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AN UNCOMMON EUROPEAN ASYLUM SYSTEM: SAFEGUARDING THE
RIGHTS OF UNACCOMPANIED MINOR ASYLUM SEEKERS

Master's Thesis in Public International Law

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Abstract for Master's Thesis

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The increase of asylum seekers in 2015-2016 highlighted the lack of procedural safeguards in the European Unions' asylum system. A portion of the asylum seekers were unaccompanied minors who arrived in the EU without a guardian. The minors seeking asylum should be granted the rights enshrined in The Convention on the Rights of the Child. In the context of asylum applicants, the central articles are article 3, the principle of the best interest of the child and article 13, the right to be heard and the child's opinions to be given due weight.

The issue is examined by comparing the different instruments governing the area and comparing different EU Member States practice establishing that there is variation between the state's methods during all stages of the asylum application. The European Convention on Human Rights is utilized in this thesis to assess whether states breach any of the human rights set forth in it. In the asylum application process, the rights assessed are the right to privacy (article 8) and the right to an effective remedy (article 13).

The thesis discusses the extent to which the Common European Asylum System and the European Union Member States safeguard the rights of asylum-seeking minors during the asylum application process and whether the processes are in accordance with the Convention on the Rights of the Child. There is a lack of common practices between the Member States as the legislation is primarily harmonized in theory. Asylum procedures are administrative procedures and Member States do not have a united administrative system and, therefore, there is variation between the processes.

Minors are entitled special protection due to their vulnerable position. Forms of protection include the right to legal aid and representation to ensure a fair asylum application process. This protection accommodates for the child's right to be heard. The Asylum Procedures Directive permits states not to offer legal aid to a minor who is likely to turn 18 before there has been a decision on their asylum status. This restricts the right of the child to be heard and does not ensure the use of the best interest of the child principle.

Age during an asylum application is important, as states are required to offer special protection to minors. The age of an asylum applicant impacts the decision on international protection as well. Unaccompanied minors undergo an age assessment during their asylum application process. Some states use medical examinations to assess the physical age which is a part of accepted evidence in age assessments. The examination methods differ, and some states apply methods which may violate applicants' right to privacy as established in the European Convention on Human Rights due to their invasive nature.

The states' margin of discretion is too wide to ensure a common procedure in all Member States. There are breaches of the Convention on the Rights of the Child by EU Member States. The EU legislation as it stands now does not specify the requirement for a common asylum application procedure sufficiently and there is a lack of case law to establish a common interpretation of the EU legislation.

Key words: common European asylum system, age assessment, unaccompanied minors, refugee, children, best interest of the child

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A Swedish Summary – En Svensk Sammanfattning

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Abbreviations

AIDA	Asylum Information Database
CEAS	Common European Asylum System
CFR	Charter of the Fundamental Rights in the EU
CRC	Convention on the Rights of the Child
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
NGO	Non-Governmental Organization
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

1. Introduction

1.1 Background

The issues unaccompanied minors face during the asylum process came to light during the refugee crisis in 2015-2016. The number of minors arriving in the European Union (EU) increased during the period of 2015-2016. In 2014, prior to the crisis, the number of minors seeking asylum was 160 145 and in 2015 it was 384 935 and a year later it was 398 255.¹ Some of the children travelled with their families or other guardians and some 96 500 (2015) and 63 300 (2016) children were unaccompanied minors. That is roughly five times as many unaccompanied minors as there was in the years 2008-2013. Many of the unaccompanied minors are boys aged 16–17 years.²

It is important to determine the age of a person as early as possible, because states have different obligations towards children and adults. States have obligations towards children, such as providing them with a representative and a faster asylum decision-making process. An asylum seeker's age impacts both the asylum process and the result of the asylum decision. Age must be considered when state authorities decide on granting international protection and what type of support a refugee has during and after his asylum process. Asylum seekers may not know their age and it is not possible to judge age by their appearance. Many minors arrive to the receiving states without proof of identity or other documents that can confirm their claimed age. Consequently, states must determine the age of unaccompanied minors.

The Treaty on the Functioning of the European Union (TFEU) established the EU shall have a common asylum system, which would mean a uniform established policy all

¹ Statistics from Eurostat <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do> accessed 8.3.2018

²Eurostat news release, Asylum applicants considered to be unaccompanied minors' 63 300 unaccompanied minors among asylum seekers registered in the EU in 2016, <http://www.europeanmigrationlaw.eu/documents/Asylum%20applicants%20considered%20to%20be%20unaccompanied%20minors.pdf> published 11 May 2017, accessed 8.3.2018

throughout the EU.³ However, currently there is no common approach to age assessment procedures and the practices differ between states.⁴

The EU has established a Common European Asylum System (CEAS) that strives towards common standards and procedures throughout the EU. The CEAS was established based on an assumption of mutual trust and mutual confidence between the Member States and their respective asylum systems.⁵ Critique towards the CEAS varies but one of the relevant issues to this thesis is that the system does not guarantee a common treatment in the Member States. The issue at hand is that of varying implementation mechanisms of the same set of rules Member States must oblige to. An uncommon asylum system shortens the rights guaranteed by CEAS: the promise that all asylum seekers receive uniform treatment and common chances of obtaining asylum - regardless of which EU Member State the applicant decides to submit his application.⁶ This rhetoric is the issue to be examined in this thesis, as the problem posed by an unequal asylum system is what causes differences at the administrative level of states.

Children are considered to be in a more vulnerable situation than adults and are entitled to a more extensive protection that states must take into account in their legislation and in practice.⁷ The Convention on the Rights of the Child (CRC) provides the rights guaranteed all children including, unaccompanied minors. The rights enshrined in the CRC should be respected in this context as all Member States have ratified the convention. The *Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection*,

³ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, art. 78

⁴ Council of Europe Children's rights division, *Age Assessment: Council of Europe Member States' policies, procedures and practices respectful of children's rights in the context of migration*, Council of Europe 2017 p. 9

⁵ Vedsted-Hansen Jens, "Reception Conditions as Human Rights: Pan-European Standard or Systematic Deficiencies?", in Chetail Vincent, De Bruycker Philippe and Maiani Francesco (eds) *Reforming the Common European Asylum System*, Vol. 39, Brill Nijhoff, 2016, pp. 317-352, p. 317

⁶ Camboulives, Sabrina L, "Luck of the Draw for Asylum Seekers in Europe: Why the Common European Asylum System Is a Breach of Justice and Why a Third Phase of Amendments Is Required", *Vermont Law*, Volume 42, 2016, pp. 393-452, p. 395

⁷ UN Committee on the Rights of the Child (CRC), General comment No. 6, 2005 p. 68

which is binding throughout the EU, includes safeguards regarding the procedural rights in age assessment procedures for children.⁸

1.2 Research questions and limitations

This thesis will examine the differences in treatment of unaccompanied minor asylum seekers by EU Member States. Seeking asylum is an intricate administrative process where Member States are affected by their own judicial traditions. A layer of complexity is added when a minor must undergo an age assessment procedure before a state can reach a decision on the applicant's asylum claim. The EU regulations and directives regulating this area of law will be examined and whether the legislation is in accordance with other international conventions, especially the CRC. The CRC must be respected by the EU and its Member States as all have ratified the convention. The provisions in the CEAS governing children's rights in the context of asylum have emphasised the importance of the CRC.⁹ Unaccompanied minors' asylum application process will be discussed with a focus on the age assessment procedure. The main focus is the compatibility between the EU legislation and the CRC and if the EU Member States are fulfilling their obligations towards the EU and the CRC by using the means and methods within their margin of discretion.

The thesis will provide for the importance the age of a person and how age functions in the EU based on the EU directives governing this area of law. States are bound to obligations towards refugees and children through the international conventions that the states have ratified. The obligations of states towards unaccompanied minors, and how states fulfil those obligations will be discussed. An asylum seeker's obligations and rights in relation to the state will also be examined. The safeguards that must be guaranteed unaccompanied minors during their asylum claim and age assessment will be considered according to the principle of the best interest of the child.

⁸ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (the Asylum Procedures Directive), art. 25.1

⁹ See for example the Asylum Procedures Directive, preamble. para. 33

There is harmonization to some extent between the Member States as all are bound by the same EU legislation. The directives leave states with the authority to decide how to achieve the standards set forth in the directives. Harmonization is present on a theoretical level but in practice there is variation between the implementation of the legislation which leads to an uncommon European asylum system. Member States may also introduce or use more favourable standards on procedures for granting and withdrawing international protection if those standards are compatible with the EU legislation.¹⁰

Age determination is the process that states use to determine a person's chronological age.¹¹ Age determinations are considered necessary because statutory age limits regulate individuals' rights and obligations in different phases of childhood and youth.¹² The age of an asylum applicant further affects the asylum procedure and the outcome of the asylum application. One of the immediate consequences of an improper age assessment may be that a minor is placed in a detention centre designated to adults. Long-term effects may be a wrongful assessment of the need of international protection. If a minor is granted international protection with a status as an adult, the minor will not have access to education, healthcare and other obligations states have towards minors.

There are also human rights investigated under European Convention on Human Rights (ECHR), and in particular Article 8, the right to privacy and Article 13, the right to an effective remedy.¹³ Privacy includes a person's physical and mental integrity that may be violated during the age determination, especially considering the possible medical age assessment methods. The right to an effective remedy includes, inter alia, the right to be heard and to receive a decision from the competent authorities within a reasonable time. In these matters, the individual's interests towards the state are regarded in accordance with the principle of proportionality and the margin of appreciation.

The medical age assessment discussion will not debate the methods used other than how it impacts the unaccompanied minors' procedural rights. There is a debate on what

¹⁰ Asylum Procedures Directive, art. 5

¹¹ European Asylum Support Office (EASO), *Age Assessment Practice in Europe*, 2014, p. 14

¹² United Nations Children's Fund, *Age Assessment: A technical note*, 2013, pp. 7-8.

¹³ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, articles 8 and 13

medical methods to use during an age assessment procedure, but the debate is better suited for a discussion within the medicinal field.

1.3 Material and method

The CRC will be used as the main source of the international law that the EU and the Member States are bound by. The CRC is the international instrument that covers the area of rights of children in the widest sense. The CRC Committee's General Comments will also be used as they have explored the safeguarding of an unaccompanied minor in a state that is not his state of origin. General comments are soft law, which means they are non-binding, but are often considered both in legislation at an EU level and many states do implement the recommendations in their national legislation. The CRC Committee intends the comments to be utilized as a tool to implement the rights enshrined in the convention.¹⁴ The comments are not binding but are generally considered authoritative and states are impacted by the interpretations found in General Comments and do use these in legislation.¹⁵

In Europe there are multiple overlapping legal regimes for the international protection of asylum seekers and refugees due to the multidimensionality of constitutional protection of human rights.¹⁶ This is why rights protected in the area can be discussed through multiple instruments. In the context of unaccompanied minors seeking asylum there are the already mentioned Refugee Convention and the CRC. In Europe the ECHR is an important instrument with its content as well as the case law that has established principles for the Member States. The ECHR requires decisions to be in accordance with the law, in this context meaning national, international and European as well as EU law.¹⁷

¹⁴ CRC/C/4/Rev.4 Rules of Procedure, 2015, supra note 60, Rule 77

¹⁵ International Law Association, "Interim Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals", in *International Law Association Report Of The Seventieth Conference* 507, 516–26, 2002

¹⁶ Garlicki, Lech, "Cooperation of courts: the role of supranational jurisdictions in Europe", *International Journal of Constitutional Law*, Vol. 6 Issue 3-4, 2008, pp. 509–530, p.509

¹⁷ ECHR, art. 53, see also: Ippolito, Francesca and Velluti, Samantha, The relationship between the ECJ and the ECtHR: the case of asylum, Dzehtsiarou, Kanstantsin, Konsadinides, Theodore, Lock, Tobias and O'Meara, Noreen (eds.), *Human Right Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR*, Routledge, 2014, pp.156-187, p. 156

Lastly, the European Court of Justice (ECJ) has the power to rule on all breaches within the EU legislation Member States are bound by. The ECJ has an important mandate and potential to impact Member States implementation of the legislation and because of this its case law is used as a source in this thesis.

This study will use Finnish legislation and practice to exemplify the implementation of the EU legislation to some extent. Finland is used as a baseline because it is quite the average country in the terms of procedures regarding unaccompanied minors. The asylum procedure in Finland includes most of the possible phases an unaccompanied minor will face during an age assessment and asylum application process. All states will not be featured in this thesis but states which stand out either positively or negatively will be included.

The EU directives in this area of law are of minimum character, which means that states may use their own discretion when choosing means and methods to achieve the directive's requirements. Member States may also introduce or use more favourable standards on procedures for granting and withdrawing international protection as long as those standards are compatible with the EU legislation.¹⁸ The EU has attempted normative sharing when implementing CEAS. This means that there is harmonization in the legal norms and the legislation that states follow. The Member States have their individual administrative systems and procedures which are not identical. This is accurate regarding asylum procedures, as procedures have not been harmonized on a practical level, contrary to the guarantees set out in the Asylum Procedures Directive.¹⁹ The legal framework for CEAS and the wide discretion it allows for Member States may have a negative impact on how protection standards are implemented in practice. It may also constitute an obstacle to achieving the level of harmonization and protection in a common system as it is defined in the TFEU.²⁰

¹⁸ Asylum Procedures Directive, art. 5

¹⁹ De Bruycker, Philippe and Tsourdi, Evangelina, "Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension", Chetail Vincent, De Bruycker Philippe and Maiani Francesco (eds) in *Reforming the Common European Asylum System*, Vol. 39, Brill Nijhoff, 2016, pp. 473-538, p. 502

²⁰ Pollet Kris, "A Common European Asylum System under Construction: Remaining Gaps, Challenges and Next Steps", in Chetail, Vincent, De Bruycker, Philippe and Maiani, Francesco (eds) *Reforming the Common European Asylum System*, Vol. 39, Brill Nijhoff, 2016, pp. 74-97 p. 79

The EU asylum *acquis* is the building stones of the EU asylum systems and consists of the following legal instruments: Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (the Asylum Procedures Directive); Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (the Reception Directive); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (the Qualification Directive); Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (the Dublin III directive); Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice.²¹ These are the instruments that regulate asylum at the EU level.

²¹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), (the Asylum Procedures Directive)

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), (the Reception Directive),
Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), (the Qualification Directive),

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (the Dublin III directive),

Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011 (the Eurodac Directive)

The EU directives discussed and used in this thesis are in force at the time of writing. There has been a suggestion to adjust the regulations and directives once more.²² All the directives regulating migration have been considered to be recast and to be transformed to Regulations. The new suggested asylum procedure's legislation, which is of importance regarding unaccompanied minors, include many amendments which have the potential to offer a greater protection during the asylum application process. The new suggested Regulations have been drafted with the difficulties and challenges from the current legislation in mind. It is however difficult to determine if or when these changes would take place as the suggested legislation is yet to be approved. These new directives are not further discussed as they do not impact the situation at hand.

1.4 Terminology

The CRC uses the phrase “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier” to define who is a child.²³ This is the foundation of the laws of many states, and it is natural that this thesis also follows the definition set by the UN. However, the use of the word minor will be prevalent throughout.

The EU Qualification Directive defines unaccompanied minors as

‘unaccompanied minor’ means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States’.²⁴

This is the definition that will be used in this thesis, but it must be noted that there are slight variations used in other documents.

²²Council of the EU: Common European asylum system reform: Council ready to start negotiations on qualification and protection standards, Press Release 489/17 19/07/2017

²³ CRC, art. 1

²⁴The Qualification Directive, art. 2

The Refugee Convention defines a refugee as a person who had "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".²⁵ The EU legislation use this definition as well.²⁶

All asylum applicants do not satisfy the criteria of being identified as a refugee as defined by the Refugee Convention. Many states or regional inter-governmental organisations, such as the EU, have established different forms of protection for such persons.²⁷ These additional forms of international protection may be used by states in situations of unexpected increase of irregular immigration, as is the context in this thesis. The different forms of protection may be used due to factual circumstances which might prevent states from providing access to the normal procedure for asylum.²⁸ In these situations the principle of *non-refoulement* in both refugee law and international human rights law obliges the State to grant some form of temporary protection. The Refugee convention prohibits states from expelling or returning a refugee in any manner to the frontiers of territories where his life or freedom would be threatened on account for his race, religion, nationality, membership of a particular social group of political opinion.²⁹ Several international law instrument have upheld this principle, and it is not subject to derogation.³⁰ Subsidiary protection is an important concept in the EU as it broadens the possibility for international protection for asylum seekers.

1.5 Disposition

This thesis will discuss the age assessment process from first contact with the receiving states authorities until the process of appealing and the issue of aging out. Chapter two

²⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, art. 1A (2), The convention is also known as the Geneva Convention

²⁶ The Qualification Directive, preamble, para. 14

²⁷ International Commission of Jurists, *Migration and International Human Rights Law*, Practitioners Guide No. 6, 2011 p. 65

²⁸ *Ibid.* p.66

²⁹ The Refugee Convention, art. 33.1

³⁰ See for example: UN General Assembly resolution 2132 (XXII), Declaration on Territorial Asylum of 1967 Article 3, 14 December 1967, Conclusion No.79, UNCHR, *op. cit.*, fn, 80, para. i

will outline the relationship between the different instruments used in this thesis. The complexity and the use of different instruments functioning in the EU warrants this, as it is important to know the limitations and powers of the instruments. Chapter three will begin the discussion on asylum procedures for unaccompanied minors seeking asylum and examine what role border control and external Schengen border has on this group. Chapter four will focus on the migration authorities' actions as well as the safeguards that are in place for the presumed minors as well as principles of standard of proof and benefit of the doubt. This chapter describes and discusses what happens prior to the age assessment and what rights should be guaranteed the unaccompanied minor.

The fifth chapter discusses the age assessment itself and what it entails for the unaccompanied minor as well as the states responsibilities and obligations in this context. The chapter focuses on document assessment, mental assessment and physical assessment of the applicant. Chapter six will examine the judicial process that is part of the age assessment, reaching a decision regarding international protection and what safeguards are in place to protect minors who are aging out of the process Lastly, chapter seven will conclude this thesis.

2. The relationship between the different instruments

2.1 The relationship between the United Nations Conventions and the EU

There is not a single instrument in international law that establishes the obligations states owe to a refugee child. The mandate of the Refugee Convention extends to everyone, including children. However, the convention does not make any reference to refugee children.³¹ The Refugee Convention focuses on adults fleeing from persecution as was the context at the time of drafting the convention. There has been criticism aimed at the convention because of this, as it leads to refugee law only being practiced from an adult perspective and viewing unaccompanied minors as refugees first and as children second.³² The Refugee Convention was drafted in a time before children were fully considered rights-bearers as that was universally established in the CRC in 1989.

The Refugee Convention is a universal humanitarian treaty established by the United Nations (UN). The interpretation of the Refugee Convention differs from state to state and there is no international adjudicative mechanism for refugee law.³³ The European Court on Human Rights (ECtHR) and the ECJ have read the convention through the lens of the principles of non-refoulement and the EU asylum regulations. The CEAS has been modelled on the refugee convention and the ECJ used it as a “direct standard of decision”.³⁴ As the rulings from the ECJ are binding for all national courts, it has generated “definitive statements on the interpretation of the Geneva Convention to be applied in the EU”.³⁵ The Refugee Convention as such should be interpreted in a consistent manner throughout the EU. Furthermore, the case law from the ECJ and the ECtHR has fulfilled the need for a sufficiently open and adaptable text to reflect the changing and evolving types of persecution as well as identified the need for complementary frameworks for persons in need of subsidiary or temporary protection.

³¹ Pobjoy, Jason, “A Child Rights Framework for Assessing the Status of Refugee Children”, Juss S. and Harvey C. (eds), *Contemporary Issues in Refugee Law*, Edward Elgar, 2013, pp. 91-138, p. 107

³² Pobjoy, Jason, *The child in international refugee law*, Cambridge, 2017, p. 3

³³ Ippolito, Francesca: A European Judicial Dialogue on Refugee Rights, *Human Rights & International Legal Discourse*, no. 9, 2015, p. 207

³⁴ Ibid.

³⁵ Ibid.

The refugee convention was very narrow in its initial scope and the case law from the regional instruments in the EU has satisfied the need for a wider interpretation of the convention. National courts have the opportunity to reflect the decisions of supranational courts. This is mostly theoretical as little has changed in the way national courts make decisions within the scope of refugee law.³⁶

The CRC is the leading international source of justice for children's rights and it stipulates that the best interests of the child must always be a primary consideration.³⁷ This principle is found in most rules regarding children, including the directives and national legislation in focus in this thesis. The Committee on the Rights of the Child (CRC Committee) has ruled that Article 3.1 of the Convention, which states that in all actions involving children, whether taken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interests of the child shall be "an independent duty for the states, self-realization and can be invoked before the court".³⁸ The CRC Committee has also acknowledged Article 3 as a principle of interpretation. The intention behind this acknowledgement is that if a law is open to more than one interpretation, the interpretation that most effectively serves the best interests of the child should be chosen.³⁹

There are shortcomings in the legal area of children as refugees, as children's and refugees' rights are separate legal areas that do not offer a united comprehensive protection for child refugees. In spite of the vulnerability of unaccompanied and separated children, studies show that states have a tendency to treat them as migrants first, and as children second, placing the issue of border control above that of child protection.⁴⁰ There are no specific written procedural requirements in this area of international law in, for example, conventions initiated by the UN. There are also no procedural requirements

³⁶ Ippolito, p. 208

³⁷ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577 (CRC), art. 3

³⁸ United Nations Committee on the Rights of the Child (CRC), General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44(6)), 34th session, UN Doc CRC/GC/2003/5 (2003) p. 12

³⁹ United Nations Committee on the Rights of the Child (CRC), General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44(6)), 34th session, UN Doc CRC/GC/2003/5, 2003, p.12

⁴⁰ J. Bhabha and M. Crock, *Seeking Asylum Alone: A Comparative Study*, 2007, p.21

established within the EU that are sufficiently specific to protect children in an intricate asylum procedure. The process of receiving children as refugees should be in accordance with the articles set out in the CRC. In theory the protection that the CRC offers is universal as most states have ratified the convention.⁴¹

The CRC or the CRC Committee has not discussed a situation when a person's age is disputed and does not refer to the issue of age assessment procedures and guarantees in these instances.⁴² Protection of unaccompanied minors was not an issue to the same extent as it is today when the CRC was drafted, which is visible by the fact that children as refugees are only referred to briefly in article 22 of the convention.⁴³ The articles first paragraph states that

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.⁴⁴

The paragraph lacks specific protections for children and relies on other conventions and instruments to offer guarantees for minors. Considering the time of the drafting of the CRC, one can assume that there was not a political or judicial climate that allowed the convention to include rules on how to implement this obligation. At the time the CEAS, or other regional instruments regulating this area, did not exist. The protection of unaccompanied asylum seekers law was the Refugee Convention.

2.2 The relationship between the ECJ and the ECHR

The ECHR and its court are a separate system from the EU legislation and the ECJ. The two have different jurisdictions. In the question of human rights, the ECJ may at times judge in cases regarding human rights. That is, however, due to a different mechanism

⁴¹ All states except the United States of America has signed and ratified the Convention

⁴² European Migration Network Synthesis Report for the EMN Focussed Study 2014 Policies, practices and data on unaccompanied minors' in the EU Member States and Norway Synthesis Report: May 2015 p. 41

⁴³ Ibid. p.41

⁴⁴ CRC, art. 22.1

than cases that are discussed under the ECtHR and its convention. There are some similarities within the systems, and they are both important in the context discussed. There must be a distinction between the two and how they operate differently. The reason why both are examined from the perspective of unaccompanied minors seeking asylum. The relationship between the two is complex and the judgement from one may have an impact on the other court.

One must remember, and consider, that the EU was originally formed as an economic and political union with very little regard to human rights. The area has evolved, and the EU is progressively developing a genuine human rights policy, which is a natural step as EU law has expanded into more sensitive areas regarding fundamental rights such as immigration and asylum law.⁴⁵

The major differences between these courts is that the ECJ possesses a jurisdiction encompassing breaches of all EU legislation and must ensure the respect of this legislative approximation of its Member States. The ECtHR on the other hand has a jurisdiction limited to guarantee the observation of the minimal standards of protection of the rights enshrined in the ECHR.⁴⁶

ECJ does not make full use of the margin of appreciation doctrine but does follow a similar principle often called the margin of discretion.⁴⁷ States are granted this discretion to use in their national legislation and implementation. The ECJ considers specific factors to impact the scope of the margin of discretion, such as the existence or absence of a European consensus in the field in question, or the degree of harmonisation provided by EU legislation on the level at which Member States must protect the fundamental right concerned.⁴⁸ The margin of discretion has a wider meaning in the ECJ, compared to the ECtHR, and it covers the extent to which States may derogate from fundamental rights, but also the discretion states might be accorded when implementing their own policies,

⁴⁵ Claes, M. and de Visser, M., "The Court of Justice as a Federal Constitutional Court: A Comparative Perspective", in E. Cloots, G. De Baere and S. Sottiaux (eds.), *Federalism in the European Union*, Hart Publishing, 2012, p. 83, supra note 29

⁴⁶ Parras, Francisco Javier Mena, *From Strasbourg to Luxembourg? Transposing the margin of appreciation concept into EU law*, Working paper no. 2015/7, Centre Perelman de Philosophie Du Droit, 2015, p. 5

⁴⁷ Ibid.

⁴⁸ Ibid. p. 13

as exceptions to EU law.⁴⁹ The uniform application of EU legislation is in the ECJ:s own words “a fundamental requirement of the Community legal order”.⁵⁰ In the context of refugees this is a main consideration for the CEAS and its implementation as a uniform application of EU legislation possesses the potential to stop refugees from attempting to seek asylum in a specific EU Member State instead of the EU as a whole.

The ECJ does not cover breaches against the ECHR which has its own court. The ECtHR focuses on breaches on its convention and the breaches can be made by states breaching the convention. Due to the lack of explicit methods regarding the age assessment of unaccompanied minor asylum applicants there is a potential for states to breach the ECHR even if they are acting within the rules set out in the CEAS.

If the ECJ were to judge in cases concerning the CEAS, such as the court did in the case regarding family reunification, states bound by the directives will need to amend their practice to fall in line with the ECJ: s judgement. It is not within the ECJ:s competence to rule on the compatibility of national law with provisions of EU legislation but to give a ruling on the interpretation of the Community law in order to enable national courts to assess the compatibility of their national legislation.⁵¹ The rulings given by the ECJ will in practice determine the outcome of such assessments as they have an *erga omnes* effect. According to the ECJ this procedure is “essential for the preservation of the Community character of the law established by the TFEU and has the object of ensuring that in all circumstances this law is the same in all States of the Community”, and therefore “divergences in the interpretation of Community law which the national courts have to apply”.⁵² A coherent implementation of the CEAS in all Member States can be argued to be dependent on a ruling on many of the provisions in the directives, which is not viable as it is very time consuming to rule on all articles or possible scenarios that might occur.

⁴⁹ Fichera, M. and Herlin-Karnell, E., “The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?”, *European Public Law*, Vol. 19 Issue 4, 2013, pp. 759-787

⁵⁰ CJ, Judgement in *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn*, joined cases C-143/88 and C-92/89, ECLI:EU:C:1991:65, para. 26

⁵¹ CJ, Judgement in *Lamaire NV v Nationale Dienst voor Afzet van Land- en Tuinbouwprodukten*, C-130/93, ECLI:EU:C:1994:281, para. 10.

⁵² CJ, Judgement in *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-166/73, ECLI:EU:C:1974:3, para. 2.

A consequence of the CEAS and the minimum character of the directives is that it leads to states having broad margin of discretion if it is examined from the perspective of the ECJ.⁵³ This is due to the principle of subsidiarity and other structural factors. This leads to broad differences between state practices in the implementation of the directives. The differences would be less of an issue if the directives were more explicit in regulating the asylum process.

In the context of the ECHR the states discretion would be considered the margin of appreciation. The margin of appreciation in this context is meaningful in the variation of the processes and results of the asylum application that the unaccompanied minors will receive depending on which state that processes the asylum application. The margin of appreciation is central when discussing human rights issues from the perspective of the ECHR and to consider the weighing of the interests of the person and the state. This issue is a part of the proportionality and margin of appreciation discussion which is often essential in cases judged by the ECtHR. The margin of appreciation must be respected but it is ultimately for the Court and the Commission to decide whether an infringement of any right, in this cases breaches of mainly article 8 and article 13, under one or more of the public interest exceptions is compatible with the ECHR.⁵⁴ Article 13 and the right to an effective remedy has the potential to be breached when applicants cannot fully exercise their right to appeal a decision. Breaches of the EU directives such as not respecting the time limit are within the mandate of the ECJ but may also be considered under article 13.

⁵³ The margin of appreciation was developed by the ECtHR to give leeway for states in practical terms to derogate from the obligations set in the ECHR (*Application No. 176/56* (Greece v United Kingdom, "Cyprus"), 2 Yearbook of the European Convention 1958-1959, 174-199 at 176). The doctrine reinforces the ECHR as a supervisory framework. The Court must account for the differences between domestic legislation when applying this principle (*The Sunday Times v United Kingdom*, no. 6538/74, § 61, ECHR 1979 A30). The margin of appreciation can be narrow or broad, depending on the right

⁵⁴ Greer Stephen, The exceptions to Articles 8 to 11 of the European Convention on Human Rights, *Human rights files no. 15*, Council of Europe Publishing, 1997, p. 16

2.3 The relationship between the EU and ECHR and the Member States

No cases regarding the age assessment has been brought to either of the courts. In the framework of the ECJ this means that no state has been found to violate the EU legislation. In the context of the ECHR the lack of case law implies that there have not been any judgements on whether the human rights enshrined in the ECHR have been violated. This lack of judgements does not imply that states are not breaching the instruments they are bound by. The lack of case law can imply that it is a time-consuming process to use either of these courts, especially considering the requirement of exhausting domestic remedies to their full extent to satisfy the admissibility criteria.

The ECtHR has observed in the case *KRS v United Kingdom*⁵⁵ that the asylum system is in place to protect fundamental rights including both the substantive rights guaranteed by the convention as well as the mechanisms controlling the implementation.⁵⁶ This alludes to the Bosphorus presumption which was established in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*.⁵⁷ The presumption is that one can presume that states follow the EU directives and conventions they are bound to, in this context especially the CRC and the ECHR, to a standard that is expected. The presumption of compliance is an important aspect of a trusted judicial system which may still at times be questioned. This presumption can be used as a base for this whole analysis, but it does not always apply as states can at their own discretion function and implement the regulations needed as they wish.

⁵⁵ *KRS v United Kingdom*, appl. 32733/08 2 December 2008 (parag. 16???)

⁵⁶ *Ibid* 16

⁵⁷ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, appl. 45036/98, 30 June 2005

3. Border control and Schengen

3.1 Presumed minors

This chapter will only focus on the unaccompanied minors who are asylum applicants and exclude unaccompanied minors not seeking asylum. In this chapter “presumed minor” is a person who lacks identification and the states authorities are not confident if the person is an adult or a minor.

There are some unaccompanied minors who arrive at the external borders of the EU not seeking asylum.⁵⁸ These minors are generally accepted into the state even though states do not have an obligation to permit non-asylum seeking unaccompanied minors to enter their territory.⁵⁹ A person not seeking international protection can be refused at the border in accordance with the states’ national legislation. States do not have an obligation to grant everyone a right to enter. Many states do however allow underaged third country nationals to cross the border into their territory.⁶⁰ Refugees do have a right to seek international protection as per the Refugee Convention and at a European regional level per the Charter of Fundamental Rights of the European Union.⁶¹ There is no obligation from the state to grant international protection to all asylum applicants but there is nothing restricting a person from practicing his right to seek asylum in any state.

The CRC Committee has stated that states have an obligation to identify an unaccompanied minor immediately upon his arrival or as soon as the authorities become aware of the minors’ presence in their state.⁶² States identifying everyone entering their territory is a part of states’ sovereignty, and they are entitled to control borders and to

⁵⁸ There is a lack of data and statistics as states generally only collect information on asylum seekers

⁵⁹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), annex 5 states that a third-country national asking for international protection on Member State territory shall be given access to relevant Member State procedures in accordance with the Union asylum

⁶⁰ European Migration Network, 2015, p. 16

⁶¹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art. 14, European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art. 18

⁶² UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, para. 31

identify those entering the state. The obligation to identify the minor can be, from the child's perspective, connected to article 8 of the CRC which requires states to respect a minor's identity as well as establishes an obligation for a state to provide appropriate assistance and protection to re-establish his identity, if the minor has been illegally deprived of some or all of the factors of his identity.⁶³

The same General Comment encourages prompt registration by means of an initial interview, conducted by qualified professionals in a manner that is age-appropriate, gender sensitive and in a language the child understands to collect biodata and social history to identify the minor.⁶⁴ Other information should be collected if possible, such as the identity of his parents, other siblings or relatives and the child's citizenship. The comment continues to encourage the recording of further information, in order for the state to identify a child's needs, and to later on be able to fulfil them. This additional information should include the reason for the minor being unaccompanied and an assessment of particular vulnerabilities concerning health aspects and if the child has any material or other protection needs, for example, from trafficking or other trauma.⁶⁵

After the identification process unaccompanied minors should be provided with his own personal identity documentation as soon as possible.⁶⁶ The tracing of his family should be initiated as soon as possible with necessary safety measures in mind.⁶⁷ The act of identifying if a person is in a vulnerable position and in need of special safeguards is emphasized in the EU Asylum Procedures Directive.⁶⁸ The assessment of vulnerability should be made within a reasonable time. If the assessment concludes the person is in a vulnerable position the applicants are to be provided with adequate support in order for them to benefit from the rights they have as vulnerable persons. The support they are entitled must comply with the obligations set forth in the Asylum Procedures Directive.

⁶³ United Nations Committee on the Rights of the Child (CRC), General comment no. 6, para. 31

⁶⁴ Ibid. para. 31 b

⁶⁵ Ibid. para. 31 b

⁶⁶ Ibid. para. 31 d

⁶⁷ Ibid. para. 32 e. The tracing of family should not endanger the family or the minor or place either at a higher risk of persecution

⁶⁸ Asylum Procedures Directive, art. 24

The Member States must ensure that the special procedural guarantees are addressed at a later stage if the need arises later in the process.⁶⁹

At this stage of the process the CRC Committee recommends the state to collect information for purposes of identifying the minor's need for international protection.⁷⁰ This includes all available information that would grant international protection due to a "well-founded fear of being prosecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" in the minor's country of origin in accordance with the Refugee Convention.⁷¹

The borders of the EU are regulated by the Schengen Borders Code.⁷² The code is an element of the attempt to unify the border control of all the EU external borders. The protection of the external borders is central in the context of free movement which is enjoyed in the Schengen area. The directive regulates a broad range of the aspects of border control, including some specifications on how the border guards should proceed when minors are crossing the external border.⁷³

The code includes both scenarios when a minor is in the care of a guardian or other family as well as how the border guards should proceed if a minor is unaccompanied. The guards should pay special attention to all minors travelling both with and without an adult.⁷⁴ In the case of minors travelling unaccompanied, border guards shall ensure by means of thorough checks on travel documents and supporting documents, that the minor is not leaving his original state or entering the territory of a new state against the wishes of the minor's guardian.⁷⁵ Member States must ensure that the border guards are specialized and properly trained for detecting and dealing with situations involving vulnerable persons, such as unaccompanied minors and victims of trafficking.⁷⁶ Many states do provide training in practice to their border guards and police force to identify minors and

⁶⁹ Asylum Procedures Directive, art. 24

⁷⁰ United Nations Committee on the Rights of the Child (CRC), General comment no. 6 p.31 c

⁷¹ UN General Assembly, Convention Relating to the Status of Refugees, art. 1A(2)

⁷² Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). All Member States are not Schengen states but as a majority are the Schengen Borders Code is used here.

⁷³ Ibid., annex VII, art. 6

⁷⁴ Ibid. annex VII, art. 6.1

⁷⁵ Ibid. annex VII, art. 6.3

⁷⁶ Schengen Borders Code, art. 16

particularly victims of human trafficking. It is arguable whether all border guards of all Member States receive this training or if the training available is sufficient. Some states training includes child-friendly communication to ensure that the minors have the best outcome possible.⁷⁷

The lack of harmonization due to the lack of specified procedures in the directives between the Member States practice leads to differences in the treatment of minors, depending on where the minor crosses the border into to the EU. Border control personnel does generally have the obligation to establish the identity of a minor or anyone who is attempting to enter the state. The border control then often refers the unaccompanied minor to the child protective services or the immigration authorities which will carry on with the investigation and safeguard the minor's rights.⁷⁸

Many asylum seekers arrive to the border of the country where they will seek asylum without identification. The lack of identification is a widespread issue affecting the borders of many states, including the EUs external border. The border guards must identify the persons crossing the border into the state and the EU. Valid identification is hence a must, and in Finnish legislation the need for identification that can be found in the Finnish Border Control Act.⁷⁹ The legislation includes the right to search a person who is unable to provide the authorities with identity documentation. If the person does not have any identification at all he is still going to be permitted to enter the state and apply for asylum. The identification process is important in asylum cases, and is a part of the asylum process. States will attempt to identify the person seeking asylum until there is a satisfactory result.

Different assessment procedures at the border are applied to control the requirements for entry depending on the state and the individual case. Border control authorities will usually try to establish the identity of the minor, whereby a search can be performed for relevant documentation and register the minor's presence. In the process the information

⁷⁷ European Migration Network, 2015, p. 17

⁷⁸ Ibid. p. 17

⁷⁹ Finnish Border Control Act (Gränsbevakningslagen) 578/2005, 36 §

gained will be shared in the EU database called Eurodac where the Member States share their registered asylum seekers.

Member States have an obligation to refer the minors, or the unconfirmed minors, to the child protective services due to reasons of the minors' vulnerability.⁸⁰ Vulnerability in this context implies they are children who are considered more vulnerable by many international instruments and referred to as a vulnerable group in the EU directives.⁸¹ States proceed in two ways at this point of a minor's arrival. Many state border authorities immediately refer any unaccompanied minors to childcare authorities without confirmation of his age.⁸²

States which do not assess age immediately can proceed with an age assessment at any point during the asylum or migration procedure.⁸³ States authorities can, when there is doubt about the authenticity of documents acquired at the border or doubt about the age claimed, usually ask for an age assessment before the minors are referred to the child protection authorities.⁸⁴ This is generally done by the immigration authorities as it falls in under the area of their duties.

3.2 Accelerated procedures and border procedures

Accelerated procedures, or border procedures, are generally not applied to minors attempting to enter a Member State. Article 25.6 in the Asylum Procedures Directive restricts states' rights to apply these fast procedures on applicants that may be minors.⁸⁵ When proposing the exempt for minors the European Commission originally attempted

⁸⁰European Migration Network, 2015, p. 17

⁸¹ Reception Conditions Directive, art. 21

⁸² Ibid.

⁸³ European Migration Network, 2015, pp. 17-18

⁸⁴ Ibid. p. 18

⁸⁵Peers, Steve, Loreno-Lax, Violeta, Garlick, Madeleine, Guild Elspeth (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Volume 3: EU Asylum Law, Brill Nijhoff, 2015, p. 246

to exempt minors fully from accelerated procedures, safe third country rules, border procedures and restrictions on access to legal aid.⁸⁶

Article 31.8 lists ten possible grounds for adult asylum seekers to be subject to accelerated procedures.⁸⁷ Article 25.6 limits these ground to only three for unaccompanied minors: (i) the child had come from a “safe country of origin” as defined by the Asylum Procedures Directive; (ii) she or he has introduced a subsequent application which is admissible (because it contains new elements) under Article 40.5; or (iii) she or he is “for serious reasons ... considered a danger to the national security or public order of the Member State” or has been forcibly expelled from a Member State on public security or order grounds.⁸⁸ This may be interpreted as an acknowledgement that a child requires more time than adults in order to effectively present his claims, and that accelerated procedures are not suitable for minors.

Border procedures may be applied on minors under the same circumstances as accelerated procedures as well as an additional three situations: (iv) if there are reasonable grounds to believe that the child has come via a “safe third country”; (v) if the applicant has misled the authorities by presenting false documents; or (vi) if he has destroyed or disposed of documents that could have helped establish identity or nationality.⁸⁹ Article 25.6 of the Asylum Procedures Directive states further that border procedures may only be used

...in individual cases where there are serious grounds for considering that the applicant is attempting to conceal relevant elements which would likely lead to a negative decision and provided that the applicant has been given full opportunity, taking into account the special procedural needs of unaccompanied minors, to show good cause for the actions referred to in points (v) and (vi), including by consulting with his or her representative.⁹⁰

The European Commission has in its latest communication concerning border procedures and minors in migration identified more guidelines which the Member States should

⁸⁶ European Commission, Recast Proposal, COM (2009) 554, Explanatory note, p. 11

⁸⁷ Asylum Procedures Directive, art. 31.8

⁸⁸ Asylum Procedures Directive, art. 25.6, see also Peers, Steve, Loreno-Lax, Violeta, Garlick, Madeleine, Guild Elspeth (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Volume 3: EU Asylum Law, Brill Nijhoff, 2015, p. 246

⁸⁹ Ibid. p. 247

⁹⁰ Asylum Procedures Directive, art. 25.6

follow.⁹¹ For comprehensive data and information about minors, the migrant should be identified and registered as a child and whether he is unaccompanied, separated or travelling with family, nationality, age and sex when he enters the EU.⁹² This data should be available in all Member States. Children should be prioritized in all border-related procedures and receive adequate support from specialized staff in the process of identification and registration, and the minors should be treated in a child-friendly and gender-sensitive manner during this process.⁹³ The Commission has acknowledged the vulnerability of children seeking asylum in all situations, and the communication can be argued to be an attempt for states to improve the safety of children.

This is a new development and only a recommendation. In a theoretical sense this is an improvement for safeguarding unaccompanied minors, but as there is no practice yet to show it is difficult to say whether these guidelines are improving in the practice of these procedures.

⁹¹ Communication From The Commission To The European Parliament And The Council, The protection of children in migration {SWD(2017) 129 final} Brussels, 12.4.2017

⁹² Ibid. p. 6

⁹³ Ibid.

4. Migration authorities' procedures and safeguards during the age assessment

4.1 Assessment of the best interest of the child

The term *best interest of the child* is central in this thesis and should be explained. The term is widely recognized as it is established in article 3 of the CRC. It is recognized in most jurisdiction and provides a wide protection for children. Article 3 in the CRC states that

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

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.⁹⁴

The CRC Committee has identified the principle as an method for interpretation to apply when ruling in cases concerning children and to judge manner which favours the child's interests the most.⁹⁵ In its most basic interpretation, the principle means that all decisions made regarding children should prioritize the child's best interest first and to treat every child in an individual manner to make judgements based on the child's specific situation. In the context here, it implies that age assessment decisions should favour the person's youngest possible age when questioning the age assessment's margin of errors, for example.

⁹⁴ CRC, art. 3

⁹⁵ United Nations Committee on the Rights of the Child (CRC), General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44(6)), 34th session, UN Doc CRC/GC/2003/5 (2003), para. 12

The best interest of the child principle is an internationally recognized principle and reinforced by the CRC Committee. The international case law where the principle has been implemented may be from any state or international instrument that has bound itself to respect the rights set forth in the CRC. As stated earlier, the Member States of the EU have ratified the CRC, and the preambles of the EU directives regulating this area of law include a clause that the best interest of the child must be respected.

The EU framework is in focus in this thesis but to some extent this principle will be discussed from a universal perspective. Article 3 of the CRC can be used as a method to secure the substantial rights set forth in the convention as the article is widely applicable in the context of the other rights guaranteed by the convention.

The Committee of Ministers of the Council of Europe has adopted the Guidelines on Child-Friendly Justice.⁹⁶ The concept of child-friendly justice is rooted in international children's law, in particular in the child's right to be heard and the child's right to participation as is laid down in the CRC. This concept has emerged in the European human rights system and with the adoption of the guidelines the concept has become a part of the European legal and political framework concerning the position of children in the civil, criminal and administrative justice systems.⁹⁷ Child-friendly justice aims to shift the focus in justice systems on children's rights to include assessments of sensitivity of children's interests and to be more responsive to children's participation in all decisions made concerning them.⁹⁸

Child-friendly justice should be distinguished from other concepts such as access to justice, which can be interpreted as the "ability to obtain a just and timely remedy for violations of rights put forth in national and international norms and standards"⁹⁹ which will be discussed later in the context of the right to an effective remedy in the ECHR. Justice for children is a concept not to be confused with child-friendly justice, as it is a

⁹⁶ Committee of Ministers Of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 2010

⁹⁷ Ton Liefaard, "Child-Friendly Justice: Protection and Participation of Children in the Justice System", *Temple Law Review* 88, no. 4, 2016, p. 905-927, p. 905

⁹⁸ *Ibid.* p. 906

⁹⁹ UN Commissioner for Human Rights, Access to Justice for Children, 4, UN Doc. A/HRC/25/35, December 2013

method “ensuring full application of international norms and standards for all children who come in contact with justice and related systems as victims, witnesses and alleged offenders; or for other reasons where judicial, state administrative or non-state adjudicatory intervention is needed, for example, regarding their care, custody or protection”.¹⁰⁰ Child-friendly justice resemblances most the child-sensitive approach by the UN Guidelines in Justice in Matters Involving Child Victims and Witnesses of crime as it is defined as “an approach that balances a child’s right to protection and that takes into account a child’s individual needs and views.”¹⁰¹

The Guidelines on Child-Friendly Justice defines the concept as

Child-friendly justice refers to justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child’s level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.¹⁰²

These guidelines add another layer to the expectations and requirements for states to act when a minor is undergoing a judicial or other process in a Member State. The guidelines are based on the CRC and other international law instruments, which is reflected in the emphasised values of children as right bearers and their dignity. The guidelines are only recommendations and not legally binding for the Member States, however, they do carry political meaning.¹⁰³ The guidelines have also been referred to by the ECtHR in cases concerning children which legitimizes the guidelines as a source of law.¹⁰⁴ It may be argued that the child focused perspectives in a judicial setting primarily emerges because of international law and the child’s standing according to international law. The Guidelines on Child-Friendly Justice have been mostly applied to cases of children in

¹⁰⁰ UN Secretary-General (UNSG), Guidance Note of the Secretary-General: UN Approach to Justice for Children, September 2008

¹⁰¹ Economic and Social Council Res- 2005/20, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime United Nations Office On Drugs And Crime, 2005

¹⁰² Committee of Ministers Of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 2010, p. 16

¹⁰³ Leifaard, p. 913

¹⁰⁴ Leifaard, p. 914

criminal proceedings, but they are applicable in all areas of law. Administrative processes are not excluded from these recommendations and they are available for implementation in questions regarding asylum and migration.

The CRC's article 3 uses very compelling language when establishing the importance of the principle of the best interest of the child and its extent to all administrative authorities or legislative bodies as well as welfare institutions.¹⁰⁵ It has been underlined that the consideration from this article must be genuine rather than merely a formality, and must ensure that all aspects of the best interests of a child are considered.¹⁰⁶ A theoretical use of the principle is not sufficient to fulfil the obligations and the use of the principle should be visible in case law. This is of essence not only in national court cases but in international court proceedings as well, such as in the ECtHR. This requirement of fulfilment in practice, as well as in theory, is closely connected to what will be discussed later, concerning issues on procedural rights, especially in a judicial setting where the procedural safeguards and processes must achieve the standards concerning the best interest of the child in practice.

An assessment of the best interest of the child requires authorities to consider the long-term effects that a decision will, or possibly, have on a child's future including the welfare and development after the child's eighteenth birthday.¹⁰⁷ The best interest of the child analysis should, according to the CRC Committee's General Comment no. 14,¹⁰⁸ the CRC and the EU asylum *acquis* include the following considerations: family reunification possibilities;¹⁰⁹ the child's life, survival and development;¹¹⁰ the child's identity;¹¹¹ situation of vulnerability; potential victim of trafficking;¹¹² the child's right to

¹⁰⁵ Rights of the Child Convention art. 3.1

¹⁰⁶ Alston, Philip, The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights in International Journal of Law, Policy and the Family, Volume 8, Issue 1, 1 April 1994, p. 13

¹⁰⁷ Pobjoy, 2017, p. 226

¹⁰⁸ The key elements to be taken into account when assessing the child's best interests are listed in Section V of the CRC Committee, General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3.1), 29 May 2013, CRC /C/GC/14, section V.A, para. 48

¹⁰⁹ CRC, art. 10, Reception conditions directive, art. 23.2

¹¹⁰ CRC, art. 6

¹¹¹ CRC, art. 8

¹¹² CRC, art. 32 and 39, Receptions conditions directive, art. 23.3

health and education;¹¹³ family unity;¹¹⁴ the child's right to be heard;¹¹⁵ protection and safety of the child;¹¹⁶ principle of non-discrimination.¹¹⁷ There is not a mechanism ensuring that these factors are considered which is a systematic issue. This forward-looking assessment may be challenging for many states to implement as many states have adopted a policy of only granting temporary international protection until a child gains majority, and thus not considering the child's best interest in the long-term.¹¹⁸ Temporary grants of asylum are not forward-looking for the minor's future and are consequently not in the accordance with the best interest of the child or the CRC.¹¹⁹

The Returns Directive has been criticized due failure to include a proper procedure for assessing the best interests of the child in the directive itself, despite that this principle was promoted as a "primary consideration" when implementing the instrument.¹²⁰ It is not only the Returns Directive that lacks a procedure to examine what is in the best interest of the child. None of the directives or regulations include a complete mechanism which could be utilized to safeguard that the consideration of best interest of the child is a priority. Most directives do not include such an aspect or does so only partly. It is for states to independently perform the evaluation of the best interests of the child and, as the issue with states granting temporary asylum demonstrates, many states procedures lack a long-term consideration.

There are a few factors that should be examined carefully when assessing what is the best interest for the child.¹²¹ The first factor is the views of the child which are manifested in article 12 of the CRC. The article imposes a positive obligation for states to hear a child and to consider his views in accordance with his age and level of maturity. A child's views may not be determinative but the CRC Committee has stated that "there can be no correct application of article 3 if the components of article 12 are not respected".¹²² This

¹¹³ CRC, art. 24 and 28

¹¹⁴ CRC, art. 9 and Dublin III Regulation art 8.2 and Qualification Directive art. 25

¹¹⁵ CRC, art.12

¹¹⁶ CRC, art. 19

¹¹⁷ CRC, art. 2

¹¹⁸ Pobjoy, 2017, p. 226

¹¹⁹ Ibid.

¹²⁰ Stalford, 2012, p. 81

¹²¹ Ibid, p. 291

¹²² UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para. 74

has been included in the EU Qualification Directive which notes that in assessing the best interest of the child “the views of the minor in accordance with his or her age and maturity” should be considered.¹²³ Many Member States national legislation has codified this.¹²⁴

The second factor to consider is the individual circumstances in every case including age, maturity and particular vulnerabilities a child may be subject to. The CRC Committee’s General Comment no. 6, which concerns treatment of unaccompanied and separated children outside his country of origin, has outlined that

A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender sensitive related interviewing techniques.¹²⁵

This is important in the context that is discussed in this thesis as the children are unaccompanied. They are already vulnerable due to their status as unaccompanied minors and as asylum seekers. Many have experienced trauma and must retell the story to the immigration authorities so that the minor’s best interest can be considered individually. Every situation is different, and vulnerability comes in many forms. The CRC Committee has commented on this issue that decision-makers must “take into account the different kinds and degrees of vulnerability of each child” in order to accommodate the reality that “each child is unique and each situation must be assessed according to the child’s uniqueness”.¹²⁶ An individual examination is important for safeguarding each asylum seekers fair process but it is resource intensive. The lack of resources may be one explanation to why there are such large differences in the asylum processes regarding children in the EU, however, the realisation of human rights should not be resource dependent.

¹²³ EU Qualification Directive recast, preamble para. 18

¹²⁴ States often include a specific age of when children shall be heard but also take the maturity and development of the child into consideration

¹²⁵ United Nations Committee on the Rights of the Child (CRC) General comment no. 6, para. 20

¹²⁶ United Nations Committee on the Rights of the Child (CRC) General comment no. 14, para 76

A factor to consider is that states have established their own independent administrative systems based on their own traditions. The differences manifest in a wide variety in states administrative procedures, which affect unaccompanied minors both during the asylum application process as well as the outcome of the decision about international protection. The degree the best interest of the child is respected in practice might be heavily affected by the different administrative methods in use during the process.

The Dublin III regulation includes some guarantees set forth regarding how states should assess the best interest of the child. States must, according to the directive, consider the following factors: family reunification possibilities; the minor's well-being and social development; safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking; the views of the minor in accordance with his age and maturity.¹²⁷ These are all central aspects in the age assessment procedure as well as in the complete asylum application process. Procedural safeguards are crucial for vulnerable groups seeking asylum as they are often unfamiliar with state authorities' procedures.

The European Asylum Support Office (EASO) has made a recommendation that the best interest of the child should be observed not only when a child is identified as such, but as well as when there are doubts as to whether the applicant is a child.¹²⁸ This indicates that from the moment when an presumed minor comes into contact with authorities he should be treated with the best interest of the child in mind. The border guards are generally the ones to first make this judgement, and if not, it is up to the migration authorities to recognize this issue.

The best interest of the child in immigration matters is implemented in many states legislation that emphasizes the vulnerable situation children are in. The Finnish Aliens act provides that in any decision concerning children "special attention shall be paid to the best interests of the child and to circumstances related to the child's development and health".¹²⁹ In Sweden this same principle has been included as a statement in the Swedish Aliens Act as "in cases involving a child, particular attention must be given to what is

¹²⁷ Dublin III directive, art. 6.3

¹²⁸ European Asylum Support Office (EASO), *Practical guide on Age assessment*, 2nd edition, 2018, p. 11

¹²⁹ Finnish Aliens Act 6 §

required with regard to the child's health and development and the best interests of the child in general".¹³⁰

Implementing legislation that safeguards a child's position in immigration matters demonstrates that states have adopted and implemented the CRC and its articles into practice, even if the CRC has not been codified into national legislation. The legislature demonstrates how important the question of age is in decisions about unaccompanied minors. In theory there is a broader protection for those who have yet to reach adulthood, in the states mentioned at least, and this should be safeguarded by the states.

4.2 The decision to assess the unaccompanied minor's age and the benefit of the doubt

The United Nations High Commissioner for Refugees (UNHCR) has stated that the burden of proof lies in principle on the applicant.¹³¹ However, the duty to evaluate all the relevant facts is shared between the applicant and the examiner. In some cases, it is the examiners duty to use all the means at his disposal to produce the necessary evidence to support the applicant. In some cases, this method is not fruitful and, in such cases, if the applicant's account appears credible, he should be given the benefit of the doubt unless there are good reasons to the contrary.¹³² The principle of the burden of proof is primarily applied in cases concerning adults to examine whether the circumstances in the applicant's specific situation is enough reason to be granted international protection. The proper implementation of the principle is an important safeguard for unaccompanied minors' rights as not to subject minors for unnecessary procedures during their asylum claim. The burden of proof has a wider application in cases where the age of the applicants is uncertain. The credibility of the applicant's claimed age is added to the aspect's authorities must evaluate. There is no requirement that the adjudicator must be fully convinced of the truth of every statement made by the applicant.¹³³ The adjudicator needs

¹³⁰ Swedish Aliens Act (2005:716), Ch 1, 10 §

¹³¹ UN High Commissioner for Refugees (UNHCR), Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, para. 6

¹³² UN High Commissioner for Refugees (UNHCR), Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, para. 6

¹³³ Ibid. para. 7

to decide based on the evidence provided and the authenticity of the applicant's statements whether the claim by the applicant is credible.¹³⁴

A minor has less of a duty to bear the burden of proof. Minors do have an obligation to cooperate with the authorities to make their statements believable using the means accessible. The Finnish legislation has codified this by stating that an authority shall see that a matter is investigated, and that an applicant has a duty to set forth any grounds that support his claim.¹³⁵ The authorities must inform the applicant on what further information they must provide, and the request of investigation shall be specified, and be in the right relation to the means of investigation the applicant can provide.

The benefit of the doubt is a key principle and safeguard in the field of age assessment since none of the current methods of age assessment are able to determine a specific age with full certainty.¹³⁶ The EU Asylum Procedures Directive has emphasised the importance of this principle.¹³⁷ The Asylum Procedures Directive includes benefit of the doubt principle regarding age assessment.¹³⁸ It states that

Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor.¹³⁹

The article has a nature of establishing two guarantees towards the unaccompanied minors. First, it declares that if a Member State has real doubts about the stated age after all other evidence has been shown, it is then reasonable to proceed with a medical examination, but only as a last resort and in accordance with the established international norms such as respect for physical integrity. The applicant has the possibility to provide all other evidence before a medical examination is to be proceeded with. Second, if there doubt persists after a medical age assessment, or if the results were inconclusive, whether the applicant is a minor or not the applicant should be regarded as a minor.¹⁴⁰ The best

¹³⁴ Ibid.

¹³⁵ Finnish Aliens Act 7 §

¹³⁶ EASO, 2018, p. 22

¹³⁷ Asylum Procedures Directive, art. 25.5

¹³⁸ Ibid.

¹³⁹ Asylum Procedures Directive, art. 25.5

¹⁴⁰ United Nations Committee on the Rights of the Child (CRC), General comment no. 6

interest of the child principle can be considered fulfilled if this is how the state authorities decide to judge a minor's age.

The benefit of the doubt should be used continuously during the process of age assessment, as even an unconfirmed minor should be treated as a minor. The presumption of minority is in the best interest of the child and should be implemented in all states. For a presumed minor this implies that he is not placed in accommodation or in detention centres with adults before an assessment of age has been made. According to the EASO report regarding unaccompanied minors, all Member States but two separate the unconfirmed minors until the minor's age has been properly assessed.¹⁴¹ This places minors in these two states in a much more vulnerable situation as they are not in an environment intended to protect minors.

The anti-trafficking directive clearly states that benefit of the doubt should be applied when a person's age is uncertain and requires states that may have reason to believe a person is a child to presume the presumed child is a child in order to receive immediate access to assistance, support and protection.¹⁴² Unaccompanied minors who are suspected victims of trafficking must be protected, and by applying the benefit of the doubt it is more probable that a state is able to identify if someone is being trafficked.

In the process of age assessment, the principle of the benefit of the doubt is present throughout the process in the EU directives. However, the implementation of the directives in the many Member States varies and all states do not use equally respectful methods to determine the age of the minors.

Medical age assessments should not be routine practice. The need for a medical age assessment should be duly justified based on substantiated doubts on the age that has been stated.¹⁴³ It should only be resorted to in cases where there is an absence of evidence or in cases where several elements of the evidence gathered contradict the applicant's claimed age. If the evidence produced by the unaccompanied minor, for example a birth

¹⁴¹ EASO, 2018, annex 4

¹⁴² European Union: Council of the European Union, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 15 April 2011, OJ L. 101/1-101/11; 15.4.2011, 2011/36/EU, art. 13.2

¹⁴³ Asylum Procedures Directive, art. 25.5

certificate, can be deemed trustworthy by the state authorities there should be no need for a medical age assessment. If the evidence does not contradict the claimed age there is no requirement for a medical age assessment.¹⁴⁴ This can be found in the Asylum Procedures Directive which sets out safeguards for unaccompanied minors during his age assessment procedure.

The principle of the benefit of the doubt is to be applied as broadly as possible in the case of unaccompanied minors who are less likely to have documentary evidence.¹⁴⁵ The benefit of the doubt must be given as soon as doubts on the claimed age appear, in both age-related directions, during the age assessment and until conclusive results are provided. The applicant should be treated as a child until he is found to be an adult.¹⁴⁶ The practice of the implementation varies from state to state as it is not explicitly stated in the directives.

These benefits unaccompanied minors are entitled to include the right to accommodation specifically aimed at children, the right to a guardian, the right to representation and to some extent the right to education.¹⁴⁷ Children are entitled to a faster asylum decision process compared to adults.¹⁴⁸ In the timeframe of 2015–2016 one must recognize that it was challenging for many states to fulfil the obligation of fast asylum decisions, even for the groups most vulnerable, because of the sudden increase of irregular immigration.

Article 8 of the CRC obliges states to respect the child's right to identity.¹⁴⁹ The concept of identity can include a child's right to confirmation of his age.¹⁵⁰ The CRC Committee has included the right to identity in their comment regarding initial assessment of unaccompanied minors position, and further stated that it is important to identify a child as soon as possible after he has entered a states' territory.¹⁵¹ The Committee states that

¹⁴⁴ EASO, 2018, p. 23

¹⁴⁵ Ibid. p. 22

¹⁴⁶ Ibid. p.12

¹⁴⁷ Parsons, Annika *Selvitys lapsen edun toteutumisesta turvapaikanhakija- ja pakolaislapsia koskevissa päätöksissä*, Vähemmistövaltuutettu (Minoritettsombudsmannen), Helsingfors, 2010, p.50. The benefits differ depending on the state, and the quality of the benefits may vary as states offer economic, social and cultural rights to their citizens to differing degrees

¹⁴⁸ Finnish Aliens Act, 6 §

¹⁴⁹ CRC, art. 8

¹⁵⁰ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to the rights of the child*, 2015, p. 167

¹⁵¹ United Nations Committee on the Rights of the Child (CRC), General Comment no.6, para. 31

such identification measures include age assessment and should not focus on the physical appearance of an individual but account for the minor's psychological maturity.¹⁵² Continuing, the Committee emphasizes the importance of using the benefit of the doubt and to treat unaccompanied minors as minors, assuming there is any uncertainty of the applicant's age. An individual's communication addressed to the CRC Committee has claimed his right to preserve his identity was violated when Spain concluded he was an adult based on solely medical age assessment results. The author of the complaint notes that age is a fundamental aspect of identity and a state has an obligation to not undermine his identity.¹⁵³ The CRC Committee did not consider this claim as they found violations of other articles and did not see it necessary to address this matter.¹⁵⁴

Medical age assessment procedures should be a last resort, as the results of the medical assessments are often granted much value as evidence. Medical age assessment can only be contested in a few Member States which adds to the severity of the possible consequences of an age assessment.¹⁵⁵ The primary reason states must execute an age assessment is that a state requires an evidential base to separate children from adults, as children and adults are entitled to different rights and treatment from the state. The separation between children and adults can be considered a protective measure towards the children on one hand, but on the other hand it is a measure for states to be resource efficient as they only need to offer additional safeguards during the asylum process to minors.

4.3 The standard of proof and the weight of evidence

The standard of proof, or the weight of evidence differs between states and some states are more likely to accept one type of evidence than other states. This is an issue especially considering what kind of documentation different Member States accept as legitimate.

¹⁵² Ibid.

¹⁵³ Committee on the Rights of the Child, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 11/2017, CRC/C/79/D/11/2017, para. 3.5

¹⁵⁴ Ibid. para. 12.10

¹⁵⁵ EASO, 2018, p. 111

The issue of the weight of documentation in the age assessment procedure will be discussed in chapter four of this thesis. The chapter discussing the specifics of this issue is focused on different types of evidence that are accepted by states, including documentation. Evidence in most asylum procedures include documentation, the applicant's story and information about the applicant's country of origin. The evidence in the age assessment uses these as well as medical and psychological assessments to varying degrees.

The burden of proof for a minor seeking asylum is different from the evidential requirements of an adult. Children cannot be expected to understand when they are persecuted or when they should experience fear of persecution in their home country. The challenges facing children regarding the burden of proof of refugees have been observed by the UNHCR. The UNHCR has mentioned in their guidelines that a child may be too young to evaluate what information is important, or not able to interpret what he has seen or experienced in an easily understandable manner. The UNHCR has also stated that a child cannot be expected to relate their experiences similarly as an adult is able to.¹⁵⁶ This might cause issues in the receiving states if the authorities are not able to understand the minor's background properly.

The UNHCR has recognized that applicants may have experienced traumatic events and consequently may not be speak freely.

... consideration should also be given to the fact that, due to the applicant's traumatic experiences, he/she may not speak freely; or that due to time lapse or the intensity of past events, the applicant may not be able to remember all factual details or to recount them accurately or may confuse them; thus he/she may be vague or inaccurate in providing detailed facts. Inability to remember or provide all dates or minor details, as well as minor inconsistencies, insubstantial vagueness or incorrect statements which are not material may be taken into account in the final assessment on credibility, but should not be used as decisive factors¹⁵⁷

Applicants have a duty to speak the truth, but their past may impact how well the applicants recall details. Evidence consisting of documents, mental age assessment and

¹⁵⁶ Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, p. 72

¹⁵⁷ Office Of The United Nations High Commissioner For Refugees, *Note on Burden and Standard of Proof in Refugee Claims*, Geneva, 16 December 1998, para. 9

the physical age assessment are all given different priority in the Member States. Some states do not consider the mental development of the unaccompanied minors as weightbearing evidence while some states consider only the mental and cultural aspects that have formed a person's maturity.

A person's age impacts the asylum decision and other issues, such as the treatment they are entitled to during the asylum application process. The age impacts the minor's right to family reunification, even if the child turns 18 during the asylum process has been judged in the ECJ.¹⁵⁸ The fairly new ruling concerning family reunification regarding minors who age out during the process, may impact the procedures used in age assessments in the future, as states can be motivated to be stricter with who is determined to be a minor because of the development in right to family reunification. States are interested in controlling the migration of their territory, and this is one way to secure that less illegitimate third country nationals are able to immigrate.

The variety of the weight of different kinds of evidence puts the minors in an unfair position, as it impacts the methods used during the age assessment. The directive's general nature, permitting states to implement what means and methods they deem necessary without any clear guidance from the EU, leave much to states own discretion and the results are varying administrative legislation and procedures. States thus have their individual methods to determine what evidence is of importance in an age assessment and subsequently impacting the decision regarding international protection. One discussion within this area is the value of documentation, how the values differ depending on where the documents are originating from and how different states value the same documentation. The value of the different evidence of the age assessment will be discussed thoroughly in the fifth chapter.

¹⁵⁸ Judgment of the Court (Second Chamber) of 12 April 2018 (request for a preliminary ruling from the Rechtbank Den Haag — Netherlands) — A, S v Staatssecretaris van Veiligheid en Justitie (Case C-550/16) (ECJ)

4.4 Rights guaranteed for minors during the age assessment procedure

4.4.1 General safeguards

The first instance decision in asylum cases is often an administrative process which means that judicial procedure legislation may not apply. The immigration authorities do not have judicial power, but their decisions are binding. If this is the case, then states should apply the legislation set out in the various states' specific administrative legislations. There are safeguards for unaccompanied minors who are processed by state authorities in both administrative and judicial proceedings.

The European Commission has in a communication in 2017 observed the main issue protecting the procedural safeguards of children during the asylum proceedings for minors.¹⁵⁹ The European Commission identified the key issues to be found in the areas of access to information, legal representation and guardianship, the right to be heard, the right to an effective remedy and multidisciplinary and rights-compliant age assessment, all which are important to a fair asylum process.¹⁶⁰ These are all important guarantees that states are obliged to achieve for a remedy to be considered effective. These issues will be discussed further in the context to article 13 of the ECHR.

These procedural safeguards are not specifically spelled out in any regulating document, and there is a lack of harmonization in between the EU states regulations of the procedural guarantees. The EU directives do not include a strict regulation on how to proceed with an asylum application of an unaccompanied minor or specified method for safeguarding an unaccompanied minor's rights in a complicated process. A consequence of this is that states may use which ever methods to fulfil the obligations of the EU regulations. This is the central issue at hand as was mentioned earlier, the variation in implementing different methods lead to an uncommon asylum system.

Unaccompanied minors are unlikely to spontaneously file an asylum claim. There should be mechanisms and procedures in place that ensure that, as soon as it becomes known

¹⁵⁹ Communication from the Commission to the European Parliament and the Council *The protection of children in migration* Brussels, 12.4.2017 COM (2017) 221 final, p. 9

¹⁶⁰ Ibid.

that the minor may have a well-founded fear or be at risk for persecution, he is referred to the competent authorities where he is able to submit an asylum application.¹⁶¹ This is established in the CRC Committee's General Comment no. 6 and is recognized as a universal right of the child.¹⁶² The EU should be abiding by this as all the Member States have ratified the CRC and are bound by it. The General Comment further states that the unaccompanied minor will need assistance from an appointed adult familiar with their background, who is competent and able to represent the child's best interest and should be given access to a qualified legal representative free of charge.

Many states place high priority on chronological age, which constitutes a significant limitation in age assessment procedures. A human rights-based approach would require individualised assessments which are sensitive to the development and vulnerability of young persons and adolescents.¹⁶³ Recommendations for age assessment procedures have not only focused on quality standards and protection during the actual procedure, but recommendations have also included the relevance of the results of the age assessment.¹⁶⁴ There are problems in an individualised assessment of age, as states have limited resources. State authorities have an obligation to determine the age of an applicant on a case by case basis and not to make general assumptions which safeguards from decisions implemented on masses. The age assessment is an indicator for states to determine a date in the future when the minor will reach adulthood and transition into the adult asylum system or integration system. There is no specific method or mechanisms throughout the EU that are used to determine age. There are some cases where children claim to be of adult age. The reasons for this vary but it can be, for example, that the minor desires to continue migration or wishes to avoid the protective measures of the authorities.¹⁶⁵ A minor might also claim he is an adult if he is a victim of trafficking. The age assessment

¹⁶¹ Migration and International Human Rights Law, Practitioners Guide No. 6, International Commission of Jurists, 2011

¹⁶² United Nations Committee on the Rights of the Child (CRC), General Comment No. 6, para. 66

¹⁶³ Council of Europe Children's rights division, *Age Assessment: Council of Europe Member States' policies, procedures and practices respectful of children's rights in the context of migration*, Council of Europe 2017, p. 9

¹⁶⁴ United Nations High Commissioner for Refugees (UNHCR) *Guidelines on Child Asylum Claims*, 2009, p. 7 and 75. See also Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012, p. 6.

¹⁶⁵ EASO, 2018, p. 21

process is not primarily in place to protect states and their limited resources, but to guard children and their rights. The use of age assessment and reliance on the results have been criticised because of the lack of standardization procedures and protocols which also should cater to the sensitivity of children. Advocates have called for age assessment protocols and procedures that respect the rights, physical integrity and the dignity of the individual and always uphold procedural safeguards.¹⁶⁶

4.4.2 Appointing a guardian and a legal representative

The distinction between a guardian and legal representative must be made in the context of unaccompanied minors. They both work in the best interest of the child to ensure that the minor will be treated in the best possible way, but they have a different status from each other. A guardian is an independent person who safeguards a child's best interests and general well-being, and to this effect complements the limited legal capacity that the child has. The guardian acts as a statutory representative of the child in all proceedings, similarly as a parent would represent his or her child.¹⁶⁷

A representative (sometimes referred to as a legal representative) refers to a person or organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures regarding seeking international protection, with a view ensuring the best interest of the child and exercising legal capacity for the minor when necessary.¹⁶⁸ Representatives are not to be confused with qualified lawyers or other legal professionals who provide legal assistance, speak on the behalf of the child and legally represent him or her in written statements and in person before administrative and judicial authorities in criminal, asylum or other legal proceedings as provided in national law.¹⁶⁹

¹⁶⁶ Separated Children in Europe Programme, 2014, p. 9

¹⁶⁷ United Nations Committee on the Rights of the Child (CRC), General comment no. 6

¹⁶⁸ Reception Conditions Directive, art. 2 (j)

¹⁶⁹ European Union Agency for Fundamental Rights, *Guardianship for children deprived of parental care, a handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, 2014, p. 12

International human rights law provides no clear indication or guidelines on what a State's positive obligations are in relation to assisting refugees in legal matters and how the legal aid should be made accessible.¹⁷⁰ This implies a lack of procedural guarantees. The UNHCR has stressed that “the right to legal assistance and representation is an essential safeguard, especially in complex asylum procedures. It is important to guarantee free legal assistance and representation in first instance procedures and against negative decisions”.¹⁷¹ This can be argued to accurate for unaccompanied minors who should have access to broader protection due to their vulnerable status as minors. It is an important safeguard for minors, as it includes an implied guarantee in appealing decisions.

The CRC Committee has made a statement in their General Comment no. 6 which establishes that

states are required to create the underlying legal framework and take necessary measures to secure proper representation of an unaccompanied or separated child's best interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State in compliance with the Convention and other international obligations.¹⁷²

The General Comment institutes the need for a systematic framework that guarantees the unaccompanied minor's representation. Furthermore, the statement includes the protection of the best interest of a child by stating that states are required to take “steps such as the appointment of a competent guardian as expeditiously as possible serves as a key procedural safeguard to ensure respect of the best interests of an unaccompanied or separated child”.¹⁷³ The same comment established that unaccompanied minors should only be referred to an asylum or other procedure after the appointment of a guardian. The statement continues: “In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should be

¹⁷⁰ Mikolajczyk, Barbara, “Legal Aid for Applicants for International Protection”, Chetail Vincent, De Bruycker Philippe and Maiani Francesco (eds), *Reforming the Common European Asylum System*, Vol. 39, Brill Nijhoff, 2016, pp. 446-470, p. 460

¹⁷¹ UN High Commissioner for Refugees (UNHCR), *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, 2 September 2005

¹⁷² United Nations Committee on the Rights of the Child (CRC) General comment no. 6, para. 33

¹⁷³ Ibid. para. 20

provided with a legal representative in addition to a guardian”.¹⁷⁴ There is strong support from international conventions on the procedural safeguards that must be in place for children during any procedures they are a part of, but not a consistent method. The guardian’s duty is to act as a contact point between the unaccompanied minor and the existing specialist agencies who provide care for the minor.¹⁷⁵ The CRC Committee has received one individual complaint concerning lack of legal representation during the age assessment procedure for a presumed minor from an unaccompanied minor in Spain.¹⁷⁶ This is the sole complaint and response the CRC Committee has published and as such a very important part of practice. It concludes

the provision of a representative for such persons during the age-determination process is equivalent to giving them the benefit of the doubt and is an essential guarantee of respect for their best interests and their right to be heard. Failure to do so implies a violation of articles 3 and 12 of the Convention, as the age-determination process is the starting point for the application of the Convention. The absence of timely representation can result in a substantial injustice.¹⁷⁷

The lack of a representative infringes on multiple rights unaccompanied asylum seekers are entitled to. Further, the CRC Committee noticed the author of the complaint, who claimed to be a minor, was not accompanied by the safeguards required to protect his rights under the CRC. The circumstances of the complaint, both the physical examination and the absence of a representative, were central in the Committee’s assessment that the best interest of the child was not a prime consideration in the age determination process and found a breach of articles 3 and 12 of the CRC.¹⁷⁸

The right to an appointed guardian is included in the right to be heard according to the CRC Committee’s General Comment no. 6. An unaccompanied minor’s right to be heard is vital in the question of guardianship, accommodation and legal guardianship as their voice should be heard in these issues as well. The information the unaccompanied minor

¹⁷⁴ Ibid.

¹⁷⁵ United Nations Committee on the Rights of the Child (CRC), General comment no. 6, para. 33

¹⁷⁶ Committee on the Rights of the Child, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 11/2017, CRC/C/79/D/11/2017

¹⁷⁷ Ibid. p. para. 12.8

¹⁷⁸ Ibid. p. para. 12.9

should receive includes these aspects of their procedure and it has been established that participation is dependent on reliable communication and thus interpretations should be available and sufficient during all the phases of the procedure.¹⁷⁹

States do not always have an obligation to provide representation in administrative matters. Judicial matters often require the state to provide a person with representation. The CRC Committee states that the right to a representative applies for all administrative and judicial procedures.¹⁸⁰ Administrative processes can be complex, and as demanding as judicial proceedings, and as such requires a representative according to the CRC. A guardian cannot be assumed to be prepared to manage the role as a minor's representative in either an administrative or a judicial process due to their complicated nature.

The case of *PC and S versus United Kingdom* from the ECtHR, concerns family law matters, but the courts assessment included a stance on legal representation.¹⁸¹ The court's opinion was that the issue at hand, due to the complex procedure with legal hearings and court dates, during a period of 20 days article 6 of the ECHR was breached as the applicant had not had access to legal aid or access to a Court as is required by article 6. This case concerns article 6 which is not applicable in cases of asylum claims. The judgement does however demonstrate the importance of representative in complex matters.

In *Steel and Morris v. United Kingdom* the court deemed that sporadic help given by volunteer lawyers or extensive judicial assistance of judges to the applicants was a substitute for competent and accessible legal representation provided by an experienced lawyer.¹⁸² This can be used as a point of reference when comparing to states which do not provide legal assistance directly but through NGOs that are not state funded, such as is the case in Hungary, which will be discussed later.

The relationship between article 6 of the ECHR and asylum procedures is not to be taken for granted as the article cannot always be utilized in asylum matters. Article 6 only applies if the examined procedure is a criminal proceeding or concerning the

¹⁷⁹ United Nations Committee on the Rights of the Child (CRC), General comment no. 6, para. 25

¹⁸⁰ Ibid. para. 36

¹⁸¹ *PC and S v. United Kingdom*, application no. 56547/00, judgement of 16 July 2002

¹⁸² *Steel and Morris v. United Kingdom*, application no. 68416/01, judgement of 15 February 2005 para. 69

determination of a civil right or obligation.¹⁸³ The proceeding related to cases within asylum law is more closely related to article 13 of the ECHR which guarantees the right to an effective remedy.

The ruling of the *Klass* case in 1978 provided the view that Article 13 is an independent provision which can be violated even if there is no other violation of the articles in the ECHR.¹⁸⁴ Article 13 can be breached in relation to another substantial right of the convention, but it is possible to rule as independently violated without a violation of another substantial right. In the context of asylum issues this means that even if no other right from the ECHR has been breached, the court can still find a breach of article 13 in the procedure.

The Asylum Procedures Directive states different safeguards for unaccompanied minors during the age assessment and the entire asylum application process, one of which is the right to a representative throughout the process of the asylum decision.¹⁸⁵ The representative shall perform their duties in accordance with the principle of the best interest of the child, and the representative needs to have the necessary expertise to complete the task. The representative must be given the opportunity to inform the unaccompanied minor about the meaning and the consequences of the personal interview. The interview in this case is in reference to the interview conducted to assess the applicant's situation and need for international protection.

Member States may refrain from appointing a representative where the unaccompanied minor will in all likelihood reach the age of 18 before a decision at first instance is taken, according to the Asylum Procedures Directive.¹⁸⁶ This restriction of the right to a representative is in contradiction with CRC in many aspects. In this case the directive arguably contradicts article 2 of the CRC regarding non-discrimination as some children are entitled to a representative but not all are.¹⁸⁷ In cases where the age of a suspected minor is unknown this may not be applicable. Considering the time required for state

¹⁸³ *Maaouia v. France*, application no. 39652/98, judgement of 5 October 2000, para. 38

¹⁸⁴ *Klass and others v. Germany*, application no. 5029/71, judgement of 6 September 1978, Series A No 28, (1979-80), 2 EHRR 214 para. 63

¹⁸⁵ Asylum Procedures Directive, art. 25.1.a

¹⁸⁶ *Ibid.* art. 25.2

¹⁸⁷ CRC, art. 2.1

authorities to process an asylum application, this can in theory mean that very young minors are not entitled to a representative. Minors who do not receive the appointment of a representative are in a far worse situation than those who do receive the access to a representative, as they must navigate the asylum application process by themselves without any safeguards to their rights or entitlements.

The right to a representative is in accordance with the best interest of a child, which as established, is what all decisions concerning children should be based on. States that do not provide representatives to minors are not fulfilling the obligations set out in the CRC, even though they may be fulfilling the obligations found in the EU legislation. The article is contradicted by this restriction, as one cannot assume that it is in the best interest of a child, let alone an unaccompanied minor, to not have access to a representative and guidance in the legal matters that concerns the minors. The Asylum Procedures Directive is contradictory to itself as well as it is stated in the preamble that “the best interests of the child should be a primary consideration of Member States when applying this Directive”.¹⁸⁸ The guarantee of a representative is of major importance to safeguard an unaccompanied minor’s rights, especially in the early stages of the asylum procedure.

Article 12, the right to participation, can also be perceived as violated due to the restrictions of the right to a representative. Children who are capable of forming their own opinions have the right to express those views freely in all matters affecting the child.¹⁸⁹ The views of the child must be given due weight in accordance with the age and maturity of the child. The right to participation is imperative in cases of representation as well as the right to be heard. Article 12 of the CRC provides children with the right to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative in a manner consistent with the procedural rules of national law.¹⁹⁰ The representative is a safeguard for the child’s participation as he can express his views better through his appointed legal aid. The Asylum Directive provides a guarantee for unaccompanied minors that Member States shall ensure that a representative is appointed to the unaccompanied minor as soon as possible, and that the representative

¹⁸⁸ Asylum Procedures Directive, preamble para. 33

¹⁸⁹ CRC, art. 12

¹⁹⁰ Stalford, Helen *Children and the European Union: Rights, Welfare and Accountability*, 2012, p. 80

shall perform his duties in accordance with the principle of the best interest of the child.¹⁹¹ If representation is not offered to unaccompanied minors, states do not fulfil the requirements of article 12 of the CRC and there is consequently an violation of the right to participate.

It is within every states' own discretion to use this restriction. The directive is, as earlier stated, a minimum standard directive that states shall implement in their systems. States have the possibility to offer more in terms of legal aid for unaccompanied minors' than what is required by the directive. The directive in this case can be claimed to allow states to deviate from the CRC. The contradiction with the CRC is amplified by the fact that different EU instruments, and directives, often refer to these principles themselves, and fail to give guidance on how to implement the principles in an effective way.¹⁹²

Access to quality legal aid at an early stage in the asylum procedure shapes the asylum seekers understanding of their rights and obligations during the asylum process.¹⁹³ Early legal access increases the confidence in the asylum process in both parties and improves the quality of the asylum decision.¹⁹⁴ Satisfaction in the process leading to a decision should decrease the amount of appeals, as well as result in less violations of procedural rights.

The case law from international judgements in a European context of unaccompanied minors' treatment under the process of age assessment is lacking in many aspects. There are some judgements made by the ECtHR that can be used as principles in some areas of the age assessment procedure, such as the rights protected by article 13, the right to an effective remedy. These aspects include the right to information and the right to be heard, even as a minor. The right to an effective remedy includes a fair judicial system, not only in theory but also in practice. If the right to this protection is not safeguarded properly it can be a violation of the minor's right to access justice.

¹⁹¹ Asylum Procedures Directive, art. 25.1a

¹⁹² Stalford, 2012, p.80

¹⁹³ European Legal Network on Asylum, European Council on Refugees and Exiles, ECRE/ELENA Legal note on access to legal aid in Europe, November 2017, p. 4

¹⁹⁴ Anderson Bridget, Conlan Sue, *Providing Protection: Access to early legal advice for asylum seekers*, Irish Refugee Council, 2014, p. 24

The unaccompanied minors' access to information regarding the asylum procedures, their rights and obligations is a part of minors' rights to be included and heard in all judicial and administrative decisions made affecting them.¹⁹⁵ This right is guaranteed in the CRC and should be implemented in all regulations on both international and domestic levels concerning children.

Substantial problems have been reported from several states relating to access to state-funded legal assistance and representation by unaccompanied children in the asylum procedure in practice.¹⁹⁶ Hungary has been criticised in this matter as asylum seeking children below the age of 14 are accommodated in open reception centres, which do not receive any state-funded legal aid but must rely on the legal aid from NGOs. Restrictions in legal aid can be viewed to be contradictory to guarantees regarding administrative and judicial proceedings found in the CRC and the ECHR.¹⁹⁷ Unaccompanied minors aged 14–18 years are detained in transit zones and are usually unable to meet with lawyers or legal guardians before their asylum interview.¹⁹⁸ The access to legal aid is consequently lacking as it is not accessible. The state does not fulfil their obligations stated in the EU regulations or the CRC. States which detain unaccompanied minors arbitrarily may breach other human rights.

4.4.2 The Right to information

The information an unaccompanied minor, and all others seeking international protection, receive should include what legal aid he is entitled to and how the process of an asylum application is processed. The right to information is guaranteed through the Asylum Procedures Directive which states

In the procedures at first instance provided for in Chapter III, Member States shall ensure that, on request, applicants are provided with legal and procedural information free of

¹⁹⁵ CRC, art. 12

¹⁹⁶ European Council on Refugees and Exiles, *Detriment of doubt: Age Assessment of Unaccompanied Asylum-Seeking Children*, Asylum Information Database (AIDA) Legal Briefing No. 5, December 2015. Specific state report provides more detailed information as well as critique from European experts.

¹⁹⁷ CRC art. 12 right to be heard and ECHR art. 13 right to an effective remedy

¹⁹⁸ ECRE/ELENA, Legal note on access to legal aid in Europe, p. 4

charge, including, at least, information on the procedure in the light of the applicant's particular circumstances.¹⁹⁹

The procedure in this instance is the general asylum procedure, and interpreting that particular circumstances include status as an unaccompanied minor, the specific procedures, such as age assessment and the safeguards in place for minor asylum applicants should also be included in the information the unaccompanied minor receives. This information is only intended for those applying for asylum. It is particularly important for unaccompanied minors to receive information on their right to legal aid, how to access legal aid and the extent of it.

Asylum seekers must have access to information about the proceeding in a language they can understand, or presumably are able to understand. In the *Rahimi v. Greece* case the court saw that the state had violated article 13 of the ECHR when the applicant had not been informed in a language he could understand regarding his case.²⁰⁰ Asylum seekers, especially children, are often guaranteed a translation for the process as well as a part of an efficient legal system. In the same case the state pointed out the applicant's vulnerable position as an unaccompanied minor, and the fact that the asylum applicant in this case had been without representation, which again was a breach of article 13 of the ECHR.

Some states have been criticized due to their lack of resources in the area of translation services offered to asylum seekers. In Hungary, the information the asylum seekers have received has lacked substantial information on what legal aid entails.²⁰¹ Asylum seekers have been eligible for free legal aid since 2004 but only a few of the asylum applicants use this service because the applicants are not aware of the legal aid system and do not seek the services.²⁰² The lack of information that asylum applicants are entitled to restricts their possibility of a well-conducted procedure, and the lack can potentially impact the process and the result of the application. Flawed applications may take longer to process, and the authority's decision on international protection may be based on an insufficient

¹⁹⁹ Asylum Procedures Directive, art. 19

²⁰⁰ *Rahimi v. Greece*, application no. 8687/08, judgement 5 April 2011, 79 §

²⁰¹ Asylum Information Database Updated Country Report from Hungary, 2016, pp. 23-25

²⁰² *Ibid.* p. 24

amount of information, as asylum applicants without legal aid are in a worse position to represent their case in an asylum procedure.

A major issue can be found as well with the language barrier in the Hungarian legal aid system, as it does not include translators or interpreters which leads to asylum applicants hardly being able to communicate with their legal aid, and that only a few applicants are able to effectively use the legal aid offered. The legal aid in this case cannot be said to be enough in practice as many are not able to access it.

The right to information is one of the most important underlying rights of a minor's part of a judicial or administrative procedure. The right is tightly connected to the right to be heard, as one needs information to be able to have an opinion on a matter. In the context of age assessment proceedings, it is not only the child in question who has the right to information, but his guardian or legal representative are likewise entitled to the information.

The right to information should include a minor's right to be informed about the procedure of the complete asylum application process as well as the specific age assessment procedure. Unaccompanied minors must be informed about the age assessment they may have to participate in, specifically regarding the medical examination per the Asylum Procedures Directive.²⁰³

The assessment of the unaccompanied minor's mental age and development is the first phase of age assessment where the state must ensure that the minor's representative is informing the unaccompanied minor of his rights and the state's obligations. Article 13 of the Asylum Procedures Directive states that "Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview."²⁰⁴ This impacts minors in different states as the personal interview is a separate and optional step in the asylum application procedure granted to minors in some states. The optional character of this article does show how weak the harmonization of the directive is as is it only is a suggestion and does not to any degree emphasize the concrete need for personal interviews during the procedure.

²⁰³ Asylum Procedures Directive, art. 25

²⁰⁴ Ibid. art. 13

The national legislation regarding the interview varies and consequently impacts minors. A personal interview has the potential to reveal more information about the individual cases and thus the restriction may weaken minors safeguards in the states that choose to implement this restriction. Personal interviews in every case would lead to a more individual assessment of each case. Every minor would have a better opportunity to be heard regarding his specific circumstances which possibly would impact the quality of the assessment of the minor's age and need for international protection. The representative has a duty, established in the Asylum Procedures Directive, to inform the unaccompanied minor about the implications and the possible consequences of the personal interview in the process of age assessment and asylum application.²⁰⁵

In Finnish legislation this right is codified in the Aliens Act, which states that before consent can be given for the unaccompanied minor to participate in an age assessment procedure the applicant as well as their representative must be given information of the consequences of the age assessment and the methods used if medical age assessment methods are used.²⁰⁶ The right to information is connected to giving true consent as an unaccompanied minor or their guardian or representative cannot consent freely if they have not received all the information needed to make a free decision.

4.4.3 The Right to be heard

Children have a right to be heard in all judicial and administrative matters concerning them, assuming that the child is capable of forming their own views and that their views are given due weight considering the age and maturity of the child.²⁰⁷ This is stated at an international level in the CRC article 12. Article 12 establishes in its first part that "States Parties shall assure to 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", and continues to secure a child's right to be heard in all judicial and administrative proceedings by stating

²⁰⁵ Asylum Procedures Directive, art. 25.1.b

²⁰⁶ Finnish Aliens Act 6a §

²⁰⁷ CRC, art. 12

“For this purpose, the child shall in particular 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” in its second paragraph.²⁰⁸

The right to be heard has been strengthened in a context of unaccompanied minors by the CRC Committee’s General comment no. 6. The comment emphasizes that “in determining the measures to be adopted with regard to unaccompanied or separated children, the child’s views and wishes should be elicited and taken into account”.²⁰⁹ It is central in all decisions made concerning children to gain the views of the child and to account for their opinions as right holders.

The General Comment establishes that the right to be heard is closely linked to the need for minors to receive information. The committee has in the same General Comment stated that

To allow for a well-informed expression of such views and wishes, it is imperative that such children are provided with all relevant information concerning, for example, their entitlements, services available including means of communication, the asylum process, family tracing and the situation in their country of origin.²¹⁰

States have a positive obligation that is not limited to hearing the child, but it extends to seriously consider the child’s opinion. This should not be confused with a child absolute right to decide in matters impacting them.²¹¹ The Finnish legislation has included this in the Aliens Act. The legislation states that a child that is at least 12 years old shall be heard unless it is obviously unnecessary.²¹² A younger minor can be heard if the child is developed enough for their opinions to be taken into account when a decision is made impacting the minor. The law includes also that the child’s opinions should be considered in accordance with their age and development.²¹³

²⁰⁸ Ibid.

²⁰⁹ United Nations Committee on the Rights of the Child (CRC), General comment no. 6, 25 §

²¹⁰ Ibid.

²¹¹ Pobjoy, 2017 p. 58

²¹² Finnish Aliens Act, 6 §

²¹³ Ibid.

The hearing of a child is a process that should be continuous throughout the minor's application proceedings. A minor's views should be gathered especially when the authorities have doubts about the information that they have been given. The authority's explanation to why there is doubt or why they require additional information may help the applicant to be more cooperative. This allows the minor a possibility to explain further and to be heard properly in cases where there are inconsistencies.²¹⁴ In the context of the consent of the age assessment, especially the medical examination, an applicant's reasons to refuse must be explored. The reluctance to consent to a medical age assessment can sometimes be overcome if the applicant is offered more information.²¹⁵

²¹⁴ EASO, 2018, p. 28

²¹⁵ Ibid. p. 29

5. The age assessment

5.1 General considerations regarding the age assessment procedure

The CRC Committee has emphasized the importance of an age assessment to properly identify a minor and to fulfil a child's right to identity. Their comment on the right to identity is a continuation of the right to identify established in the CRC article 8.²¹⁶ The Committee has stated that

Such identification measures include age assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, s/he should be treated as such.²¹⁷

The factors listed by the committee are central points that must be safeguarded to ensure that unaccompanied minors are not treated in a manner that breaches international children's rights. The EU and the directives that regulate this area have taken these same considerations when emphasizing the importance of children's rights in the directives and regulations preambles.

There are multiple stages in a medical age assessment. States use different methods during age assessments. The lack of direct regulation has led to a variety of methods used by states. A broad margin exists for states to use their own discretion which still satisfies the requirements set out both at a universal level by the CRC and at a European level by the various directives governing this area. The EU directives that Member States follow use minimum standards when regulating medical age assessment procedures. The directives state that states are allowed to use medical age assessment as a tool to assess a possible minor's age, but the Asylum Procedures Directive, which includes the use of medical age assessment of minors does not include any procedural guidelines for how to use medical methods to complete an age assessment.²¹⁸ Medical age assessments are permitted but are

²¹⁶ CRC art. 8

²¹⁷ Ibid.

²¹⁸ Asylum Procedures Directive, art. 25.5

not mandatory or even encouraged, if there are other ways to determine an unaccompanied minor's age.

In this context, the CRC Committee comment cited above is of importance as it guarantees the child's rights in a broad manner in a context that is related to the procedural rights unaccompanied minors encounter during the age assessment. The comment attempts to safeguard unaccompanied minors' rights during a medical examination process and underlines the importance of other methods, as well.

An age assessment has a few different elements which need to be examined, and state practice varies. Based on the findings of some or all of the elements that can be used to assess age, the authorities will reach a conclusion about the age of the applicant. There are generally different sources of evidence that are used, and some states do not use all the applicable methods. This chapter will discuss the different methods in use and how the lack of a united legislation throughout the EU leads to an unharmonized process for unaccompanied minors arriving in the Member States.

Member States use different evaluations for assessing age which shows clearly in an analysis made by the EASO.²¹⁹ States use different methods in their evaluations and weigh the asylum applicant's evidence in varying ways. Some states stress the physical age, and some consider mental age and development of a child as the most important factor. This leads to a variation in the methods used during an age assessment procedure and to very varying results depending on where the claimed minor is being age assessed. The CRC Committee encourages states which are parties to the CRC to assess a person's age from multiple perspectives and not only focus on physical development. The EU directives do share this evaluation in theory, however, states are allowed a wide discretion and may assess age using a method they prefer.

The medical age assessment aspect will be considered in this thesis from a processual viewpoint. As stated, this will not include an analysis of the different methods medically used but only consider the medical age assessment from the perspective of procedural differences and to enhance the unequal treatment that is evident throughout the EU, allowing some children a process which does not violate their integrity to the same extent

²¹⁹ EASO, 2018

as other states' methods. The use of the margin of error of the medical age assessment results is used in varying methods, which leads to more favourable conditions depending on which state the assessment is conducted in. The plurality of different methods used in the EU prompts ethical issues as a shared protocol based on the most recent scientific methods and evidence would ensure the safeguarding of minors' rights to a broader degree.

There is an exceptional case in Europe as well in this issue which is Bulgaria. Bulgaria lacks an official age assessment process completely.²²⁰ All other Member States have an official age assessment procedure in place which includes methods of the states' choice. Bulgaria relies on the resources of NGOs functioning within their state to identify, not only unaccompanied minors', but persons with other vulnerabilities as well.²²¹ In Bulgaria's state report to the organization AIDA from 2017 it is stated that at currently there is neither law nor practice providing any mechanisms for the identification of unaccompanied minors'. An age assessment can be ordered if state authorities deem the stated age of the unaccompanied minor to be false but only if the minor has stated to be a minor, and the state believes that the claimed minor has reached adulthood. Age assessments are rare as there are no official statistics over their occurrence, and at the end of 2017 an NGO found proof of nine cases of age assessment in Bulgaria.²²² This lack of procedure has consequences for the minors arriving and seeking asylum in Bulgaria as the remaining evidence is used to assess the asylum application.

5.2 Document assessment

The age assessment usually begins with an evaluation of the documentation available. The unaccompanied minors are seized of their documentation at the border by the border guards and is used to identify the person if documents are available. Primary documentation is often birth certificates or other state issued documentation. Due to many

²²⁰ European Migration Network, 2015, p. 18

²²¹ Bulgarian country report to AIDA <https://www.asylumineurope.org/reports/country/bulgaria/asylum-procedure/guarantees-vulnerable-groups/identification>, accessed 11.12.1018

²²² Bulgarian Helsinki Committee, 2017 Annual RSD Monitoring Report, 31 January 2018

circumstances the minor arriving at the border to enter the EU may not have any or only secondary documentation with them.

Asylum seekers fleeing from their states of origin do not always carry their identification documentation with them, which leads to difficulties for the immigration authorities to identify the asylum applicants. If the refugee has brought identification of some sort there is still a need to verify the identification or to decide whether the documentation is legitimate. A state processing an asylum claim is not always capable of contacting the applicant's state of origin to verify an asylum seekers identification due to security reasons. According to the Committee on the Rights of the Child, General Comment no. 6, discussing the duties of tracing an unaccompanied minor's family, it is possible to draw the conclusion that if a state is trying to trace a family the state should not make any reference to the child as an asylum seeker or refugee.²²³

Following this precaution, a state processing an asylum claim should not be in a position to contact the applicant's state of origin to verify the identity if an unaccompanied minor without possibly endangering the person. Contacting an unsafe third country could have negative consequences for an individual or their families if they are persecuted. The state processing an asylum application must see to the safety of their asylum applicants and avoid providing information about refugees to third states.

The EASO has recommended that document evidence should be considered primarily before resorting to other assessment methods, such as medical age assessments.²²⁴ Considering the fact that many states do not systematically record births or other vital life events and thus may not fulfil the requirements for public records within EU states. These legal documents may not be available for refugees because of circumstances in their states of origin and that is why it is recommended for states to accept supporting documentation in the form of passport, identification documents, residence cards, travel documents provided by the UNHCR or other documentation that can strengthen the unaccompanied claimed identity and age.²²⁵

²²³ United Nations Committee on the Rights of the Child (CRC), General comment no. 6, para. 80

²²⁴ European Asylum Support Office, *Age assessment practice in Europe*, December 2013, p. 6; See also: Separated Children in Europe Programme, 2012.

²²⁵ EASO, 2018, p. 45

Documentation that the asylum seeker has brought to the authorities of the receiving state and the story that the asylum applicant is part of the evidence for the case of their age and asylum decision. It is not only state issued identification documentation which is considered as evidence, but also documents that can otherwise support an unaccompanied minor's claimed age. Asylum seekers from some states do not always have a legitimate identification in the eyes of the receiving state, as some states issue documentation which is very simple and easy to forge.

An explanation to why many asylum-seeking minors do not have any documentation with them is that there is a low registration rates in the countries of origin and that is why they are lacking documents or are only able to provide documents which are considered unreliable.²²⁶ UN statistics show that around 6-10% of children who were born 14-18 years ago in the countries of origin were registered at birth.²²⁷ This is a quite regular occurrence which contradicts the CRC, as it has established that “the child shall be registered immediately after birth”.²²⁸ To place the burden of proof, the burden to provide migration authorities with documentation, to prove ones age is a much more burdensome task for a person from outside the EU as a large part of the population in states where they are fleeing from have never been registered.²²⁹

The burden of proof lies in asylum cases on the asylum applicant even in the case of minors.²³⁰ There is national case law from Sweden that the burden of proof lies with the applicant to establish their stated age as probable with supporting documents if available.²³¹ The case was about an asylum seeker claiming to be 16 years old when he arrived in Sweden. The migration authorities found that he seemed to be older than stated and offered the possibility of a medical examination of his age. The medical examination

²²⁶ Ibid. p. 16

²²⁷ Ibid. see also: UNICEF statistics:

http://data.unicef.org/wpcontent/uploads/2015/12/Birth_registration_May-2016.xlsx, accessed 11.12.2018

²²⁸ CRC art. 7; see also: Covenant on Civil and Political Rights art. 24 which states that “Every child shall be registered immediately after birth and has the right to acquire a nationality”

²²⁹ Noll Gregor, *Creation, imagination, speculation: age assessment and the asylum procedure*, Refugee Studies Centre, part of the Hilary term 2014 Public Seminar Series, 5 March 2014. Persons born 14-18 years ago are the persons who now are being age assessed

²³⁰ Note on Burden and Standard of Proof in Refugee Claims, UN High Commissioner for Refugees (UNHCR), 1998, para. 6

²³¹ Swedish Migration Court of Appeal, MIG 2014:1, UM 2437-13, judgement of 11 February 2014

in turn then showed that according to two different doctors that it was likely that the applicant was of age of majority.

Later on, the applicant showed his *tazkira*, a kind of document of identification from Afghanistan that was dismissed by the migration services as it is too simple to be reliable as there are no security measures taken to verify if the document is legitimate. In the Swedish administrative system, the principles of free evidence evaluation and free evaluation of evidence are used.²³² In view of the placement of the burden of proof, a medical age assessment is one of the few measures that the Migration Board in Sweden can use in cases where the asylum seeker has not been able to thoroughly demonstrate his claimed age, and there remains doubt about the applicant's age. A medical age assessment then has a certain amount of weight as evidence, which cannot be disregarded and must be assessed together with all the other evidence that has been brought forth.

Evaluations of documents are often based on the documents that the unaccompanied minors have with them and which they are required to release to the immigration authorities at the border. Documentation accessed after the first contact between the applicant and the authorities can be considered valuable. Evaluating the legitimacy of documentation is a difficult task, and that is a reason why there are several other factors in age assessment.

5.3 The mental assessment

The assessment of documentation is one of the non-medical methods used in age assessment of unaccompanied minors. The other non-medical method generally in use is the mental assessment. One of the main components of a mental and developmental age assessment is the interview conducted with the unaccompanied minor.

The interview is perhaps the most important non-medical method of evaluating a presumed minor's age as it consists of interviewing the minor individually. Interviews are an important source of background information of the applicant's past and the

²³² Translated terms of *Fri bevisprövning* and *Bevisvärdering* from the Glossary for the Courts of Sweden, Avdelningen för kompetensutveckling, och internationella relationer och Avdelningen för HR och kommunikation, 4th edition, 2016

situation from which they are fleeing, but it can also be used as a method for migration authorities to evaluate a minor's psychological state and mannerisms to determine the age of an applicant based on their mental capabilities. Interview based evaluations of age can have a large impact on the result of the age assessment in some states, but in others the interview is given almost no weight at all.²³³

Children are entitled to a child sensitive interview conducted by a professional with enough training to be viewed as a trustworthy interviewer. All asylum seekers have a personal interview and there are guarantees set out in the Asylum Procedures Directive regarding how interviewers must be able to be considerate of different backgrounds and gender.²³⁴ The special safeguards in place for minors in this instance are focused on the personal interviewer's competence which according to the Asylum Procedures Directive is

that the that interview is conducted by a person who has the necessary knowledge of the special needs of minors' and that an official with the necessary knowledge of the special needs of minors' prepares the decision by the determining authority on the application of an unaccompanied minor.²³⁵

These required qualifications guarantee that a minor has an interview with special emphasis on their status as a vulnerable person. Their special vulnerabilities are recognised when a decision is made based on the interview. However, it is arguable that all Member States are not in a position to offer this level of competence to all unaccompanied minors.

Minors and persons suspected to be underaged are treated with their vulnerability status in mind. Staff involved in status determination procedures of children should receive training on adopting a child-, cultural-, and gender-sensitive application of international and national refugee law. To properly assess asylum claims of children, information about children, including information on minorities and marginalized groups, should be included in government efforts to collect country of origin information.²³⁶ This is stated

²³³ EASO, 2018, annex 4

²³⁴ Asylum Procedures Directive, art. 15

²³⁵ Ibid. art. 25 1 a-b

²³⁶ CRC General Comment no. 6, para. 75

by the CRC Committee. EU directives state that when making decisions which most likely potentially has an impact on the inclusion of these values into domestic legislation it is to be prioritized.²³⁷ Some states have included these aspects into their national legislation.

The Asylum Procedures Directive establishes that the best interest of the child is to be considered when making decisions based on the directive and when making a judgement about a child, and the state must heavily consider what is the best interest of the child regarding their social development and background.²³⁸ The interview is central as it provides much information about the factors that must be considered when making a decision about a child, while keeping in mind the best interest of the child and treating an individual child as a unique case with unique circumstances. Authorities contemplating the best interest of the child have to consider many variables regarding the minor's present and future situation. The state's decision is twofold, as there must be a decision on the age assessment as well as possibly granting a minor international protection.

An example of good practice of safeguarding the rights of unaccompanied minors' can be found in the Belgian procedure of interviewing unaccompanied minors. The country report that the state has submitted to the European Migration Network shows how Belgium has implemented a system for interviewing minors' that prioritizes the unaccompanied minor.²³⁹ The minors are separated from the other asylum seekers and assisted by personnel trained to accommodate the special needs of minors. The minors are then appointed a guardian. The minor will then be invited to an interview with a specialised caseworker trained in interviewing vulnerable persons.²⁴⁰

This is not the asylum interview which the applicant will later participate, in where the guardian is present, and the minor may be assisted by a lawyer and a translator if needed. This second interview is conducted by someone who has extensive training in vulnerable groups and considers the minor's age, maturity and other cultural and personal factors.

²³⁷ Asylum Procedures Directive, preamble 39 – 46 §

²³⁸ Ibid. preamble 33 §

²³⁹ European Migration Network, *Policies, Practices and Data on Unaccompanied Minors in Belgium*, 2014 Update, Focused Study of the Belgian National Contact Point of the European Migration Network (EMN), p. 18

²⁴⁰ Ibid.

The caseworkers interviewing these minors are specialized in the geographical area that the minor comes from. In Belgium an applicant's young age can shift the burden of proof away from the child and towards the state authorities, and the principle of the benefit of the doubt has a larger field of application.²⁴¹ The way the interviews are conducted and the different aspect that the Belgian migration authorities have considered when implementing this procedure adds greatly to the safeguards of the rights of the unaccompanied minor. The aspect of the mental maturity evaluation but for the procedural rights a child has when a decision is made about them, such as he has a right to information, a guardian and a right to be heard, among other rights.

The fact that the burden of proof shifts away from the minor is an asset for the children being processed in Belgium. Chapter four of this thesis has criticised the aspect of burden of proof and how burdensome it may be for third country nationals who have never been registered and Belgium works around this issue for the minors lacking documentation.²⁴²

A study conducted in Finland by the Minority ombudsman has concluded that unaccompanied minors are often not aware of how the asylum application process functions. In interviews many minors stated that from their perspective there are many different people involved in the process. The process is viewed as complicated, and many applicants not understand the process, or their rights are during the process.²⁴³ This study was conducted prior to the refugee crisis in 2015, but it does highlight the issues unaccompanied minor face during the asylum application process. The responses from the minors can be used as a scale to study how well the rights of minors are safeguarded. This discussion has emphasized how the rights are safeguarded in theory and in legislation on multiple levels, but the safeguards only have value if they are efficient in practice as well.

²⁴¹ European Migration Network, 2015, p. 21

²⁴² European Migration Network, *Policies, Practices and Data on Unaccompanied Minors in Belgium*, 2014 Update, Focused Study of the Belgian National Contact Point of the European Migration Network (EMN), p. 18

²⁴³ Parsons, p. 3

5.4 The physical assessment

5.4.1 Informed consent

The right to information is key in enabling an unaccompanied minor to understand the age assessment process and the consequences of it. The rights and the obligations that the process entails are central information to the minor. This right to information is closely connected to the right to make decisions based on accurate and comprehensive information. Informed consent includes the aspect of available information and the ability for minors to give consent freely and without any kind of pressure or condition.²⁴⁴ In practice an example of coerced consent would be if a state requires a minor to undergo an age assessment and if the minor refuse he would be considered an adult.

Prior to their examination for age assessment purposes minors should be informed in a language they understand of the possibility that their age may be determined by medical examination and the consequences age has on their application.²⁴⁵ The information needed for the fulfilment of right to information regarding the age assessment is the methods which will be used, and the consequences of the assessment, including that the result of the medical age assessment may determine whether the applicant is to be regarded as a child or an adult. The minors need to be informed that medical examination is not a mandatory procedure, and that states cannot reject an application based on the refusal to undergo a medical examination.²⁴⁶

The Finnish legislation includes this in the Aliens Act which regulates how a medical age assessment should be conducted and what safeguards are placed during the procedure. The legislation states that the unaccompanied minor and their guardian or legal representative must first be provided with information about the medical procedure and its possible consequences. The information provided must also include the medical

²⁴⁴ EASO, 2018, p. 18

²⁴⁵ Asylum Procedures Directive, art. 25.5

²⁴⁶ Ibid.

examinations possible side effects on the minors' health.²⁴⁷ The information provided by the state authorities regarding the medical age assessment must include information on the possibility of refusing the medical examination and consequences of refusing to participate in such an examination, and the consequences of refusing to proceed.²⁴⁸ The information is to be given in a language the applicant or guardian or legal representative can reasonably be expected to understand.²⁴⁹ The ECHR case of *Rahimi* demonstrates how the court can in practice find a violation of human rights if the information is not presented in a language that the applicant is able to understand.²⁵⁰

The legislation states that the examination can only be conducted if the person to be examined has given their consent in writing and the consent must be based on knowledge and free will.²⁵¹ If either of these requirements are not fulfilled the consent cannot be viewed as true consent. There is a requirement of written consent from their guardian or legal representative. The consent is then given in an informed and free way as there is no pressure to consent and the information should be accurate. In the Finnish legislation the pressure to consent does not explicitly exist because the refusal to participate in a medical age assessment cannot alone result in a negative asylum decision.²⁵² If an applicant refuses to undergo the examination, he may be considered an adult if there is not an acceptable reason for the refusal.²⁵³ There are, however, other aspects of the age assessment that must be considered. An applicant's refusal can be justified and well-motivated in some cases. A method to combat unaccompanied minors' refusals is to inform the minor about the procedure and its consequences. This aspect is discussed earlier in this thesis and the same context and regulation applies is this issue.

The authorities must make an age assessment of the suspected minor even if he refuses to participate in a medical examination. The lack of medical evidence forces authorities to base the decision on other evidence. The deciding authorities cannot decide solely based on the refusal to not partake in a medical examination that the applicant is not a

²⁴⁷ The possible side effects are often related to the use of X-rays and its radiation during a medical age assessment

²⁴⁸ Asylum Procedures Directive, art. 25

²⁴⁹ Finnish Aliens Act, 6 a §

²⁵⁰ *Rahimi v. Greece*, application no. 8687/08, judgement of 5 April 2011, para. 79

²⁵¹ Finnish Aliens Act, 6 a §

²⁵² Ibid. 6 §

²⁵³ Ibid.

minor. This principle applies as well in the authorities means to determine whether the person needs international protection. A negative decision about granting asylum cannot be based on an unaccompanied minor's refusal to participate in one aspect on an age assessment. The authorities deciding on the applicant's status as a refugee must still consider the rest of the applicant's case as an asylum application, and if it fulfils the requirements for need of international protection, it may be granted to the applicant.

In 2016 in Finland there were 630 medical age assessment examinations made. 64 % of those who were medical age assessed were determined to be adults.²⁵⁴ The total amount of asylum decisions made regarding unaccompanied minors' that year was 1824, which means that 35 % of the decisions made regarding unaccompanied minors were done using medical age assessments. There is not a lot of data from recent years to analyse the impact of medical age assessments on asylum decisions on unaccompanied minors. The most recent study conducted in Finland, by the minority ombudsman, in 2008 shows one unaccompanied minor applying for asylum declined to participate in the age assessment and was later on treated as an adult during their application process.²⁵⁵

The Member States use different approaches when determining the margin of error of an age assessment. For example, in Belgium a standard deviation (minus 1) is used, in Austria the age assessment leads to a defined minimum age and in some states the age assessment determines the likelihood in a percentage that the person is the claimed age and on this basis an evaluation is made whether the person is likely to be underage or not.²⁵⁶ There is variation in the margins of error used and the methodology of analysing the results of the different medical methods.

The study by the Minority Ombudsman in 2010 where it was noted that the unaccompanied minors then were not aware that they were able to refuse the medical examination.²⁵⁷ In the study there was one asylum applicant who refused to be examined medically that resulted in a decision that they were adults.²⁵⁸

²⁵⁴ Annual Report on Migration and Asylum, Finland 2016, European Migration Network, 2017

²⁵⁵ Parsons, p. 51

²⁵⁶ European Migration Network, 2015, p. 18

²⁵⁷ Parsons, p. 51

²⁵⁸ Ibid. p. 51

5.4.2 Methods

There is no one method which is used during the medical age assessment. The process of medical age assessment is very broadly done at the state's own discretion. The different methods should respect the core principles, such as the best interest of the child and the principle of least intrusive procedures, which are stated in the Asylum Procedures Directive.²⁵⁹ The CRC Committee has emphasized this in their comment regarding third state nationals in a foreign territory. There is a wide margin of appreciation for the Member States methods in the age assessment which is an explanation to the lack of harmonization of practices.

From a human rights perspective based in on the ECHR article 8 *right to respect for private and family life* one can consider that the assessment is strictly private life. The ECHR applies the same to minors as to adults and children have the same rights set forth in the convention as an adult. The examination should therefore be done in accordance with the restrictions mentioned in article 8.2. It states that

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.²⁶⁰

The state does not have a right to interfere in an individual's private life unless it can be justified by this article. The age assessment can be argued to be necessary in a democratic society as states have the right to control immigration to its territory.²⁶¹ However, the methods used should be as nonintrusive as possible. In a discussion where a medical age assessment with a strong physical aspect the discussion must focus on the part of physical integrity. As stated earlier, this thesis is not focusing on the technical or medical side of medical age assessment but on the differences in the methods and the outcomes to

²⁵⁹ Asylum Procedures Directive, art. 25.5

²⁶⁰ ECHR, art. 8.2

²⁶¹ *Abdulaziz, Cabales And Balkandali v. The United Kingdom*, Application no. 9214/80 9473/81 9474/81, judgement 28 May 1985

demonstrate the differences for minors depending on where they are applying for asylum and undergoing the age assessment.

In case law from the ECtHR:s has established that there must be proportionality between the actions of states in the name of any of these qualifiers. This means that often the judges weigh whether the infringement of the right has been in proportion to the aim and national interest.

Physical integrity is a part of one's private life and should be protected. The ECtHR follows the principle of proportionality as well in their judgement of states use of the margin of appreciation. A judgement of breach of one of the rights must include the aspects stated in article 8.2 as well have legitimate aim and the interest must balance out in the consideration of proportionality.

The physical examination must be in accordance with the law according to the ECHR. In the Finnish legislation this is prescribed in the Aliens act which states that the state authorities are allowed to conduct a medical age assessment and how the examination should proceed.²⁶² The legal requirement is fulfilled by the Finnish legislation as there is clear support in the law on when it is appropriate to proceed with a medical age assessment. The issue of consent is included in the paragraph as well as what is required by the state and those who are performing the medical age assessment. It is possible to compare this to the legal situation in Bulgaria. Bulgaria lacks an official age assessment method completely. It is not prescribed in any legislation and the nine age assessment procedures performed on unaccompanied minors would be a violation of article 8 of the ECHR.

There is a lack of case law in international courts such as the ECtHR as the problematics of medical age assessment for unaccompanied minors is yet to reach the court. There is some case law from which one can draw parallels to the medical age assessment procedures. It is a question of time before there will be actual cases regarding these issues, but the time is not now.

²⁶² Finnish Aliens Act, 6a § and 6b §

The medical assessment is a procedure which is allowed by the Asylum Procedures Directive.²⁶³ The article does not specify a method for the medical age assessment, but it does provide some guarantees to the minors about how the procedure will be performed. Member States are only permitted to do a medical examination if the states have doubts concerning the persons age after general statements and other indicators. If there is continued doubt still about the age of the person after a medical examination the applicant shall be considered a minor.²⁶⁴

The medical examination is only to be proceeded with if there is clear doubt regarding the applicant's claimed age. This means that if an unaccompanied minor can produce enough evidence of a satisfactory level, such as documentation, states should avoid the other elements of an age assessment. This is in accordance with both international children's rights standards as well as the Asylum Procedures Directive. A medical age assessment should not be an examination that is conducted automatically.²⁶⁵ It does occur in some states as a process which cannot be bypassed which is a violation of EU legislation against the CRC and CRC Committee's comments. A few Member States solely rely medical methods during age assessment such as Latvia.²⁶⁶ Romania uses mainly medical methods, except for one non-medical aspect when assessing an unaccompanied minor.²⁶⁷ The lack of mental and developmental assessments is not in accordance with the CRC Committee General Comment that emphasizes a well-rounded assessment of age.

The Asylum Procedures Directive states that Member States must ensure that the unaccompanied minor is informed prior to the examination in a language he understands, of the possibility that his age may be determined by the medical age assessment. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for

²⁶³ Asylum Procedures Directive, art. 25.5

²⁶⁴ Ibid.

²⁶⁵ Ibid. art. 25

²⁶⁶ EASO, 2018, annex 4

²⁶⁷ Non-medical methods include: documents submitted; estimations based on physical appearance; age assessment interview; social service assessment and psychological interviews. Of these methods Romania uses estimations based on physical appearance, see also EASO, Practical guide on age assessment, 2018, p. 106

international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination. The unaccompanied minor and/or their representative must consent for a medical examination to proceed. Member States must ensure that the applicant's refusal to do a medical examination does not lead to a rejection of an application of international protection.²⁶⁸ Lastly the directive states the best interests of the child shall be a primary consideration for Member States when implementing this directive.²⁶⁹

Some Member States do not use the method which is least intrusive to a person's physical integrity and many states still utilize an assessment of sexual maturity by inspecting the applicant's genitalia. Generally, there is a risk that the unaccompanied minors have experienced some kind of trauma on their journey.²⁷⁰ An intrusive medical examination may have a negative impact on their mental health on those who have experience trauma previously. This trauma adds to their vulnerable position as an unaccompanied minor. The invasive medical examination cannot be considered to be in accordance with the principle of the best interest of the child. The variation of methods used shows the inequalities that these minors experience, as it is only in some states that the medical age assessment includes very intruding examinations.

The method of examining sexual maturity is unreliable as it has a very wide margin of error and its invasive nature is not complicit with the Asylum Procedures Directive, which encourages states to use methods which minimize the intrusion of one's body. The best interest of the child cannot be argued to be respected when states use this method to assess age, and it has been criticised by the CRC Committee and the European Commission and is not in accordance with the ECHR or the case law that has been brought before it.²⁷¹

Estimating the age of a person based on observations of physical traits is the least accurate.²⁷² Assessment of a child's sexual maturity cannot be considered to be in the best

²⁶⁸ Asylum Procedures Directive, art. 25.5

²⁶⁹ Ibid. art. 25.6

²⁷⁰ Björklund, Krister, *Unaccompanied refugee minors' in Finland Challenges and good practices in a Nordic context*, Institute of Migration, Turku, 2015 p. 17

²⁷¹ European Parliament resolution of 12 September 2013 on the situation of unaccompanied minors' in the EU (2012/2263(INI)). See also: Detriment of doubt: Age Assessment of Unaccompanied Asylum-Seeking Children, AIDA Legal Briefing No. 5, December 2015, European Council on Refugees and Exiles, p. 4

²⁷² Ibid. p. 56

interest of the child as it is both inaccurate and may be a traumatic event for the children.²⁷³ The Asylum Procedures Directive states that any medical examination shall be performed with full respect for the individual's dignity and shall be the least invasive examination.²⁷⁴ One cannot assume that it is the least invasive form of examination or that it is in the best interest of the child to be examined in this way. However, some seven EU states still use this method.

The issue of consent in matters of invasive medical examinations have been brought to the European Court of Human Rights. The case of *Yazgöl Yılmaz v. Turkey* was about a 16-year old who claimed she was sexually abused while in detention in Turkey. She was forced to a medical and gynaecological examination because of these allegations. The examination was carried out against her consent and the Court ruled that the treatment of the girl amounted to a violation of Article 3 of the European Convention on Human Rights.²⁷⁵ The Court saw that the authorities had failed to obtain the consent of the girl or her legal representative for the gynaecological examination. Considering her vulnerable position in custody, the girl could not have been expected to object to such an examination.

Even if this case is not directly related to age assessment procedures it is relevant to note the importance the Court places on obtaining the informed consent of the child or his legal representative before referring the child to any medical examination. The risk that invasive medical examinations could have traumatizing effects on a child is clearly acknowledged. The court states that children in the hands of state authorities cannot be expected to object to medical examinations if they are in a vulnerable position and receive no proper support in accordance with their rights and needs as children.²⁷⁶ Gynaecological examination is not a scientifically accurate method to assess age and it can be traumatizing for some minor who already have experienced sexual trauma. It is not considered to be in the best interest of the child to be evaluated in this way as it may be very derogatory or traumatic.

²⁷³ Ibid. p. 34

²⁷⁴ Asylum Procedures Directive art. 25.5

²⁷⁵ *Yazgöl Yılmaz V. Turkey* application no. 36369/06, judgement 1 February 2011

²⁷⁶ Age assessment: Council of Europe Member States' policies, procedures and practices respectful of children's rights in the context of migration, Council of Europe, 2017, p. 40

Some states have no guidelines at all on how to proceed with an age assessment, such as Lithuania.²⁷⁷ In cases where the regulations and guidelines are non-existent it is difficult to evaluate how the situation functions in practice and how the minors, or suspected minors are treated in the state.

In Finland a medical age assessment most often includes an examination of an applicant's knee and mouth cavity. This method has a margin of error of ± 2 years and is not very reliable but considering the alternatives it is arguable the most scientific method to use.²⁷⁸ The authorities responsible for determining the age of individuals are aware of the margins of error and are accounting for these margins when making decisions on age in each case.

States use different margins of error when determining the age of an applicant. The national guidelines are generally found in the legislation concerning migration and aliens, but they are assumed to fulfil the requirements set out in the EU directives regulating this legal area. For example, in Belgium, the age is assessed by medical means include three tests: clinical impression of a dentist, a radiological examination of the dentition; a radiological examination of the hand and wrist of the non-dominant hand; medical ends of both collarbones. Belgium has opted for these methods to increase the validity and reliability of the medical age assessment.²⁷⁹ If the three different tests give different results, the lowest age is accepted as the minor's age. To further safeguard the minor the age minus 1 standard deviation on a particular test is used to finally determine if the minor is below or over 18 years of age.²⁸⁰

Radiological examinations are widely used in many of the Member States.²⁸¹ It is generally viewed as a quite non-intrusive method with an acknowledged margin of error. There has been critique towards this method suggesting that the use of radiology for age assessment for administrative purposes opposed to medical purposes is not only imprecise

²⁷⁷ EASO, 2018, annex 4, p 102

²⁷⁸ Age Assessment Practice in Europe, 2013 p. 30, p. 35

²⁷⁹ European Migration Network, Belgian contact point, *Unaccompanied minors' in Belgium, Reception, Return and Integration Arrangements*, p. 26

²⁸⁰ Asylum Information Database, national country report for Belgium, 2013, pp.43

²⁸¹ EASO, 2018, annex 4, p. 106

but also unethical and potentially unlawful.²⁸² The CRC Committee has in a response to an individual communication noted that the Greulich and Pyle atlas method lacks precision and there is a large margin of error and thus is not suitable as the sole method for determining chronological age.²⁸³ This method of determination is based on a 1950s study of a sample of 6,879 healthy children of upper-middle-class background from the United States of America and the method is not applicable to migrants which often consist of adolescents fleeing countries from other geographical areas and are not from the same socioeconomical conditions.²⁸⁴ Medical age assessment methods will not be discussed further but this observation is made to point out the insecurity found by the CRC Committee in the methods used.

The United Kingdom ceased the use of medical methods after the case of *R v Merton*, in which the United Kingdom High Court found that “given the impossibility of any decision maker being able to make an objectively verifiable determination of the age of an applicant who may be in the age range” such as 16 to 20, a medical report was unnecessary.²⁸⁵ The guidelines that came, as a result of this case, state that in cases where the age of an applicant is not clear, and no reliable documentary evidence exists, the credibility of the applicant, physical appearance and behaviour must be assessed. The assessment must also consider the general background of the applicant, such as cultural considerations, family circumstances and education.²⁸⁶ The court also emphasised the difference between an applicant’s age assessment and the applicant’s reasons for seeking international protection are two entirely different issues and any inconsistencies in the account for the reasons the applicant is fleeing his country of origin and the person’s

²⁸² Aynsley-Green, Al, Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control, *British Medical Bulletin* 1(102), 2012, pp. 17-42

²⁸³ Committee on the Rights of the Child, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 11/2017, CRC/C/79/D/11/2017, p. 12.6

²⁸⁴ Ibid. 3.1, 8.4, See also Mansourvar, M., The applicability of Greulich and Pyle atlas to assess skeletal age for four ethnic groups, *Journal of Forensic and Legal Medicine*, vol. 22, 2014. pp. 26-29

²⁸⁵ *R (on the application of B) v. London Borough of Merton*, [2003] EWHC 1689 (Admin) United Kingdom: High Court (England and Wales), para. 28

²⁸⁶ Detriment of doubt: Age Assessment of Unaccompanied Asylum-Seeking Children, AIDA Legal Briefing No. 5, European Council on Refugees and Exiles, December 2015, p. 5

account of their age do not necessarily indicate that an applicant's account of their age is to be doubted.²⁸⁷

This is once again an example of the lack of harmonization within the EU in the area of asylum procedures. The medical methods in use have specified but separate margins of error compared to each other. It is understandable that some states have elected not to use these medical methods due to the margins of error. This has had an impact on the difference in treatment that unaccompanied minors receive depending on which state their application is processed in. Many different entities argue for a more holistic age assessment than a strictly medical one, but in general according to the international guidelines that have been discussed, the medical examination should not be the primary method in use.

Concluding of the medical age assessment methods in use in the different Member States it is possible to determine that many states do not fulfil the minimum standards set in the EU Asylum Procedures Directive. Some states use intrusive methods which cannot be considered to be in the best interest of the child, or in accordance with the EU directives, as there are less invasive methods available. The methods compared in this section are all used, and the examples concretely demonstrate how the different methods still have the same value as they are used as perimeters when age assessing. The use of only medical methods is questionable, as the margins of error are quite large, and not only has the CRC Committee criticized this from the perspective of rights of the child, but the medical community has critiqued using many of the tests solely as well.²⁸⁸ Critique from different, but both relevant fields, can imply that the methods are unsatisfactory and that there should be change in practice to safeguard all minors throughout the process. It is clear that uniform guidelines for consistent methods throughout the EU would safeguard children's equal treatment.

²⁸⁷ Brownlees, Laura, Yazdani, Zubier, Office of the Children's Commissioner, *The Fact of Age*, July 2012, p. 28

²⁸⁸ See for example: De Sanctis V1, Soliman AT, Soliman NA, Elalaily R, Di Maio S, Bedair EM, Kassem I, Millimaggi G. "Pros and cons for the medical age assessments in unaccompanied minors: a mini-review" in *Acta bio-medica: Atenei Parmensis* 86(3), 2016, pp. 121-131

6. The judicial process

6.1 The right to an effective remedy in the context of the European Convention on Human Rights

The right to an effective remedy can be found in the ECHR article 13 which states that “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.²⁸⁹ The right can be found in other instruments as well. The right to an effective remedy is crucial in human rights law as it regulates the different proceedings and processes states implement to achieve a resolution in disputes. Dispute in the context of migration concerns the asylum seekers status, and whether applicants will be granted international protection. National authority in the context of the article does not specifically refer to a judicial authority, but to one with mandate to decide within the relevant field to be determined it is an effective authority.²⁹⁰

The applicability of article 13 of ECHR as an independent provision has already been discussed and the ruling of the *Klass* case in 1978 provided the view that Article 13 is an independent provision which can be violated even if there is no other violation of the articles in the Convention.²⁹¹ The Court has also stated later that “Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order”.²⁹² The absence of a satisfactory remedy at a domestic level will normally be a matter subsidiary to the principal complaint, however, it is appropriate that the issue of remedies should be examined separately if there are allegations that the state in question lacks effective remedies.²⁹³ This is an explanation to

²⁸⁹ ECHR art.13

²⁹⁰ *Kudła v. Poland*, application no. 30210/96, judgment of 26 October 2000, 157 §

²⁹¹ *Klass and others v. Germany*, application no. 5029/71, 6 September 1978, Series A No 28, (1979-80), 2 EHRR 214, para. 63

²⁹² *Lyanova and Aliyeva v. Russia* Apps. 12713/02 and 28440/03, judgement of 2 October 2008, para. 134

²⁹³ White, Robin C.A and Ovey, Clare *The European Convention on Human Rights*, 5th edition, Oxford 2010. p. 133

why the article is applicable in the question of age assessment and to article 8 of the ECHR. Article 13, and its case law, establishes an obligation for states to offer an effective remedy in multiple ways. The right to an effective remedy includes many aspects which will be discussed in this chapter. The right is related to the issues that unaccompanied minors face when they are not satisfied with the decision of the first instance and attempt to appeal the decision.

Using the context of the unaccompanied minors the authority in question that has the mandate for migration processes is the immigration authorities and to some extent the child protective services. The Asylum Procedures Directive has established throughout the directive that the “competent authorities” are to be used in all processes of the asylum application process which includes the age assessment.²⁹⁴ In the preamble of the directive there is emphasis on that the applicant has “the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his case and sufficient procedural guarantees to pursue his or her case throughout all stages of the procedure”.²⁹⁵ The competent authorities are also the ones that should decide in the case of age assessment, and make the final judgement on the applicants international protection application. An implementation of effective remedies at a domestic level should lower the ECtHR:s case load and result in a detailed treatment of each individual case.²⁹⁶ An effective remedy is a safeguard for children, as it secures a timely and thorough process and should guarantee a correct assessment of the need for international protection.

In its case law the ECtHR has reflected on the different elements this article includes. The article itself does not pose any specific remedies that states must make available but permits state authorities the possibility to decide how to fulfil the obligations stated in this article.²⁹⁷ The conventions use of the word “remedy” has been identified through its case law. It includes the need for competent domestic authorities to be permitted to handle

²⁹⁴ See for example Asylum Procedures Directive, preamble p. 25

²⁹⁵ Asylum Procedures Directive, art. 25

²⁹⁶ Directorate General, Human Rights and Rule of Law, Council of Europe, “Guide to good practice in respect of domestic remedies” (adopted by the Committee of Ministers on 18 September 2013), p. 7

²⁹⁷ *Budayeva and Others v. Russia*, Application no. 15339/02 etc., judgment of 20 March 2008, para. 190-191

the substance of the relevant convention complaint and to offer relief that is appropriate under the specific circumstances.²⁹⁸ It has been established by the ECtHR that a remedy is not sufficient unless it is sufficient both in theory and in practice.²⁹⁹ This is reflected in other aspects of procedural law and important for any functioning legal system.

The effectiveness of a remedy does not depend on the success of the applicant's case.³⁰⁰ The issue in questioning the effectiveness of the remedy offered by a state is not related to whether an applicant receives an unfavourable decision, if the procedure for the decision has been made with a remedy that can be considered effective. The assessment of effectiveness of a remedy must consider the formal remedies available, as well as the general legal and political context in which they mechanisms function and the personal circumstances of the applicant.³⁰¹

The time required for the authorities to conclude a claim is an aspect to consider when deciding if an effective remedy is offered in the domestic system. Children, as a vulnerable group of applicants, should be prioritized in the asylum systems to ensure that they are processed in a reasonable time frame. Some states, such as Finland, do make an effort to prioritize unaccompanied minors. The Aliens Act affirms the unaccompanied minor's faster asylum procedure.³⁰²

The timeframe for authorities to reach a decision on an unaccompanied minor's application for international protection must be "reasonable" as is stated in the asylum directives. In the case of *B.A.C vs. Greece*, the court deemed that it was not an effective remedy when an adult applicant was waiting for a decision about international protection for twelve years.³⁰³ The norms that have been set forth in this chapter are all provided by case law from the ECtHR. Case law is generally aimed to regulate cases concerning

²⁹⁸ *M.S.S. v. Belgium and Greece*, Application no. 30696/09, judgment of 21 January 2011, para. 288; *Halford v. the United Kingdom*, Application no. 20605/92, judgment of 25 June 1997, para. 64

²⁹⁹ *McFarlane v. Ireland*, Application no. 31333/06, 10 September 2010, para. 114; *Riccardi Pizzati v. Italy*, Application no. 62361/00, judgement of 29 March 2006, para. 38

³⁰⁰ *Kudła v. Poland*, para. 157

³⁰¹ *Dorđević v. Croatia*, Application no. 41526/10, 24 July 2012, para. 101; *Van Oosterwijck v. Belgium*, Application no. 7654/76, judgment of 6 November 1980, para. 36-40

³⁰² Finnish Aliens Act, Utlänningslagen 30.4.2004/301, 6 §

³⁰³ *B.A.C v. Greece*, Application no. 11981/15, judgement of 13 October 2016

adults. Children, and especially unaccompanied children, are in a more vulnerable situation when awaiting an age assessment and a decision about an asylum application.

The ECJ has acknowledged that asylum procedures may take a long time and do in practice exceed the time limits set out in EU legislation as Member States deal with large numbers of asylum seekers. The timeframe varies in different states, but for example, in Austria³⁰⁴ unaccompanied minors wait for their first instance asylum decision more than 15 months. The average processing time in Sweden³⁰⁵ was in 2017 longer than 19 months and up to 20 months in Slovenia.³⁰⁶ In Ireland³⁰⁷ the wait for an interview can be up to 20 months.³⁰⁸ These state reports noted that the timeframe has not been an issue in the past to the same extent, but the increase of irregular immigration has had a negative impact on how quickly state authorities can make investigations and binding decisions.

The pressure of the time restrictions should not impact the quality of the investigation or in this case the age assessment procedure as then it can be considered to not be an effective remedy and violate other procedural rights in the area of processual regulations. The urgent issues with the long processes, in the case of unaccompanied minors, is the fact that minors can age out of the child protection services that are offered. The rights may include a right to education and housing facilities aimed towards minors. The differences in Member States, once again, lead to different results for the unaccompanied minors even though the applicants are in similar situations but in different states.

Timeframes for different states to make an age assessment and an asylum decision for unaccompanied minor varies a lot, and due to the increase of refugees in 2015 the time was the longest in 2016. Viewing the caseload of the immigration authorities the largest

³⁰⁴ Austrias country report (2018) to the Asylum Information Database available here: <https://www.asylumineurope.org/reports/country/austria/asylum-procedure/guarantees-vulnerable-groups-asylum-seekers/special> accessed 30.11.2018

³⁰⁵ Swedens country report (2018) to the Asylum Information Database available here: https://www.asylumineurope.org/reports/country/sweden/asylum-procedure/procedures/regular-procedure#footnoteref1_07gyubw accessed 30.11.2018

³⁰⁶ Slovenias country report (2018) to the Asylum Information Database available here: <https://www.asylumineurope.org/reports/country/slovenia/regular-procedure> accessed 30.11.2018

³⁰⁷ Irelands country report (2018) to the Asylum Information Database available here: <https://www.asylumineurope.org/reports/country/republic-ireland/asylum-procedure/procedures/regular-procedure> accessed 30.11.2018

³⁰⁸ Statistics for Finland are not used in this example because statistics are not available

absolute amount was solved during the same year. This can be explained by the amount of applications that state authorities had to decide on compared to other years.

In the case of *MSS v. Belgium and Greece* the ECtHR held that there had occurred a breach of article 3 in conjunction with article 13. The court stated that the applicant did not receive any legal information and did not have access to organizations offering legal advice and guidance. Further in this case the court found the Greek asylum procedure ineffective especially for vulnerable groups. One of the main reasons for the ineffectiveness of the asylum system in Greece was the lack of a functioning legal aid system and the lack of information concerning the proceedings, which deprives many applicants from the possibility to access legal aid.³⁰⁹ The cases that have been judged in the Court are generally cases where the applicant is an adult so it is not possible to conclude that the judgements would be exactly the same if a minor was the applicant. As unaccompanied minors are viewed as more vulnerable the judgements would probably be harsher, and it is possible that a breach of the convention would have been found under milder neglect from the states side if the applicants of the cases were minors.

6.2 First instance

The EU Charter of Fundamental Rights (CFR) is a source of primary EU-law which is binding on Member States when implementing secondary EU legislation, in this case the directives regulating the different areas of obligations towards refugees. Article 47 of the CFR brought the right to an effective remedy, article 13 of the EHCR, and the right to a fair trial, article 6 of the ECHR, to the same provision.³¹⁰ There is resemblance between the articles from the ECHR and the Charter, however the Charter provisions offer a more extensive protection.³¹¹ Article 47 applies to matters of EU law including migration and asylum that are not regulated by ECHR:s article 6 as the article is only applicable in issues

³⁰⁹ *MSS v. Belgium and Greece* application no. 30696/09, 21 January 2011, para. 319

³¹⁰ Explanations Relating to the Charter of Fundamental Rights (2007/c 303/02), in particular references to: Case 222/84 Johnston [1986] ECR 1651; and others (Title VI, Explanations to Art. 47)

³¹¹ European Council on Refugees and Exiles, ECRE/ELENA Legal note on access to legal aid in Europe, November 2017, p. 3

of criminal law or some civilian situations. The CFR article 47 specifically applies as it states that includes that everyone shall have the right to

fair and public hearing [...] within a reasonable time by an independent and impartial tribunal established by law' beyond 'disputes relating to civil law rights and obligations', to the right to 'being advised, defended and represented' and the right to be granted legal aid in situations where the person concerned 'lack[s] sufficient resources' and 'in so far as [it] is necessary to ensure effective access to justice.'³¹²

The provision includes all right set forth in the Charter and establishes the right to legal aid to everyone lacking sufficient resources in order to ensure effective access to justice.³¹³ The rights related to a person's legal proceedings are better covered by the Charter, and thus the ECJ would constitute a more appropriate court for judgments, but one cannot argue the value of case law from the ECtHR, as it demonstrates how the courts judgement evolves and is dynamic, as well as build precedential law for national courts to follow in future similar cases. The CFR contains the right to asylum as a crucial element of the CEAS all guarantees listed in Article 47 should be applied to asylum cases, even those who lack the enough resources.³¹⁴ Minors often do not need the resources for these guarantees as they are guaranteed legal aid and other benefits through other instruments and legislation. In Finnish legislation the need for remuneration from the applicant is waived by the Aliens Act where it is established that the payment can be made by state funding.³¹⁵

In Finland the right to legal assistance and aid is guaranteed in the legislation in the Legal Aid Act.³¹⁶ The legal aid does not include assisted attendance in asylum interviews unless an assistant's presence is necessary for particularly important reasons. Legal assistance includes the aids' attendance at asylum interviews, if the applicant is under 18 and resides in the country without a custodian.³¹⁷ The Aliens Act ensures that interpretation is

³¹² European Union, Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1, art. 47

³¹³ Explanations Relating to the Charter of Fundamental Rights, Title VI — Justice, Explanation on Article 47, Official Journal of the European Union C 303/17 - 14.12.2007

³¹⁴ Mikolajczyk, Barbara, "Legal Aid for Applicants for International Protection", Chetail Vincent, De Bruycker Philippe and Maiani Franscesco (eds), *Reforming the Common European Asylum System*, Vol. 39, Brill Nijhoff, 2016, pp. 446-470, p. 456

³¹⁵ Finnish Aliens Act, 9 §

³¹⁶ Finnish Legal Aid Act (Rättshjälpslagen), 5.4.2002/257

³¹⁷ Finnish Aliens Act, 9 §

provided if the applicant does not understand the language of the court.³¹⁸ Further the Legal Aid Act states that every person living in Finland has the right to legal aid, as well as those whose case will be dealt with in a Finnish court or if there are special grounds for granting legal aid. Legal aid is provided under the conditions laid down in the Convention on International Legal Assistance.³¹⁹

The ECJ has stated that access to legal aid is an important aspect of the general principle of effective judicial protection in EU law.³²⁰ The ECJ has provided national courts with guidance on the assessment whether the grant of legal aid is necessary to ensure the fulfilment of the obligations of the EU general law principle of effective judicial protection. Issues that the ECJ has recommended that states consider when deliberating to grant legal aid are *inter alia*: the subject matter and importance of what is at stake for the applicant, the applicant's capacity to represent themselves effectively, the complexity of the procedure, and the applicant's prospect of success. Applicants for asylum would generally satisfy the criteria, except for the likelihood of success.³²¹

6.3 The possibility to appeal a decision

6.3.1 Safeguards during appeal processes

The Asylum Procedures Directive establishes applicants entitlement to free legal assistance and representation upon request in the case of a negative decision by the domestic authorities, in order to lodge an appeal and be represented in the appeal hearing.³²² There are limitations that the Member States can use such as only to grant legal aid to those appeals with tangible prospects of success.³²³ When considering these limitations, within the framework for minors, it is relevant only if the minor's age has

³¹⁸ Ibid. 203 §

³¹⁹ Finnish Legal Aid Act, 2 §

³²⁰ Explanations Relating to the Charter of Fundamental Rights, Title VI — Justice, Explanation on Article 47, Official Journal of the European Union C 303/17 - 14.12.2007, p. 4

³²¹ Guild, Elspeth, "The Asylum Seeker's Right to Free Legal Assistance and/or Representation in EU Law", *Issues in International Migration Law*, Brill Nijhoff, 2012, pp. 261-288, pp. 281-284

³²² Asylum Procedures Directive, art. 20

³²³ Ibid. art. 20.3

been assessed to be over 18 years and as a consequence the applicant has not been granted asylum.

Tests for means and merits are applied in some states when an applicant wishes to appeal their decision. Provisions regarding free legal aid may be conditional and have specific requirements, such as the lack of resources, hence the means test. The merits test is based on the likelihood of success of the appeal and may also be a condition for a case to be brought to the second instance.³²⁴ The directive is in favour of these tests and allows them to be used at the appealing to a second instance court.³²⁵ There is a requirement in the directive that obligates states to provide competent legal aid during the process of appealing.³²⁶ This is a change from the first instance, in which the free legal information may be provided by non-governmental organisations, by professionals from government authorities or from specialised services of the states.

The standard for being approved for an appeal of an asylum decision is if the asylum seeker has new evidence to show or if the situation in their country of origin changes drastically for the worse. The asylum decision is influenced by the information that the decision-making authorities have about the applicant's state of origin. States, according to EU directives, cannot rely on lists of so-called safe countries and it is a challenge to acquire accurate information about the security situation of a refugee's home base under a certain period of time.³²⁷ There is good practice which does not use a means or a merits test, such as in Denmark.³²⁸

Appealing an age assessment has restrictions in many states. The EASO has in its practical guide on age assessment noted that an applicant whose age assessment results are different from their claimed age should have the opportunity to challenge the results in a prompt and accessible way.³²⁹ This is only a guideline and many states do not comply

³²⁴ European Council on Refugees and Exiles, Right to Justice: Quality Legal Assistance for Unaccompanied Children comparative report, ECRE 2014, p. 51

³²⁵ Asylum Procedures Directive, art. 20

³²⁶ Ibid. art. 21.1

³²⁷ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) p. 46-48

³²⁸ European Council on Refugees and Exiles, Right to Justice: Quality Legal Assistance for Unaccompanied Children comparative report p. 53

³²⁹ EASO, 2018, p. 29

with this statement. The Asylum Procedures Directive has regulated appealing an asylum decision. Generally, for an appeal to be possible the asylum seeker must bring forth new evidence for their case.³³⁰ In many states it is not possible to only appeal the result of the age assessment, only the asylum decision as a whole. Partial changes in a judgement, regarding asylum, are not very common in appeals systems.

The right to appeal is an important factor of the right to an effective remedy of article 13 of the ECHR. The article provides that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.³³¹ The right includes the right to appeal a decision made about oneself. The article does not require a specific kind of remedy and states have a margin of appreciation on how to comply with this obligation.³³² It does encompass the possibility for applicants to appeal to a second instance.

The Asylum Procedures Directive does not include an article regarding the contesting of an age assessment, as opposed to other decisions taken in the asylum procedure.³³³ This means that states do not have an obligation to re-evaluate their decision regarding age assessment, but they must fulfil the requirement of effective remedy in other ways. It has been argued that shielding the age assessment from legal challenge, despite their potential impact on a child’s fundamental rights, amounts to a restriction to an effective remedy laid down in Article 47 in the EU Charter.³³⁴

In the case of appealing the decisions concerning the age of a unaccompanied minors some Member States offer the possibility to appeal only the age assessment while other states make the appeal possible only if the applicant appeals the asylum decision as a whole.³³⁵ There are two Member States, Cyprus and Slovakia, that do not offer any kind of legal remedy to the applicant against the age assessment.³³⁶ The question remains if

³³⁰ Asylum Procedures Directive, art. 46

³³¹ ECHR art. 13

³³² Directorate General, Human Rights and Rule of Law, Council of Europe, *Guide to good practice in respect of domestic remedies*, p. 13

³³³ Asylum Procedures Directive art. 46.1

³³⁴ EU Charter, art 47. See also: “Detriment of doubt: Age Assessment of Unaccompanied Asylum-Seeking Children”, AIDA Legal Briefing No. 5, December 2015, European Council on Refugees and Exiles, p.6

³³⁵ EASO, Practical guide on age assessment p. 111

³³⁶ Ibid. p.112

these appealing possibilities fulfil the articles requirements. The issue at hand is the fact that these differences are too different to be said to fulfil the requirements established in the framework for the CEAS. The unaccompanied minors who should be receive a similar treatment throughout the EU are experiencing very large differences in the administrative domestic legislature.

The principle of the best interest of the child can be utilized in this area, as the case law of ECHR article 13 has stated that the effective remedy should see to each case particular circumstances. The vulnerability of being an asylum-seeking child should be one of the circumstances that the states authorities take into consideration. The lack of the harmonization between the Member States is visible from the differences and shows that there should be an EU regulation in the legislative area of legal administration in asylum cases.

A child's right to be heard has been discussed earlier in this thesis but are also included in the CRC:s articles 12 and 14 as well as articles 24 and 41 of the Charter of fundamental rights in Europe. This is connected to the right guaranteed in the ECHR article 13, right to an effective remedy where being heard is one aspect of the judicial system. It is a central aspect that has been underlined by the CRC Committee as well to hear children's voices in cases regarding themselves.

The right to an effective remedy is manifested in articles 12 and 47 of the Charter. In the context of the CFR this right implies that the outcomes of the process can be challenged in a different body and that the information and assistance needed to exercise this right is available to children. Financial costs incurred from the challenging the age assessment decision shall not be shouldered by the applicant; otherwise the right to an effective remedy would not be utilized properly.³³⁷ It is still debatable that the ECJ would be a more efficient instrument for breaches of the right to an effective remedy, but the appeal processes have potential to be considered violations of article 13 of the ECHR as well.

³³⁷ Ibid. p. 19

6.2.3 Safeguards for aging out of the protections guaranteed for minors

The last area that needs to be safeguarded in the process of age assessment and procedures relating to the determination of need of international protection is how should minors be protected in case they age out of the process. One of the central rights a minor loses out on if he ages out is the right to family reunification, which is guaranteed in many international instruments. Other rights are affected as well, such as the right to education and the right to a representative. The main issue which will be focused on in this chapter is the right to family reunification.

Ageing out in this context means that a minor reaches adulthood during the process of age assessment and during the process of receiving a decision regarding the granting of international protection. A state has different obligations towards a minor than an adult and hence a minor that ages out during the process has generally lost the right to family reunification. It is generally considered to be in the best interest of the child to be united with their family unless there are some specific circumstances in a case.

A minor's age assessment procedure and decision about international protection can take a long time to finalize. This has especially been an issue when there has been an increase of asylum seekers and the receiving states have not had the resources to manage the amount of asylum applications both from adults and minors properly.

The process can be, and has been in many states, so time-consuming that minors "age out" of the protection they are granted. Most of the unaccompanied minors are between 15-17 years of age, which means that it is possible for a minor to reach adulthood before their age assessment and application has been processed by the authorities. The Asylum Procedures Directive has set forth time limits that are expected to be followed by all Member States during a process to determine if a person should be granted international protection. As stated earlier a child should be processed faster than an adult in these cases. It can be a drawn-out process, especially in cases concerning minors as the age assessment needs to happen first and after the fact the authorities need to make the regular assessment of need of international protection that should be granted to an asylum seeker.

In its article 31 the Asylum Procedures Directive regulates the timeframe of decision makers as “Member States shall ensure that the examination procedure is concluded as soon as possible, without prejudice to an adequate and complete examination”³³⁸; “Member States shall ensure that the examination procedure is concluded within six months of the lodging of the application”.³³⁹ Member States can after this period extend the time limit for a period of nine months if there are complex issues of fact involved, a large number of third-country nationals or stateless people are applying for international protection at the same time, making it impossible due to practical reasons to comply with the six month rule, or a delay is caused by failure by the applicant to comply with their obligations under Article 13. Additionally, there can under exceptional circumstances be another three-month period when it is necessary to ensure an adequate examination.³⁴⁰ This means that the maximum time limit for reaching a decision about the need for international protection is 21 months from lodging the application.

Family reunification for unaccompanied minors has been discussed to a large extent because of this. Member States have had the possibility to use their own discretion in how to proceed when an unaccompanied minor ages out of the right to family reunification and this has resulted in varying guarantees for the minors. The recent judgement from the ECJ established minor’s right to family reunification if the applicant was a minor when lodging the asylum application.³⁴¹ The ruling will have effect on how states permit family reunification as the courts’ rulings are judicial interpretations of the EU legislation that states must confirm to.

The right to a family life is one of the main pillars in many international right systems and it can be found in the CRC and ECHR as well as the International Covenant on Civil and Political Rights article 23 which states that “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”³⁴²

³³⁸ Asylum Procedures Directive, art. 31.2

³³⁹ Ibid. art. 31.3

³⁴⁰ Ibid.

³⁴¹ Judgment of the Court (Second Chamber) of 12 April 2018 (request for a preliminary ruling from the Rechtbank Den Haag — Netherlands) — A, S v Staatssecretaris van Veiligheid en Justitie (Case C-550/16) (ECJ)

³⁴² CRC art. 8 ECHR art. 8, see also; UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, art. 23.1

Article 9 of the CRC states that

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.³⁴³

Which means that a child has the right to be united with their family. There are exceptions to this as is stated in cases of neglect or when a state sees that is necessary to separate a child from their family if it is in the best interest of the child. Article 10 of the CRC guarantees that “applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner”³⁴⁴ and article 22 guarantees that states should “assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family”.³⁴⁵

A best interest of the child’s viewpoint does include a critical right to family, and in most cases where a child’s family can be located, it is in their best interest to be united with their family as per the CRC Committee’s General Comment number 6 which states that

In order to pay full respect to the obligation of States under article 9 of the Convention to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views.³⁴⁶

This statement does show how important the right to family life is in the area of children’s rights. It shows that the right of the child to be heard is a primary consideration and that it is not a guaranteed right for family to be reunited with their children if the state deems it to be in the child’s best interest to continue being separated due to, for example, violence or neglect. It gives the child a possibility to voice their opinions about their situation and as always, a state must take this into consideration based on a child’s maturity.

³⁴³ CRC art. 9

³⁴⁴ Ibid. art. 10

³⁴⁵ Ibid. art. 22

³⁴⁶ United Nations Committee on the Rights of the Child (CRC), General comment no. 6, para. 81

The assessment that it is in the best interest of the child to be with his family is not to promote states decision not to grant international protection to children, but to safeguard the right of families reuniting in the minor's new state. Internationally it is recognized that states have the right to control their immigration³⁴⁷ and within in the EU it has been demonstrated through case law in the ECtHR where family reunification has been denied because there is not a right to family life in a specific state.³⁴⁸ The case from the ECtHR does not directly deal with refugees but with immigration control. It is a legitimate concern for states to protect their immigration system and simultaneously protect their economic well-being and national security. The CRC Committee has however recognized that reasons based on general migration control are not enough to justify an outcome that is not compatible with the best interest of the child.³⁴⁹

³⁴⁷Pobjoy, Jason, "The Best Interests Of The Child Principle As An Independent Source Of International Protection", *British Institute of International and Comparative Law*, Vol. 64 Issue 2, 2015, pp. 327-363

³⁴⁸ *Abdulaziz, Cabales And Balkandali v. The United Kingdom* Application no. 9214/80 9473/81 9474/81, judgement 28 May 1985, para. 60-61

³⁴⁹ United Nations Committee on the Rights of the Child (CRC), General comment no. 6, para. 86

7 Conclusion

This thesis has examined the relationship between the internationally acknowledged rights of the child and the EU instruments on a regional level as well as Member States' practice during unaccompanied minors' asylum claims. The variation between the states' administrative processes of asylum applications is present at all stages of the process. The CEAS standards allow for states to use their own discretion broadly and some states provide unaccompanied minors with a fairer asylum application process than others. The lack of harmonization in practice at the EU-level leads to unequal treatment of the unaccompanied minors who arrive in the EU. A truly common asylum system cannot be achieved with the legislation that is currently in force.

The rights guaranteed by the CRC are superficially included in the legislation governing the area. The importance of respecting the rights of children is emphasized in all the directives and regulations governing immigration issues. However, specific provisions allow for restricting the rights. The restriction of the right to representation is one of these rights which does not comply with the CRC. This limitation of the access to the right breaches the CRC as it interferes with a child right to be heard.

The discretion permitted to states to determine the methods applied in medical age assessment is questionable in states. State practice include the use intrusive methods which may harm the minors and cannot be considered to be in the best interest of the child. The different methods in use and the varying margins of error demonstrates the uncommonness of the CEAS and that unaccompanied minors submitting asylum applications cannot be expected to be treated uniformly throughout the EU.

The complex structure of EU legislation and the separate system of human rights in Europe and their different judicial powers have the potential to impact the asylum processes minors face. The practice and the interpretation of the instruments by supranational courts carry much weight for states implementation of the documents. Both judicial bodies have the mandate to some extent rule in cases concerning unaccompanied minors' asylum application process. The generally worded directives do not guarantee any specified procedural rights for unaccompanied minors and as there is not enough case law to effectively establish a common standard in the EU.

The large disparity in how well the children and their rights are safeguarded in judicial processes is evident. Starting from when an unaccompanied minor enters a Member State's territory, there is variety between the states from a judicial and administrative perspective. The quality of legal aid and information for the minor varies much from state to state. Some states are guilty of breaching the rights set out in the CRC during the first instance decision. The possibility to appeal an asylum decision depends on the state. There is usually not a mechanism in place that can be used to overturn only the age assessments result. The restrictions of appealing decisions may also be a breach of the ECHR, as it does not ensure an effective remedy. General issues, such as the time for applicants to receive a decision during the asylum process might not fulfil the requirements for an effective remedy.

The Asylum Procedures Directive needs substantive changes, especially with respect to clarifying terminology that permits states a wide margin of interpretation. The directive needs to adjust its requirements for Member States following the criteria set forth as well to improve the rule of law.³⁵⁰ The lack of precise wording and strict requirements has been demonstrated throughout the thesis in the different areas that unaccompanied minors must go through in the process of age assessment.

The injustices children face because of the lack of rules and regulations in a process with potentially large consequences on their life cannot be argued not to be because of the challenged implementation of the existing regulations. The directives which are regulating this international legal area are too vaguely formed for there to be a practical protection from unjust treatment of children between different Member States.

³⁵⁰ Camboulives, Sabrina L, "Luck of the Draw for Asylum Seekers in Europe: Why the Common European Asylum System Is a Breach of Justice and Why a Third Phase of Amendments Is Required", *Vermont Law*, Volume 42, 2016, pp. 393-452, p.405

A Swedish Summary – En svensk sammanfattning

Den ogemensamma asylpolitiken i Europeiska unionen: Skyddet av ensamkommande asylsökande barns rättigheter

Antalet asylsökande ökade under 2015 och 2016 i Europeiska unionen (EU). En del av de asylsökande var ensamkommande barn som anlände till EU utan vårdnadshavare. Barns rättigheter skyddas genom Barnrättskonventionen som alla EU:s medlemsstater ratificerat och stater har en skyldighet genom detta åtagande att garantera ensamkommande barn de rättigheter som finns i Barnrättskonventionen.

EU har en gemensam asylpolitik som tillämpas i alla medlemsstater. Den gemensamma asylpolitiken strävar efter att alla asylsökanden ska ha samma förutsättningar till asyl oberoende vilken stat en ansökan gjorts. Asylpolitiken stadgas genom olika förordningar och direktiv och innehåller bestämmelser om hela asylproceduren. Lagstiftningen är harmoniserad i teorin eftersom alla medlemsstater bör följa samma regler men i praktiken finns det skillnader mellan staters förfaranden. Det fattas praxis som behandlar barns asylprocess inom EU och det är därför svårt att bestämma hur stort handlingsutrymme stater har i frågorna.

Avhandlingen diskuterar asylprocessens olika stadier utgående från principen om att barnens bästa ska beaktas som stadgats i Barnrättskonventionens artikel 3. Myndigheterna som fattar beslut om barn ska enligt Barnrättskonventionen fatta beslut baserat på vad som är för barnens bästa. Enligt Barnrättskommittén krävs en mångsidig analys som granskar vad som är för barnets bästa långsiktigt. Ett beslut borde bland annat beakta vad som är bäst för barnets möjlighet till utveckling och familjeliv. Det finns ingen mekanism som undersöker om stater beaktar alla aspekter då de fattar beslut om barns asylstatus.

EU lagstiftningen har uppmärksammat att Barnkonventionen ska respekteras i förorden till alla direktiv och förordningar som styr asylfrågor. Den flesta av den gemensamma asylpolitikens rättsliga dokument är direktiv av minimikaraktär vilket betyder att stater har möjlighet att påverka de metoder som används för att uppnå målen i direktiven. Det fattas exakta bestämmelser om asylprocessen vilket leder till en stor variation i förvaltningen av asylbeslut mellan medlemsstaterna.

Avhandlingen granskar om EU:s bestämmelser inom asylpolitiken är förenlig med barns rättigheter och om medlemsstaterna respekterar Barnrättskonventionen i alla olika stadier under asylprocessen. Ett visst fokus ligger på ålderbestämningsprocessen som utförs av stater om det finns misstanke om en persons ålder. Avhandlingen granskar även ifall det sker kränkningar av de rättigheter som fastslagits i europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna under asylprocessen gällande rätten till privatliv och rätten till ett effektivt rättsmedel.

Det finns två juridiska system inom Europa som har mandat att granska och döma om stater har brutit mot de regionala bestämmelser som finns inom området. Europadomstolen granskar att stater efterlever de rättigheter som är stadgade i Europakonventionen. Europeiska unionens domstol granskar att stater följer den

lagstiftning som finns i EU och visar genom praxis hur lagarna ska tolkas. Dessa två juridiska institutioner kan döma om stater har kränkt rättigheter som finns i deras respektive rättskällor och att dessa används som utgångspunkt i avhandlingen.

Ensamkommande asylsökande barn anses vara en särskilt sårbar grupp vilket betyder att staterna bör tillgodose deras behov till en större mån än vuxna asylsökanden. Många barn kommer till EU:s gräns utan identifikationshandlingar och stater kan utföra en åldersbestämning på personer ifall det finns tvekan om personens ålder. Det är viktigt att veta åldern på en person eftersom stater har en skyldighet att erbjuda ett bredare skydd till omyndiga personer både under och efter asylprocessen. Åldern som bestäms på en person har i sin tur en inverkan på beslut som fattas gällande internationellt skydd. En persons ålder har även betydelse i frågan om straffrättsligt ansvar. Det enskilda beslutet om ålder går inte att överklaga i de flesta av medlemsstaterna vilket försämrar rättssäkerheten och kan innebära en kränkning av Europakonventionens artikel 13.

Asylprocessen för barn innefattar vissa garantier för att skydda barns särskilda sårbarhet. Myndigheterna som påträffar en person som misstänks vara underårig ska direkt meddela migrationsmyndigheter eller barnskyddsmyndigheter om personen. Om en person misstänks vara underårig ska hen garanteras det skydd som finns tillgängligt för barn. En del av detta skydd är att stater bör erbjuda rättshjälp och representation åt ett barn för att möjliggöra barns rätt att bli hörda. Det finns brister i denna garanti eftersom Asylprocedurdirektivet stadgar att de barn som förväntas bli myndiga innan ett beslut har fattats om dem har ingen rättighet till rättshjälp. En del stater erbjuder ingen rättshjälp åt underåriga och vissa stater erbjuder rättshjälp som inte är tillgänglig, till exempel rättshjälpen som finns att tillgå är på ett språk som barnet inte förstår.

Ålderbestämningprocessen som ensamkommande barn kan genomgå använder olika bevismaterial för att bestämma en ålder. Bevis godtas i form av legitima identitetshandlingar, utvärdering av den mentala utvecklingen och utvärdering av den fysiska åldern genom en medicinsk åldersbestämning. Den medicinska undersökning som krävs för att bestämma den fysiska åldern ska utföras med metoder som är minst inkräktande på personen enligt Asylprocedurdirektivet. Medicinska metoder får endast användas om den undersökte eller hans representant har samtyckt. Det finns basis i Europadomstolens praxis att stater som kränker den fysiska integriteten har brutit mot europakonventionens artikel som skyddar privatlivet.

Den gemensamma asylpolitiken inom EU tillåter mycket handlingsutrymme för enskilda stater vilket leder till att det inte är möjligt att systematiskt garantera att barns rättigheter respekteras. Det finns brister i utformningen av reglerna under åldersbestämningen. Särskilt stora brister finns det i de bestämmelser som gäller den medicinska åldersbestämningen. Staters breda handlingsmarginal leder till stor variation mellan de olika metoder som används och hur de beaktas och vägs vid en bedömning av ålder.

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