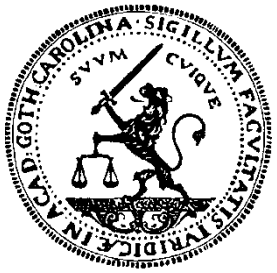


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# OUR CHILDREN OR THEIR CHILDREN?

## THE OBLIGATION TO PROTECT UNACCOMPANIED ASYLUM-SEEKING CHILDREN

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# Summary

The right to seek asylum, as protected in *inter alia* the Refugee Convention, does not provide a right to obtain asylum, however, it obliges the states to protect asylum-seekers against being returned to the frontiers of a territory where his or her life or freedom will be threatened. The current prohibition is known as the principle of *non-refoulement* and constitutes, according to the Swedish Aliens Act, a legal impediment to enforcement in the case of refusal of entry or of expulsion. The Aliens Act also recognises that there may be other situations where a refusal of entry or expulsion may lead to an unreasonable result and hence, pursuant to Chapter 12 Section 18 indents 2-3, an application of practical impediments can be lodged. Such practical impediment could - in the context of unaccompanied or separated children - *inter alia* consist of the lack of an adequate reception in the country of origin. In the newly adopted provision in Chapter 12 Section 3(a) of the Aliens Act, it is established that the responsibility to ensure such adequate reception lies with the executive authorities. The aim of this thesis is to examine the scope of protection and the application of the regulation on practical impediments to enforcement, in order to determine which considerations are taken into account in relation to the obligations that *inter alia* the CRC imposes.

The thesis is divided in four parts. In the first part the general legal framework constituting the backdrop to impediments to enforcement is outlined. The second part summarises the rights and obligations enshrined in the CRC, with a particular focus on the principle of the best interests of the child, in relation to unaccompanied children. The third part seeks to identify the components of the provision on practical impediments and, applying a child's perspective, find out whether the assessments carried out are really in line with international human rights obligations. This part also includes a case study.

In the conclusion it is argued that the international human rights framework protecting unaccompanied children is rather comprehensive. However, the corresponding provisions in the Aliens Act appear less protective and in the assessments of the applications the Migration Board seemingly still places a heavy burden on the child, instead of assuming the responsibilities that derive from the international human rights obligations. There are still protection gaps that need to be filled in order to secure that unaccompanied children are able to, on equal terms, enjoy the rights they are entitled to and there is still a rather long way to go before the principle of the best interests of the child is fully respected.

# Preface

To Anoosh, the inspiration and reason behind this thesis.

I want to thank my supervisor Rebecca Stern for her support and constructive comments during the process of writing. I would also like to thank all my colleagues at the Swedish Refugee Advice Centre for sharing their knowledge with me.

Last, but not least, I would like to thank my mother for her constant support, love and belief in me. I owe you everything.

# Abbreviations

| | |
|---|---|
| CRC | Convention on the Rights of the Child |
| DRC | Democratic Republic of Congo |
| Dublin regulation | Council regulation 343/2003/EC of 18 February 2003 establishing the criteria and mechanism for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national |
| ECHR | European Convention on Human Rights and Fundamental Freedoms |
| EU Charter | Charter of Fundamental Rights of the European Union |
| ICESCR | International Covenant on Economical, Social and Cultural Rights |
| Refugee Convention | Convention relating to the Status of Refugees |
| Return Directive | Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals |
| Qualification Directive | Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted |
| UNHCR | United Nations High Commissioner for Refugees |
| UNHCR Handbook | 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 |
| UNICEF | United Nations Children's Fund |

# 1 Introduction

## 1.1 Background

There is no precise statistical information concerning the number of children involved in the migration process throughout the world today.[1] Many children continually cross borders with their parents or extended family members, yet at the same time, indicators show that an increasing number of migrant children are actually autonomous and unaccompanied.[2] These children, whether separated from their parents[3] or otherwise unaccompanied[4] are extremely vulnerable to a wide range of human rights violations and abuses, such as trafficking and forced recruitment, during the entire migration process. These risks may in various ways affect the child's life, survival and development.[5] Another danger inherent to migration, is the risk of being returned to unsafe living conditions without access to the protection measures to which they are actually entitled.[6]

The right to seek asylum traces its legal background to Article 14(1) of the 1948 Universal Declaration of Human Rights[7] (UDHR), which was later codified in the 1951 Convention Relating to the Status of Refugees[8] (Refugee Convention), amended by the 1967 protocol[9] (New York Protocol). Since states as a matter of international law have the right to control the entry, residence and expulsion of aliens from their state territory[10], the convention is silent on the legal right to obtain asylum, merely mentioning a right to apply for protection and a safe haven. However, under Article 33 of the Refugee Convention, every contracting state is prohibited to expel or return a refugee to the frontiers of a territory where his or her life or freedom will be threatened on account of his or her race, religion, nationality, membership of a particular social group or

[1] Human Rights Council, Promotion and protection of all human rights, civil, political, ecnomic, social and cultural rights, including the right to development. Bustamante, J., *Report of the Special Rapporteur on the human rights of migrants* (2009) A/HRC/11/7, p. 5.
[2] *Ibid*.
[3] Committee on the Rights of the Child, General Comment No. 6, *Treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/6, para. 8.
[4] Unaccompanied children are the ones separated from parents or other relatives, or not being cared for by an adult who, by law or custom, is responsible for doing so. *See supra* note 3, para 7.
[5] *Supra* note 3, paras. 23-24.
[6] *Supra* note 1, p. 6
[7] UN General Assembly, *Universal Declaration of Human Rights* (adopted 10 December 1948) UNGA Res. 217A (III).
[8] *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.
[9] Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
[10] *See inter alia Üner* v. *the Netherlands*, 18 October 2006, ECHR, no. 46410/99, para. 54.

political opinion. The provision expresses the principle of *non-refoulement* and constitutes a so-called 'legal impediment' to the enforcement of a decision to refuse entry, or expulsion.

Sweden ratified the Refugee Convention in 1954[11] and is hence bound by its provisions. The correspondent regulation on *non-refoulement* is introduced in Chapter 12 Sections 1-2 and even in Chapter 4 Section 2 of the Swedish Aliens Act[12]. The definition of 'refugees' is found in Chapter 4 Section 1 of the Swedish Aliens Act.

Nevertheless, there are also other situations where refusing entry or effecting an expulsion may seem unreasonable. Consequently, Chapter 12 Section 18 of the Swedish Aliens Act makes a provision regulating these cases of so-called 'practical impediments'. These may include situations where the country of destination most probably will reject the person; when a person's status of health prevents the person from travelling; or where there is another particular reason for not executing the expulsion.

The Convention on the Rights of the Child[13] (CRC) requires all contracting states to pay particular attention to the needs of children, and to let the principle of the best interests of the child permeate the development and undertaking of all actions and policies.[14] In relation to asylum-seeking unaccompanied or separated minors, this is reflected in the obligation to accord these children the same protection and humanitarian assistance as any other child in the enjoyment of all applicable rights set forward in the international instruments that the state is party to.[15]

Access to justice is one of the fundamental rights that we as humans are all entitled to. The right is crucial since a theoretical right is worth nothing if not respected and enforceable. In the context of minor asylum-seekers, it is of particular importance due to the role and status children have in society today. Children are usually not entitled to initiate proceedings and claim their rights in the same way as adults are, and consequently, the legal framework protecting them may be of particular concern.[16]

The Refugee Convention and the corresponding regulations in the Swedish Aliens Act are mainly shaped from the perspective of an adult. As a consequence, the provisions may not always take into explicit consideration

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[11] *See* United Nations Treaty Collections, <http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en>, accessed 12 May 2012.
[12] Utlänningslag (2005:716).
[13] *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[14] UNICEF, 'Convention on the Rights of the Child', see <http://www.unicef.org/crc/>, accessed 19 May 2012.
[15] Article 22 of the CRC.
[16] Bhagha, Jacqueline, 'Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?', *Human Rights Quarterly*, Volume 31, Number 2, May 2009, pp. 410-451, *see inter alia*, p. 445 *et seq*.

the perspective of the child, and the difficulties that he or she may encounter. In order to apply the Refugee Convention correctly, from a child perspective, it may therefore be important to alter position and redefine the provisions. In the context of impediments to enforcement, that may entail the inclusion of different abuses and difficulties when applying the principles on a case concerning a child, than when applying them on an adult.[17]

## 1.2 Purpose and Research Question

Under Chapter 12 Section 18 of the Swedish Aliens Act the Migration Board 'may' grant a person a permanent residence permit if there are practical impediments to enforcement of refusal of entry or expulsion, on the condition that the impediment is enduring and that the circumstances that have come to light are new. This confers a privilege of discretion rather than a duty, which implies that the Migration Board is not obliged to act even if the criteria are fulfilled.

Pursuant to indent 3 of the provision, a decision on refusal of entry or expulsion may be revoked if there are particular grounds as to why the decision should not be executed. In regard to unaccompanied or separated children, it has been established that the lack of adequate reception arrangements may constitute such grounds.[18]

The responsibility to trace family members and arrange for the return to the country of origin was previously to a large extent placed on the minor and the guardian appointed in accordance with Swedish law.[19] A judgment of the Swedish Migration Court of Appeal in 2009 raised the concern of the Child Ombudsman since the decision of the Court indicated that it is the child who bears the burden of proving that he or she is effectively abandoned.[20]

In the beginning of 2011 the Chief Legal Advisor at the Swedish Migration Board issued a legal statement to guide the executive authorities on how to carry out the assessment of applications of impediments to enforcement in the context of unaccompanied or separated children.[21] The legal statement precipitated the adoption of the Return Directive[22] on 1 May 2012, which prescribes under Article 10.2 that a member state, before removing an

[17] *See* for example, Bexelius, M., *Asylrätt, kön och politik*. *En handbok för jämställdhet och kvinnors rättigheter*, Rådgivningsbyrån för asylsökande och flyktingar (2008) p. 22 *et seq*.
[18] SOU 2009:56. *Den nya migrationsprocessen*, Slutbetänkande av Utvärderingsutredningen, p. 226.
[19] Lag (2005:429) om god man för ensamkommande barn.
[20] *Supra* note 18, p. 379.
[21] RCI 08/2011 *Rättschefens rättsliga ställningstagande angående verkställighet av beslut som rör ensamkommande barn*.
[22] Directive 2008/115/EC of 16 December 2008 of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

unaccompanied or separated minor from its territory, shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the state of return. Hence, under the recently enacted provision in Chapter 12 Section 3(a) of the Aliens Act the responsibility of the executive authorities is now established by law. In the remark made by the Migration Board in relation to the legislative proposal, the Migration Board stated that they were in favour of the proposed legislation since it corresponds well with their current practice.[23]

The aim of the thesis is to examine the scope of protection and the application of Chapter 12 Section 18 indent 3 of the Aliens Act, with a particular focus on the new regulation in Chapter 12 Section 3(a), in relation to unaccompanied or separated children. This thesis will examine which considerations are taken into account - in regard to material and procedural safeguards, to find out whether the assessments carried out by the Migration Board are in line with the existing international legal framework protecting children's human rights, on equal conditions and in a non-discriminatory manner, particularly focusing on the right to an adequate reception and what that right entails.

## 1.3 Method and Materials

In order to understand the legal framework regulating the bases of impediments to enforcement of refusal of entry or expulsion, I have looked at various international and regional human rights instruments, including conventions and treaties, general guidelines and comments, as well as Swedish legislation and its *travaux préparatoires*.

I have also examined some cases from the European Court of Human Rights that specifically concern refusal of entry or expulsion of unaccompanied or separated children, in order to see how the Court defines these situations and the possible breaches they may entail. The first case represents the first time that the Court assessed this particular situation, and the second case is more recent, in order to determine a possible development of the case-law. Since the specific provision which this thesis mainly focuses on is not subject to appeal, I have also studied the guiding decisions issued by the Swedish Migration Board in relation to the present regulation.

To analyse how the provisions are implemented in practice, I have examined a range of decisions that the Migration Board has given me access to. All of the decisions were issued during the last year, after the legal statement, and prior to the enactment of the new provision. I have not been able to freely choose the decisions; instead they were selected by an administrator at the Migration Board. It may therefore be difficult to draw too far-reaching conclusions, but they may however give indications on how the Migration Board is arguing on these matters.

[23] Prop. 2011/12:60 *Genomförande av återvändandedirektivet*.

## 1.4 Delimitations

Impediments to enforcement to refusal of entry or expulsion may be of both legal and practical nature. However, the area is wide and cannot be fully covered in these few pages. Hence I have chosen to focus on practical impediments to enforcement in the context of child asylum-seekers. There is however a link to legal impediments of enforcement, which will be discussed further on in the text. This link is interesting because it extends the general perception of the scope of protection of the principle of *non-refoulement*, taking into consideration the particular difficulties that unaccompanied or separated asylum-seeking minors may encounter.

## 1.5 Disposition

The thesis will be divided into several parts - I will first explain the legal framework constituting the backdrop to the provisions on impediments to enforcement. These include the right to seek asylum and the interrelated rights of protection against being returned to countries where a person's life or freedom would be threatened, the so-called 'legal impediments'; or from enforcing a decision of refusal of entry or expulsion when it is not practically possible, the so-called 'practical impediments'.

The next section will focus more explicitly on the particular legal framework relating to the protection of children's human rights and the implementation of the child's perspective.

In the following section the implications that the application of the child's perspective have, or ought to have, in the assessment of practical impediments within the context of child asylum seekers will be treated. The discussion and analysis in this chapter include reference to a case study.

The final chapter serves to sum up my findings, thoughts and critique.

# 2 Impediments to enforcement of refusal of entry or expulsion

Pursuant to the principle of sovereignty and to well-established international law, states are entitled to control their territory, including the entry of aliens and their residence there. Hence the right to seek asylum as laid down in for example the Refugee Convention does not, as previously discussed, include a right to obtain asylum, nor the right of an alien to enter and reside in a country of his or her choice – but instead, merely the right to seek asylum.

This, however, does not imply that states do not assume responsibility for the persons residing in their territory or subject to their jurisdiction. The obligations under the international human rights conventions apply to everybody without discrimination.[24]

The regulations on impediments to enforcement have their legal ground in a range of different international treaties and conventions. Hence, in this chapter I will first outline the legal framework on an international and regional level in order to define the rights and obligation that constitute the backdrop and prerequisite for the Swedish legal framework. Thereafter I will outline the Swedish legal framework, from the historical background to the present provisions and their application.

## 2.1 The United Nations

The right of all human beings to life, liberty and security is protected in a wide range of documents, *inter alia* under Article 1 of the UDHR and Articles 6, 7 and 9 of the International Covenant on Civil and Political Rights[25] (ICCPR).

The principle of non-discrimination in Article 2(1) of the ICCPR provides that each state party:

> …undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[24] See for example *Hirsi Jamaa and Other* v. *Italy*, 23 February 2012, ECHR, no. 27765/09, where Italy was found to have been in breach of Article 3 of the ECHR by returning potential asylum-seekers since they found themselves in a mixed-flow of migrants.
[25] *International Covenant on Civil and Political Rights* (adopted16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

Consequently, the obligation to protect life, liberty and security applies to all human beings, including asylum-seekers and non-citizens who find themselves within the territory of the state.

Article 33(1) of the Refugee convention explicitly recognizes the principle stating that:

> No Contracting State shall expel or return *('refouler')* a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

However, the provision is not absolute. As stated in Article 33(2):

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

An equivalent prohibition is found in Article 7 ICCPR stipulating a prohibition against torture and cruel, inhuman or degrading treatment or punishment, and in Article 3(1) of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment[26]. These prohibitions are absolute, meaning that the state party is not only responsible for acts committed by the proper state authorities, but they are also under an obligation to ensure that persons are not returned to countries where they are subjected to such risk.[27] This principle, known as the principle of *non-refoulement,* constitutes a legal impediment to enforcement of a refusal of entry or expulsion.

## 2.2 The European system

On a regional level, Swedish regulations are governed by the Council of Europe, which was founded in 1949 with the primary aim of creating a common democratic and legal area to ensure respect for its fundamental values: human rights, democracy and the rule of law.[28] All member states are bound by the European Convention on Human Rights[29] (ECHR), which endeavours to promote protection for civil and political rights, not only to

[26] *International Convention Against Torture and Other Inhuman or Degrading Treatment* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[27] *See inter alia Soering* v. *the United Kingdom*, 7 July 1989, ECHR, no. 14038/88.
[28] Council of Europe, 'The Council of Europe in brief', <coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en>, accessed 26 March 2012.
[29] *The European Convention for the Protection of Fundamental Freedoms and Human Rights as amended by Protocols No. 11 and No. 14* (adopted 4 November 1950, entered into force 3 September 1953) CETS No.: 005.

the citizens of the member states but to everyone within the jurisdiction of the states.[30]

The principle of jurisdiction is essentially territorial and presumed to be exercised throughout the territory of the state. However, in order to ensure that the object and purpose of the ECHR are fulfilled, the definition of jurisdiction may also include acts or omissions committed within a territory where the state exercises effective control. In the recent case of *Hirsi and Others* v. *Italy* the principle of extra-territorial jurisdiction was defined as to imply [that] "Whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms […] relevant to the situation of that individual"[31]. The measures that gave rise to the complaint before the European Court of Human Rights were in the present case carried out on a vessel sailing under the Italian flag. Under the regulations in the law of the sea this implied that the vessel is subject to exclusive jurisdiction of the state under whose flag it was sailing.[32]

Pursuant to Article 3 of the ECHR "[N]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". In accordance with well-established case law the prohibition is absolute.[33] It implies the application of the article in cases of expulsion, extradition or any other measure to remove an alien where substantial grounds have been shown for believing that a person, if expelled, would face a real risk of being subjected to treatment in contrary to the present article.[34]

The prohibition entails the prohibition against bodily injury as well as intense physical or mental suffering, on the condition that it attains a certain level of severity. Treatment that "humiliates or debases an individual, showing lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance" may according to the *Pretty* v. *the United Kingdom*[35] case also amount to degrading treatment within the meaning of Article 3 of the ECHR.[36]

The Charter of Fundamental Rights of the European Union[37] (EU Charter) contains a similar protection under Articles 4 and 19, which prohibit torture and inhuman or degrading treatment, or the expulsion or extradition to a state where there is a serious risk that the person would be subjected to death penalty, torture or other inhuman or degrading treatment.

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[30] *See* the preamble and Article 1 of the ECHR.
[31] *Supra* note 24, paras. 71,73 and 74.
[32] *Ibid*., para. 77.
[33] *See inter alia supra* note 27, para. 88.
[34] *See inter alia supra* note 24, para. 114.
[35] *Pretty* v. *the United Kingdom*, 29 April 2002, ECHR, no. 2346/02.
[36] *Ibid.*, para. 52.
[37] *Charter of Fundamental Rights of the European Union* (2000) OJ C 364/01.

When adopted, the EU Charter was merely a political commitment and therefore lacked legally binding effects. By the adoption of the Treaty of Lisbon, which entered into force in 2009, the EU Charter was given legal status, which implies that it now enjoys the same status as the ECHR. The EU Charter is based *inter alia* on the provisions recognised in the ECHR. However, it extends the scope of protection as to include not only civil and political rights, but also social and economic rights.[38]

On the whole, the European legal framework provides a wide scope of protection for both civil and political rights, as well as cultural and economic rights.

## 2.3 The Swedish legal system

Sweden has ratified all the previously mentioned international treaties[39] and, as a member of the Council of Europe and the European Union, the EU Charter and the ECHR are also legally binding in Sweden. While the ECHR has been incorporated in the Swedish law by way of the 1994 law on the European Convention on Fundamental Rights,[40] the provisions of the Refugee Convention constitute the foundation of the provisions on protection in the Swedish Aliens Act.

Under Chapter 4, Section 1 of the Aliens Act a 'refugee' designates an alien who is outside the country of the alien's nationality, or outside the country in which he or she was previously residing, due to well-founded fear of persecution linked to the person's race, nationality, religious or political belief, gender, sexual orientation or membership of a particular social group; and is unable, or because of his or her fear, is unwilling, to avail himself or herself of the protection of that country.

Following the implementation of the Qualification Directive[41], the concept of subsidiary protection in Chapter 4 Section 2 was altered in order to fully correspond to the definition in the directive. It refers to an alien who is outside his or her country of nationality because there are substantial grounds for believing that the person, if returned to the country of origin,

[38] *See* Eurofond, 'Charter of Fundamental Rights of the European Union', <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/charteroffundamentalrightsoftheeuropeanunion.htm>, accessed 13 May 2012.
[39] *See* for example United Nations Treaty Collection, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=enand> and UNHCR 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol',<http://unhcr.org/protect/PROTECTION/3b73b0d63.pdf>, accessed 26 April 2012.
[40] Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.
[41] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (2004) OJ L 304/12.

would face the risk of being subjected to death penalty, corporal punishment, torture or other inhuman or degrading treatment or punishment, or indiscriminate violence due to an armed conflict - and the person is unable or unwilling to avail himself or herself of the protection of the country of origin.

The third category in Chapter 4 Section 2(A) refers to persons otherwise in need of protection, including persons who find themselves outside the country of nationality because they are in need of protection due to an external or internal armed conflict, or because of such conflict, they harbour a well-founded fear of being subjected to serious abuses, or they are unable to return to the country of origin because of an environmental disaster.

All of the protection grounds apply equally regardless of whether it is the state that is responsible for the abuses, or if the state cannot be assumed to offer protection against violations committed by private individuals.

A residence permit may also be granted under Chapter 5 Section 6 of the Aliens Act on the ground of exceptionally distressing circumstances. Due to the interrelation between the assessment of exceptionally distressing circumstances and practical impediments to enforcement the present provision will be discussed more thoroughly later on in the text.

### 2.3.1 Background

The regulation of impediments to enforcement originates from, and can be compared to, the rules in international human rights law regarding the principle of *non-refoulement*. In accordance with Section 85 of the 1980 Aliens Act[42], the Police should notify the Migration Board in cases where the applicant, during the process of enforcement, invoked a risk of being subjected to persecution based on political grounds, or being sent to a war zone, punished for leaving such a zone or refusing to fulfil military service.

During the preparation of the 1989 Aliens Act[43] it was recognised that the current system had led to a large amount of unsubstantiated claims, which delayed the process.[44] However, the need to provide an opportunity to invoke new circumstances that might pose a risk to the life, health and freedom of the person after the decision had gained legal force was acknowledged. Hence, under the re-drafted Aliens Act, a new application could be submitted if new circumstances arose that had not yet been examined, which would entitle the person to a residence permit based on protection grounds or exceptional humanitarian circumstances.[45]

[42] Utlänningslag (1980:376).
[43] Prop. 1988/89:86 *med förslag till ny utlänningslag m.m*.
[44] *Ibid*., p. 114.
[45] *Ibid*., p. 118 *et seq*.

The new procedure, which allowed a person to re-apply for a residence permit, eventually became a part of the normal procedure and not the kind of extraordinary measure it was intended to be. New applications concerning the same circumstances were made on a regular basis, hence providing no natural end to the process.[46] As a consequence, during the preparation of the enactment of the 2005 Aliens Act, the focus was on finding a way to allow for a new assessment in situations when a prior decision neither can, nor shall, be executed but, at the same time, to limit the possibility of applying.[47] Hence, one of the aims was to create a strong incentive to advance all the relevant circumstances already during the ordinary assessment by the Migration Board.[48]

Through the enactment of the 2005 Aliens Act, the possibility of making a new application was removed. It was replaced by the current procedure in Chapter 12 Sections 18 and 19, which entails the right to make a request for an assessment of impediments to enforcement of refusal of entry or expulsion, when new circumstances that have not been previously examined are brought to light. One of the novelties was the obligation of the Migration Board to *ex officio* assess whether any new circumstances had appeared that might constitute an impediment to enforcement.[49] The assessment shall consider both legal and practical impediments, *e.g.* if there is reason to believe that the intended country of return will not accept the person, if there are grave medical impediments, or if there are any other particular grounds not to enforce the decision. However, in order for such circumstances to be considered impediments, the person must show that he or she has been cooperating in trying to carry out the execution of the decision.[50]

The new procedure introduced a kind of preliminary assessment, meaning that if the person claims entitlement to international protection, the Migration Board shall make a preliminary examination under Chapter 12 Section 19 to see whether a permanent impediment could be presumed to exist. If the Migration Board refuses to carry out a new assessment the decision is subject to appeal. Hence the new order differs since it does not oblige the Migration Board to make a new assessment every time a person brings forward new circumstances.[51] On the contrary, if the person invokes that there are practical impediments to enforce the refusal of entry or expulsion under Chapter 12 Section 18 indents 2 and 3, the decision of the Migration Board is not subject to appeal.

In spite of the aims and goals of the enactment of the 2005 Aliens Act, the implementation of the law has not been as smooth as predicted. One of the aims of the new law was to heal the difficulties that the practitioners

[46] *Supra* note 18, p. 282.
[47] *Ibid*., p. 282.
[48] *Ibid*., p. 253.
[49] *Ibid*., p. 253.
[50] Prop. 2004/05:170 *Ny instans- och processordning i utlännings- och medborgarskapsärenden*, p. 226.
[51] *Supra* note 18, p. 283 *et seq*.

encountered due to the consistent amendments that had been done during the years. The Swedish Council of Legislation raised various critiques against the proposal that was forwarded in 2002, and since the new proposal in 2004 differed only slightly from the previous one, the Council of Legislation found reason to raise the same critique, *e.g.* that it did not include the desired far-reaching transfiguration of the law, but rather, selectively inserted additions.[52]

According to the critique raised by the Council of Legislation, one of the main problems was the shape of the regulations – in other words, it contended that since some were mandatory while others were optional, this allowed for a large room of manoeuvre for assessments, even in relation to very important issues.[53] The aim of the re-drafting was to strengthen the rule of law. However, if the provisions to a large extent are based on discretion, it may be difficult to identify the criteria relevant for the assessment. Even though it is understandable that all provisions cannot be exhaustive, the problems of interpretation will then be left to the courts, allowing for assessments of suitability.[54]

Similar critiques can be raised in regard to the provisions regulating impediments to enforcement to refusal of entry and expulsion. Firstly, the basic rule within administrative law is that a person, if the application is rejected, is free to lodge a new application. The aim of the new order, which is to limit the possibility of re-applying, may therefore be considered in contravention to ordinary administrative law. Secondly, even if the criteria are fulfilled, the Migration Board is not obliged to grant a residence permit, but 'may' do it, if it chooses to. The fact that decisions in regard to practical impediments are not appealable raises other concerns. As a consequence, the practice developed by the administrators at the Migration Board is never subject to scrutiny by the Migration Court of Appeal, whose purpose is to constitute the highest organ of interpretation of the Aliens Act.

### 2.3.2 Chapter 12. Enforcement of refusal of entry and expulsion orders

As previously outlined, a decision on refusal of entry or expulsion that has gained legal force can only be dealt with within the context of Chapter 12 Sections 18 and 19 of the Aliens Act, pursuant to which an applicant may lodge a claim that there are impediments to enforcement if new circumstances come to light which have not been previously examined.

Under Chapter 12 Section 19 the regulation on legal impediments and the possibility to obtain a new assessment is established, providing:

[52] Lagrådets yttrande, *Utdrag ur protokoll vid sammanträde*, 9 May 2005, p. 2 and 6.
[53] *Ibid*., p. 4.
[54] *Ibid*., p. 9 *et seq*.

If, in a case concerning the enforcement of a refusal of entry or expulsion order that has become final and non-appealable, an alien invokes new circumstances

1. that can be assumed to constitute a lasting impediment to enforcement as described in Section 1, 2 or 3, and
2. these circumstances could not previously have been invoked by the alien or the alien shows a valid excuse for not previously having invoked these circumstances,

the Swedish Migration Board shall, if a residence permit cannot be granted under Section 18, re-examine the matter of a residence permit.

If the conditions set out in the first paragraph have not been fulfilled, the Swedish Migration Board shall decide not to grant a re-examination.

A decision of refusal to entry or expulsion shall not be executed before the Swedish Migration Board has decided upon the question of whether a re-examination shall be carried out, or, if a re-examination has been granted, before the question of a residence permit has been decided upon and the decision has gained legal force.

Chapter 12 Section 1 establishes:

The refusal of entry and expulsion of an alien may never be enforced to a country where there are reasonable grounds for assuming that
- the alien would be in danger there of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment or
- the alien is not protected, in that country, from being sent on to a country in which the alien would be in such danger.

Section 2 reads:

The refusal of entry and expulsion of an alien may not be enforced to a country
- if the alien risks being subjected to persecution in that country or
- if the alien is not protected, in that country, from being sent on to a country in which the alien runs the risk of being persecuted.

Section 3 further states:

The refusal of entry or expulsion of an alien referred to in Chapter 4, Section 2, first paragraph, indents 1, in case of an armed conflict, or Section 2(a) first paragraph may not be enforced to the alien's country of origin or to a country where he or she risks being sent on to the country of origin, unless there are exceptional grounds for this.

The prohibition on refusal of entry and expulsion is not absolute. Pursuant to Section 2 second and third paragraphs, derogations are allowed if the

person has committed a particularly serious crime which implies that the person may pose a serious risk to public order. However, if there is a risk of torture or inhumane or degrading treatment or punishment, the prohibition is absolute. In contrast to the Refugee Convention, the provisions in the Aliens Act include all aliens, not only refugees, hence extending the scope of protection.

During the evolvement of the present legislation on impediments to enforcement it was recognised, as previously discussed, that the protection against *refoulement* was not sufficient. Hence, in addition to the legal impediments to enforcement, a provision regarding so-called 'practical impediments to enforcement' was introduced to regulate the situations where the enforcement would in any other way lead to an unreasonable result.

Chapter 12 Section 18 states:

> If, in a case concerning the enforcement of a refusal of entry or expulsion order that has gained legal force, new circumstances come to light that mean that
>
> 1. there is an impediment to enforcement under Section 1, 2 or 3,
> 2. there is reason to assume that the intended country of return will not be willing to accept the alien, or
> 3. there are medical or other special grounds why the order should not be enforced, the Swedish Migration Board may grant a permanent resident permit if the impediment is enduring.
>
> If there is only a temporary impediment to enforcement, the Migration Board may grant a temporary permit.
>
> During an assessment in accordance with the first paragraph, indent 3, as to whether there exist any other special grounds why the order should not be enforced, particular consideration shall be given to the consequence for a child of being separated from his or her parents, if it is clear that a residence permit would have been granted due to a strong connection in accordance with Chapter 5 Section 3, first paragraph indents 1-4, Chapter 5 Section 3(a), first paragraph indents 1-3 or the second paragraph, if the application has been submitted before entering Sweden.
>
> The Swedish Migration Board may also order a stay of enforcement.

Pursuant to the first paragraph of Section 18, the first criterion is that the invoked situation constitutes a new circumstance, meaning that is has not been previously assessed by the Migration Board. Hence, if the circumstance or the evidence invoked is a mere modification or addition, or only aims at strengthening previously invoked circumstances related to the person's need for protection, there is no need to re-examine the entire case.

An example could consist of a document, such as a decision from a court, or a letter, that is added in order to strengthen previously invoked claims.[55] However, if new country of origin information appears indicating a general or more specific change of the political climate that would have a bearing on the previous assessment, this information must be considered new according to a legal statement made by the Chief Legal Advisor of the Swedish Migration Board.[56]

The legal statements issued by the Chief Legal Advisor constitute guidelines for how to implement the Aliens Act and the decisions of the Migration Court of Appeal and, as such, they do not bind the Migration Courts but merely constitute internal instructions for the administrators at the Migration Board. One problem that may arise from this is linked to the implementation of the legal statements, since it is difficult to control whether they are actually applied by the administrators working in the different departments of the Migration Board.

A claim also has to be of a certain substance to prompt further investigation, meaning that besides being new, it must to be of an appropriate character and sufficiently substantiated. The Migration Board is responsible for ensuring that measures of enforcement are not carried out in breach of the provision, which includes arranging necessary measures of control and investigation. Sometimes it may however be difficult to decide whether to reject a claim as unsubstantiated or require the applicant to present better material.[57] Pursuant to Section 8 of the Swedish Administrative Court Procedure Act,[58] which is applicable also within the area of migration law, the court shall ensure that the case is as thoroughly examined as its nature requires. Accordingly, the court shall direct the applicant how to supplement the application if deemed unsubstantiated. The application of this principle in the area of migration law will be further elaborated later on.

As to the initiation of the assessment, there are no formal requirements, meaning that the Migration Board *ex officio* shall consider if there are any impediments to enforcement. The assessment can also be initiated by the applicant lodging a claim to the Migration Board. One difficulty that will be discussed later on in this paper is the framing of such claim, partly because the applicant is no longer eligible to a public legal representative when the ordinary proceeding has come to an end.

Since practical impediments might be of a transient nature, the Migration Board is given the opportunity to either stay the enforcement of the refusal or entry or expulsion or grant the person a temporary residence permit. Accordingly a permanent residence may only be granted if the impediment

[55] MIG 2008:6.
[56] RCI 09/2010 *Rättschefens rättsliga ställningstagande angående utredning och kontroll m.m. av omständigheter som kan utgöra verkställighetshinder enligt 12 kap. 18 § utlänningslagen*, p. 5.
[57] *Ibid*., p. 3 f.
[58] Förvaltningsprocesslag (1971:291).

is enduring. The notion of "enduring circumstances" is however not defined in the *travaux préparatoires*,

In regard to the notion 'unreasonable result' the Chief Legal Advisor at the Migration Board has established in a legal statement that a residence permit cannot be based on the current provision unless, as a minimum, the new circumstances attain the criteria for exceptionally distressing circumstances in Chapter 5 Section 6 of the Aliens Act. Likewise, a family link not sufficiently strong to constitute a ground for a residence permit will not in itself constitute an impediment to enforcement unless additional criteria are present.[59]

Pursuant to indent 3 of the first paragraph, the Migration Board 'may' grant a residence permit if the other criteria are fulfilled. The provision is hence discretion-based, which means that even if the criteria are fulfilled, the Migration Board is not obliged to grant a residence permit.[60] From a perspective of strengthening the rule of law, such formulation can be brought into question since it opens up for arbitrariness.

Section 18 first paragraph indent 1, refers to the legal impediments to enforcement covered by Chapter 12 Sections 1-3, which are also dealt with within Section 19 of the current chapter. The scope of protection and the link that can be established between the more practical impediments to enforcement, the present subsection of the provision, and possible violations of Article 3 of the ECHR will be discussed more thoroughly later on in the text.

Under Section 18 first paragraph indent 2, a residence permit may also be granted if "there is reason to assume that the intended country of return will not be willing to accept the alien". The starting point is that, once the application for asylum has been turned down and the decision has gained legal force, the alien shall voluntarily leave the country. Hence it is the responsibility of the individual to take the required steps, such as arranging for travel documents and visas, in order to return to his or her country of origin. However, under certain readmission agreements, the sending state may be required to adduce certain documents or take other measures. In other situations the country of origin information may suggest that a return will not be accepted irrespective of what steps are taken.[61] Such situations may arise in regard to for instance Cuba which refuses the entrance of persons who have been outside the country for a longer period than eleven months, or Saudi Arabia, which requires that the person has a guarantor to be received. If the impediments can be considered enduring, implying that an enforcement will not be able to carry out within a near future, the Migration Board may grant a residence permit.

[59] *Supra* note 56, p. 3.
[60] *Supra* note 18, p. 323.
[61] *Supra* note 56, p. 6.

Beyond that, under Section 18 first paragraph indent 2, a residence permit may also be granted when "there are medical or other special grounds why the order should not be enforced". The *travaux préparatoires* underlines that this significantly limits, in comparison to earlier legislation, the possibility of granting a residence permit due to illness, or illness combined with other distressing circumstances, once the decision has gained legal force.[62] Further it is stated that it is not the severity of the illness that should be assessed, but the question whether the current state of health actually constitutes a practical impediment to deportation,[63] *i.e.* the person is not transportable, or when it can be established that the person will not be able to obtain medical treatment in the country of origin.

The second part of the sentence refers to when there are "other special grounds to why an order should not be enforced". To define the scope of protection and the application of that particular sentence in the context of child asylum seekers is the very essence of this thesis. According to the *travaux préparatoires* it applies *inter alia* in situations where an enforcement of refusal of entry or expulsion may lead to an unreasonable result. One example might be an unaccompanied or separated child that upon return in the country of origin will lack adequate care due to the death of his or her caregivers. Another example might be when a child is at risk of being separated for an extended period from one of the parents because the child cannot settle in the country of the parent.[64] Regrettably, the *travaux préparatoires* does not elaborate further on the situations that may be covered by the provision. Since the decisions under Chapter 12 Section 18, contrary to decisions under Chapter 12 Section 19, are not appealable neither has the Migration Court of Appeal been able to issue any precedents. Due to the lack of precedents, the Chief Legal Advisor has issued a few legal statements and the Migration Board has also published a range of guiding decisions in order to guide the assessment of practical impediments to enforcement.

The newly introduced regulation under Chapter 12 Section 3(a) was enacted 1 May 2012 and is based on Article 10.2 of the Return Directive[65] stating that:

> The refusal or entry or expulsion of an unaccompanied child may not be enforced unless the authorities shall be satisfied that the child will be returned to a member of the child's family, a nominated guardian or adequate reception facilities appropriate for taking care of the child.

Pursuant to the provision the obligation of the Migration Board to ensure adequate reception arrangements is laid down by law, which presumably

[62] *Supra* note 56, p. 7.
[63] *Supra* note 18, p. 321.
[64] *Ibid*., p. 226.
[65] *Supra* note 22.

will facilitate the questions in relation to burden sharing and the obligation to investigate.

According to the *travaux préparatoires* practical impediments to enforcement shall be considered under Chapter 5 Section 6 of the Aliens Act already during the primary assessment at the Migration Board. Hence, if, at that stage, it is established that an enduring impediment to refusal or entry or expulsion exists, a residence permit can be granted pursuant to exceptionally distressing circumstances.[66]

Chapter 5 Section 6 of the Aliens Act reads as follows:

> If a residence permit cannot be awarded on other grounds, a permit may be granted to an alien if on an overall assessment of the alien's situation there are found to be such exceptionally distressing circumstances that he or she should be allowed to stay in Sweden. In making this assessment, particular attention shall be paid to the alien's state of health, his or her adaptation to Sweden and his or her situation in the country of origin.
>
> Children may be granted residence permits under this Section even if the circumstances that come to light do not have the same seriousness and weight that is required for a permit to be granted to adults.

Due to the interdependency between Chapter 12 Sections 18 and Chapter 5 Section 6, the Migration Board has published a range of guiding decisions issued by the Migration Courts concerning exceptionally distressing circumstances in order to clarify how the assessments should be determined. One of these guiding decisions is the judgment of the Migration Court of 26 July 2011, which concerned an unaccompanied boy from Afghanistan. His application was at first turned down by the Migration Board because he lacked credibility. Due to the lacking credibility the Migration Board stated that the applicant's claim that he was abandoned was not plausible either. The Migration Court agreed on the reasoning of the Migration Board in relation to his asylum claim, however, as to the invoked circumstances in regard to his parents and that he lacked a social network in Afghanistan, the Court considered him trustworthy. Since the applicant was a child, taking into consideration the child's perspective, a return could affect both his psychological health and development and he was accordingly granted a residence permit.

In the present judgment it seems like the Court divides the questions in a more correct way than the Migration Board, whose decision indicates that if a person is not telling the truth in regard to one aspect, he or she is presumably lying in other aspects as well. It might be true, and it surely does not enhance the credibility. However, untrue statements and false documents shall not *per se* constitute enough grounds to reject a residence

[66] *Supra* note 18, p. 375.

permit.[67] In addition, in the case of an unaccompanied or separated child, although the invoked circumstances in regard to the asylum claim might be exaggerated, or even untrue, he or she might still be abandoned and in lack of proper care, which, in accordance with Swedish law, constitutes an impediment to enforcement, and if not respected, a possible breach of the prohibition on *refoulement*.

The second judgement of 11 November 2011[68] concerned a boy who grew up with his grandmother in Morocco. Since the grandmother, due to her advanced age, was not able to take proper care of him, the applicant had lived as a street child for a couple of years. The court considered him credible and after an overall assessment taking into consideration the harsh experience he had in the country of origin, the social context that he would risk ending up in as a street child, and the lack of adequate reception, he was granted a residence permit on the grounds of exceptionally distressing circumstances.

In connection to the recent adoption of Chapter 12 Section 3(a), the Migration Board published a guiding decision[69] for the implementation of Chapter 5 Section 6, which aims at placing a particular focus on the application of the principle of the best interests of the child and clarify the obligations of the Migration Board. The case concerned an unaccompanied 16 years old boy from Afghanistan. His parents were both dead and the boy had since then lived with his maternal uncle and his siblings in Kabul. The uncle subjected the boy to constant physical and psychological abuse and consequently he eventually decided to escape.

In the reasoning the Migration Board recognise their obligation to analyse the consequences for a child that a decision may entail.[70] Hence the assessment shall include a comparison where the situation in Sweden is balanced against the situation which the child would find himself or herself in, if returned to the country of origin. In this respect, considerations shall be given to whether the basic needs of the child, as referred to in the CRC, will be fulfilled. In the present case the Migration Board established that the boy had made his statement plausible and that he was to be considered abandoned. To return the child to the uncle was not considered in line with the principle of the best interests of the child and since there are, for the moment, no known childcare institutions which are able to fulfil such basic needs, the boy was granted a permanent residence permit.

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[67] *See* for example 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*, January 1992, reissued Geneva, December 2011, HCR/1P/4/Eng/Rev.2 (UNHCR Handbook), para. 199.
[68] The Migration Court, UM 2904-11.
[69] Migration Board, decision 3 May 2012, Lifos no. 24787, available at <http://lifos.migrationsverket.se/dokument?documentSummaryId=27487>, accessed 13 May 2012.
[70] *See* Förordning (2007:996) med instruktioner för Migrationsverket.

The Migration Board seems to assume a rather large responsibility in investigating the situation and without requiring much evidence they lay the story as the basis for his application. The reasoning may seem in line with the new provision in Section 3(a), which according to the Migration Board is in harmony with the already existing proceedings in assessing practical impediments. However, whether that statement is actually reflected in the everyday decisions will be elaborated on later on in this paper.

# 3 The rights of the child

Human rights are considered to be universal, and the international and regional instruments protecting human rights apply to all human beings without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[71] Consequently, the same provisions applying to adults shall equally apply to children. However, the definition of a right and what it entails is mutable reflecting the time and society that we currently live in. Hence, it has been recognised that *inter alia* the Refugee Convention has been developed focusing on politically engaged men, disregarding the role that for example women may play and what may actually constitute persecution.[72] The recognition of the ongoing marginalisation against certain groups in society has led to the adoption of a range of subject-specific legal instruments protecting *inter alia* women and children.[73]

The CRC was adopted by the United Nations General Assembly in 1989 and entered into force in 1990. Subsequently two Optional Protocols regarding the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography were adopted and entered into force in 2002. In December 2011 a third Optional Protocol regulating the communications procedure was adopted. The third Optional Protocol, once entered into force, will allow for the lodging of individual complaints if a regulation of the CRC or of any of the Optional Protocols has been violated.[74]

The CRC has its foundation in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly in 1959. The need to extend particular care to children has also been recognized in the UDHR, as well as in the International and the International Covenant on Economic, Social and Cultural Rights.[75] It is the first legally binding international instrument to incorporate all different types of rights, *i.e.* economical, social, cultural, civil and political rights and it is the most commonly ratified international human rights instrument. As of today, only Somalia and the United States have still not ratified the convention.

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[71] *See inter alia* Article 2(1) of the ICCPR, Article 2(2) of the International Covenant on Economical, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, Article 1 of the ECHR and the *Vienna Declaration and Programme of Action* (adopted 14-25 June 1993) U.N. Doc. A/CONF.157/23 (Part I) at 20 (1993).
[72] *Supra* note17, p. 22 *et seq*.
[73] *Ibid*., p. 22 *et seq*.
[74] *See* Committe on the Rights of the Child, *Monitoring children's rights*, <www2.ohchr.org/english/bodies/crc/>, accessed 17 April 2012.
[75] *See* the preamble of the CRC.

Another novelty of the CRC is the gradual transition from the view of children as objects of protection, part of the family unit and recipients of help, to the view that children are actually independently right-holders and entitled to participation. In particular the inclusion of participation rights has been considered very controversial.[76]

The CRC does not recognise any hierarchy between the rights but rather focuses on the holistic approach and the interdependency of the rights, implying that the "enjoyment of economic, social and cultural rights is inextricably intertwined with enjoyment of civil and political rights"[77]. However, as established by the Committee on Economic, Social and Cultural Rights the instant realisation of certain rights may, due to economical reasons, not be possible, which implies that they may be subject to progressive realisation.[78] The argument is primarily valid in regard to economic, social and cultural rights although it might be well-founded also in relation to civil and political rights since the realisation of most rights transmits increasing costs.[79]

Pursuant to Article 2 of the CRC it is the obligation of the contracting state to respect and ensure all rights to *each child* within its jurisdiction without discrimination, regardless of whether or not the child resides lawfully within the territory of the state. It means that they have to reassure that domestic legislation is compatible with the CRC, and whenever there is a conflict, the CRC must prevail.[80] The states parties have to interpret the convention in good faith and in the light of its object and purpose, meaning that they are not allowed to make reservations in contravention to the object and purpose of the convention.[81]

## 3.1 The core principles of the CRC

The CRC is based on four core principles entailing non-discrimination (Article 2); the best interests of the child (Article 3(1)); the right to life and development (Article 6); and the right to be heard (Article 12(1)).[82] These four principles form the starting point for the obligations of the state. The principle of the best interests of the child is the guiding principle of the CRC, requiring the states parties to make the principle a primary

[76] Stern, R., *The Child's Right to Participation - Reality or Rhetoric?* (Uppsala Universitet 2006) p. 38.
[77] Committee on the Rights of the Child, General Comment No. 5, *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5, para 6.
[78] Committee on Economical, Social and Cultural Rights, General Comment No. 3, *The nature of the States parties' obligations (art. 11(1))*, HRI/GEN/1/Rev! At 45 (1994)
[79] *Supra* note 76, p. 48.
[80] *Supra* note 77, para. 20.
[81] Article 31 of the *Vienna Convention on the Laws of Treaties* (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[82] *See inter alia* UNICEF, *Convention on the Rights of the Child*, <http://www.unicef.org/crc/>, accessed 12 May 2012.

consideration in all actions concerning children, whether the action is undertaken by a public or a private agent.[83] The principle is explicitly referred to in some provisions[84] but shall permeate the application of all provisions.[85]

### 3.1.1 The principle of non-discrimination

Pursuant to Article 2 the states parties shall respect and ensure the rights to each child within their jurisdiction irrespectively of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. The states parties are also under an obligation to take all appropriate measures to ensure that children are protected against all forms of discrimination and discriminatory punishment. In regard to unaccompanied or separated children it also requires that measures are taken to address possible misperceptions and stigmatizations of these children in society.[86]

The protection of children seeking refugee status or who are considered refugees is further highlighted in Article 22(1) compelling the states parties to ensure that these children receive appropriate protection and humanitarian assistance in the enjoyment of the rights enshrined in the CRC and other applicable international human rights or humanitarian instruments.

In view of that, it may almost seem as the legal framework providing protection for these children is almost stronger than in regard to other children, since they are, in addition to the non-discriminatory provision entitled to particular concern. However, as will be discussed further on, that might not always be the case.

### 3.1.2 The best interests of the child

The principle concerning the best interests of the child in the CRC derives from two basic ideas; firstly, that children are equally entitled to respect for their dignity and, secondly, that they should enjoy special protection due to their vulnerability.[87] Under Article 3(1) the best interests of the child shall be a primary consideration in all actions concerning children, which requires active measures by government, parliament and the judiciary whether the actions are undertaken by public or private actors. It implies that every legislative, administrative and judicial body or institution shall systematically consider how their decisions and actions affect children's

[83] Article 3(1) of the CRC.
[84] *See inter alia* Articles 9 and 18 of the CRC.
[85] Article 4 of the CRC.
[86] *Supra* note 3, para. 18.
[87] Prop. 1997/98:182 *Strategi för att förverkliga FN:s konvention om barnets rättigheter i Sverige*, p. 13.

rights and interests, including those indirectly affected.[88] The obligation is further emphasised in Article 4, which provides that all "State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention".

The declaration that the principle shall be *a* primary consideration instead of *the* primary consideration presumably indicates that the drafters of the convention implicitly were trying to "ensure a certain degree of flexibility, at least in extreme cases, to permit the interests of people other than the child to prevail"[89], even though it seems to impose the burden of proof of those who try to put other interests higher. However, pursuant to the general comments published by the Committee on the Rights of the Child arguments that are not rights-based, such as regulated immigration, cannot balance out the consideration of the best interests of the child.[90]

In regard to the asylum assessment the application of the best interests of the child means that the harm shall be assessed from the child's perspective including an analysis of how the harm might affect the rights and interests of the child. As a consequence, even though the ill-treatment may not reach the required level to constitute persecution in respect of an adult, it may suffice in the case of a child.[91] In addition there are also child-specific forms of persecution, which solely, or disproportionally, affect children.[92] Hence, in relation to children an accumulation of less serious violations may amount to persecution.[93] One example that will be discussed further on is the potential link between the principle of *non-refoulement* and the refusal of entry or expulsion of unaccompanied or separated asylum-seeking children. The need to pay particular focus on children may partly depend on the subordinate role, position and status children continue to possess in certain societies. Hence, an important step would be to actually recognise children as 'active subjects of rights'.[94] In the context of migration it might also depend on a kind of dissociation, because people sometimes conceive that these children "are not like our kids" and therefore they can be treated like adults.[95] However, taking into consideration the best interests of the child does not imply that every child asylum-seeker should be granted refugee status, although it does entail that the principle of child protection includes access to child welfare, protection, education and health services.[96] This obligation is also protected under Article 27(1) of the CRC,

[88] *Supra* note 77, p. 4.
[89] *Antwi and Others* v. *Norway*, 14 February 2012, ECHR, no. 26940/10, dissenting opionion, para. 3.
[90] *Supra* note 3.
[91] UNHCR, *Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, p. 7.
[92] *Ibid*., p. 9.
[93] Supra note 67, para. 53.
[94] UNHCR, *Conclusion on Children at Risk*, 5 October 2007, No. 107 (LVIII) - 2007.
[95] *Supra* note 16, p. 416.
[96] Separated Children in Europe Programme, *Statement of Good Practice*, 4th Revised Edition, p. 15.

establishing that the states shall recognise "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development".

The Human Rights Council has also recognised the particular vulnerability of unaccompanied or separated children, appealing to the states to ensure that the best interests of the child should always be a primary consideration in their policies of integration, return and family reunification in regard to this particular group.[97]

The principle of the best interests of the child is also laid down in the EU Charter.[98] Additionally, within the European context the SCEP's *Statement of Good Practice*[99] aims to establish a shared policy and commitment to best practice based on the CRC, the General Comment No. 6 of the Committee on the Rights of the Child and the UNHCR's Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum.[100]

The EU Action Plan on Unaccompanied Minors that was adopted in 2010, ending in 2014, establishes that return might constitute a durable solution for unaccompanied children, unless granting of international protection status or resettlement is possible. However, as established by other organs, the assessment shall be carried out with the focus on the best interests of the child.[101]

Accordingly, as laid down in the CRC and the different European legal human rights instruments, the principle of the best interests of the child shall be a primary consideration. It may however be noticed that there are other international legal instruments which provide an even stronger protection by stipulating that the best interest of the child "shall always be *the* paramount consideration".[102] Although it can be questioned, some scholars argue that given its broad acceptance, the principle of the best interests of the child might actually have become a general principle of international law.[103]

### 3.1.3 The right to life

The right to life is protected in Article 6 of the Child Convention. It prescribes the child's inherent right to life and the obligation of the states to ensure to the maximum extent possible the survival and development of the

[97] Human Rights Council Resolution 9/5. *Human Rights of Migrants*, A/HRC/RES/9/4, para. 3(c).
[98] *Supra* note 37, Article 24.
[99] *Supra* note 96.
[100] *Ibid*., p. 3 *et seq*.
[101] European Commission Directorate-General Home, *Comparative Study on Practices in the Field of Return of Minors*, HOME/2009/RFXX/PR/1002, Final Report 2011, p. 21.
[102] *See* for example Article14(1) of the European Convention on the Adoption of Children (adopted 24 April 1967, entered into force 26 April 1968) CETS No.: 058.
[103] *Supra* note 89, dissenting opinion of Judge Sicilianos, joined by Judge Lazarova Trajkovska, para. 4.

child. The mere survival will not suffice, on the contrary, 'development' is to be interpreted broadly, as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development and consequently, implementation measures should aim at achieving the optimal development for all children.[104]

In regard to unaccompanied or separated children this provision is crucial. As formerly discussed, these children run a particular risk of being subjected to a wide range of abuses during the entire migration process, such as trafficking and exploitation, which may have an effect on their right to life. In the case of refusal of entry or expulsion they may also face the risk of being deprived their right to development, if the safeguards in place to protect them from being returned to inadequate reception conditions are failing.

### 3.1.4 The right to be heard

Pursuant to Article 12 states are obliged to assure the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. This implies that the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. The article thus refers to the child as being an autonomous individual, recognising that children have capacities equal to adults to express their own wishes and influence their own life. As previously discussed, the acknowledgment of the child as a rights-holder and participant is fundamental in the discussions on democracy since participation in the decision-making processes is the very foundation of democracy.[105]

The origin of democracy can be traced back to the ancient Athens. However, it included a limited number of men born in Athens, while excluding women, children, resident foreigners and slaves. Hence, gender, age, ethnicity and social status have been, and still are, decisive factors to justify inclusion and exclusion.[106] The deprivation of this aspect of citizenship seriously affects a person's life since he or she is no longer capable of participating in the shaping of the proper life.[107] Hence, where advocacy and the rights holders are weak and where the political will is absent, the *de facto* norm is rightlessness.[108]

[104] *Supra* note 77, p. 4.
[105] *Supra* note 76, p. 97.
[106] *Ibid*., p. 108 f.
[107] *Ibid*., p. 112.
[108] *Supra* note 16, p. 449.

The provisions are to be applied equally to all children. However, in regard to the question on democracy unaccompanied or separated asylum-seeking children are doubly excluded. Primarily, this is because they are children, and as such they do not possess legal capacity, hence lacking the same right to participate in the decision-making process. Secondly, as non-citizens and without proper residence permits, they are excluded from the debate concerning their future and living conditions. The result is a complete lack of participation in setting their own agenda, and, as stated above, where rights holders are weak, the actual norm is rightlessness.

## 3.2 The best interests of the child within the Swedish legal context

In Sweden already around 1917-1920 a range of laws concerning children were enacted that provided protection for *inter alia* children born outside marriage and children who were adopted. The prevailing principle was the best interests of the child.[109] Hence, the principle of the best interests of the child was present even before the ratification of the CRC, which might have been the reason why the Swedish legislator omitted to fully incorporate the convention into Swedish law when it was ratified in 1990. However, the Supreme Court has established that in interpreting the Swedish laws enacted in order to fulfil the provisions of the CRC, the judiciary should consider the convention and its *travaoux préparatoires* since it is the duty of the state to ensure that the obligations arising in regard to the convention are respected.[110] The manner in which they are implemented is however left to the discretion of the state, as long as the implementation process is in line with the provisions of the convention.[111]

The principle of the best interests of the child is a fundamental part of the Swedish legislation. In accordance with *inter alia* Chapter 1 Section 2 fifth paragraph, of the Instrument of Government[112], Chapter 6 Section 2(a) of the Parental Code[113] and Chapter 1 Section 10 of the Aliens Act, society is responsible for ensuring the equal participation and non-discrimination of children, as well as making the principle of the best interests of the child a primary consideration in all measures concerning children. The provision in the Aliens Act was introduced in the 1989 Aliens Act due to the ratification of the CRC.[114] The formulation is rather general in order to enable the application of the principle on any given situation.[115] Despite the vague formulation a heavy responsibility lies with the state, meaning *inter alia* that when the principle of the best interests of the child is not decisive, the

[109] *Supra* note 87, p. 13 *et seq*.
[110] NJA 1993 p. 666.
[111] *Supra* note 87, p. 9.
[112] Kungörelse (1974:152) om beslutad ny regeringsform.
[113] Föräldrabalk (1949:381).
[114] Prop. 1996/97:25 *Svensk migrationspolitik i globalt perspektiv*, p. 226 *et seq*.
[115] SOU 1996:115. *Barnkonventionen och utlänningslagen*. Delrapport av Barnkommittén Stockholm 1996, p. 34 *et seq*.

authorities must demonstrate that the principle has been taken into consideration in the entire decision-making procedure.[116]

With the enactment of the new regulation under Chapter 12 Section 3(a) of the Aliens Act the responsibility of the Migration Board is further broadened in regard to the protection of unaccompanied or separated children.

[116] *Ibid*., p. 36.

# 4 Practical impediments to the enforcement of refusal of entry or expulsion in the context of asylum seeking children

A decision on refusal of entry or expulsion that has gained legal force can solely be dealt with within the context of Chapter 12 Sections 18 and 19 of the Aliens Act, which provides the legal framework for impediments to enforcement, legal as well as practical. In accordance with Chapter 12 Section 18 indent 3 of the Aliens Act, a decision of refusal of entry or expulsion shall not be enforced if there are other special grounds why the order should not be enforced. As previously discussed the determination that a child is truly abandoned could constitute such ground and should result in the granting of a definite leave to remain, meaning that Sweden assumes the responsibility for children arriving in the country who are unable to rely on family care.[117] Additionally, due to the implementation of the Return Directive the obligation of the state to ensure adequate reception arrangements is now part of Swedish law. According to the Migration Board the newly adopted provision is a codification of the already existing practice in relation to these children. The aim of the present chapter is to identify the components of the provision and, applying a child's perspective, find out whether the assessments carried out are really in line with international human rights obligations and the statement made by the Migration Board.

## 4.1 The best interests of the child

Pursuant to both CRC and the Aliens Act the definition of a child includes any person below the age of 18 years.[118] To benefit from the application of the child's perspective the person therefore has to be considered a child. In many cases where the age is disputed, age determinations are carried out as a consequence. These assessments have been heavily challenged since "[A]ge determination is extremely difficult to do with certainty… [it] is an inexact science and the margins of error can sometimes be as much as 5 years either side… Estimates of a child's physical age from his or her dental development are [only] accurate to within + or - 2 years for 95% of the population."[119] The Migration Board does not consider these determinations

[117] *Supra* note 114, p. 250 *et seq*.
[118] Article 1 of the CRC and Chapter 1 Section 2 of the Aliens Act.
[119] *See inter alia supra* note16, p. 428 and *Rädda Barnen om åldersbestämning av ensamkommande barn*, available at

decisions and, as a consequence, they are not appealable although they have serious implications for the person concerned. If a person is not considered a child a wide range of safeguards are withdrawn, such as the right to a guardian, the protection against being returned in accordance with the Dublin regulation to a country where the person has solely passed without actually applying for asylum[120] and, most importantly, to have his or her application assessed from a child's perspective. To apply the principle of the best interests of the child properly must, to my view, mean that the child is given the benefit of the doubt in regard to the determination of the age and hence, the child's perspective shall be applied unless the child is obviously an adult. To heal the potential margin of error, this may imply that solely if a medical assessment indicates that the person is above the age of for example 23 years, the person can be treated as an adult. It should also entail improving the guidelines for carrying out the assessments and, most importantly, make the decisions appealable in order to enable the minor and his or her legal representative to advance their claims and proofs. The UNHCR has given voice to a similar conclusion, stating, [that] "every minor who is a principal asylum-seeker shall be ensured child-sensitive procedural safeguards. As a consequence, lowering the age or applying harsh age assessments enabling the state to treat them as adults, may be in contravention with the rights established in international law."[121]

The starting point is that, when a decision has become final, the return to the country of origin shall be done voluntarily. However, in regard to unaccompanied or separated children that cannot be requested to the same extent according to the Chief Legal Advisor at the Migration Board.[122] Swedish authorities are responsible for assessing the prerequisites for the child to be properly taken care of upon return, either by relatives or by a child care institution.[123] The obligation of ensuring adequate reception arrangements derives from Article 10 of the Return Directive, which states that before returning an unaccompanied child the state has to reassure that he or she will return to a member of the family, a nominated guardian or adequate reception facilities in the country of return.[124] During the European Commission Contact Committee workshops of the implementation of the directive it was stated that the return should always be accompanied by appropriate reintegration measures reassuring a sufficient child protection infrastructure and secure care and custodial arrangements.[125] The responsibility is further highlighted in Article 22(2) of the CRC, which establishes that states shall co-operate with the United Nations and any other

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<rb.se/SiteCollectionDocuments/Ställningstaganden/Rädda%20Barnens%20ställningstagande%20åldersbedömningar.pdf>, accessed 12 May 2012.

[120] Article 6 of the Council regulation 343/2003/EC of 18 February 2003 establishing the criteria and mechanism for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (2003) OJ L 50/1.

[121] *Supra* note 91, p. 5.

[122] *Supra* note 21, p. 2.

[123] Chapter 12 Section 3(a) of the Aliens Act.

[124] See also supra note 101, p. 19.

[125] *Ibid*., p. 19 *et seq*.

organisation co-operating with the United Nations to trace the parents or other members of the family to enable reunification.

Due to children's dependency on adults and their specific development needs, child-specific rights, such as socio-economic needs are normally more compelling than those of an adult.[126] Therefore, a violation of one right may amount to the exposure and reinforce their subjection to other abuses and human rights violations.[127] Pursuant to the obligations that the CRC places on the contracting states Sweden is required to fulfil certain criteria, ensuring that the basic needs of the child in regard to access to food, housing, health care, education and so forth are met. However, according to the statement made by the Chief Legal Advisor at the Migration Board the examination of what constitutes 'acceptable conditions' must be carried out within the local context, and not in comparison with Swedish conditions. Acceptable conditions include the possibility to stay in contact with parents and relatives, access to sufficient and healthy food in accordance with local traditions, access to health care, access to education and vocational training, sufficient hygiene and sanitary conditions, a sufficient and secure place for private belongings and protection against violence and exploitation.[128]

In accordance with the UNHCR Guidelines on international protection, internal flight might be an alternative in certain situations - however, there are two parameters that have to be given due weight, namely the relevance analysis and the reasonableness analysis.[129] All the same, the criteria for when internal flight can be considered reasonable, cannot be the same for unaccompanied children as for adult asylum seekers. To request a child to relocate and live alone without adequate state protection, when there are no known relatives living in the country who are willing and able to care for him or her, is not in line with applying the child's perspective.[130] There might be situations when institutional care may be considered an option. However, prior to entrusting the child to institutional care a proper assessment needs to be carried out, taking into consideration the long-term life prospects of children being institutionalised.[131]

Several concerns can be raised in regard to this issue. As previously discussed, the legal framework seemingly provides a rather strong protection for unaccompanied or separated migrant children. However, the statement made by the Chief Legal Advisor demonstrates the contrary. According to his view, the definition of 'acceptable conditions' shall be defined in accordance with local traditions hence implying that these children are not entitled to the same rights as other children within the

[126] *Supra* note 91, p. 8.
[127] Committee on Economic, Social and Cultural Rights, General Comment No. 11*, Plans of action for primary education*, U.N. Doc. E/C./12/1994/4 (1999), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.& at 59 (2003), para. 4.
[128] *Supra* note 21, p. 5.
[129] *Supra* note 91, p. 20.
[130] *Ibid*., p. 21.
[131] *Ibid*., p.21.

jurisdiction of the state. In many situations it might be difficult to reach the level of standard in Sweden and therefore it might be understandable to not require an equal standard. However, to define 'in accordance with local traditions' is rather difficult - a slippery slope which might imply that a child is deprived of a range of basic needs because it is considered in line with the local context. Another concern is the question whether the child will actually be accommodated. Certain countries apply more restrictive rules in regard to when a child is considered a child and, as a consequence, the child may not be entitled to childcare because he or she is no longer considered a child.

## 4.2 The principle of *non-refoulement* applying a child's perspective

The prohibition on torture and other inhuman or degrading treatment and punishment would traditionally not be considered to include the *refoulement* of a child to the country of origin without guarantees on adequate reception arrangements. In spite of that, as stated several times in regard to the application of the ECHR it must be recalled that the convention is a "living instrument which must be interpreted in the light of present-day conditions"[132]. The Committee on the Rights of the Child has argued that in regard to unaccompanied and separated children the principle of *non-refoulement* should be construed as to include socio-economic conditions in the country or origin.[133]

In 1996, in the case *Nsona v. the Netherlands*[134] the application of Article 3 of the ECHR within the context of refusal of entry or expulsion of minor migrants was assessed for the first time. The case concerned a nine years old girl who travelled from Zaire to the Netherlands in the company of a Zairian woman who was living in the Netherlands claiming to be the maternal aunt of the girl. Since the girl lacked the requested documents she was refused leave to entry and taken to the airport hotel. Subsequently the Zairian woman was informed that she had to accompany the girl back to Zaire. Firstly, she accepted to do so but in due course she refused to, claiming that it would be unsafe for her to return to Zaire. Eventually the young girl was returned to Zaire travelling by herself. Although the Netherlands authorities' attempts to arrange for a proper receiving at the end proved unsuccessful, the Court was of the opinion that the state had acted with due diligence and, as a consequence, there was no breach of Article 3 of the ECHR. In accordance some critique has been raised, stating that the refusal of the Court to recognise the violation could almost be seen as a punishment partly because she entered on a false passport.[135]

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[132] *Mubilanzila Mayeka and Kaniki Mitunga* v. *Belgium*, 12 January 2007, ECHR, no. 13178/03, para. 48.
[133] *Supra* note 1, p. 9.
[134] *Nsona* v. *the Netherlands*, 8 November 1996, ECHR, no. 23366/94.
[135] *Supra* note 16, p. 434.

In a more recent case *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*[136] from 2006 the Court came to the opposite conclusion. The case concerned a five years old girl who was brought from the Democratic Republic of Congo (DRC) to Belgium by her maternal uncle in order to enable the reunification with her mother, who at the present time was applying for asylum in Canada. Since she lacked the required documents she was refused leave to enter and eventually detained in a refugee centre. The Belgium authorities managed to locate another maternal uncle, a young student living on a student campus, and subsequently deported her to the DRC accompanied by a social worker who upon arrival in DRC placed her in care of the police at the airport. Nobody from the family was there and a secretary at the National Information Agency of the DRC who offered her accommodation then collected her. A couple of days later it was discovered that the uncle had disappeared and at the same time the mother was granted a residence permit in Canada and the young girl could eventually reunify with the mother in Canada.

In the reasoning the Court stated that it was actually struck by the failure to provide adequate preparation, supervision and safeguards for her deportation.[137] The young girl had travelled by herself, solely accompanied by a special hostess on the airplane, the uncle was merely informed about her arrival and there were no alternative arrangements considered.[138] It clearly showed that the Belgian authorities did not ensure that the applicant would be properly taken care of, neither considered the situation that she was likely to encounter in DRC.[139] Finally, the Court stated that the deportation of the applicant must have caused her "extreme anxiety and demonstrated such a lack of humanity towards someone of her age and in her situation as an unaccompanied minor as to amount to inhuman treatment".[140]

To conclude, the case-law referred to above and the statements made by different international human rights organs proves that these assessments really have to be taken seriously and that the state responsibility is far-reaching. It is not sufficient to state that there will be relatives receiving the child, but the state authorities have to ensure that they will actually be there and make alternative arrangements if they turn out not to be there.

[136] *Supra* note132.
[137] *Ibid*., para. 66.
[138] *Ibid*., para. 67.
[139] *Ibid*., para. 67.
[140] *Ibid*., para. 69.

## 4.3 The burden of proof and the responsibility to investigate

Children do not have legal capacity under Swedish law. As stated by the Committee on the Rights of the Child the providing of guardianship and effective legal representation to unaccompanied or separated child migrants is therefore essential in protecting their rights.[141] Pursuant to Swedish law unaccompanied or separated children are therefore entitled to a legal guardian, whose responsibility is to guard the rights of the child.[142]

Pursuant to the new provision introduced in Chapter 12 Section 3(a) of the Aliens Act the main responsibility of ensuring that a family member, a nominated guardian or adequate reception facilities appropriate for taking care of the child will receive the child upon return now rests explicitly on the Migration Board. The enactment of the new provision was precipitated by a legal statement by the Chief Legal Advisor at the Migration Board, where it was established that because of children's lack of legal capacity the responsibility should instead be placed on the authorities.[143] Accordingly, if the child persistently claims that he or she does not know the whereabouts of his or her parents and other relatives, that statement shall generally be taken as true, particularly in regard to countries affected by conflicts or where Sweden is lacking official representation, such as for example in Somalia.[144] The question on how the responsibility of investigating is placed, and if these statements are respected is essential in the assessment of practical impediments.

In accordance with general principles of administrative law the burden of proof lies on the person submitting a claim.[145] However, pursuant to Section 8 of the Administrative Court Procedure Act it is the responsibility of the Court to ensure that the case is sufficiently investigated and, if needed, the Court shall indicate how the investigation should be complemented. However, in accordance with the *travaux préparatoires* this responsibility extends differently within different areas of law.[146] Within the area of migration law the UNHCR has recognised that the applicant may encounter difficulties substantiating the claim with adequate documents and other proof and, as a consequence, the duty to ascertain and evaluate the facts should be shared between the applicant and the examiner.[147] Some statements may still not be susceptible to proof and the applicant shall then, if he or she appears credible, be given the benefit of the doubt, if he or she has made a genuine efforts, and there are no reasons to the contrary.[148] In

[141] *Supra* note 3.
[142] *See* Section 2, lag (2005:429) om god man för ensamkommande barn.
[143] *Supra* note 21, p. 6.
[144] *Ibid*., p. 4.
[145] *See inter alia supra* note 67, para. 196.
[146] Prop. 1971:30. *Kungl. Maj:ts proposition till riksdagen med förslag till lag om allmänna förvaltningsdomstolar, m.m.*; given Stockholms slott den 12 mars 1971, p. 529.
[147] *Supra* note 67, para. 196.
[148] *Ibid*., paras. 196 and 203.

cases concerning unaccompanied children the examiner should take on an even greater burden of proof, applying a liberal application of the benefit of the doubt.[149]

A prerequisite in order to make a thorough assessment of the case is that all the relevant circumstances and the invoked documents and material are on the table. The Migration Court of Appeal has established that the responsibility to investigate enters when the basis for decision is insufficient for reaching a decision.[150] It does not imply that the Court itself has to carry out the investigation but the assignment could be delegated to the applicant and the legal representative.

The question on responsibility to investigate has quite recently been discussed in two rather similar cases concerning alleged damages of torture. In the first case, *R.C.* v. *Sweden*[151], as well as in the second case from the Migration Court of Appeal[152], it was held by the courts that there were credibility deficiencies in regard to the circumstances invoked by the applicants, which implied that the individual had to provide "a satisfactory explanation for the alleged discrepancies".[153] Regardless of that, if an applicant provides a medical certificate, although not written by an expert, that indicates rather strongly that the injuries may have been caused by ill-treatment or torture, it is the obligation of the Migration Board to dispel the doubts.[154] Hence, in both cases the Migration Board ought to have requested the expert opinion on the injuries. In regard to *R.C.* v. *Sweden* the European Court of Human Rights stated that although the main responsibility rests on the applicant, the state is under the obligation to ascertain all relevant facts, in particular if something indicates that the person has been subjected to torture.[155]

Although it might be disputed whether the same argument can be made in regard to unaccompanied or separated children that are about to be expelled, I think it has a bearing on it, especially, since as we have already seen, that the expulsion to an uncertain and potentially dangerous situation may amount to a violation of Article 3 of the ECHR. Hence, when there are indications that a child might, if returned to the country of origin, face the risk of being subjected to this kind of ill-treatment, the burden of evidence should be shifted to the Migration Board to prove that the indicators are false.

[149] *Supra* note 91, p. 27.
[150] MIG 2006:1.
[151] *R.C.* v. *Sweden*, 9 March 2010, ECHR, no. 41827/07.
[152] MIG 2012:2.
[153] *Supra* note 151, para. 50.
[154] *Ibid*., para. 50.
[155] *Ibid*., para. 53.

## 4.4 Case study

In order to examine how the assessments of practical impediments are carried out, which considerations are taken into account and, most importantly, the level of coherence in relation to international human rights obligations, ten decisions of the Migration Board have been revised. The Migration Board provided me with ten decisions, five approvals and five rejections. In most cases they had also enclosed the final decisions of the Migration Court. Hence I was able to see whether the applicant had invoked practical impediments already during that stage, the arguments of the Court and the rationale behind the refusal. The decisions were issued between 24 March 2011 and 4 April 2012, hence during the period subsequent to the legal statement that was issued by the Chief Legal Advisor of the Migration Board concerning enforcement of decisions in regard to unaccompanied or separated children, and prior to the enactment of the new provision.[156]

In the following section I will give a brief summary of the decisions and the arguments of the Migration Board. This will include an analysis of the claim and evidence put forward by the applicant during the procedure at the Migration Court and in the application to impediments to enforcement, as well as the reasoning and evaluation of the evidence by the deciding authorities.

The basis of the case study is rather limited and therefore it is not possible to deduce too far-reaching conclusions. However, the cases might constitute an indicator of how the Migration Board reasons.

### 4.4.1 Approved applications

*Case 1: Decision of 20 June 2011*

The case concerned a child originally from Somalia who was 16 years old at the time for the decision.

During the proceedings at the Migration Court the applicant stated that his father had been killed, and that consequently his mother had decided that he had to leave the country due to the risk he might encounter. During his time in Sweden, he contacted his uncle who informed him that his mother and sister have moved around, so hence he did not know their whereabouts at the time being. In regard to the applicant's claim that he lacked knowledge about where his family was residing, the Migration Court in the reasoning established that no evidence had emerged in the present case, indicating that the applicant previously was deprived the right to his basic needs and there were no reasons to presume that he would be deprived of his basic needs if returned to his family.

[156] *Supra* note 21.

During the phase of enforcement the Reception Unit at the Migration Board indicated that they had exhausted all possibilities to return the applicant and the Migration Board hence assessed the case *ex officio*. In the reasoning the Migration Board established that the responsibility of tracing family members and arrange for adequate reception arrangements lies on the Migration Board, and since they considered that they had exhausted all possible remedies the applicant was granted a residence permit.

*Case 2: Decision of 8 July 2011*

The second case examined also concerned a boy from Somalia who at the time for the decision was 15 years old.

The boy's father had been killed by Al-Shabaad and when the same group began directing threats against the applicant, and attempted to forcefully recruit him, he fled the country. In their reasoning, the Migration Court rather lightly dismissed his claim of being abandoned, stating that there was nothing in the case indicating that he has been previously deprived of his basic need when he was living as a street child in Somalia. The Court also stated that the fact that he had lost contact with his family due to the flight could not be equated to being abandoned.

Even in the second case the Migration Board initiated the assessment *ex officio*. In an official memo the Reception Unit notified that it appeared that the applicant did not have any contact with the family. The guardian of the applicant and the applicant himself had been in contact with the International Red Cross but they had failed to locate the boy's family. Since the Migration Board lacked knowledge about any institutions or organisations that could receive him upon return he was granted a residence permit.

*Case 3: Decision of 10 January 2012*

The third case concerned a boy of Afghani nationality who at the time for the decision was about to turn 18 years old.

The applicant claimed that he and his family fled to Pakistan after an attack on his home village when he was 15 years old. In Pakistan the family had been separated, and he was sent to an uncle who was living in Sweden. After the separation he had no contact with the family. During the proceedings in the Migration Court, the applicant stated that the uncle did not have the number of his family, and in addition, due to security reasons it was not plausible to think that the family had returned to Afghanistan. In the reasoning the Migration Board stated that since the applicant lived with the family prior to the departure there was nothing indicating that he would not be taken care of upon return.

In an official memo the Reception Unit at the Migration Board noticed that the applicant had managed to establish a link with the mother. However, since she was residing illegally in Iran she could not go to the embassy in order to prove her stay there. A telephone interview was consequently carried out by the Migration Board, which proved that the family most probably were living in Iran at the present time. As a consequence it could be established that the applicant was deprived the possibility of reunifying with his family in Afghanistan. Due to the scarce communication with the organisations working in Afghanistan with family tracing it was hard to establish when the tracing of other family members could be initiated. Given that the Migration Board considers that there are no adequate childcare institutions in Afghanistan the applicant was granted a residence permit.

*Case 4: Decision of 17 February 2012*

The fourth case again concerned a child from Afghanistan who at the time of decision was about to turn 18 years old.

During the proceedings at the Migration Court, the applicant invoked the risk of persecution due to his ethnic origin since his family were Uzbeks living in Afghanistan. The applicant notified the Court that he had tried to call his mother without success for seven months and hence did not know anything about her whereabouts. The Court noted that nothing in the investigation pointed to the fact that the family had disappeared and hence his claim could not justify the statement that the family was no longer present in Afghanistan. Rather it could be presumed that they were still residing in the area where they were present last time they were in contact.

In the application of impediments to enforcement the applicant stated that he had tried to get in contact with the mother through a friend of some relatives who were living in Sweden. However, due to fear, the person living in Afghanistan did not wish to resume the contact. Neither had he had any contact with the relatives living in Sweden. The applicant had sent a request through the Afghanistan Independent Human Rights Commission but, as in the previous case, the Reception Unit recognised that the collaboration was currently not working and hence no tracing could be done. The applicant had also been in contact with the International Red Cross but they had still obtained no answer. Accordingly, the Reception Unit stated that they had exhausted all possible measures and that it would not be possible to return the applicant to Afghanistan within the near future, at least not prior to his 18th birthday, and for that reason the applicant was granted a permanent residence permit.

*Case 5: Decision of 4 April 2012*

Even the last case concerned a boy from Afghanistan who at the time for the decision was 17 years old.

In the proceedings before the Court the applicant claimed that he left the country due to threats from his father's former colleague. The family could not afford to leave all together and consequently he was separated from them. In the reasoning the Court stated that since they were in Afghanistan at the time for his departure and there was nothing in the case indicating that the family had disappeared the applicant's claim was finally turned down in late 2009.

In the claim for impediments to enforcement, the applicant invoked that together with the guardian he had initiated tracking of the family by using Facebook and Family Link and by contacting the family reunification unit at the International Red Cross. They had also contacted the International Organisation of Migration in order to find a childcare institution. However, they were told that the applicant would not be considered a child in Afghanistan and accordingly he would be denied accommodation. In the reasoning the Migration Board recognised that the applicant to a large extent had cooperated in providing them with information and due to the circumstances it could therefore be established that he was actually abandoned. As in the previous cases, the Migration Board established that since there are no known childcare institutions in Afghanistan the applicant should be granted a residence permit.

#### 4.4.1.1 Analysis

When assessing the approved applications one of things that struck me the most was the vast responsibility that the Migration Board put on the child and his or her guardian to provide evidence for the claims. In accordance with both general administrative law and the new provision regulating the obligation of the Migration Board in these matters, it could be discussed whether this heavy demand on the applicant is in line with national and international human rights and the principle of the best interests of the child. In all cases where the Migration Board granted a residence permit the applicant had substantial proofs of their attempts to trace their parents or other family members by contacting the International Red Cross, the International Organisation of Migrants, using Facebook and Family Link or letting the Migration Board interview family members residing illegally in third countries. In some cases the Migration Board also stated that due to difficulties in collaborating with the authorities in the present country, family tracing would not be possible to initiate within a foreseeable future and hence the applicant should be granted a residence permit. As a consequence of these difficulties, as stated in decision no. 4, it would not be achievable to enforce the expulsion within the nearest future, "at least not until the applicant turns eighteen". The meaning of the phrase is indefinite but it indicates an awareness of when the responsibility terminates and it

raises a presentiment. Are there situations when the Migration Board staves off the decision in order to avoid having to take into consideration these particular concerns?

### 4.4.2 Refused applications

*Case 6: Decision of 23 March 2011*

The first case concerned a young girl from Uganda who was 16 years old at the time of the decision.

In the proceedings before the Migration Court the applicant claimed that she had to flee the country due to her father's participation in the conflict in the Democratic Republic of Congo and Uganda, since he could not guarantee her safety in the country. The rest of the family had disappeared and there were no adequate institutions in the country able to take care of her. In the reasoning the Court stated that there was no evidence showing that she lacked a social network in Uganda and although the applicant withheld that she did not know the whereabouts of her father and maternal grandmother it had not been investigated whether she was actually abandoned.

With the help of the guardian the applicant invoked that she had on different occasions tried to call her father on his cell phone. However, there had been no answer except for one time when an unknown man had answered saying that the father was not present. The applicant had also undertaken investigations through Internet in search of the family but with no results. In the reasoning the Migration Board seemed to accept that the applicant was abandoned and accordingly initiated discussing the possibility of placing her in a childcare institution. The Migration Board referred to a document provided by the Swedish Embassy in Uganda confirming the existence of orphanages in Uganda and subsequently stated that the Migration Board do not take a position on whether she will actually be accepted.

Unfortunately the Migration Board did not provide any further information on the case and thus it has not been possible to follow up on the continuation of the case. Whether the applicant is still in Sweden or if she was actually expulsed is hence unknown.

*Case 7: Decision of 5 January 2012*

The following case concerned a boy from Guinea who at the time for the decision was 17 years old.

In the proceedings before the Court the applicant claimed that he had left Guinea since his mother, when the father passed away, had re-married a man who subjected him to forced-labour and ill-treatment. When his mother eventually passed away he decided to leave the country. As a consequence

he had no family in Guinea. According to country of origin information the childcare institutions were scarce and he would not be able to obtain a guarantee of acceptance. In the reasoning the Court stated that since the applicant previously was able to manage without his family it could be presumed that, regardless of the situation of the family, he would obtain satisfactory care in an orphanage or through some other organisation or institution.

In the application submitted by the guardian of the applicant it was invoked that he is an orphan and hence his future in Guinea could not be guaranteed. In the reasoning the Migration Board simply dismissed the application stating that no new circumstances had come to light.

*Case 8: Decision of 10 February 2012*

This case concerned three children originally from Montenegro, the oldest one 17 years old and the youngest nine years old at the time for the decision.

The judgement of the Migration Court was not attached, but from the background described in the decision it was clear that the children were abandoned. The mother left them because she considered that she could not take care of them due to her state of health and since then the children had been living with a foster family. In view of the fact that the father and his family had physically abused the children, returning the children to him was precluded.

In the reasoning the Migration Board stated that there are public childcare institutions in place in Montenegro where the children could be accommodated. They also referred to the obligation of the Migration Board to reassure that the quality of the institution is in accordance with the general standard of the country. In addition, given that the maternal grandmother lived in Montenegro they could also receive support from her.

*Case 9: Decision of 22 February 2012*

The following case concerned a 17 years old boy originally from Kosovo.

Even in the present case the judgement of the Migration Court was lacking and the decision did not refer to the previous claims, hence the background is unknown.

In the application of impediments to enforcement, submitted by the guardian of the applicant, it was invoked that the applicant did not know the whereabouts of his mother and sister and that the father, who at the time was detained, had been charged with burglary and physical abuse of the son. In addition, the applicant's girlfriend was pregnant. Since the applicant left Kosovo at the age of six his language knowledge was scarce.

In the reasoning the Migration Board discussed the amendment that entered into force 1 July 2010 with the aim of counteracting certain cases of separations between children and parents.[157] However, the regulation is supposed to be applied restrictively in regard to the possibility to be granted a residence permit after having entered the country, which is the main rule. To apply the provision a fundamental prerequisite is that the applicant holds a valid passport and since the applicant in the present case did not hold any valid passport the Migration Board could not apply the provision.

In regard to the claim that he was abandoned the Migration Board stated that the fact that his mother and sister had absconded did not imply, when making a forward-looking assessment, that he was truly abandoned. Hence, if during the enforcement of the expulsion it would be established that he is abandoned, the executing authority would then consider placement in a childcare institution, since they recognised their obligation to arrange for a proper reception.

*Case 10: Decision of 27 February 2012*

The last case concerned a 16 years old boy from Mongolia.

In the proceedings before the Court, almost two years prior to the application of impediments to enforcement, the applicant claimed that, if returned to Mongolia, he would face a risk of being subjected to harassment from other children and from the authorities in Mongolia. In the reasoning the Court stated that in accordance with available country of origin information there were suitable childcare institutions in Mongolia, thus it would be possible to arrange for accommodation in such an institution.

In the petition to the Migration Board, boy's guardian claimed that the applicant had started to exhibit serious psychological problems due to his situation and, in addition, he is an orphan with no knowledge about his parents. In the reasoning the Migration Board stated that the claims invoked in regard to the applicant's health already had been assessed by the Court and therefore were not new. The claim that the applicant was abandoned was not countered by the Migration Board.

#### 4.4.2.1 Analysis

While reading the decisions I was struck by the perfunctory reasoning of the Migration Board not only in regard to the possible existence of parents and relatives, but also of existing childcare institutions. In their reasoning, the Migration Board generally established that "there are institutions" in the country, without further discussing whether these institutions actually fulfil the criteria of an adequate reception facility, which would be able to provide

[157] *See* Chapter 12 Section 18 fourth paragraph of the Aliens Act.

the child with adequate housing, food and other basic needs. In only one of the decisions (decision no. 9) the Migration Board stated that the expulsion would not be enforced unless they could guarantee a proper receiving. As stated by the Chief Legal Advisor the standard of the institutions shall be in line with local traditions. However, that raises two questions. Firstly, who is actually controlling the level of the institutions and, secondly, in a country with very harsh living conditions in general which level would actually be acceptable? In one of the decisions (decision no. 6) the Migration Board stated that they had received a note from the Swedish Embassy in the country informing that there existed childcare institutions in the country. The question, however, remains: is the Swedish Embassy really adequate for investigating on these matters? Should it not be an organisation with specific knowledge on children's rights, the situation in the country in regard to public institutions and so on? From the reasoning it can be deduced that Sweden in general considers that Afghanistan and Somalia are not in grade to provide adequate reception facilities. But are these countries really the only one who does not fulfil the criteria?

It is also interesting to see the reasoning of the Migration Court during the ordinary process, especially due to the link between the assessment of practical impediments and exceptionally distressing circumstances. In one case (decision no. 2) the Migration Board established that the fact that the applicant had lost his parents because he had to flee the country does not equal being abandoned. In another case (decision no. 3) it was established that since he previously lived with his parents it could be presumed that they still resided in the same area, although they all had fled the country according to the applicant. In a third case (decision no. 4) the applicant had been trying to call the family for seven months but without results. Despite that, the Migration Court concluded that the family would presumable still reside in his home village. In my view, the conclusions that the Migration Court draws and the causal link that they seem to think exist between the two premises are not very clear. Firstly, the obligations to protect extend equally to unaccompanied and separated children, regardless of the reason as to why they have lost their family members. As a matter of fact, the parents could actually be the reason for the flight and a ground for the need of protection.

Linked to this discussion is the statement made by the Migration Court in another case. In the present case (decision no. 7) the Migration Board established that the fact that the applicant was able "to get by" prior to the departure for Sweden led to the conclusion that it could be presumed that he would be able to get by once he returned as well. The statement raises two concerns. Firstly, how do they define "get by"? The boy was living by himself more or less as a street child, surviving, yes, but is that enough? And does it really matter? Even though he was able to survive in his country of origin does not imply that our obligation ceases to exist and that we shall not resume responsibility once he is here.

# 5 Conclusion

The aim of the present thesis has been to examine the scope of protection and the application of Chapter 12 Section 18 indent 3 of the Aliens Act in relation to unaccompanied or separated children, with a particular focus on the new regulation under Chapter 12 Section 3(a), in order to identify whether the assessments carried out by the Migration Board are in line with our obligations to protect unaccompanied or separated asylum seeking children against being returned to unsafe and potentially dangerous situations in the country of origin and to ensure these children the same rights as every other child within the jurisdiction of the country.

Legal provisions are not always very specific and seldom include a list of rights or wrongs that purports to be exhaustive. This room of manoeuvre, a kind of margin of appreciation, affords the judiciaries to interpret and develop the law. In order to reassure that the aims and ambitions of the legislator are respected, the judiciary may seek guidance in the *travaux préparatoires* and case-law. In that context Chapter 12 Section 18 of the Aliens Act encounters two problems. Firstly, the *travaux préparatoires* are rather scarce and provide little guidance on how to define the criteria 'another particular ground' to not enforce a decision of refusal of entry or expulsion. The situation of unaccompanied or separated children is tangentially touched upon, merely stating that it could apply to a child that upon return in the country of origin cannot be properly taken care of because the parents have passed away. The *travaux préparatoires* preceding the adoption of the Return Directive elaborates slightly more on the obligation of the authorities, stating that it should be clarified that the definition of "adequate reception facilities" solely includes such institutions that are suitable to accommodate a child. However, consistently throughout the reasoning of the Migration Board, except for in one of the decisions referred to in the case-study, the discussion of the standard of the institutions is non-existent. On the contrary, the Migration Board states that they do not take a position on whether the applicant will even be granted accommodation. In the conclusion of the European Court of Human Rights in the case of *Mubilanzila* v. *Belgium*, the Court established the obligation to ensure, not solely that there will be a person receiving the child upon return, but also the obligation of the state authorities to make alternative plans, in case the primary plan fails. To not even consider whether the child will actually be accommodated can therefore not be in line with the obligations of the state to ensure the protection of the child. Secondly, since the decisions are not appealable the Migration Board of Appeal do not have the jurisdiction to issue precedents, which may result in an ambiguous and unequal application of the law. As a consequence, the transparency of the system remains weak, which is the just the opposite to the aim of the adoption of the regulation of impediments to enforcement and the strengthening of the rule of law.

Another problem is linked to the lack of legal representation during this state of the process. Since the ordinary proceedings have come to an end the person is not entitled to public legal representation, which may amount to problems framing the applications. From an economical point of view it may be understandable that society cannot afford to provide everyone with legal counselling even during an extraordinary process. However, the possible difficulties in framing the application should then be taken into consideration. This difficulty is linked to the discussion about responsibility to investigate and provide evidence. Some legal representatives have highlighted that there are cases where the person would have been granted a leave to remain if the same circumstances had been forwarded during the ordinary assessment,[158] which may partly depend on the lack of legal representation. The applicant may think that it is sufficient to claim that he or she is abandoned without providing any evidence. At that point, it could be discussed to which extent the Migration Board is responsible for informing the applicant that the claim is not sufficiently substantiated and ask him or her to provide further evidence.

A final reflection is associated with the time for assessing practical impediments. Pursuant to the *travaux préparatoires* practical impediments shall be considered already during the ordinary process and if it can be established that there are practical impediments that could be considered enduring, the Migration Board shall grant a residence permit based on exceptionally distressing circumstances. However, as quite clearly indicated in the reasoning of the Migration Court in the present cases it seems like they do not carry out any investigations in regard to the claims of the applicants of being unaccompanied or separated. On the contrary, in one of the refused applications of impediments to enforcement, the Migration Board stated that it could not be taken for sure that the applicant was abandoned. However, if during the enforcement it was discovered that she was truly abandoned the executive authorities would begin considering placing in a childcare institution. This conceivable unwillingness to make a decision and assume responsibility for a child may result in situations where the child spends long periods waiting. This may have serious implications on the child since, in the meantime, he or she is deprived the possibility to establish himself or herself and eventually may loose the capacity to form the future when the contact with the culture, the language and the country of origin is weakened. The child is then left in a vacuum and when the expulsion is finally to be carried out it is perceived as something impossible.[159]

To conclude, the existing international legal framework protecting children's human rights is all-embracing and provides determinate obligations that the states parties are bound by. The corresponding provisions in the Swedish Aliens Act may not be as protective, but it seems that there is a will to develop a stronger framework guided by the principle of the best interests of the child. However, there are still protection gaps that

[158] Nya migrationsprocessen, p. 321.
[159] SOU 1996:115, p. 52.

need to be filled and concepts that need to be defined more clearly before we can say that all children enjoy equal protection, regardless of their citizenship and status in society. As it stands today, it seems that it is acceptable to treat unaccompanied or separated children differently, lowering the acceptable living conditions, leaving them in uncertain situations for long periods. In order to render the process more transparent and in accordance with the rule of law, there is also a need for procedural changes, such as the introducing the possibility to appeal the age determinations and the assessments of practical impediments, or at least, provide better guidelines on how the assessments should be carried out and continue discussing the evidentiary rules, the responsibility to investigate and to lay down evidence. Steps are being taken in the right direction, but the goal, where the child is truthfully and fully respected and protected, is still distant.

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