document or the identity of the applicant was verified before said document was issued.[254] If the applicant is in possession of several documents all of rudimentary character they can be taken together thus affording some evidential value in regards to proving the identity of the applicant.[255] In the case of the unaccompanied minor not being in possession of any documents, such circumstance should not affect the overall credibility of the applicant but s/he may need to provide a reasonable explanation as to why s/he is not in possession of such document.[256]

Thus most unaccompanied minors arriving to Sweden are unable to prove their age by providing documentary evidence, because even the few who possess documents will most likely not be in possession of a document that the Migration Board will regard as verifiable.[257]

4.2 Statements

When an unaccompanied minor has lodged an application, the Migration Board officer must always complete a face-to-face interview with the applicant where the minor is given the opportunity to state his or her identity and reasons for seeking international protection. The officer will try to establish the minor's identity by asking question relating to the minor's family, educational background, and important events in the country of origin. To determine the age based on the ways in which the applicant look or behave is a very subjective practise. Many cultural and educational

[253] Migration Court of Appeals, MIG 2014:1, p. 4 and 15 (regarding tazkira). www.migrationsverket.se/Privatpersoner/Bli-svensk-medborgare/Medborgarskap-for-vuxna/Styrkt-identitet/Migrationsverkets-bedomning-av-identitetsdokument.html (Accessed 23 March 2015).
[254] Migration Court of Appeals, 2007:12.
[255] Migration Court of Appeals, MIG 2010:17.
[256] UNHCR Handbook, para 205(a)(II). Diesen, et al, 2012, p. 257.
[257] UNHCR *Handbook*, para 197, Gov Bill Prop. 1997/98:178, p.8. Nyström, Viktoria, 2014, pp. 83-84.

aspects affect the ways people behave.[258] For example, it is not uncommon for children to be given far greater responsibilities in their families compared to e.g. a Swedish child, making the minor applicant appear older than s/he actually is. The effect of this I believe is that the assessment really becomes an assessment of the psychological age rather than the chronological age which is the age really being assessed.

When assessing which evidential value is to be given to the applicant's statement, it is necessary to assess whether said statement is credible or not. The relevant credibility is that of the statement rather than the credibility of the applicant.[259] In order to be assessed properly, this demands that the officer has knowledge regarding the background, education and culture of the person giving the statement.[260] Not only is the credibility important in order to assign an evidential value to the statement, but furthermore it is important in order for the benefit of the doubt to be applied.[261] In order for the benefit of the doubt to be given to the applicant, the Migration Board considers it important for the statement to be coherent, plausible, must not run counter to generally known facts and should remain unchanged in essential part during the procedure.[262] By 'remaining the same' it is meant that the main points of the statements should remain the same however it is natural for a story to get more detail rich when told repeatedly or minor details being misremembered. However if the unaccompanied minor changes essential parts of his or her statement, the opportunity to explain such change should be afforded to the applicant.[263] For example, the unaccompanied minor may be influenced or advised by others to tell a certain story. Judging the credibility of the statement regarding claimed risk of persecution or past events is in itself a complex and difficult task, even more so when the task is to assess the credibility of a stated age.

Information may also be gathered from the appointed guardian, Social services or other persons who have been in contact with the child and might give an indication of the applicant's age as previously mentioned.[264] The

[258] Nyström, Viktoria, 2014, pp. 85-86.
[259] UNHCR *Handbook*, paras 196 and 204. SOU 2006:6, p. 234.
[260] Aynsley-Green, A., Cole, T.J., Crawley, H., Lessof, N., Boag, L.R., Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to migration control, British Medical Bulletin, 2012: 102, 17-42, p. 14.
[261] See further chapter 2.1.1 and 2.2.1.
[262] UNHCR *Handbook*, paras 203-204. Article 4.5 RQD. Migration Court of Appeal, 2014:1, MIG 2007:12.
[263] Migration Court of Appeal, 2011:6. Diesen , et al, 2012, p. 241.
[264] Migration Board, RCI 13/2014. According to Social services Act (2001:453), all children without a legal guardian must be must go through an investigation carried out by the Social services in the responsible municipality, which should then be taken into

guiding principle when assessing statements by other people is the expertise said person has and whether they can make an informed assessment. Although the guardian can be asked this is usually not done or even if it is, it is not given much evidential weight considering the guardians biased opinion and lack of expertise on the topic. The same applies to teachers and the staff working at the minor's accommodation. The social worker assigned by the municipality to assist the unaccompanied minor is commonly asked to give an assessment however the assessment usually does not indicate a specific age since due to the expedited process the social worker has had very limited access to the child hence the assessment will essentially be based on ocular and behavioural observation.[265]

4.3 Medical examinations

The medical examination offered by the Migration Board consists of radiographs taken of the applicant's carpal skeleton and teeth that are then examined to assess the level of maturity by comparing to a reference chart.[266] Although the National Board of Health and Welfare recommends that the radiographs are complemented by an examination by a paediatrician this is not currently common practice.[267]

According to Instrument of Government (1974:154) ch. 2 6 §, bodily invasive procedures against the will of the affected person is prohibited unless according to law. Both methods of age assessment as mentioned above would be considered as invasive procedures and is consequently prohibited unless the applicant consents to the procedure.[268] Given the situation the applicant is in and not being in possession of any documents combined with the knowledge that the Migration Board already doubting the applicant's age, it can be discussed whether participation is really agreed to out of free will or if the medical examination is *de facto* compulsory.[269]

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consideration by the Migration Board. The Social services must give such information to the Migration Board when asked for it according to the Aliens Act, ch.17 1§. Due to time limits for asylum applications made by unaccompanied children, this investigation is not thorough and does not usually assess the age of the minor. Nyström, Viktoria, 2014, pp. 84-87.

[265] Nyström, Viktoria, 2014, pp. 86-87.

[266] Hjern, Anders, Brendler-Lindqvist, Maria and Norredam, Marie, *Age assessment of young asylum seekers,* I: Acta Paediatrica, 2012, volume 101 pp. 4-7. National Board of Health and Welfare, 2012, dnr 31156/11, p.2.

[267] National Board of Health and Welfare, 2012, dnr 31156/11. Nyström, Viktoria, 2014, p. 88. Migration Court, UM 3797-11.

[268] Gov Bill Prop. 2009/10:31, p. 199.

[269] Roscam Abbing, Henriette D.C., 2011, p. 20.

Assessing the age of an applicant based on radiographs of skeletal maturity of the carpal bone, the most common method used is the "Atlas method" which was developed by Greulich and Pyle in 1959. The reference group used in this study was mainly North American Caucasian middle class children and was conducted in the 1930s.[270] The study was originally developed to assess developmental stages when a chronological age was already known.[271] When making an assessment, the radiologist compares the applicant's radiographs to the radiographs in the Atlas reference, comparing the Atlas radiographs to the applicant's until the two sets of radiographs match and thus the age stated on the Atlas reference which matches the applicant's, is the age the radiologist will estimate that the applicant is.[272] In Sweden an orthopantomogram (dental X-ray) is used in combination with the carpal radiogram assessment. The orthopantomogram assessment mostly looks at the sequential eruption and dental structure of mainly the third molar due to their late development. The third molar is also however the tooth most varied in the dentition and is congenitally absent in one of ten.[273] Thus these assessments are heavily dependent on a subjective element and not only is the reference group not representative for the person it is compared to, it further neglects to take into consideration variations due to secular trends or socio-economic, ethnic, genetic, endocrinal, nutritional or medical factors.[274]

Although these methods have been considered the most suited method available and produce a rather reliable estimation up to the ages of 16, it does not produce a reliable estimation between the ages of 16-18 years old.[275] Although the use of radiographs /method is deemed to be the most suited method, it still yields estimations with a margin of error of ±2 and ±4 years, the greater margin of error applicable in the upper adolescences.[276]

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[270] Aynsley, A. et al, 2012, p. 31. See further: Greulich, WW, Pyle, SI, *Radiograph Atlas of Skeletal Development of Hand and Wrist,* Palo Alto California, Stanford University Press, 1959.
[271] Hjern, Anders, et al, 2012, p. 2. Aynsley, A. et al, 2012, p. 33.
[272] Aynsley, A. et al, 2012, pp. 31-33.
[273] Nyström, Viktoria, 2014, p. 88.Hjern, Anders, et al, 2012, p.2. Aynsley, A. et al, 2012, pp. 34-35. Nyström, Viktoria, 2014, p. 88.
[274] Aynsley, A. et al, 2012, pp. 28, 31. Hjern, Anders, et al, 2012, p.2. Roscam Abbing, Henriette D.C., 2011, p. 16.
[275] Roscam Abbing, Henriette D.C., 2011, pp. 16-17. Hjern, Anders, et al, 2012, p.2. EASO, 2013, p.35.
[276] National Board of Health and Welfare, 2012, dnr 31156/11. Migration Court of Appeals, MIG 2014:1, pp. 10-11. Hjern, Anders, et al, 2012, p.2. Roscam Abbing, Henriette D.C., 2011, p. 16.

the unaccompanied minor arriving to Sweden is most commonly between 16-17 years old thus being affected by the higher margin of error.[277]

The National Board of Health and Welfare recommends that the examination should be completed by especially trained radiologists, forensic dentists and paediatricians and at a limited number of clinics.[278]
The result of the medical examination should be reported in a specific template but the margin of error as described above is not evident from looking at the template and furthermore the jurists using the assessment are not medically trained thus potentially creating a miscommunication.[279] The National Board of Health and Welfare prescribes in its recommendations that the medical age assessment must be objective, of scientific quality and legally secure whilst taking the best interest of the child principle into consideration. In their view, such criteria for example rule out the possibility of using unscientific and subjective methods such as an ocular examination unless it is beyond any doubt that the applicant is in fact an adult.[280] Furthermore, given the margin of error, the Board recommends that the scientifically acceptable level of probability, 95%, should be obtained when relying on the medical assessments.[281] In addition, the Board recommends that the medical examinations should only be used to aid a paediatric physical examination done to assess the applicant's age. This examination would include anthropometric measurements, psychosocial and physical maturity, the medical history and other anamnestically important information. Assessing all information collectively, the paediatric could then make a holistic assessment of whether the stated age of the applicant is probable or not.[282] This method is also of course subjective and will also include a margin of error, which has further not been studied greatly thus creating a larger uncertainty as in regards to the extent of the margin of error.[283]

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[277] http://www.migrationsverket.se/download/18.39a9cd9514a346077211b0a/1422893141926/Inkomna+ans%C3%B6kningar+om+asyl+2014+-+Applications+for+asylum+received+2014.pdf . (Accessed 20 May 2015).
[278] The Swedish age assessment procedure and the medical age assessment is further detailed in chapter 2.4.1. National Board of Health and Welfare, 2012, dnr 31156/11.
[279] Noll, Gregor, 2015, section 3.c. Migration Court of Appeals(?), UM 3919-11.
[280] National Board of Health and Welfare, 2012, dnr 31156/11, p.2. Migration Court of Appeals, MIG 2014:1.
[281] National Board of Health and Welfare, 2012, dnr 31156/11, p.2. Migration Court of Appeals, MIG 2014:1, p. 11.
[282] National Board of Health and Welfare, 2012, dnr 31156/11, p. 3.
[283] Hjern, Anders, et al, 2012, pp. 2-3. Roscam Abbing, Henriette D.C., 2011, pp. 18-19. Aynsley, A. et al, 2012, pp. 28-30.

If the Member State has received a medical examination carried out in another Member State this may be included in the case, given that it is communicated to the applicant and s/he is given the opportunity to comment it. For example in Sweden, such medical examination is given the same evidential value as a domestic one would, given that there is sufficient reference material and the examination was carried out by a qualified medical professional in line with the recommendations from the National Board of Health and Welfare.[284]

4.4 Application and Evaluation in the Migration Courts

As evident by the content of the thesis so far, the application of the different provisions and principles must be considered when evaluating to which extent the Swedish age assessment practice complies with international and regional obligations.

In order to make an analysis of the application of the provisions and the evaluation of the different types of evidence resulting from the different age assessment methods, 26 Migration Court and 4 Migration Court of Appeal cases have been studied.[285] The aspects most closely analyzed can be studied further in supplement A where the result of the case analysis is presented in the form of a chart. All the cases studied review claims for international protection lodged by minors whose age has been disputed by the Migration Board and where some kind of method of age assessment has been applied. The selected cases represent all three Migration Courts as well as the four existing cases regarding age assessment which has been reviewed by the Migration Court of Appeal in Stockholm. The vast majority of the cases are from the years 2013-2015 which is when most cases have been reviewed by the Migration Courts and furthermore the newer cases are more relevant for the purpose of this thesis and represent the current practice more accurately. It is to be noted that not all age assessment disputes will be able to appeal as described in chapter 2.4.4, hence this analysis is not representative for those age assessments which have not been reviewed by the Migration Courts other than visible trends between the interdependency of the decisions of the Migration Court and the Migration Courts. In this

[284] Migration Board, RCI 13/2014, chapter 3.1.4. Migration Board, *regarding the consequences of case MA, BT and DA v Secretary of State for the Home Department* C-648/11, VCI AP 8/2013. National Board of Health and Welfare, 2012, dnr 31156/11.
[285] For the manner in which these cases where selected see chapter 1.3.

section the main conclusions which can be drawn from the case analysis will be detailed however it will be further analyzed in chapter 5 in conjunction with the methods of age assessment mentioned above.

When studying the cases it is evident that there is no consensus or established practice between the different Courts as to what evidential value should be given to the result of the medical examination or even which methods is to prefer or if all three methods[286] must be applied. Although all cases acknowledge that the methods used to assess age do not produce exact results, the weight given to the result is regardless often high and decisive for the outcome of the case.[287] Furthermore the evidential weight given to the results vary rather greatly between cases despite the fact that such evidential value will be decisive for the outcome of the decision. For example in some cases the Court notes that all three methods should have been used to be afforded a higher evidential value while in other cases only one method has been used but is still considered to have a high evidential value.[288] In effect, if the Court values the medical examination as having a greater evidential value than the applicant's statement (documents are most often not provided) the decision of the Court will in line with the age stated by the Migration Board. The evidential value given to the results appears to further be influenced by which Court is reviewing the case. For example the Migration Court in Malmö appears to be more liberal in valuing the statement of the applicant higher than the result of the medical examination, compared to the Courts in Gothenburg and Stockholm. The explanation for this could have numerous causes such as the training of staff, direction given by the leadership within the Court or a progressive point of view in the region.[289] This is a topic of issue which is not possible to further detail in this thesis however it would be a valuable aspect to be further researched.

When the statement of the applicant is given a higher evidential value than the result of the medical examination, similarities can be seen as to what the Court considers to be deciding factors. The following aspects of the applicant's statement impacts the evidence value positively; if the applicant offers genuine and spontaneous details about the origin of the age information such as writing birthdates in the Koran or putting into perspective of events or the age of a sibling, if the applicant consistently has

[286] As previously mentioned, the National Board of Health and Welfare recommends using a pediatric examination in combination with dental and carpal radiograms, dnr 31156/11.
[287] See for example UM 2437-13, UM 3990-14, UM 6382-13, UM 1823-13, UM 2119-13.
[288] See for example UM 2129-14, UM 7494-14, UM 6336-13.
[289] For example in UM 5404-14 it is stated that all pediatric clinics in Skåne have decided to refuse to complete age assessments due to its uncertain results.

maintained his or her age through the process, if the statement is cohesive, coherent and does not run contrary to known facts, if the applicant can provide plausible explanations for contradictory information, if the applicant can provide credible details and answer questions to a satisfactory level.[290] As can be seen, these aspects for the most parts mirror the criteria for applying the benefit of the doubt principle. Although the principle is not explicitly mentioned, except for a very limited number of cases, one could argue that, in effect, it has in fact been applied.[291] However as the use of the principle is not referenced it is not possible to fully ascertain that this was the intention of the Court or their reasoning behind the application of the principle. It is to be noted that this only applies to the cases that actually award the statement evidential value, some cases simply state that it is not possible to make the age probable by solely a oral statement and do not consider the statement further. Concerning statements made by other persons such as the Social services, accommodation officials or teachers, important factors are what expertise the person making the statement has and for what duration has the person spent with the applicant prior to the assessment.[292] In regards to the statement of the applicant the practice in the Court is in compliance with its obligations, however this compliance only applies in those cases where the statement is in fact considered.

One practice which is not in compliance with Sweden's obligations is the use of ocular assessment. Although some cases condemn such method of age assessment, the method is still applied in other cases by the Court and it is further evident that the Migration Board has used such methods in its initial decision.[293] The Court has for example made statements regarding the fact that the behavior and appearance of the applicant does not appear contradictory to his or her stated age.[294] Regardless of the fact that the use of such methods was, by chance, beneficial for the applicant, the use of ocular assessment is contradictory to the obligations established by international, regional and domestic regulations and recommendations.
As mentioned in chapter 2.4, the Migration Officer makes a note regarding the probability of the by the applicant stated age upon the initial lodging of the application for international protection. In some cases the Court has used such initial note regarding the age in its evaluation of the presented evidence. It has been used in a way to support that the by the applicant stated age is not unreasonable as even the Migration Board itself initially

[290] See for example UM 6674-12, UM 6336-13, UM 8475-12, UM 2265-14, UM 5044-12.
[291] For cases where mentioned see UM 5368-14, UM 6660-14, UM 3328-13, UM 2464-13.
[292] See for example UM 5054-12, UM 5404-14.
[293] See for example UM 5404-14, UM 1883-13.
[294] See for example UM 1883-13, UM 3712-13, UM 6897-13.

thought the age to be reasonable.[295] Although the reasoning of the Court in these cases where beneficial to the applicant, the signal such reasoning could send to the Migration Board is potentially harmful in extension. The effect of practice could be that the Migration Board is hesitant to assess the applicant as a minor at the initial meeting and routinely question the age of the applicant simply in order to avoid it being weighed against them in a potential future Court review. This is evidently not a desirable effect of something that perhaps initially was a way of alleviating the burden of proof of the applicant and needs to be considered.

As evident by the case analysis as per above, there are varied differences in the interpretations and evaluation as executed by the Court and no best practice can be said to have been established. One aspect which all except a very few cases do have in common however, is the failure to mention international or EU regulations or principles.[296] The most commonly referenced source of guidance is the recommendation issued by the National Board of Health and Welfare and most commonly no source of international or regional instruments are mentioned.[297] The neglect to mention the instruments do not necessarily by default mean that the Court was not aware of such obligations, that they deliberately neglected to reference them or that they were not comfortable utilizing it, however it would be beneficial for e.g. transparency reasons if such use was indicated. This would further strengthen the developed of the jurisprudence in regards to age assessment of unaccompanied minors and the benefit of transparency would also extend to the applicant should s/he wish to appeal the decision as the decision will contain more detailed reasoning.

Furthermore, one obligation which is grossly neglected is the best interest of the child principle which should be a primary consideration in all matters involving children according to not only international and regional but also Swedish regulations. Out of the 30 cases which were studied, only 5 cases mentioned the principle however none of the cases actually gave it consideration or engaged with the principle in relation to the age assessment thus not complying with Sweden's obligations.[298] Although the best interest of the child is not to transform into its own ground for granting international protection as this could encourage misrepresentation or increase the act of sending children to travel alone and exposing them to

[295] See for example UM 7493-13, UM 6336-13.
[296] An example of a case where is thoroughly mentioned is UM 2437-13/MIG 2014:1.
[297] National Board of Health and Welfare, dnr 31156/11.
[298] See further UM 2437-14, UM 5044-12, UM 5368-14, UM 8475-12, UM 6674-12.

potential harm and exploitation in order to later join through reunification.[299] Regardless of the aforementioned concern, it is still important that the principle is given serious consideration and should not only be applied in regards to granting international protection considerations but also during the age assessment. This is something that the Court is failing to do thus neglecting to protect the rights of the child applicant.

Another obligation which is largely neglected is the principle of benefit of the doubt as obligated by international and regional obligations. There are only a handful cases which explicitly extend the benefit of the doubt to the applicant.[300] As mentioned above, the reasoning in regards to the evaluation of the value of the statement of the applicant is very similar to the content of the benefit of the doubt principle and could thus be argued to in effect be an obligation which the application in the Migration Courts comply with. For reasons of transparency, the development of jurisprudence and to aid the applicant as mentioned above, it would be beneficial if the Court explicitly considered the principle and motivated its decision whether to afford it to the applicant or not.

In conclusion, to be able to say definitely whether the application in the Migration Courts is in compliance with international, regional and domestic regulation one must really analyze it on a case-to-case basis as the practice varies to such extent. The cases however allow to be exposed to a compliance analysis on a broader level as has been detailed above. On broad level it can be said that the Courts neglect to at least mention international and regional instruments and perhaps also to consider it and it can further be stated that in regards to the best interest of the child principle, the Courts do not comply with their obligations as established by international, regional and domestic instruments.

[299] Regarding transformation into ground for international protection: Diesen, et al, 2012, p. 102, Gov Bill prop. 1996/97:25 pp. 246-248.
[300] See further (UM 5368-14), UM 6660-14, UM 3328-13, UM 2464-13.

5 Application analysis

As the text of the law has been studied in chapter 3, the focus will now be shifted to examining the application of the obligations both in the procedure carried out by the Migration Board but also when applied and evaluated by the Migration Courts. An important component of such application by the migration Courts is the evidential value they assign to the different elements of the age assessment and will therefore also be detailed.

When examining the different methods used in order to assess the age of the applicant, a number of issues of concern become evident. This is especially true when the medical examination methods are applied. The results of the medical examinations are highly uncertain and imprecise due to a high margin of error and the reference group which the methods are based upon. There is a high risk of the method assessing the age of the applicant incorrectly which has for example led the US State Department and Health and Human Services Department and Germany to using such method due to the precarious result.[301]

When it comes to documents requested by applicants if they want to show that they are suffering from a physical or mental illness, the Migration Board applies a high standard as to what documents are accepted as evidence to prove such illness. If the same high standard was applied to the results of the medical examination and it was the applicant providing the results, the Migration Board would not consider it sufficient as supporting the applicants claim.[302] The Migration Board relies heavily upon the result of the medical examination and the result is most often the deciding factor in an age assessment. It is unacceptable that the Migration Board so heavily relies on such result because if the roles were reversed, the Migration Board would dismiss it and state that the applicant had not made his or her claim probable. It is important that applicants as well as citizens have confidence in the competence of the Migration Board and the decision which they take.

The uncertainty of the result of the medical examinations are further worrying as they are meant to be for example objective and scientifically satisfactory however the result that the current methods produce are very subjective and are not supported by acceptable scientific methods.

[301] Noll, Gregor, 2015, pp. 8-9. Nyström, Viktoria, 2012, p. 90, note 97.
[302] Nyström, Viktoria, 2012, p. 89.

Furthermore, in order to evaluate the results, the reader must have relevant experience and knowledge if miscommunication is to be avoided and that is something which judges do not have as they are not medically trained. The result of this should be that when assessed in the Migration Courts, the medical result should be given a low evidential value, if any. In practise however this is not adhered to as can be seen by the previous case analysis, as the result of medical examination is still given decisive weight in many cases.

As evident in the case analysis in the chapter above, the best interest of the child principle is in Swedish Migration Courts overlooked and not given enough consideration, contrary to international, regional and domestic obligations. This aspect is something that Sweden was criticised for by the CRC Committee in its fifth report on Sweden published in March 2015; namely the Committee was concerned that in practise inadequate weight is given to the best interest of the child principle especially in asylum procedures, a view shared by the Swedish Children's Ombudsman. Furthermore, emphasis was put by the Committee on the importance of educating the staff in contact with the children and ensures that the best interest principle guides the process of all decisions.[303]

If the Migration Board staff and judiciary officials receive education they are more likely to be confident in applying the principle thus affording a higher protection of the child rights of the applicants. The role of the public council is also important as if they present best interest principle arguments the Court will have to consider it and is more likely to seriously consider the principle in regards to the age assessment part of the claim. The respect of the rights of the child applicant during the asylum procedure will increase the more awareness is raised.

Some critique presented by scholars such as Anna Lundberg and Johanna Schiratzki is the vagueness of the principle and the effect it has on the protection of the rights of the child applicant.[304] When the principle is an open concept rather than a traditional legal rule it offers flexibility to the person applying the principle, not demanding the same consideration and encourage subjective decision-making. The protection of the best interest of the child would be improved if the legal status was strengthened and idea of incorporating the right rather than use the transformation method has been a

[303] Committee on the Rights of the Child, *Concluding Observations: Sweden*, 2015, paras. 17-18. Barnombudsmannen, 2012, p.3. Sandesjö, Håkan, 2013, pp. 84-86.
[304] Lundberg, Anna, 2011, p. 66-68. Schiratzki, Johanna, 2000, pp. 222-223.

topic under Governmental domestic consideration for a while which would be an effort to improve the application of the principle.[305] Strengthening the status of the principle does not per se mean that too strict and inflexible rules should be introduced as this will most likely not benefit the child applicant. The decision on whether the applicant has made his or her age probable will still need to be completed on a *sui generis* basis and pay consideration to the particular circumstances of the applicant. Although this is true in claims where the applicant is an adult, it is especially important when the applicant is a minor regardless of unaccompanied or not.[306] Another issue which ties into the flexibility aspect is the geographical disparities that it enables which is something the CRC has also criticised and could be seen in the case analysis above.[307] If there are large discrepancies in regards to implementing the obligations, the child applicants are not offered inequitable protection of their rights and for example how much is demanded of them in order to fulfil their burden of proof. As the guardians are appointed by the local municipalities this too effects the treatment the child receives for example the time it takes before a guardian is appointed or what knowledge of child related claims such guardian has received. This is yet again something Sweden has received criticism for by the CRC Committee, which recommends that the appointment of guardians be regulated in the Aliens Act.[308]

Another topic which needs to examined in regards to whether Sweden complies with its international and regional obligations is the benefit of the doubt principle. As seen in the case analysis in chapter 4.4, it is not often the principle is explicitly applied by the Migration Courts however in some cases the principle is applied to some degree without explicit mention. As a whole it cannot be said that the application in the Migration Courts comply fully with Sweden's obligations as the Migration Courts should consider the principle, which is not the same as extending it to the applicant in every case but it should be acknowledged by the Court. The relationship between the

[305] 27 March 2013 the Government decided to investigate the effect of incorporating rather than transforming the CRC provisions, Kommittédirektiv 2013:35. See further on the topic: Stern, Rebecca, Jörnrud, Martin: *Barnkonventionens status – En utvärdering av för- och nackdelar med barnkonventionen som svensk lag,* UNICEF and Raoul Wallenberginstitutet för mänskliga rättigheter och humanitär rätt, 2011. Åhman, Karin: *Rättsutlåtande om inkorporation av Barnkonventionen,* Rädda Barnen, 2011.
[306] Hathaway, James C., 2005, p. 331. Migration Court of Appeal, MIG 2011:6, MIG 2011:11.
[307] Committee on the Rights of the Child, *Concluding Observations: Sweden*, 2015, para 11.
[308] Committee on the Rights of the Child, *Concluding Observations: Sweden*, 2015, paras 49(e)-(f), 50(d).

benefit of the doubt and the uncertain results from the dental and carpal radiogram methods will be further discussed below.

Sweden's use of medical examinations as methods for age assessment is in line with its international and regional obligations, primarily Article 25(5) RAPD. The Article stipulates that if after carrying out such a medical examinations there is still doubt regarding the age of the applicant, the applicant should be assumed a minor thus extending the benefit of the doubt to the minor. Gregor Noll makes compelling arguments regarding what effect Article 25(5) has on the usefulness of using the dental and carpal radiogram method to establish the age of an unaccompanied minor which will be presented and commented below. Noll argues that because the scientific base of the medical examinations are not sufficient enough to produce a doubt-eradicating result, due to the aspects such as the reference group used and ignoring the influence of interdisciplinary aspects such as ethnicity, genetic, trauma exposure and socio-economic factors.[309] If the result of the medical examination is used despite its unscientific base, Noll argues that it is merely a speculation which lacks the authoritative status which is usually associated with expert evidence when part of a legal proceeding. Given the content of Article 25(5) the applicant should always be considered a minor because when medical examination is used, there will inherently, due to the aforementioned scientific shortcomings of the method, still remain doubt after the medication examination thus the applicant should be assumed to be a minor.[310] The use of medical examination then becomes medically and judicially indefensible and futile as it will only expose the applicant to unjustifiable radiation exposure, potentially cause retraumatization and will be in breach of the least invasive method principle.[311]

Ultimately, Noll argues that the core root cause of the problem is the lack of civil registration of births in the country of origin of the applicants.[312] However true of an observation, to eradicate the root cause is an immensely complex issue and not something I think will be achieved in the foreseeable future thus other strategies to remedy the situation will have to be designed which in itself is also immensely challenging. Although I fully share Noll's point of view and the reasoning of his argumentation, I also see some problematic potential effects with a too lenient application of the benefit of

[309] Noll, Gregor, 2015, pp. 4-7, 9-10.
[310] Noll, Gregor, 2015, pp. 5, 13.
[311] Noll, Gregor, 2015, pp. 8, 13-14.
[312] Noll, Gregor, 2015, p. 14.

the doubt that I feel needs to be addressed in order to provide a bigger picture. This does not imply that I do not believe that the benefit of the doubt should be applied by the Migration Court in a far more cases than the current practise because that is my opinion however the issue is not unproblematic. If the application of the benefit of the doubt, and the best interest principle for that matter, is too lenient it may be an incentive for misrepresentation, exposing unaccompanied minors to harmful means of travel and forum shopping thus a cautions and informed application is motivated.

If the benefit of the doubt is applied, it can alleviate the high burden of proof placed on the applicant and remedy such misdistribution of burden to some extent. It is to be remembered that the majority of unaccompanied minors arriving in Sweden are between 13-15 or 16-17 years old who are unable to prove their age by the use of identification documentation as most of them are not in possession of any such document and even if they were, they would not be accepted by the Migration Board.[313] Furthermore and as mentioned, the age cannot be made probable solely with a statement from the applicant thus creating a heavy burden for the, already vulnerable, lesser part of the procedure. On paper the medical examination is voluntary however it can be discussed whether the applicant actually has a possibility to refuse without it having detrimental effect on the outcome of his or her claim and to what extent it is an informed decision to participate. It is further important that the Migration Court is not simply rubber-stamping the Migration Board decisions without evaluating its content critically but rather avoiding an attitude of disbelief towards the applicant and is further mindful of the individual situation of the applicant and equality of arms concerns in order to assure reaching a decision respecting the rule of law.

It is evident that the issue of age assessment is a multifaceted issue and the area of law would benefit from further research. In the domestic setting it would for example be enlightening to further explore the geographical differences and its relationship to discrimination and rule of law, perhaps with focus on the decision making executed by the Migration Board. The psychological effects of the age assessment methods would also be beneficial to be studied further which could affect the balancing of different methods and also different interests when for example conducting a best

[313] http://www.migrationsverket.se/download/18.39a9cd9514a346077211b0a/1422893141926/Inkomna+ans%C3%B6kningar+om+asyl+2014+-+Applications+for+asylum+received+2014.pdf . (Accessed 20 May 2015). Nyström, Viktoria, pp. 69-70.

interest of the child determination. In regards to the data collection concerning claims lodged by unaccompanied minors it would be valuable to have more disaggregated data for the purpose of the Swedish asylum procedure being open to both internal and external scrutiny. When I have studied the compliance with Sweden's international and regional obligations, the focus has not been on the quality of the content of such instruments which Sweden must comply with however I believe it would be enlightening to compare such content with other legal instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination.[314]

Despite aforementioned disquieting aspects of the age assessment of unaccompanied minors, the issue of how to assess age remains problematic as there is not a method available that may be used in order to definitely determine the chronological age of a minor. There is no best practise established between the Member States and the methods used vary greatly and not all involve medical examination components.[315]For example in the UK, rather than using methods involving radiation, social service case workers evaluation the unaccompanied minor for a short extended period of time and then produces a statement assessing the age of the applicant.[316] Although such method is appealing due to the lack of radiation exposure, it has problematic aspects such as subjective decision-making based on ocular observations as well as the caseworkers having an invested interest in the decision being taken. If assessed as a minor, the care of the minor will transfer from the Migration Authorities to the local Social services where the caseworker making the assessment works. Thus if the case worker assesses the applicant as a minor it will directly affect the workload of him- or herself or colleagues, which of course is not desirable as it may affect the objectivity of the decision reached.

[314] International Convention on the Elimination of All Forms of Racial Discrimination, UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.
[315] For the different methods used in Europe, see EASO, 2013.
[316] See for example: Crawley, Heaven, *When is a child not a child?- Asylum, age disputes and the process of age assessment*, ILPA policy paper, May 2007.

6 Conclusion

The issue of age assessment of unaccompanied minor is characterized by sparse regulation, vague concepts and lack of best practice consensus. The one thing which is clear about the issue is that it is a highly problematic area of law which will only become more pressing in the future given the many conflicts around the world forcing minors to flee their homes.

In order to share some light on this multifaceted issue I have detailed the international, regional and domestic obligations that Sweden must respect when assessing the age assessment of an unaccompanied minor. The legal frameworks governing the issue of age assessment sparsely regulate the procedural aspect of such assessment or when it does, such regulations does not demand very much of the State in order to comply with such obligations. The three main principles which dictates the age assessment is the burden of proof, the benefit of the doubt and the best interest of the child principle which have all been detailed in great detail. If I were to describe the framework with one collective word I would choose the word vague. I would do so because there is vagueness in the content of the obligations, their scope of application and how they are intended to be applied. This vagueness can be seen in the lack of unison in the content of such principles when applied by the Migration Court, seen when the empirical study was conducted.

The thesis has further detailed the methods used in Sweden for assessing the age of an unaccompanied minor, namely identification documents, the statement of the applicant and the result of the medical examination if such was conducted. Moreover, the evidential value each piece of method has been given by primarily the Migration Court as been studied in order to reveal the true level of compliance as simply looking at the text of the law will not suffice when aiming to answer a question regarding level of compliance. Throughout the thesis, while detailing the aspects mentioned above, the impact on the level of protection offered to the minor has been highlighted. Emphasis has further been on the unbalanced relationship between the stronger part, the Migration Board, and the weaker part, the unaccompanied minor with an almost insurmountable burden of proof put upon the minor. Such relationship has further been fortified by the inability of appealing an age assessment specifically and the fact that it can be

discussed whether participating in medical examinations is in practise voluntary or not. Many of the arguments regarding the effect the different problematic aspects of age assessment of unaccompanied minors has, is in effect arguments regarding the rule of law not being respected and the quality of the decisions which are taken both by the Migration Board but also the Migration Courts.

Most probably there will never be a method which produces accurate results in regards to the age of an unaccompanied minor unless functional civil registration authorities are established. Since it does not appear to be able to be stopped entirely, the situations in which the medical examination is executed should be limited with satisfactory safeguards put in place when the medical examinations are carried out and a comprehensive evaluation of the result respecting all international, regional and domestic should be completed in every application for international protection lodged by an unaccompanied minor. This would ensure that the decision taken was both in respect of rule of law and complying with the existing obligations.

When answering the main question of the thesis, it is hard to give an overarching level of compliance achieved as such level varies from aspect to aspect, and furthermore the compliance seen from a written law perspective compared to an application perspective is rather different. The written law in regards to age assessments complies for the most part with Sweden's international and regional obligations. In regards to the case analysis a definite answer as to what level the obligations are complied with is nearly impossible as some cases fully comply in its application why others miss the mark miserably. It can however be said for all cases studied, that the best interest of the child is grossly neglected by the Migration Courts but also by the public councils pleading the case of the unaccompanied applicant. It is evident by the difference between the level of compliance if you compare the written law to the application, that conducting empirical studies is really enlightening and revealing.

Thus, if Sweden is to continue the use of medical examinations as means of the assessing age of unaccompanied minors, which it seems to due to the lack of presence on the political agenda, a more holistic approach should be developed. Such holistic approach should not only comply with international and regional obligations, but also consider the vulnerability of the applicant and his or her individual level of need for protection, thus moving away from the current strict focus on chronological age. For lack of

a better method for accurately assessing the age of unaccompanied minors, a holistic approach could produce a decision which would be fairer and more respectful of the rights of the applicant and at the same time be more tailored to the individual needs of the child compared to what the current decision-making process is. If a vulnerability element was added, the legal consequences of the age would decrease thus potentially having the effect that there would be a decrease in the encouragement of misrepresentation.
Taking vulnerabilities into account is something that the Migration Court is failing to do thus neglecting to fully protect the rights of the child applicant. This could further help by removing some of the stigma and actually give the applicants what they are ultimately in need of - help.

Supplement A

Case no	Year	Location of Court	Age stated by appli-cant	Age stated by medical examin-ation	Consid-ered to be a minor by Court	Mention of Benefit of the doubt principle	Mention of Best interest of the child principle	Engagement with the principles	Evaluation of written documentation	Evaluation of statement	Evaluation of result of medical examination	Method of age assessment used
UM 694-14	2014	Migration Court of Appeal Stockholm	16	At least 19.2	Remanded to lower court for insufficient examination	-	-	-	-	-	Contradictory results thus it should be remanded to lower court for further investigation	Dental, physician statement provided by applicant (16,64 years)
UM 2129-14	2014	Migration Court of Appeal Stockholm	< 18	At least 19.1	X	X	X	X	Not commented	Not commented	Although precarious result, decisive	Dental
UM 2437-	2014	Migration Court of Appeal	16	At least 19.2	X	✓	✓	X	Tazkira: disregarded	Written procedure, no comment of	Decisive weight given to the	Dental, statement

13		Stockholm								previous statement	medical examination	form Social services
UM 6147-11	2011	Migration Court of Appeal Stockholm	< 18	At least 19	Remanded to lower court	-	-	-	-	As the statement and documents provided by applicant could inform the Court about his age the case was remanded	-	Skeletal, applicant provided2 statements from pediatrician, 4 witnesses
UM 8030-12	2013	Gothenburg	17	At least 19.2	✓	✓	X	X	Has none	Statement in Court was decisive	Collected evaluation but statement overweighed result of medical examination	Dental and skeletal
UM 1761-13	2013	Gothenburg	< 18	19	Does not state if minor or not: "very young"	X	X	X	Has none	-	-	-
UM 2111-14	2014	Gothenburg	17	At least 19.2	X	X	X	X	Has none, provided article and letter from teacher	"not possible to prove age with statement solely"	Some weight given, states the applicant is just over or under 18	Dental, skeletal
UM 3990-	2014	Gothenburg	17	Skeletal: over 19	X	X	X	X	Has none	"not possible to prove age with statement	Decisive weight given to the	Dental, skeletal,

14				Dental: 95% between 17.2 - 21.2						solely"	medical examination result	pediatric evaluation
UM 6896-14	2015	Gothenburg	17	Skeletal: at least 19 Dental: at least 17.5 - 18	✓	X	X	X	Has none, provides a statement from pediatrician which is given some consideration	Statement consistent and coherent. Valued with medical examination result it is decisive	Precarious method and result contradictory.	Dental, skeletal
UM 5044-12	2013	Malmö	16	At least 19	✓	✓	✓	X	Has none. Supplied statement by pediatrician (based on 4 interviews, pediatric examination, examination of skeletal radiograms, puberty evaluation) which is given large and	Statement consistent and contradictions explained.	Precarious method and should be valued cautiously, the result does not contradict the statement of the applicant	Skeletal

									decisive weight, statement from accommodation (known applicant for 3 months, cultural experience) given relative weight			
UM 1883-13	2013	Malmö	16	19	✓	X	X	X	Has none	During statement given plausible details, behavior and appearance support age. Decisive weight	Disregarded because large margin of error attached to method and did not completely eliminate possibility that the applicant was a child	Medical examination, method not stated
UM 3712-13	2013	Malmö	≈16.4	Skeletal: over 19 Dental: 19.2 Pediatrician: could be	✓	X	X	X	Has none. Court has disregarded documents from other Member State because do not know the	Statement coherent and consistent, behavior and appearance support age. Decisive weight.	Precarious method so valued cautiously	Dental, Skeletal, statement pediatrician

				17.5					domestic process			
UM 6382-13	2014	Malmö	17	19.2 Social services: significantly older than stated age	X	X	X	X	Has none, weight given to absence of document	No consideration given to statement of applicant. Statement from Social services given low weight because based on ocular assessment	Decisive weight given to result of medical examination	Dental, Skeletal, Social services statement
UM 6897-13	2014	Malmö	16.5	> 18	✓	X	X	X	Has none. Provided statement from physician and psychologist but no consideration by Court	Consistently stated the same age, such age supported by behavior and appearance. Taken together with medical examination result being precarious given decisive weight	Very precarious results	Dental, Skeletal
UM 2265-14	2014	Malmö	17	> 18	✓	X	X	X	Has none	Given details (e.g. notes in the Koran, consistent with known COI facts) and consistently stated same age. Given decisive weight.	Precarious results thus not a high evidential value given	Dental

UM 2755-14	2014	Malmö	15 (2012)	17.5 (2013)	✓	✓	X (only in regards to residence permit)	X	Tazkira disregarded. Statement by psychologist stating behavior consistent with 16 yr old was given some weight	Has consistently stated same age, also supported by tazkira (despite not sufficient as evidence).	Due to precarious results which do not consider ethnicity it is not afforded a high evidential value and not enough to discredit statement of applicant.	Dental
UM 5404-14	2015	Malmö	17	> 18 Ocular estimation said at least 7 years older	✓	✓	X	X	Has none. provided statements contesting his behavior was consistent with his age. Statements given weight as assessment was completed with experience and prolonged period with the applicant.	Applicant was credible and consistent in regards reasons for international protection. Taken together with the documental statements provided given decisive weight.	Court notes that it is not acceptable with ocular assessment and only after seeing applicant a few times. The refusal to take part was considered not unfounded.	Not completed because the guardian refused due to precarious results (applicant himself did not refuse).
UM 3955-	2015	Malmö	16	> 18 Austria:	X	X	X	X	Tazkira disregarded.	Not commented upon.	The Austrian assessment is not	Austrian age assessment

14				at least 17					Copy of passport from Austria provided by Migration Board. Neither support his stated age.		to be completely disregarded, afforded some weight. As nothing else supported the stated age, result given decisive weight.	using 6 different methods
UM 5368-14	2014	Malmö	16	Dental: at least 17.5 Skeletal: > 18	✓	✓	✓	(✓) A little with benefit of the doubt	Has none. A photo of note written in the family Koran.	The applicant has made a trustworthy impression, has made a genuine effort to provide documents. Consistent, coherent, not contradictory and stated same age throughout.	The stated age is within the range of results yielded from medical examination.	Dental, Skeletal
UM 4052-14	2014	Malmö	16	19.2	X	X	X	X	Has none. Provided statement from teacher and physician.	Not commented	The lowest possible result was 17.2 when conducted 1 year ago. Since there is no supporting documents, result given decisive result.	Dental (denied request for assessment by pediatrician)

UM 6660-14	2014	Stockholm	16	Dental: 19.2 Skeletal: > 19	✓	✓	X	✓ Extended engagement with benefit of the doubt	Has none.	Applicant explicitly given benefit of the doubt and statement taken together with medical examination result is decisive.	Very precarious result. There was a 16% chance that the applicant was under 18 thus given less evidential value	Dental, Skeletal
UM 83-13	2013	Stockholm	< 18	> 18	X	X	X	X	Tazkira and Afghan birth certificate. Given low evidential value. Migration Board provided a statement from accommodation	Only note that not been made probable through statement	The result of the medical examination taken with the statement from the accommodation is given decisive weight	Dental
UM 3328-13	2013	Stockholm	17.2	Dental: at least 17.5 Skeletal: > 19	✓	✓	X	✓ regarding benefit of the doubt	Has none.	Nothing of statement gives rise to disbelieve the by the applicant stated age thus given the benefit of the doubt	Unsure result and it is possible the applicant is under or over 18, thus given lower evidential value	Dental, Skeletal
UM 6336-13	2013	Stockholm	16	19.2	X	X	X	X	Has none	Not to be disregarded entirely as not giving rise to questioning credibility but very unsecure details.	The result of the medical examination is given decisive weight due to lack	Dental, Court ordered statement from Social

											of better evidence to base decision upon.	services as only dental method had been used
UM 7494-13	2013	Stockholm	< 18	> 19	X	X	X	X	Has none.	Not made age probable through statement.	If all three recommended methods had been used a higher evidential value would be given. Nonetheless given high and decisive weight	Dental
UM 2464-13	2013	Stockholm	17	At least 18.3	✓	✓	X	✓ some influence of result	Has none. Provided statement from Swedish and Afghan school. Provides some support as credible but cannot be verified.	Has not made any statements contradictory to the stated age. Given the benefit of the doubt.	The result is not certain enough to be given decisive weight. The result does not entirely contradict the by the applicant stated age.	Dental
UM 8475-12	2013	Stockholm	≈16.8	At least 19.2	✓	✓	✓	X	Has none. Difficulty to provide one is	Statement is credible, consistent and not contradictory to	The result is under 95% certainty and	Dental

									recognized.	known COI facts.	cannot be given decisive weight.	
UM 6674-12	2013	Stockholm	17	19.2	✓	X	✓	X	Tazkira, given low evidential value.	Age made probable through own statement. Credible, consistent and contradictory details explained.	The result is under 95% certainty and cannot be given decisive weight.	Dental
UM 1828-13	2013	Stockholm	17	At least 19.2	X	X	X	X	Tazkira, not enough.	No details in statement give reason to disregard medical examination result.	Given decisive weight.	Dental, Social services statement
UM 2119-13	2013	Stockholm	< 18	At least 19.2	X	X	X	X	Has none.	No details in statement give reason to disregard medical examination result. Unsure statements "I could be 18" valued negatively for applicant.	Given decisive weight.	Dental

Source: Infotorg Juridik, http://www.infotorg.se/ (Accessed 12 May 2015).
Note: Only intended to be used for the purpose of this thesis.

Bibliography

Literature

Alston, Philip. *The Best Interest Principle: Towards a Reconciliation of culture and Human Rights*, Oxford: Oxford University Press, 1994.

Alston, Philip. *The Legal Framework of the Convention on the Rights of the Child*, Bulletin of Human Rights 91/2, 1991.

Aynsley-Green, A., Cole, T.J., Crawley, H., Lessof, N., Boag, L.R. *Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to migration control*, British Medical Bulletin, 2012: 102, 17-42.

Aynsley-Green, Sir Albert. *The assessment of age in undocumented migrants*, March 2011.

Bhabha, Jacquelina, Young, Wendy. *Not adults in miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines.* 11 Int'l J. Refugee L. 84, 1999.

Bhabha, Jacquelina. *Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers.* European Journal of Migration and Law, 3(3-4) pp. 284-314, 2001.

Bull, Thomas, and Sterzel, Fredrik. *Regeringsformen: en kommentar*. Studentlitteratur: Lund, 2010.

Carlson, Per and Persson, Mikael. *Processrättens grunder*, 7 uppl, Iustus: Uppsala, 2004.

Crawley, Heaven. *When is a child not a child?: Asylum, age disputes and the process of age assessment*, ILPA policy paper, May 2007.

Crawley, Heaven. *Child first, migrant second: every child matters*, ILPA policy paper, February 2006.

Diesen, Christian, Lagerqvist Veloz Roca, Annika, Lindholm Billing, Karolina, Seidlitz, Madelaine, and Wahren, Alexandra. *Bevis 8: Prövning av migrationsärenden*, 2nd ed, Norstedts Juridik: Visby 2012.

Freeman, Michael. *Law and Childhood studies*. vol 14, Oxford University Press: Oxford, 2011.

Goodman, Ryan and Alston, Philip. *International human rights.* Oxford University Press: Oxford, 2013.

Goodwin-Gill, Guy S. *Convention relating to the Status of Refugees, protocol relating to the Status of Refugees*, The United Nations Audiovisual Library of International Law, 2008.

Gorlick, Brian. *Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status*, 2003, 15 International Journal of Refugee Law.

Gorlick, Brian. UNHCR Working Paper No. 68, "*Common burdens and standards: legal elements in assessing claims to refugee status*", October 2002.

Greulich, WW, Pyle, SI. *Radiograph Atlas of Skeletal Development of Hand and Wrist,* Palo Alto California, Stanford University Press, 1959.

Hathaway, James C. *The Rights of Refugees under International Law*, Cambridge University Press: Cambridge, 2005.

Hellners, Tryggve and Malmqvist, Bo. *Förvaltningslagen med kommentar*, Norstedts Juridik: Stockholm, 2010.

Hjern, Anders, Brendler-Lindqvist, Maria and Norredam, Marie. *Age assessment of young asylum seekers,* I: Acta Paediatrica, 2012, volume 101.

Hoecke, Mark van. *Methodologies of legal research: what kind of method for what kind of discipline?*, Hart publishing: Oxford, 2011.

Janis, Mark W. *European Human Rights Law: Texts and Materials,* Oxford University Press: Oxford, 3 ed., 2008.

Kilkelly, Ursula. *The Child and the European Convention on Human Rights,* Dartmouth Publishing Company Limited: Aldershot, 1999.

Lundberg, Anna. *The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights*. Journal of Human Rights Practice, 3(1): 49-70, 2011.

McAdam, Jane. *Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection,* 14 International Journal of Children's Rights 14: 251-74, 2006.

Mellqvist, Mikael. *Processrätt: grunderna för domstolsprocessen,* Iustus: Uppsala, 2010.

Nilsson, Eva. *Barn i rättens gränsland: Om barnperspektivet vid prövning om uppehållstillstånd,* Iustus: Uppsala, 2007.

Noll, Gregor. *Junk Science? Four Arguments Against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum*, 7 January 2015.

Nyström, Viktoria. *Handbok för offentliga biträden i asylprocessen,* Norstedts Juridik: Stockholm, 2014.

Price Cohen, C. *The United Nations Convention on the Rights of the Child: Implications for Change in the Care and Protection of Refugee Children*, International Journal of Refugee Law, 3(4) pp. 675-691, 1992.

Roscam Abbing, Henriette D.C. *Age Determination of Unaccompanied Asylum Seeking Minors in the European Union: A Health Law Perspective*. European Journal of Health Law (18) 2011 11-25.

Sandesjö, Håkan. *Barnrättsperspektivet i asylprocessen*, Norstedts Juridik: Stockholm, 2013.

Schiratzki, Johanna, *Barnrättens grunder*, 4 uppl, Studentlitteratur: Lund, 2010.

Schiratzki, Johanna. *The Best Interests of the Child in the Swedish Aliens Act.* International Journal of Law, Policy and the Family, 14(3) pp.206-225, 2000.

Seidlitz, Madelaine. *Asylrätt - en praktisk introduktion*, Nordstedts Juridik: Stockholm, 2014.

Stalford, Helen. *Children and the European Union: Rights, Welfare and Accountability*, Hart Publishing: Oxford, 2012.

Stern, Rebecca and Jörnrud, Martin. *Barnkonventionens status – En utvärdering av för- och nackdelar med barnkonventionen som svensk lag*, UNICEF and Raoul Wallenberginstitutet för mänskliga rättigheter och humanitär rätt, 2011.

Stern, Rebecca and Österdahl, Inger (red.), *Folkrätten i Svensk rätt*, Liber: Malmö, 2012.

Sweeney, James A. *Credibility, Proof and Refugee Law*, International Journal of Refugee Law, vol. 21, no. 4, 2009.

Tobin, John. *Seeking to Persuade: A constructive approach to Human Rights Treaty Interpretation.* 23 Harvard Human Rights Journal 201, 2010.

Wikrén, Gerhard and Sandesjö, Håkan. *Utlänningslagen: med kommentar*, 10 uppl, Norstedts Juridik: Stockholm, 2014.

Åhman, Karin: *Rättsutlåtande om inkorporation av Barnkonventionen*, Rädda Barnen, 2011.

UN documents

Committee on the Rights of the Child, *Concluding Observations: Sweden*, 16 March 2015, CRC/C/SWE/CO/5.

Committee on the Rights of the Child. *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14.

Committee on the Rights of the Child. *General comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5.

Committee on the Rights of the Child. *General comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6.

UNHCR, *Guidelines on Determining the Best Interests of the Child*, May 2008.

UNHCR, Unicef et al, *Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, January 2004.

UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997.

UNHCR. *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009.

UNHCR. *Guidelines on the Policies and Procedures in dealing with Unaccompanied Children seeking asylum*, February 1997.

UNHCR. *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3.

UNHCR. *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998.

UNHCR. *Refugee Children: Guidelines on Protection and Care*, Geneva, 1994.

UNHCR. *Summary of UNHCR's Executive Committee Conclusion on Children at Risk No. 107 (LVIII)*, 5 October 2000.

EU documents

European Asylum Support Office. *Age assessment practice in Europe*, December 2013.

European Council on Refugees and Exiles. *Position on Refugee Children,* November 1996.

European Union Agency for Fundamental Rights. *Separated, asylum-seeking children in European Union Member States, Summary Report,* 2010.

Non-governmental organizations

Separated Children in Europe Programme. *Position paper on Age Assessment in the context of Separated Children in Europe,* May 2012.

Swedish governmental documents

SOU 2011:29 En utvärdering av regeringens nationella handlingsplan för mänskliga rättigheter 2006-2009

SOU 2006:6 Skyddsgrundsdirektivet och svensk rätt

SOU 2006:114 Asylsökande barn med uppgivenhetssymtom - ett svenskt fenomen åren 2001 – 2006

SOU 2009:56 Den nya migationsprocessen

Kommittédirektiv 2013:35 Översyn av barnets rättigheter i svensk rätt

Government Bill proposition

Prop. 1996/7:25 Svensk migrationspolitik i globalt perspektiv

Prop. 1997/98:178 Medborgarskap och identitet

Prop. 2004/5:136 Stärkt skydd för ensamkommande barn

Prop. 2004/5:170 Ny instans- och processordning i utlännings- och medborgarskapsärenden

Prop. 2009/10:31 Genomförande av skyddsgrundsdirektivet och asylprocedurdirektivet

Prop. 2009/10:80 En reformerad grundlag

Prop. 2009/10:232 Strategi för att stärka barnets rättigheter i Sverige

Prop. 2012/13:45 En mer ändamålsenlig förvaltningsprocess

Governmental reports and guidelines

Barnombudsmannen. *Barnombudsmannens underlag till regeringen inför Sveriges femte FN-rapportering*, 2012.

Migration Board. *Handbok i Migrationsärenden*, 25 August 2014.

Migration Board. *Rättsligt ställningstagande angående sannolik identitet i asylärenden*, 31 May 2013, RCI 08/2013.

Migration Board. *Rättsligt ställningstagande angående åldersbedömningar*, 11 June 2014, RCI 13/2014.

Migration Board. *Regarding the consequences of case MA, BT and DA v Secretary of State for the Home Department C-648/11*, 2 July 2013,VCI AP 8/2013.

National Board of Health and Welfare. *Medicinsk åldersbedömning för barn i övre tonåren (New Swedish recommendations for age assessment of unaccompanied children),* 26 June 2012, dnr 31156/11.

Parliamentary Ombudsman. JO decision 12 December 2012, dnr 4107-2011.

Table of Cases

European Union case law

Bensaid v the United Kingdom, no. 44599/98, 6 February 2001, ECtHR.

Bouchelkia v France, no. 23078/93, 29 January 1997, ECtHR.

Dalia v France, no. 154/1996/773/974, 19 February 1998, ECtHR.

Handyside v United Kingdom, no. 5493/72, 7 December 1976, ECtHR.

Johnston and others v Ireland, no. 9697/82 , 18 December 1986, ECtHR.

MA, BT och DA v Secretary of State for the Home Department, case C-648/11, 6 Juni 2013.Court of Justice of the European Union.

Maaouia v. France, Appl. no. 39652/98, 5 October 2000, ECtHR.

Moustaquim v Belgium, no. 12313/86, 18 February 1991, ECtHR.

N v Finland, no. 38885/02, 26 July 2005, ECtHR.

R.C v Sweden, no. 41827/07, 9 March 2010, ECtHR.

Saadi v Italy, no. 37201/06, 28 February 2008, ECtHR.

Sahin v Germany, no. 30943/96, 8 July 2003, ECtHR.

Soering v United Kingdom, no. 14038/88, 7 July 1989, ECtHR.

Sommerfeld v Germany, no. 31871/96, 8 July 2003, ECtHR.

Vilvarajah and Others v. the United Kingdom, no. 13163-5/87, 13447-8/87, 30 October 199, ECtHR.

X and Y v The Netherlands, no. 8979/80, 26 March 1985, ECtHR.

Y.F v Turkey, no. 24209/94, 22 October 2003, ECtHR.

Swedish case law

Migration Court of Appeal

MIG 2014:1
UM 21219-14
UM 694-14
MIG 2012:2
MIG 2011:6
MIG 2011:11
UM 6147-11
MIG 2010:20
MIG 2010:17
MIG 2008:5
MIG 2007:41
MIG 2007:33
MIG 2007:15
MIG 2007:12
MIG 2006:7
MIG 2006:1

Migration Court

Förvaltningsrätten i Göteborg

UM 8030-12
UM 1761-13
UM 2111-14
UM 3990-14
UM 6896-14

Förvaltningsrätten i Malmö

UM 5044-12
UM 1883-13
UM 3712-13
UM 6382-13
UM 6897-13
UM 2265-14
UM 2755-14

UM 5404-14
UM 3944-15
UM 5368-14
UM 4052-14

Förvaltningsrätten i Stockholm

UM 6660-14
UM 83-13
UM 3328-13
UM 6336-13
UM 7494-13
UM 2464-13
UM 8475-12
UM 6674-12
UM 1823-13
UM 2119-13