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# ‘Kids in Limbo?’

An Analysis of Temporary Residence Permits to Unaccompanied Asylum Seeking Children in Norway in Light of the Convention on the Rights of the Child

Candidate number: 8011

Submission deadline: 15 May 2013

Number of words: 19 839

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## Acknowledgements

I would firstly like to extend my warmest gratitude to Vigdis Vevstad for her unwavering guidance and support during the writing process of this thesis. Her extensive knowledge of the field of forced migration has been highly inspirational. My sincere appreciation also extends to Kirsten Sandberg for her invaluable comments in the final phase of this project.

I am also indebted to Save the Children and Norwegian People's Aid for rewarding discussions and material for the thesis, as well as the Norwegian Organisation for Asylum Seekers for inspiring me to put the spotlight on the human rights situation in Norway.

A special thanks to Fritt Ord for supporting the thesis financially and to the Norwegian Centre for Human Rights for allowing me to spend two years on studying human rights. Heartfelt appreciation also goes to my wonderful fellow classmates for countless lunches and laughs - I am forever grateful that I now have friends from all corners of the world!

In particular, warm thanks go to 'study buddy' Natasha Telson, for encouraging comments and for taking the time to proofread the final draft of my thesis.

I would also like to express my deepest gratitude to my mom, dad and big brother for their ever-continuous support and belief in me during all these years of studies.

Lastly, thanks to my boyfriend Peder. Without reading a word of this thesis, you have aided me in countless ways and I am eternally grateful. Finally, we can return to 'normal'!

## Abbreviations

| | |
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| CAT | Committee Against Torture |
| CEAS | Common European Asylum System |
| CESCR | The Committee on Economic, Social and Cultural Rights |
| CRC | The Convention on the Rights of the Child |
| CRC Committee | The Committee on the Rights of the Child |
| ECHR | The European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECRE | European Council on Refugees and Exiles |
| ECtHR | The European Court of Human Rights |
| FRA | The European Agency for Fundamental Rights |
| HRC | The Human Rights Committee |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| UDI | The Directorate of Immigration |
| UNE | The Immigration Appeals Board |
| UNHCR | The United Nations High Commissioner for Refugees |
| UNICEF | The United Nations Children's Fund |
| VCLT | Vienna Convention on the Law of Treaties |
| 1951 Refugee Convention | The Convention Relating to the Status of Refugees |
| 1967 Protocol | The Protocol Relating to the Status of Refugees |

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# 1 Introduction

## 1.1 Background

As a country on the outskirts of Europe, Norway is perceived as being on "the periphery of most migration flows".[1] Yet, in the first half of 2008, Norway, next to the Netherlands, experienced the largest increase in asylum arrivals in Europe. As a direct consequence, the Norwegian government tightened its immigration policy and presented a thirteen point-plan for restricting asylum arrivals.[2] In 2009, another list containing eight points was introduced, bringing the total measures to twenty-one.[3] In this master thesis, I seek to analyse the human rights consequences of the tightened policy in regards to unaccompanied asylum seeking children, in light of the Convention on the Rights of the Child (CRC). In particular, I will focus on measure number six, which was codified in § 8 (8) of the Immigration Regulations in May 2009. The tightening measure reads as follows:

> "Based on an individual assessment, temporary residence without the right to renewal can be granted to unaccompanied minors who are 16 years or older and today are given a residency simply because Norwegian authorities cannot locate their parents/family.[4]

The core of this changed practice is that unaccompanied asylum seeking children, who are *not* considered eligible for protection, receive temporary residence until they reach the age 18. On their 18th birthday, after a period of at least two years in Norway, they are supposed to return to their respective home countries.[5] Prior to the policy change, these unaccompanied children received a renewable residence permit that could lead to permanent settlement. Under international and domestic law, Norway is prohibited from returning children to their countries of origin unless there are adequate reception facilities

[1] Brochmann and Hammar 1999:230
[2] Ministry of Labour (2008)
[3] Ministry of Labour (2009)
[4] Ministry of Labour (2008)
[5] Sønsterudbråten 2010:9

to return them to.[6] In other words, those under 18 are largely granted temporary permits as a result of their status as vulnerable children, while the day they turn 18 they are considered to be adults subject to immigration control. When turning 18, these youths find that their choices are limited: return voluntarily to their country of origin, or attempt to avoid forced return by 'disappearing', often to a life in destitution. However, for many of the youths who take this path, the final outcome could still be detention and enforced removal.[7]

In a European context, a similar practice of granting temporary residence permits to unaccompanied children is found in Denmark, UK and the Netherlands.[8] Hence, as a sovereign nation-state Norway has the right to control the entry, presence and exit of foreign nationals and is required to balance the rights and needs of individuals with the interest of the state. In accordance with Article 14 of the Universal Declaration of Human Rights (UDHR), unaccompanied children thus have a right to *seek* asylum, but the state is not obliged to *grant* it.[9] This reflects one of the major dilemmas of this thesis, namely the balancing of 'immigration-regulating considerations' against the 'best interest of the child'.

## 1.2 Aim and Purpose

I take as my point of departure that the Nordic countries should be at the forefront when it comes to children's rights, and that as a welfare state Norway is often looked upon by other countries for best practice. One therefore expects that Norway should, to the maximum extent possible, protect, respect and fulfil the 'minimum standards' set out by the CRC, and thereby not legitimise violations of children's rights in countries less wealthy than Norway.

A main purpose of this study is therefore to shed the light on one of the areas in which Norwegian law and practice may be improved, and to constructively engage in order to find possible solutions. Furthermore, as this topic clearly is of international relevance, I see it as a strength that the thesis is written in English. In this way, I hope to contribute to the on-going debate in Norway, but also to raise awareness of this issue on an international level. Accordingly, I have developed the following research question:

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[6] Gladwell and Elwyn 2012:1
[7] Ibid 2012:3
[8] Meld.St.27 (2011-2012):33
[9] Kjærum 1994:444-445

*Does the granting of temporary residence permits to unaccompanied asylum seeking children in Norway lead to breaches of the Convention on the Rights of the Child?*

The basic units of analysis will be § 38 of the Norwegian Immigration Act, in conjunction with § 8 (8) of the Immigration Regulations; the justifications behind the tightening measures; and the intended and unintended human rights consequences of the policy. In order to reach the aim of the thesis the main question is supported by four sub-questions:

i. What was the rationale of the policy change and has it led to the intended results?
ii. What are the human rights consequences of temporary residence permits?
iii. What happens after the unaccompanied asylum seeking child turns 18?
iv. What are the alternatives to temporary residence permits?

## 1.3 Definitions, Numbers and Demarcations

When speaking of *unaccompanied children* I refer to those "who are separated from both parents and are not being cared for by an adult who, by law or custom, is responsible to do so".[10] The UNHCR also apply the term *separated children* to include those accompanied by extended family members, but who are separated from their previous legal or customary caregivers.[11] Yet, for the sake of consistency, asylum seeking children arriving with extended family, e.g. older siblings, come within the meaning of the first definition.

In accordance with the CRC and Norwegian law, I also wish to underscore that all persons under the age 18 are de jure *children*. Thus, I will mainly apply this term when speaking of asylum seekers aged 15 to 18. Nonetheless, when assessing the human rights consequences of temporary residence permits, one also needs to take into account what happens with the child in its transition to adulthood. Although the law sees 18 as the cut-off point from which a person goes from being a child to a fully adult, there is ample evidence

[10] CRC GC No. 6:6
[11] Halvorsen 2005:77

to suggest that such an absolute dichotomy is in practice both unrealistic and unhelpful. At the international level, the United Nations defines *youth* as persons between the ages of 15 and 24 years, and calls for the development of youth policies, which addresses the needs of young people who are particularly vulnerable as a result of their current circumstances.[12]

As will be shown, there is a possibility that *former* unaccompanied children with *expired* temporary permits may comprise one of these groups, as they in many cases become even more vulnerable and at risk after they turn 18. For them, reaching the age of maturity will be a crucial turning point, as the care situation, resources and legal options may suddenly change as they are required to leave the country.[13]

As shown by Figure 1 below, the arrival numbers to Norway have varied greatly from 2002-2011. While 403 unaccompanied children arrived in 2007, the numbers rose to 1374 in 2008, and peaked at 2500 arrivals in 2009. Since then, there have been a steady decrease to 892 arrivals in 2010, 858 in 2011 and 964 in 2012.[14] In the figure, the blue line indicates the number of asylum applications, while the columns show the number of decisions taken the same year. Further, the 'green' colour signifies rejections, 'purple' protection granted, 'red' temporary permits and 'light blue' are other types of dismissals.

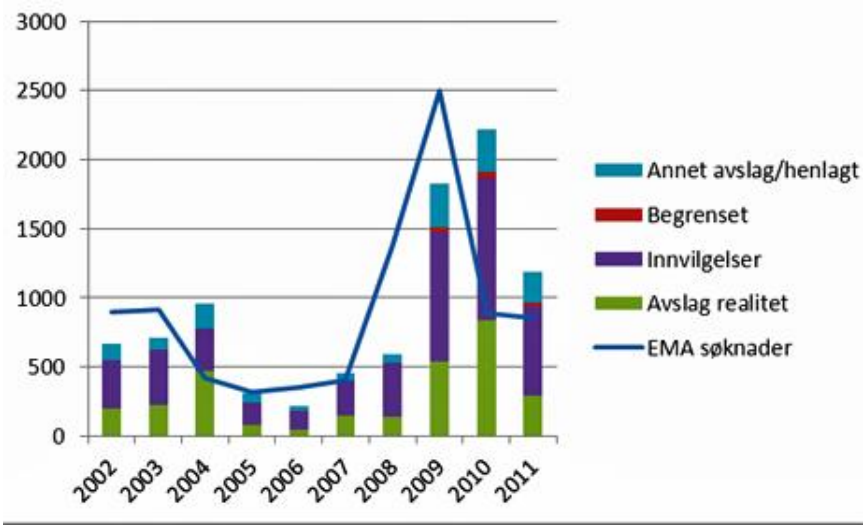


**Figure 1: Unaccompanied Minors, Applications and Decisions 2002-2011. Source: UDI 2012**

[12] Gladwell and Elwyn 2012:17
[13] European Union Agency for Fundamental Rights (FRA) 2010:117
[14] Meld.St.27 (2011-2012):11

As indicated by Figure 1, the number of applications granted to unaccompanied children is usually around 60 per cent. In addition, the figure shows that the number of unaccompanied children granted temporary permits have been relatively stable since the inception of § 8 (8) in the Immigration Regulations in May 2009. In total, as of 25 April 2013, 160 unaccompanied children have been granted temporary residence status in Norway.[15]

Furthermore, the chosen topic is naturally delineated in that the point of departure is policy measure number six and thus involves only asylum seeking children who receive a temporary residence permit. By way of illustration, this excludes from the discussion unaccompanied children under the Dublin-regulation and the ones who have received a positive answer, that is, permits that can form the basis for permanent residence status. Due to space constraints, little attention will be paid to relevant issues such as age determination procedures and family tracing, although these issues will be mentioned where appropriate.

### 1.4 An Interdisciplinary Approach to Human Rights and Migration

In view of this thesis concern with phenomena of an inherently transnational and political character, I find that an interdisciplinary approach is needed. This is based on an assumption that some of the most important questions about human rights cannot be answered by legal analysis alone. What, for instance, does the principle of the best interest of the child mean? Is the political justification of temporary residence permits morally and legally justifiable? And how do human rights relate to the contentious choices that governments have to make among priorities in situations of scarce resources?

In consequence, the methodology I employ is a combination of legal and social science perspectives. With regards to the legal tradition, I follow what is referred to as the *law in context* approach rather than what is commonly known as *black-letter law*. While the latter focuses heavily on using court judgements and statutes to explain law, the former approach also considers the broader social and political context.[16] In this regard, the thesis is primarily conducted as a desk-study of legal *and* extra-legal sources, such as secondary literature and reports from Non-Governmental Organisations (NGOs). Due to time

[15] UDI (2012)
[16] McConville and Chui 2007:1-5

constraints, I have chosen not to conduct interviews, but rather strived to bring forth an overview of the current state of knowledge about this group of unaccompanied children.

The legal methodology will further be applied to establish and analyse the laws *de lege lata,* i.e. the primary legal sources acknowledged in Article 38 (1) of the International Court of Justice (ICJ), being treaties, customary law and general principles of law, as well as relevant Norwegian legislation such as the Human Rights Act and the Immigration Act. To a certain extent, the thesis also builds on domestic case law in order to illustrate the issues that are discussed, as well as jurisprudence from the European Court of Human Rights (ECtHR). As *lex specialis* on children's rights, the CRC will have a particular prominent role in the thesis, as well as 'soft law' sources such as the General Comments and Concluding Observations from the Committee on the Rights of the Child (CRC Committee). The CRC must also be viewed in the context of the other international treaties that Norway is bound by, such as the two International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (Torture Convention).

## 1.5 Readers Guide

The thesis is structured into six main chapters. Whereas *Chapter One* has sought to introduce the main research question and the chosen methodology, *Chapter Two* will proceed by outlining the historical and theoretical basis of tightening measure number six. *Chapter Three* will discuss the relevant legal standards at the international, regional and domestic level, while *Chapter Four* will go more in depth on the human rights consequences of temporary residence permits and if this leads to breaches of the CRC. *Chapter Five* will examine the difficulties facing unaccompanied children as they turn 18, while *Chapter Six* will provide a brief conclusion to the main research question, as well as an outline of possible alternatives to the current practice of temporary residence permits.

# 2 Development of the Temporary Protection Scheme

Understanding the context and rationale behind the introduction of temporary permits is an important part of the analysis of whether Norway is in breach of its international obligations. In consequence, Part I of this Chapter asks whether temporary protection is an accepted 'tool' for international protection, while Part II sees this in light of the 'comprehensive approach' to immigration. Part III will present the main features and dilemmas of the temporary model, while Part IV will address the main arguments of the Norwegian government for introducing temporary permits to unaccompanied children.

## 2.1 An Accepted 'Tool' for International Protection?

The concept of temporary protection is widely used at international and national levels, yet there are no internationally accepted definitions, agreements on minimum content, or on the situations or persons to which it could apply. However, according to the UN High Commissioner for Refugees (UNHCR), temporary protection is "best conceptualised as a practical device for meeting urgent protection needs in situations of mass influx."[17] In the EU Temporary Directive, the term 'mass influx' is defined as the arrival of 'a large number of displaced persons, who come from a specific country or geographical area'.[18]

At the outset, it is important to draw a distinction between this type of temporary protection and its uses in other situations, such as towards unaccompanied asylum seeking children. In my view, the term 'temporary protection' is thus an overarching concept with various *forms*, such as discretionary leave to remain, temporary refuge or temporary residence status. UNHCR has acknowledged that temporary protection may be used outside the context of mass influx, but that the applicability in such situations deserves further reflection.[19] Accordingly, one of the questions that this thesis asks is whether the form of temporary protection employed towards unaccompanied children in Norway is legally and morally justifiable, and should be accepted as a 'tool' for international protection.

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[17] UNHCR 2012:2
[18] Art 2(d)
[19] UNHCR 2012:2

The temporary model has undoubtedly many advantages, such as enhancing the reception of refugees to European countries that are increasingly tightening its borders and imposing more restrictive asylum laws.[20] Yet, the advantages of the model must also be seen in light of its possible drawbacks. UNHCR has stated that temporary protection should *not* be used to undermine existing obligations; to discourage people from seeking asylum; to encourage their premature return; to save costs in relation to individual status determination; or to politicise a particular situation at stake.[21] The European Council on Refugees and Exiles (ECRE) also argues that temporary protection is a reasonable policy *only* in emergency situations, where individual refugee status determination is not immediately practicable, and oppose any use of temporary protection for those individual asylum seekers whose application for asylum are rejected, but who cannot be returned for other reasons.[22]

## 2.2 Towards a Comprehensive Approach to Immigration

Temporary protection, and the challenges associated with it, is not a new phenomenon.[23] According to the UNHCR, the practice dates back to 1953 when Chinese refugees were temporarily admitted into Hong Kong. Other prominent examples include those fleeing the Hungarian Revolution of 1958 into Austria and the 19 million Bengalis moving from East Pakistan into India in 1971.[24] Through its usage, temporary protection has been seen as an intermediate step on the way to a *durable solution*, meaning either voluntary repatriation, integration in the country of first asylum or resettlement in a third country.[25]

In Norway, the idea behind temporary protection was brought to the fore at the end of the 1980s, in the White Paper *On Immigration Policy (1987-1988:39).* For the first time, immigration control now included preventative measures beyond its national borders. Thus, while the traditional concern had been to deal with the *symptoms* of conflict by helping the victims, a change now occurred to deal with the *causes* of refugee flows.[26] Moreover, the

[20] Halvorsen 2005:76
[21] UNHCR 2012:2-4
[22] ECRE 1997:4-5
[23] Sønsterudbråten 2010:25
[24] UNHCR 2012:3
[25] Kjærum 1994:445
[26] Tjore 1998: 13, 28

White Paper underlined that "Norway cannot solve the refugee and migration problems of the world by letting everyone who desires to settle in the country, do so."[27] Consequently, an implicit demarcation was made between the 'real' and 'unfounded' refugees; a demarcation that still holds a prominent place in the Norwegian asylum discourse.[28]

However, it was in the subsequent White Paper *On Refugee Policy (1994-1995:17)* that the final formulation of the approach was presented.[29] According to Grete Brochmann, this White Paper endeavoured to create a new set of expectations, not only among the refugees but also in the Norwegian public, by sending a clear signal that receiving asylum does not necessarily result in permanent residence. By applying temporary protection, the authorities sought to extend the available solutions as far as protection was concerned, as well as to pave the way for greater flexibility in enforcing policy.[30] The development of the comprehensive approach to immigration was in line with developments in Western Europe and was advised by the Norwegian Refugee Council and the UNHCR in the context of the acute situation in the former Yugoslavia and the influx of refugees in the early 1990s.[31]

## 2.3 The Balkan Crisis: A 'Test-case' of Temporary Protection

Despite its long history, the reception of the Bosnian refugees in 1992-1993 was the first test of the temporary instrument in Europe and a marker in Norwegian refugee policy.[32] Through the Bosnian refugee situation, Norway opted for a new control mechanism for large-scale migration that was said to "encompass both voluntary repatriation and obligatory return when the reason for the exile has ceased".[33] In this regard, what were the main features of the temporary protection offered to the Bosnian refugees? Moreover, did the government face any challenges or dilemmas in the implementation of the model?

*Firstly*, the temporary regimes developed for the Bosnian refugees emerged as a parallel system of reception, and was restricted to use in mass-flux situations.

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[27] Brochmann and Hammar 1999:213
[28] Ibid:213
[29] Rusten 2006:41
[30] Brochmann and Hammar 1999:219-221
[31] Brekke 2001a:123-126
[32] Brekke 2001b: 6
[33] Brochmann and Hammar1999:220

Consequently, Bosnians were given protection on a *collective* basis, and the handling of their individual asylum applications was postponed. This meant that when the situation in Bosnia improved, the temporary permits would be lifted and the individual applications would be tried. Those who did not qualify for continued protection on individual grounds would risk being sent back.[34] This type of temporary protection largely corresponds to the UNHCR definition as outlined above. Hence, one of the main differences between this definition and the practice towards unaccompanied children is that the latter are granted temporary residence status on an *individual* basis through the refugee status determination process. Another difference is the reasons for cessation of the temporary status. While the temporary element in the Bosnian case were contingent on return when they "could do so in dignity and safety",[35] the unaccompanied children should return when they turn 18.

*Secondly*, when receiving the Bosnian refugees, the Norwegian government applied a 'two-track course' under which integration and repatriation were seen as parallel goals. In turn, it was decided that the refugees should be offered housing in municipalities across the country. As discussed in Chapter 4.3.1, the latter is clearly in contrast to the practice towards the unaccompanied children granted temporary status, which are residing in reception centres throughout their stay in Norway. Notably, this points to one of the complex decisions that the government had to make in developing the temporary model and the apparent dilemma between *integration* and *isolation.* On the one hand, it was argued that choosing integration would increase the refugees' attachment to Norway, thus resulting in more refugees wanting to stay, and increasing the necessity of forced returns. On the other hand, the possibility of leading a rewarding life while in Norway could make the refugees' repatriation to Bosnia easier. Although the case for an isolation strategy seemed stronger in the short run, it was considered to be potentially harmful, both physically and mentally, for the refugees. Thus, the integration track carried more weight.[36]

*Thirdly*, the political vulnerability of the model was illustrated in the autumn of 1996 when the government decided to grant all the Bosnian refugees permanent residence,

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[34] Brekke 2001b: 7
[35] Ibid:7
[36] Ibid:7-9

due to a more prolonged conflict in Bosnia than anticipated, as well as heavy critique in the media.[37] This illuminates several dilemmas of the temporary model, namely that it has a *soft* side and a *hard* side, it is *time fragile, ambitious* and that if the popular backing of the policy fades, one runs the risk that the policy will be terminated prematurely.[38] Grethe Brochmann discusses this vulnerability in the terms of *costs* of immigration control, for the state and for society. While some of these costs are visible in the short run, and could easily be connected to the control regime, other costs are subtler and only traceable over a long-term perspective.[39] For the Bosnian refugees, the social costs of the model, in terms of the refugee's uncertain situation, failed to serve the higher purpose, for instance of creating a circulation of migration. In consequence, the Bosnian 'test-case' was not taken to its end.[40]

However, in 1998, temporary protection was also granted to around 8000 Kosovo Albanians, who mainly returned voluntarily or were sent back with force. Except for the Bosnian and Kosovo Albanian caseloads, *collective* temporary permits have not been granted to other refugee groups in Norway. However, the model has been used in individual cases, such as in the 'MUF-case' where around 2000 Northern Iraqis were given temporary permits without the right to family reunion; to persons granted humanitarian protection but who has not yet documented their identity; and to persons that are dependent on lifesaving health services not available in their country of origin.[41] Hence, from being primarily used in cases of mass influx, temporary protection now serves as a special arrangement for several purposes and towards different types of cases and individuals.

## 2.4 The Background and Rationale of the Tightening Measures

Based on the above, the introduction of temporary permits to unaccompanied children should be seen as a continuation of the 'comprehensive approach', but now being more centred towards the phenomena of child migration. In the government's 21-point-plan of restricting asylum arrivals, several of the measures had a direct effect on children. For

[37] Brochmann and Hammar 1999:222-223
[38] Brekke 2001b:17
[39] Brochmann and Hammar 1999:3
[40] Brekke 2001b:17; Brochmann and Hammar1999:222-223
[41] Sønsterudbråten 2012:21-22

instance, in addition to measure number six on temporary permits, the government established that *former* unaccompanied children without a link to a particular geographical area could still be returned through the internal flight alternative (IFA); that unaccompanied children were not longer exempt from the Dublin-procedure; and that the government possibly would establish practices *contrary* to UNHCR recommendations.[42] This was in stark contrast to the first political platform of the Labour Party, the Socialist Left Party and the Centre Party, which stated that: "The government wants to conduct a refugee policy that gives *greater consideration* to the recommendations from the (…) UNHCR."[43] As described in Chapter 5.1.3, the government also introduced the possibility of establishing care centres for unaccompanied children in their country of origin.[44]

However, in analysing the rationale behind the tightening measures one needs to see it in the context of the political situation at the time. For instance, when the number of asylum arrivals increased in 2008, the government was still negotiating a national budget for the forthcoming election year. Although there had only been around 6000 arrivals in 2007, it was predicated that the numbers for 2008 would be 15 000. The costs of reception, case handling and integration measures were thus bound to be a topic in the budget discussions. The government were soon criticised by the political opposition for not acting, and the pressure mounted on Dag Terje Andersen, the newly appointed Minister for Labour and Social Inclusion.[45] Disregarding that the Socialist Left Party dissented on point one to eight of the tightening measures, the Labour Party still felt the need to act. With this as a contextual backdrop, what is the explicit rationale behind *tightening measure number six*?

In addition to the budgetary argument, the first justification is based on a presumption that many of the unaccompanied children arriving in Norway between the age 16 and 18 are sent voluntarily by their parents and that they are aware of their location in the country of origin. Thus, the government finds that it would be irresponsible not to consider the knowledge that has been produced on the risks that children face when embarking on a

[42] Ministry of Labour (2008)
[43] The Labour Party, The Socialist Left Party and The Centre Party:75 (my emphasis)
[44] Ministry of Labour (2009)
[45] Brekke and Aarseth 2009:50-52

journey to Europe, and that the goal must be to prevent children in migrating in the first place.[46] As summed up by State Secretary Pål Lønseth:

> We want to prevent parents from sending their children to earn money. We know that it will take time to change the tradition of sending children, but we have to start somewhere. And we do not start by granting permanent residence status to everyone we believe to be younger than 18.[47]

By introducing temporary permits, the government thus intends to send a signal that if you do not have a protection need, you should not start on a dangerous journey that will lead to rejection and return.[48] To strengthen the perception of the policy, Norway has also funded an information campaign in Afghanistan in cooperation with UNICEF.[49]

In 2011, Denmark also introduced temporary permits to unaccompanied children, and justified the law amendment with the same argument as the Norwegian government.[50] Based on a report by Oppedahl and colleagues (2008), a UNHCR Report (2010) and experiences from Dutch care centres in Angola and DR Congo, Pernille Teilberg Jørgensen concluded that many unaccompanied children are in contact with their parents after arrival in Europe. However, as pointed out by Ada Engebrigtsen, while some parents do to send their children in the hope of giving them a safe environment, in other cases it could be an unstable and abusive home environment that impels the child to leave.[51] The assumption that many children know where their parents are is thus *partly confirmed*.

However, I find that the second assumption, being that the measure will stop children in migrating in the first place, is not as easily confirmed. Studies from UNHCR and the European Union Agency for Fundamental Rights (FRA), rather confirm that the number of unaccompanied children arriving to Europe most likely will rise, given the continuing conflicts in the world and increasing economic disparities.[52] Notably, the

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[46] Meld.St.27 (2011-2012):48
[47] Lønseth (2012), my translation
[48] Lønseth (2011), my translation
[49] Meld.St.27 (2011-2012):14
[50] Teilberg Jørgensen 2012:21
[51] Engebrigtsen 2002:134
[52] FRA 2010:125

unaccompanied children arriving in Norway come from the most conflict-ridden countries in the world, such as Afghanistan, Somalia and Eritrea.[53]

In addition, Jan Paul-Brekke and Monica Aarseth contend that when analysing the relationship between policy change and asylum arrivals one must draw a line between (a) the reasons to flee and (b) the reasons to end up in a particular country.[54] For instance, Save the Children has found that some of the most common reasons why unaccompanied children migrate are conflict, poverty, hunger, lack of educational opportunities and the death of parents and caregivers.[55] However, although these 'push-factors' may tell us why children migrate, they do not indicate why children arrive in a particular country.

In the literature, it is shown that social networks in the host country is perhaps the most important 'pull-factor' for migrants, while the more strategic decisions, which take account of a host country's asylum procedure, quality of care and approval rates, is often left to the smugglers in transit countries.[56] Thus, I argue that the tightening measures may have helped decrease the asylum arrivals to Norway but that it will not stop children in migrating in the first place. In Chapter 4.2, I will examine if it is *legally justifiable* to apply these arguments to limit the rights of the child present in Norway.

[53] Meld.St.27 (2011-2012):17
[54] Brekke and Aarseth 2009:110
[55] Save the Children UK 2007:11
[56] Brekke and Aarseth 2009:28

# 3 The Rights of Unaccompanied Asylum Seeking Children

The human rights of unaccompanied children are first and foremost enshrined in the CRC and in the 1951 Refugee Convention and its 1967 Protocol. However, bearing in mind that this thesis is concerned with unaccompanied children that are *not* granted refugee status and which face major difficulties in their *transition to adulthood*, it is also helpful to show the nexus to other human rights norms, as well as the regional legal standards. Yet, in order to be given meaning, the human rights of unaccompanied children must also be implemented into domestic laws.[57] Thus, this Chapter is divided into three Parts that seek to address the most relevant legal standards at the international, legal and domestic levels.

## 3.1 The Convention on the Rights of the Child

The CRC was adopted on 20 November 1989 and came into force in September 1990.[58] The year after it was ratified by Norway, and has achieved near universal ratification with only the US, Somalia and South Sudan abstaining. The CRC is also the most comprehensive treaty, including civil, political, economic, social and cultural rights. In addition, many of the rights safeguarded by the CRC are not enshrined in the other human rights treaties and are thus unique.[59] Hence, one could postulate that the CRC both reflects the interdependence and indivisibility of all human rights and that *all* its provisions are relevant to unaccompanied children in Norway who are granted temporary residence status.

### 3.1.1 The Four General Principles

In Chapter Four, I take as my point of departure what the CRC Committee has termed the general principles of the CRC, namely the right to non-discrimination (Article 2), the best interest of the child (Article 3), life, survival and development (Article 4) and the right of being heard (Article 12). These principles permeate all the provisions of the CRC, and could thereby be seen in conjunction with the right to, *inter alia*, health and adequate

[57] CRC GC No. 5, para 24
[58] The two Optional Protocols on ”the Sale of Children, Child Prostitution and Child Pornography” and the Protocol on ”the Involvement of Children in Armed Conflict” will not be addressed in the thesis.
[59] Høstmælingen, Kjørholt and Sandberg 2012: preface

nutrition (Article 24) and education (Article 28). Moreover, unaccompanied children with temporary permits are children temporarily or permanently deprived of their family environment, and, as such, beneficiaries of the state's obligation to provide special protection and assistance.[60] Notably, under Article 22 (2) Norway is also obliged to cooperate to trace parents or other family members in order to reunify the unaccompanied child with his or her family. Yet "in cases where no parents or other family members are found" Article 22 sets out that the child shall be afforded *a non-discriminatory access to special protection and care* as well as to the enjoyment of *all* the provisions of the CRC.

### 3.1.2 The Committee on the Rights of the Child

In accordance with Article 43 of the CRC, a monitoring body is set up to ensure that State parties comply with the provisions of the CRC. Under Article 44 (1), the CRC Committee requires that a State report be submitted within two years of its entry into force and thereafter, every five years. Based on these reports, the Committee addresses its concerns and recommendations in the form of *Concluding Observations*, the last one in relation to Norway in 2010. The Committee also publishes its authoritative interpretation of the provisions of the CRC in *General Comments* and organises *Days of General Discussions*.

Notably, these sources are not legally binding for Norway, but in the preparatory works to the Human Rights Act it is underscored that General Comments are sources of law that carries significant weight.[61] Soft-law sources also embody *moral* and *political* weight, and in some circumstances pave the way for legally binding customary law.[62] Whereas the Concluding Observations should be attributed considerable authority if made by a "unanimous committee", is "clear" and "upheld despite contra arguments",[63] the Days of General Discussions does not have the same status. Yet, the days often summarises important discussions and can be seen as *indications* on how to interpret the CRC.[64]

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[60] CRC art 20 (1)
[61] Ot.prp. nr. 3 (1998-1999), para 9.2.2.1
[62] Høstmælingen 2003:366
[63] Ot.prp. nr. 3 (1998-1999):68
[64] Lile 2009:56

### 3.1.3 The Third Optional Protocol on a Communications Procedure

On 28 February 2012, the Third Optional Protocol to the CRC on a Communications Procedure was opened for signature and ratification. Interestingly, Norway did not participate in the drafting process, and has not signed of ratified the Protocol. In explaining Norway's reserved attitude, the Foreign Minister expressed his concern over the lack of a margin of appreciation in the Protocol and over the fact that the provisions of the CRC are 'vague' and 'aspirational'.[65] However, I find this standpoint to be contradictory, as the decisions of a complaints body may actually help to clarify the scope and content of the provisions.[66] Notably, the Norwegian Supreme Court states that since the CRC Committee does not have an individual complaint procedure, their General Comments do not carry the same weight as the Comments from, inter alia, the HRC. Therefore, the General Comments of the CRC should be viewed as *guidelines* that set the standards of best practice.[67]

## 3.2 Interpreting the CRC: The Nexus to Other Human Rights Conventions

In accordance with Article 31.1 (c) of the Vienna Convention, the interpretation of treaties must take account of the context in which the treaty is part of, including "any relevant rules of international law applicable in relation between the parties". Thus, any international law that the state is bound by could be relevant in the interpretation of the CRC.[68] In what follows, I therefore briefly outline a selection of provisions of relevance to this thesis.

### 3.2.1 The 1951 Refugee Convention and its 1967 Protocol

The 1951 Refugee Convention and its 1967 Protocol is the only universally binding treaty regarding refugee law,[69] and defines in Article 1A that a refugee is someone who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the

[65] Document No. 15:632 (2010-2011)
[66] Ot.prp. nr. 3 (1998-1999), para 9.2.2.1
[67] Rt.2009 p.1261, para 19
[68] Lile 2009:56
[69] Rehman 2010:657

protection of that country…" Although all its provisions are applicable to refugees, save for Article 22 on public education the Convention is strikingly silent on the needs of children.[70] To remedy this situation, the UNHCR has issued guidelines on, *inter alia*, the situation of unaccompanied minors (1997) and on determining the best interest of the child (2008). Currently, the UNHCR and UNICEF are also developing guidance on the best interest of the child in industrialised countries.[71] As soft-law sources, these guidelines are not legally binding and as evidenced by the tightening measures, their weight may vary over time.

### 3.2.2 The Two International Covenants

The ICCPR and the ICESCR was ratified by Norway in 1972 and are important sources for the interpretation of the CRC.[72] For instance, Article 24 of the ICCPR enshrines the right of the child to non-discrimination, while Article 10 of the ICESCR establishes that "special measures of protection and assistance should be taken on behalf of all children and young persons". In addition, the ICESCR also enshrines the right to an adequate standard of living (Article 11) and the highest attainable standard of physical and mental health (Article 12). Thus, the Covenants protect the former unaccompanied children also after they turn 18.

### 3.2.3 The European Legal Standards

The main human rights treaty of the Council of Europe is the ECHR, which came into force in 1950 and was ratified by Norway in 1952. The ECHR spells out the civil and political rights and freedoms of the people living in Europe, and complements the European Social Charter.[73] The two key provisions of the ECHR applicable to unaccompanied children is Article 8 on the right to respect for private and family life, applied in *Butt v. Norway*, as well as Article 3 on the right not to be subjected to torture or to inhuman and degrading treatment or punishment. Notably, Article 3 is also interpreted to include a prohibition of non-refoulement and thus complements Article 37 (a) of the CRC, Article 33 of the 1951 Refugee Convention and Article 3 of the Torture Convention. Thus, the principle of non-

[70] Andersson et. al 2005:12
[71] ECRE and Save the Children 2011:147
[72] Høstmælingen et. al 2012:18
[73] CRIN 2011

refoulement, which states that a refugee should not be returned to a situation that would threaten his life or freedom, now also applies to non-convention refugees and to all persons under temporary protection. The ECHR establishes the European Court of Human Rights (ECtHR), which on several occasions has recognised the importance of the CRC, for instance in *Sahin v. Germany*.[74] As the judgements of the ECtHR are *legally binding* on Norway, the ECHR is of particular relevance to unaccompanied asylum seeking children.

On the regional level, Norway is also influenced, directly and indirectly, by the Common European Asylum System (CEAS).[75] For instance, Norway has implemented the Return Directive into domestic legislation,[76] which contains several binding safeguards relating to unaccompanied children. Article 10 (2), for instance, states that: "before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return".

Based on the above, these international and regional instruments *should* provide a comprehensive protection of the human rights of unaccompanied children in Norway. However, in order to be *effective* these rights must be implemented into domestic laws.

### 3.3 Implementation of the CRC into Norwegian Law

The Human Rights Act fulfils § 110c of the Norwegian Constitution and has the purpose of "strengthening the status of human rights in Norwegian law".[77] In 2003, the CRC was incorporated into the Human Rights Act in line with the ICCPR, ICESCR and ECHR and thereby given what Eivind Smith has called a "semi-constitutional" status.[78] Yet what does this in practice mean and how is it relevant for unaccompanied asylum seeking children?

[74] Sahin v. Germany, para 41
[75] Brekke and Vevstad 2007:7
[76] ECRE and Save the Children 2011:45
[77] HRA § 1
[78] Lile 2009:49

### 3.3.1 The Human Rights Act

According to § 3 of the Human Rights Act, the incorporation of the CRC implies that in the event of *conflict*, its provisions shall take *precedence* over any other statutory law. According to the Ministry of Justice, however, the precedence rule is more or less symbolic given that Norwegian law is normally reviewed before ratification so that the laws will comply with the convention. In addition, through the *principle of presumption*, the courts are obliged to interpret Norwegian law in such a way that no conflicts arise with conventions to which Norway is bound.[79] In the so-called *Bøler-judgment* of the Norwegian Supreme Court, this was explained as follows:

> whether there is a conflict between a convention rule that has been incorporated into Norwegian law and other Norwegian law, with the consequence that the convention rule must take priority, cannot be resolved by a general rule but must depend on a more detailed interpretation of the legal rules in question. Harmonisation through interpretation can resolve an apparent conflict.[80]

In other words, in order to determine whether conflict occurs one must interpret the convention and the relevant domestic laws. However, as will be seen in the discussion of the child's best interest, there may be doubts as to how a convention rule should be interpreted, due to, inter alia, vagueness in the language of the provision or the required balancing of interests and values. This often relates to a debate on the justiciability of human rights and whether the provision is *self-executing*, meaning if it is directly applicable before the courts.[81] For unaccompanied children the issue of justiciability is important for their possibilities of taking alleged breaches of the CRC to the courts of law.

### 3.3.2 The Immigration Act and Regulations

On 1 January 2010, the new Immigration Act and Regulations entered into force, which incorporates the CRC through § 3. Pursuant to § 75 of the Act, it is the Norwegian Storting that shall approve the main principles of the regulation of immigration, while it is the King,

[79] Lile 2009:49
[80] Rt. 2000 p. 1007; Lile 2009:51
[81] Lile 2009:51

the Ministry, the Directorate of Immigration (UDI), the Immigration Appeals Board (UNE), the police and public authorities that implement the Act. However, the government *may* amend the Regulations without approval from the Storting. Whereas it is UDI that processes asylum applications as first instance, rejected asylum seekers may appeal to UNE, which makes the final decision. UNE's decisions can further be appealed through the judicial system, and, eventually, to an international body.[82]

An important change in the new Immigration Act is that the term 'refugee' now includes not only the persons who meet the criteria of Article 1A of the Refugee Convention, worded literally in § 28 (a), but in § 28 (b) also include other applicants covered by the non-refoulement provisions to which Norway is bound. Notably, § 28 also establish that "*where an assessment is made pursuant to the first paragraph, account shall be taken of whether the applicant is a child*" and in § 29 (f) it is specified that persecution include acts of a "child-specific nature". The preparatory works underscore that children are more vulnerable than adults and may be less able to communicate individual conditions of significance. It is also held that a return situation regarded as safe for adults may actually constitute inhuman and degrading treatment if the child is returned without proper care.[83]

It is important to note that the unaccompanied children in focus in this thesis are deemed *not* to meet the criteria for protection in § 28. However, in such cases, the immigration authorities *shall* consider whether the child should be granted a residence permit on strong humanitarian grounds or a particular connection with the realm.[84] Importantly, this is a *may* provision, meaning that the applicant does not have a *right* to be granted protection on a humanitarian basis.[85] Thus, § 38 allow the authorities ample room for discretion and the threshold for granting a permit is primarily a political question.[86]

Moreover, § 38 clearly states that when the immigration authorities are making an assessment, importance *shall* be attached to some discretionary factors, while they *may*

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[82] Vevstad 2010:462-464
[83] Ot.prp. nr 75 (2006-2007):92-93
[84] § 38 (1)
[85] Ot.prp. nr 75 (2006-2007):152; NOU 2004:264.
[86] Rt.2012 p.1985, para 142-143

attach importance to others.[87] For instance, the children at focus in this thesis are granted temporary permits primarily because they are unaccompanied minors without proper care on return, in accordance with § 38 (2)(a) of the Act. Moreover, § 38 (3) implements Article 3 (1) of the CRC by highlighting that "in cases concerning children, the best interest of the child *shall* be a fundamental consideration" and that children may be granted "a residence permit pursuant to the first paragraph even if the situation is not so serious that a residence permit would have been granted to an adult". Thus, § 38 has great potential to safeguard the rights of the unaccompanied children who do not fall within the scope of § 28.

Nonetheless, the preparatory works underscores that the authorities *may* choose to attach importance to immigration-regulating considerations, which are defined as: possible consequences for the number of applications based on similar ground; social consequences; the need for control, and respect for the other provisions of the Act.[88] In consequence, when the arrivals of unaccompanied children increased in the first half of 2008, the government tightened the 'humanitarian space' in § 38 and introduced § 8 (8) in the Immigration Regulations, which codified measure number six on temporary permits.

### 3.3.3 The Children's Act and the Child Welfare Act

The best interests of unaccompanied children are also enshrined in other national laws. The content of the care responsibility, for instance, is set out in the 1999 Children's Act in § 30 (2) and in the Norwegian Child Welfare Act, which applies to all persons under 18 years. The Child Welfare Act also enshrines that it shall "ensure that children and young persons who live in conditions that may be detrimental to their health and development receive the necessary assistance and care at the right time".[89] Additionally, there are other laws safeguarding the rights of unaccompanied children, such as the Education Act and the Guardianship Act. These laws will be elaborated in Chapter 4.3.3 and Chapter 4.4.2.

[87] Rt.2012 p.1985, para 102
[88] § 38 (4)
[89] § 1(2) and 1(3)

# 4 Temporary Residence Permits: A Breach of the CRC?

Since its introduction, temporary permits to unaccompanied children have become a recurring topic in the public debate. On the one hand, critics claim that it places youths 'in limbo' and is a breach of, *inter alia*, the four general principles of the CRC.[90] On the other hand, the Norwegian government defends the practice, maintaining that it is not in breach of the CRC, but rather has contributed to decreasing the number of asylum arrivals.[91]

Despite this rather polarised debate, little academic knowledge has been produced about this group of unaccompanied children, especially from a human rights perspective. The aim of this Chapter is to thereby try to answer the main research question of this thesis: *Does the granting of temporary residence permits to unaccompanied asylum seeking children in Norway lead to breaches of the Convention on the Rights of the Child?*

## 4.1 The Right of Non-discrimination

> *State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion or other opinion, national, ethnic or social origin, property, disability, birth or other status* – CRC Article 2 (1)

In the view of the Ombudsman for Children in Norway, there are especially two areas in which unaccompanied children are discriminated. This is firstly in regards to the reception and care situation of those above 15 years and secondly in regards to the granting of temporary residence permits to unaccompanied children above 16 years.[92] Before examining this, the scope and content of Article 2 (1) will be discussed.

Although the CRC does not define discrimination or specify any limitations to the provision, there are certain elements that recur when trying to determine discrimination.[93]

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[90] NGOU 2006:1; Norwegian Forum for the CRC (2009)
[91] Meld.St.27(2011-2012):48
[92] Ombudsman for Children in Norway 2009:11
[93] Høstmælingen et. al 2012:36-37

*Firstly*, the principle of non-discrimination prohibits State parties from treating a child differently on the basis of certain personal characteristics. In other words, on account of the protected grounds in Article 2 (1), being race, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.[94]

*Secondly*, treating these children equally means that similar situations should be treated alike, and dissimilar situations should be treated differently.[95] In *Waite v. UK*, the ECtHR described this as a criterion where there exists "difference in treatment between persons in analogous or relatively similar situations".[96] In addition, one must show that the persons who claim to be discriminated are put at a disadvantaged position in comparison to others in a similar situation *because* of this differential treatment.[97]

*Thirdly*, as Article 2 (1) is an accessory right it must be viewed in conjunction with the other CRC provisions. This means that the differential treatment must limit the fulfilment of, for instance, the best interest of the child (Article 3), the right to development (Article 6) or the right to be heard (Article 12). The prohibition of discrimination thus implies that children shall be ensured *equal access* to the rights enshrined in the CRC.[98]

*Lastly*, however, it is important to note that differential treatment is not always unjustifiable. In the *Belgian Linguistic Case* the ECtHR reasoned that: "A difference in treatment is discriminatory if it has no reasonable justification: that is, if it does not pursue a *legitimate aim*, or there is no reasonable relationship of *proportionality* between the means employed and the aim sought to be realised".[99] Thus, the ECtHR establishes that one may discriminate if it pursues a legitimate aim and if it satisfies the proportionality test.

In sum, when examining if the granting of temporary residence permits to unaccompanied children leads to a violation of Article 2 (1), we need to address the four elements as pronounced above. In what follows, I therefore commence by asking the first question: On what *protected grounds* are unaccompanied children treated differently?

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[94] Abramson 2008:18
[95] Høstmælingen et. al 2012:36-37
[96] Waite v. UK (2002), para 79
[97] Høstmælingen et. al 2012:36-37
[98] Ibid:36-37
[99] Belgian Linguistic Case (No. 2), para 10 (my emphasis)

### 4.1.1 Differential Treatment on Account of Age and Residence Status?

As outlined above, Article 2 (1) mentions a range of protected grounds, such as sex, religion or other statuses, but do not explicitly put forward *age* or *residence status*, which are the grounds I wish to investigate. Yet, according to the Norwegian Ombudsman for Children, age is recognised as a basis for discrimination in other conventions, and there are reasons to believe that age may also be included in the *other statuses* ground.[100] For instance, in General Comment No. 20 of the Committee on Economic, Social and Cultural Rights (CESCR), it is stated that: "In relation to young persons, unequal access by adolescents to sexual and reproductive health information and services amounts to discrimination".[101] In their 2010 Concluding Observations, the CRC Committee also recommended that Norway "carefully examine the possibility of expanding legislation to provide protection of children against discrimination on the grounds of their age".[102]

In Norway, only protection against age discrimination in relation to the workplace is laid down in national legislation, via the Anti-Discrimination Act of 2006.[103] The Anti-Discrimination Ombud also has the authority to monitor and ensure compliance with the Anti-Discrimination Act, in addition to receiving individual complaints.[104] The Norwegian Ombudsman for Children, however, does not have the same possibility in relation to its supervision of the CRC, and consequently, there is no appeals body to which children may apply in order to test age discrimination beyond the court system. Moreover, as far as the Ombudsman for Children is aware, there are no examples of age discrimination against children ever being tested in the Norwegian court system.[105] According to Frøydis Heyerdahl, this may be an indication that children do not have a satisfactory access to enforcement mechanisms if they have been subjected to age discrimination.[106]

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[100] The Ombudsman for Children in Norway 2009:10
[101] CESCR GC No. 20, para 29.
[102] CRC Concluding Observation: Norway (2010), para 20
[103] The Ombudsman for Children in Norway 2009:11
[104] The Anti-Discrimination Ombud Act §1 and § 3.
[105] The Ombudsman for Children in Norway 2009:11
[106] Høstmælingen et. al 2012:35

As regards residence status, the CRC Committee has stated that in all its facets, Article 2 (1) applies to unaccompanied children, and that it prohibits discrimination "on the basis of the *status* of the child as being a refugee, asylum seeker or migrant".[107] This is also evident in the repeated concerns of the CRC Committee in its Concluding Observations to Norway. In 2003, the Committee was concerned with the absence of legal guarantees of non-discrimination and stated that this *could* deprive children without a Norwegian nationality of their rights under the CRC.[108] In 2005, the Committee argued that unaccompanied children *are* treated differently than Norwegian children and recommended that Norway:

> "…improve the situation in reception centres for unaccompanied children seeking asylum, in terms of resources and adequately trained and competent staff, so that the assistance and care for these children reaches the same level as that provided in other institutions under the child welfare system."[109]

Based on the above, I argue that the *other statuses* ground in Article 2 (1) do contain a prohibition of discrimination on the basis of age and residence status. Moreover, in line with the CRC Committee, I argue that unaccompanied children's reception and care situation do not hold the same standards in comparison to Norwegian children. As such, I now address if this amounts to differential treatment of persons in a *similar situation* and in turn, if this differential treatment pursues a *legitimate aim*.

### 4.1.2 Reception and Care of Unaccompanied Children

Although the Child Welfare Act applies to all children present in Norway less than 18 years,[110] until 2007, all unaccompanied children were under the reception and care of the UDI. However, due to, *inter alia*, the critique from the CRC Committee, the government decided to transfer the care responsibility for unaccompanied children under 15 years to the child welfare services. According to the government, the objective of this transfer was both to provide shelter and care for children with special needs, and the same quality standard as

[107] CRC GC No. 6, para 18 (my emphasis)
[108] CRC Concluding Observations: Norway (2003), para 229
[109] CRC Concluding Observations: Norway 2005),para 42
[110] § 1(2) and 1(3)

to other children for which the child welfare services is responsible for. By providing better care for children when they first arrive, the hope is that this could contribute to preventing psychosocial problems and criminality, and provide a good standard of living, or alternatively, the best possible return to the child's country or origin.[111]

Consequently, as it is today, the child welfare services only has the day-to-day responsibility for unaccompanied children less than 15 years, while it is the UDI that has the reception and care responsibility for children between 15 and 18 years.[112] Thus, the unaccompanied children over 16 years, whose only ground to stay are that they are without adequate care on return, are treated differently than children in a *similar situation* under 16 years, as well as Norwegian children. However, does this put the children above 16 years in a disadvantaged position and does it hinder them in accessing their rights under the CRC?

Notably, Article 22 (2) establishes that although reunification is seen as the primary goal when receiving unaccompanied children, "in cases where no parents or other members of the family can be found, the child shall be accorded *the same protection* as any other child permanently or temporarily deprived of his or her family environment *for any reason*…"[113] This provision must be seen in conjunction with Articles 3 (2) which enshrines that the State must "ensure the child such protection and care as is necessary for his or her well-being" as well as Article 3 (3) which establishes that the "institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of staff, as well as competent supervision".

In March 2013, Lidén and colleagues published a comprehensive report on the living conditions in reception centres for unaccompanied children between 15 and 18 years. The researchers found that there are two types of child residents in the centres, the ones staying *short-term*, and the ones staying *long-term*. The living conditions for these two groups vary significantly. On a positive note, the immigration authorities have reduced the case processing time and settlement of asylum seeking children. As such, most of the ones

[111] Norway's Fourth Report to the CRC, para 20
[112] Ministry of Children and Equality and Ministry of Foreign Affairs 2008:17
[113] (My emphasis)

receiving a positive answer, only stay at the centres for three to five months. Yet for the long-term residents, that is, the children with temporary residence permits, rejections from UDI or appeals at UNE, the living conditions were *not* found to be satisfying. Particularly unsatisfactory was the number of staffing per child, staff skills and competences, housing standards, and environmental resources. Thus, the researchers concluded that the standards at reception centres for unaccompanied children were below the norms that are applied by institutions run by the child welfare services for the children under 15 years.[114] As argued by the Ombudsman for Children, this amounts to discrimination, as the level of follow-up of unaccompanied children between 16 and 18 years is considerable inferior compared with both Norwegian children and unaccompanied children under the age of 15.[115]

Nonetheless, although we may establish that these children are treated differently and in consequence not given equal access to Articles 3 and 22, we still need to address if this policy pursues a *legitimate aim*. In 2007, the justification for not transferring the care responsibility for *all* unaccompanied children was based on the resource situation in the child welfare services.[116] However, in the 2009 political platform of the government it was contended that the reception and care of the unaccompanied children between 15 and 18 years would be transferred to the child welfare services in the course of 2009. Later in that year, however, the government postponed the transfer of care *indefinitely*, justified by the large increase in asylum arrivals.[117] In their 2010 Concluding Observations, the CRC Committee expressed concern over this decision, stating that Norway "has limited the responsibility of the Child Welfare Services to children under the age 15 leaving older children with reduced assistance…" and recommended that the authorities "expand, as planned, the responsibility of the Child Welfare Services to children aged 15, 16 and 17."[118] In my opinion, this postponement could clearly be seen in relation to the tightening measures introduced at the time, and that the government wanted to encourage children to return voluntarily, rather than to improve their conditions in Norway.

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[114] Lidén, Hidle, Nilsen and Wærdahl 2013:9-10
[115] The Ombudsman for Children in Norway 2009:11
[116] Ministry of Children and Equality and Ministry of Foreign Affairs 2008:17
[117] Ministry of Children and Equality (2009)
[118] CRC Concluding Observation: Norway (2010), para 51, 52 (e)

It is nonetheless important to note that, in many circumstances, the 'lack of resources' argument applied by the Government may be seen as a legitimate aim. As such, Article 4 of the CRC enshrines that: "With regard to economic, social and cultural rights, State parties shall undertake such measures to the *maximum extent of their available resources*…"[119] Thus, as long as the government pursues a progressive realisation of the rights of the CRC, constraints due to limited resources are usually acknowledged. Nevertheless, both the CRC Committee's Concluding Observations to France (2009)[120] and the General Comment No. 3 of the CESCR[121] underscore that Article 2 does not allow discrimination on account of limited resources. This means that the progressive realisation of economic, social and cultural rights must be fulfilled without discrimination.[122] Taking into account that Norway is a resourceful country, and that the arrival numbers of refugees have decreased, I therefore find that the government's argument for not raising the standards for unaccompanied children above 16 years do not pursue a legitimate aim.

### 4.1.3 Temporary Residence Status

In addition to the reception and care situation, the critics of temporary residence permits claim that the introduction of § 8 (8) of the Immigration Regulations could amount to a breach of Article 2 (1) in conjunction with Article 3 and 6 of the CRC. In the White Paper *On Asylum Seeking Children,* the government acknowledges that the granting of temporary residence permits entails a differential treatment of unaccompanied children under and above 16 years who are in the same situation. Thus, it is clear that the differential treatment is on account of age. However, the government finds that the differential treatment is not discrimination, given that Article 2 (1) does not mean *equal treatment*. For instance, in General Comment No. 6, the CRC Committee express that Article 2 (1) "does not prevent, but may indeed call for differentiation on the basis of different protection needs, such as those emerging from age or gender."[123] Of importance, according to the government, is that

[119] (My emphasis)
[120] CRC Concluding Observation: France (2009), para 19
[121] CESCR GC No. 3, para 1
[122] Høstmælingen et. al 2012:47
[123] CRC GC No. 6, para 18.

the principle of non-discrimination should ensure that all children have *equal access* to the provisions of the CRC.[124] This is correct. In other words, as explained above, it is not age differentiation *per se* that is forbidden; it is differentiation that hinders the child's enjoyment of other provisions of the CRC.[125] In the view of the government, the differential treatment does not hinder the children in accessing their rights.[126]

The government further finds that the introduction of temporary permits pursues a legitimate aim, as it intends to prevent children and young persons in migrating in the first place.[127] Yet, as will be discussed in Chapter 4.3, I question whether the granting of temporary permits is a *proportionate means* to achieve this goal. Rather, I believe that it was the political situation at the time, as well as budgetary reasons, that were the government's most weighty arguments. However, in order to conclude whether the granting of temporary residence permits to children above 16 years amounts to discrimination, we must firstly address whether it is *legally justifiable* to place more weight on the 'children' in Afghanistan, Somalia and Iraq, than on the best interest of the 'child' present in Norway. This will be discussed more thoroughly in Chapter 4.2.2.

## 4.2 The Best Interest of the Child

> *In all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*
> – CRC Art 3 (1)

Article 3 of the CRC has three sections, all of which are highly relevant in an assessment of whether temporary residence permits are in breach of the CRC. Whereas Article 3 (2) and 3 (3) have been discussed above, I will now focus my attention on Article 3 (1), which is implemented, *inter alia*, through § 38 of the Immigration Act, which also establishes that the authorities may place weight on immigration-regulating considerations. However, by

[124] Meld. St. 27 (2011-2012), p. 48
[125] Abramson 2008:23
[126] Meld. St. 27 (2011-2012):48-49
[127] Ibid:48-49

drawing on jurisprudence from the Norwegian Supreme Court, this Part asks whether it is justifiable, in the name of immigration control, to limit the best interest of the child?

### 4.2.1 The Lack of a Proper Definition

That the CRC does not define 'best interests' has been the subject of extensive debate in Norway, not the least in connection with the White Paper *on Asylum Seeking Children* (2011-2012). In its Concluding Observations to Norway in 2010, the CRC Committee recommended that Norway should elaborate directions on how to operationalize the term, and many practitioners expected the White Paper to do exactly this. However, as stated by the National Institution for Human Rights (NI), the White Paper rather "contributed to more confusion through vague and contradictory statements, and omitting to say anything concrete on how the best interest determination should be carried out".[128]

There have been several attempts at defining 'best interests', and in the following, I will take as my point of departure the definition developed by John Ekelaar, professor at Oxford College. He says that best interest can be defined as: "Basic interests, for example to physical, emotional and intellectual care, developmental interests, *to enter adulthood as far as possible without disadvantage*; autonomy interests, especially freedom to choose a lifestyle of their own."[129] In the UNHCR Guidelines, this is broadly defined as the child's well-being, determined by a variety of individual circumstances, such as age, the level of maturity, the presence and absence of parents and the child's experiences. Further, it is underscored that both the *short-term* and *long-term* impacts must be weighed before determining the child's best interest, including the prospects for a durable solution.[130]

### 4.2.2 Do the Child's Best Interests 'Trump' Immigration Regulation?

In the words of Ronald Dworkin, an important element in distinguishing a *human right* from a *high-priority goal* is that rights have a special normative force that makes it 'trump' non-rights objectives, such as increasing national wealth or reducing immigration.[131] At the

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[128] National Institution for Human Rights (NIHR) 2012:1, my translation
[129] Freeman 2007:27 (my emphasis)
[130] UNHCR 2008:14, 67
[131] Nickel 2007:22-23; Stanford Encyclopaedia of Philosophy 2011

core of this debate is whether the best interest of the child is a *guideline* or a *right* and whether it is *a* primary or *the* primary consideration. In assessing the preparatory works, we find that the inspiration for the provision comes from the 1959 UN Declaration on the Rights of the Child, which enunciates that it is to be *the paramount* consideration in the enactment of laws.[132] This was also the formulation in the first draft of the CRC. Nonetheless, during the drafting process many delegations were uncomfortable with the wording, holding that there are situations in which competing interests of justice and society should be of equal, if not greater, importance than the best interest of the child. Hence, it was suggested that the provision should be worded as it is today, namely that the best interest of the child is *a* primary consideration.[133] The wording, however, still signifies that the child's best interest as a *main rule* shall override other considerations, and that an exception to the rule must be justified and made visible in the decisions.[134] In limiting the best interest of the child, there are especially two arguments laid forth by the government.

*The first argument* is that the authorities may, in some circumstances, place more weight on immigration-regulating considerations than the child's best interest. However, in General Comment No. 6 the CRC Committee has noted that, in the case of *return* of unaccompanied children, considerations that are to take precedence over the child's best interest must be *rights-based* and that "non-rights-based arguments such as those relating to general immigration control, cannot override best interest considerations."[135] As such, I find that there are two ways to view the government's decision to grant temporary residence permits to unaccompanied children. On the one hand, the government may be seen as fulfilling this criterion by allowing the children to stay until their 18th birthday. On the other hand, there is no doubt that, in general, immigration-regulating considerations have overridden the best interest of the child when it comes to the granting of temporary residence permits. This is evident in that before 2008, it was usually considered to be in the

[132] Freeman 2007:45
[133] Ibid:45-46
[134] NIHR 2012:3; The Ombudsman for Children in Norway 2009:12
[135] CRC GC No. 6, para 86

best interest of *all* unaccompanied children to be granted a renewable permit if they were without adequate care on return, while today, this only applies to those under 16 years.

In the Norwegian Supreme Court case of *Ashok v. UNE*, concerning the return of an unaccompanied boy to Sri Lanka, the first-voting judge held that the statement from the CRC Committee that immigration control cannot override best interest in the case of return could not be seen independently from the child's family ties. Notably, Article 9 and 22 of the CRC also underscore the importance of family reunification. Hence, in the judge's view it is only in cases where the child's situation implies that *it cannot be returned*, that immigration-regulating considerations cannot trump the child's best interest.[136] Although it might have been in the best interest of Ashok to stay in Norway, the fact that he did not have a protection need and had family in his home country, thus implied that immigration-regulating considerations could outweigh the child's best interest.[137]

In principle, it is difficult to disagree with this opinion, as family reunification should be the primary option when receiving unaccompanied children, except in cases involving abuse or neglect by the parents, or where reunification is made impossible because of the location of their caretakers.[138] Yet as regards the children at focus in this thesis, the reason why they are granted a permit at all is that they are without adequate care, and thus *cannot be returned*. It is therefore questionable that the government applies immigration regulation as an argument for returning children after their 18th birthday. Based on the above, this should only be justifiable if it is found to be in their best interest.

*The second argument* pronounced by the government is that limiting the residence rights of the children above 16 is a measure that aims at preventing children in migrating in the first place. In my view, this raises an important question: Can the government place more weight on the best interests of 'children' present in Afghanistan and Iraq, than on the best interest of the 'child' present in Norway? In the Norwegian Supreme Court Case *Mahdi v. UNE*, concerning an Iranian family who, at the time of the decision, had lived in Norway for a long time, the first-voting judge elaborated on this question, holding that the

[136] Rt.2009 p.1261, para 61-62
[137] Ibid: para 80
[138] CRC GC No. 6, para 81

balancing standard in Article 3 (1) is a "a requirement of rationality and proportionality if the child's best interest is set aside…I find it clear that considerations of immigration control are rational".[139] Referring to the *Ashok-case*, he further held that this, in particular, applies to "immigration policy considerations that are not altogether general but based precisely on a desire to protect other children from ending up in that same situation".[140]

In conclusion, according to these judgments, placing decisive weight on immigration-regulating considerations that seek to protect the children 'out there' is a *legally justifiable aim*. Yet, as mentioned earlier, I find this standpoint to be problematic for at least for two reasons. Firstly, as mentioned in Chapter 2.4, there does not exist enough evidence that limiting children's rights in Norway stops children in migrating in the first place. More likely, they end up in other countries, perhaps with lower standards of reception. Secondly, in the preparatory works to the Immigration Act, the Ministry emphasise that it "would constitute a breach of the convention to attach decisive weight to considerations of immigration control if this is not justifiable in in relation to the child's best interests".[141] A way to solve this apparent dilemma is thus to assess the *proportionality* of setting the child's best interest aside. This will be discussed in the following section.

## 4.3 The Right to Life, Survival and Development

> *States Parties shall ensure to the maximum extent possible the survival and development of the child.* - CRC Article 6 (2)

According to Elin Saga Kjørholt, the word 'survival' in Article 6 (2) signifies physical survival, while 'development' involves a great deal more.[142] This holistic interpretation is supported by the CRC Committee's Guidelines for Periodic Reports, in which the State is asked to described the measures taken to "create an environment conducive to ensuring to the maximum extent possible the survival and development of the child, including physical,

[139] Rt.2012 p.1985, para 187-188
[140] Rt.2009 p.1261, para 62
[141] Ot.prp.nr 75 (2006-2007):160
[142] Høstmælingen et. al 2012:75

mental, spiritual, moral and psychological and social development, in a manner compatible with human dignity, and to prepare the child for an individual life in a free society".[143] In view of this interpretation, I argue that Article 6 (2) is not only valuable for its own sake, but could also help establish if it is to the *best interest* of the child to receive a temporary permit until its 18th birthday, or if it is *proportional* to set the child's best interest aside.

### 4.3.1 Mental Health Implications of Being 'In Limbo'

In Norway, unaccompanied children have the right to specialist health care to the extent that they need it, and the law does not vary significantly with regard to the right of Norwegian children versus children with temporary permits.[144] However, according to Brekke and Vevstad, the mental healthcare system for children and traumatised asylum seekers has been a discussion for years, and the CRC Committee also expressed its concern on this matter both in the 2000[145] and 2010[146] Concluding Observations to Norway.

It is well known that many of the refugees who have lived under forms of temporary protection at the national level have experienced mental health problems as a result of insecurity and social exclusion in the host country.[147] As outlined in Chapter 2.3, this dilemma between *integration* and *isolation* was discussed by the Norwegian government already in the 1990s with the arrival of the Bosnian refugees. At that time, the government chose integration and settlement in local municipalities, as the isolation strategy was considered to be potentially harmful to the individual refugee.[148] Yet, in 2009, it was decided that unaccompanied children granted temporary permits would be placed in a specialised reception centre in Salhus, Bergen. Gathering the children with temporary permits was seen as a good solution, because it simplified the qualification and training program that was intended to fill their days with meaning, and prepare them for return.[149]

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[143] CRC Guidelines of Periodic Reports, para 40 (my emphasis)
[144] Ministry of Children and Equality and Ministry of Foreign Affairs 2008:123
[145] CRC Conluding Observations: Norway (2000), para 40-41
[146] CRC Conluding Observations: Norway (2010), para 42
[147] ECRE 1997, para 7
[148] Brekke 2001b:9
[149] Sønsterudbråten 2010:52

However, already a year after the start-up of the centre, Save the Children sent a report of concern to the child welfare services, describing that the nature of the temporary permits had placed an extra burden on the youths that had not been anticipated. The children reported a lack of motivation and feeling of powerlessness that was not present to the same extent with other asylum seeking children. Yet despite these concerns, the child welfare authorities chose not to pursue the report, since, in their opinion, the responsibility of these youths was under the UDI and the report was related to *all* the children at the centre and not an individual child.[150] Recalling the discussion in Chapter 4.1.3, this could clearly be criticised in a non-discrimination perspective and could also be a breach of § 4 (3) of the Child Welfare Act, which enshrines the right and duty to make investigations.

Moreover, in a report by Silje Sønsterudbråten (2010), it was confirmed that the children at Salhus clearly found themselves in a difficult situation, being in-between integration and return motivation. In her opinion, this was conceivably intended by the government, wanting to avoid that the youths acquire a 'connection to the realm', which later could be used to appeal their case. Sønsterudbråten observed, however, that several of the children had drug-related problems and that some had self-mutilated.[151] In the UK, which has a similar form of temporary permit, a practitioner working with unaccompanied children gave the following description of the implications of the practice:

> The procedure as it exists today creates a limbo for young people and they remain in uncertainty during a crucial period of adolescence, which probably has long term negative consequences on their emotional and psychological well-being, whether they stay here or go back to their country of origin.[152]

These feelings of uncertainty during the waiting time is reported to have a significant impact on the children's ability to plan for the future, and these feelings becomes even more acute when the children concerned are already traumatised by earlier experiences.[153]

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[150] NRK Hordaland 2012
[151] Sønsterudbråten 2010:75-76
[152] Gladwell and Elwyn 2012:5
[153] ECRE 1997:4

In her work with the Documentary 'The Others' Margreth Olin found that several of the children living at Salhus had severe psychological problems. Of the 20 boys she followed in her film, three had attempted suicide, one of them on their 18th birthday. Another boy was traumatised after witnessing the execution of his parents and two younger siblings in Afghanistan, and during his stay at Salhus, he became paralysed in both legs. Yet another boy lost the ability to speak after self-harming during a panic attack, and three others have been hospitalised in closed psychiatric wards for longer-periods of time.[154] Although this represents some of the gravest examples, Sønsterudbråten also questioned in her report what it does to vulnerable children aged 16 to 18 to live in such an environment.[155] In 2011, much due to Sønsterudbråten's report, the UDI decided to close Salhus, and transferred the children to reception centres for unaccompanied children.[156]

However, as discussed in Chapter 4.1.3, Lidén found that the standards at the reception centres where the unaccompanied children are currently living are not satisfactory. In addition, Lidén observed that the mental and physical health problems among the children with temporary permits are in a *critical state*. The low level of economic support, combined with the fact that many of the youths must prepare their own meals, also leads to an inadequate nutritious diet and that medical treatment and medication are not prioritised. According to the report, this reprehensible situation is partly due to the children's long-term stay at reception centres with insufficient living conditions, but above all, their health and development are strongly affected by the temporary status in itself.[157]

Based on the above, it is debatable whether these conditions create an environment that is conducive to ensuring, *inter alia*, the psychological and social development of the child in a manner compatible with human dignity. And recalling the debate on the child's best interest, I also question whether the individual costs of the model, such as the children's mental health, is proportional to the aims sought to be realised. As highlighted by the CRC Committee, unaccompanied children are a particularly vulnerable group and

[154] Olin 2013
[155] Sønsterudbråten 2010:75
[156] Meld. St. 27 (2011-2012):71
[157] Lidén et.al 2013:10

should have a non-discriminatory access to special protection and assistance.[158] Moreover, as will be discussed below, they are at risk of being subjected to trafficking and other criminal activity.[159] Thus, in what follows, I address to what extent unaccompanied children with temporary permits *disappear* from reception centres while Chapter 4.3.3 will conclude on whether *education* can outweigh these negative effects of temporary permits.

### 4.3.2 Youths Disappearing From Reception Centres

In the 2010 Concluding Observations to Norway, the CRC Committee expressed its concern that "an increasing number of unaccompanied children have disappeared from reception centres" and recommended that Norway "must make sure that these children do not disappear and fall into the clutches of traffickers and exploiters" as well as to "investigate cases of disappearances and find ways to make access available to hidden children".[160] In Norway, the children who leave reception centres without providing a new address are registered as having 'disappeared'.[161] The UDI is then required to report as soon as the disappearance of a child is noticed and it is standard procedure that after 24 hours they report the unaccompanied child as 'missing'.[162] From here, it is the local police who have the responsibility to decide whether or how to pursue the case.[163]

As of 25 April 2013, 50 out of 160 unaccompanied children who have been granted temporary permits are labelled by the UDI as 'private'/ 'disappeared'.[164] Whereas some of these unaccompanied children may stay with friends or family at private addresses, the great risks for these youths are still destitution, poverty and homelessness. Norwegian NGOs have also raised attention to additional risks, such as various forms of exploitation, development of drug abuse and illegal survival strategies, as well as psychological and other health problems.[165] In their Concluding Observations to Norway in 2012, the

[158] CRC art 20 and 22
[159] CRC GC No.6, para 23-24
[160] CRC Concluding Observations: Norway (2010), para 50 (e), 51, 52 (h)
[161] Norway's Report to the CAT (2012), para 193
[162] CAT/C/SR.1103, para 13
[163] Meld.St.27 (2011-2012):74
[164] UDI (2013)
[165] SEIF et. al 2011:55; Gladwell and Elwyn 2012:17

Committee against Torture also explicitly linked its concern over the disappearances to § 8 (8) of the Immigration Regulations, stating that temporary permits "may encourage minors to leave the reception centres before their permit expires".[166] In its Concluding Observations to Denmark in 2011, the CRC Committee also recommended that the authorities should "undertake a systematic survey of the disappearances of unaccompanied asylum-seeking children, especially with regard to the effect that *revoking residency rights upon attaining 18 years of age may have on the disappearance…*"[167]

The government acknowledge in the White Paper *On Asylum Seeking Children* that although many of the youths leave reception centres voluntarily, one cannot rule out that some of them are subjected to human trafficking or other illegal activity. For instance, the police have found some of the disappeared youths while making arrests in connection with drug sales or theft,[168] and The Coordination Unit for Victims of Human Trafficking reports that the children who approach the age 18 seem to be the most vulnerable to being subjected to human trafficking.[169] In responding to these challenges, the government has issued guidelines on disappearances of unaccompanied children between the ages of 15 and 18, and on how to follow-up on the possible victims of human trafficking. In the government's *Action Plan for Human Trafficking*, it is also said that the follow-up of youths who join "criminal/substance abuse communities" will be improved.[170]

On a positive note, PRESS found that, since 2008, there has been a change for the better in the attitude towards taking disappearances of asylum seeking children more seriously and that new circulars have set out the responsibility of the reception centres and the child welfare services more clearly than before. However, they also find that the unaccompanied children above 16 years are less protected than the children less than 16, and thus recommend a transfer of the care responsibility to the child welfare services.[171]

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[166] CAT Concluding Observations: Norway (2012), para 22
[167] CRC Concluding Observations:Denmark (2011), para 57-58 (my emphasis)
[168] Meld.St.27 (2011-2012):74
[169] KOM 2012:38-39
[170] Ministry of Justice and the Police 2010:5
[171] Espeland 2013:29, 42

In addition, practitioners interviewed by Save the Children emphasise that there are three challenges for their work with unaccompanied children: (a) the care situation for unaccompanied children between 15 and 18 years; (b) the practice of returning children in accordance with the Dublin procedure; (c) and the granting of temporary permits. This not only presents a challenge for the child welfare services work with these children, but has also, on several occasions, been a direct hindrance in providing necessary aid to children exploited by human trafficking. Save the Children thus opines that the tightening measures have worked in the opposite of being preventative, and rather contributed in making an already vulnerable group, even more vulnerable for exploitation.[172]

### 4.3.3 Can Education Outweigh the Negative Effects of Temporary Permits?

In the White Paper *On Asylum Seeking Children* (2011-2012), the government acknowledges that there are negative effects of temporary residence permits. However, they argue that if children are afforded a program that provides them with knowledge they can use upon return, this can counteract the other negative effects.[173] This was also the intention behind the qualification and training program at Salhus in Bergen, but after Sønsterudbråten's report, the program was ended. Nonetheless, based on her recommendations a new training program is set up, which also includes unaccompanied children with final rejections. This entails a voluntary and individual offer at the centres in which they live, and the program comes in addition to other types of schooling.[174]

The right to education for unaccompanied children is enshrined, *inter alia*, in Article 28 of the CRC and Article 22 of the 1951 Refugee Convention. These rights are implemented through the Education Act, which in § 2-1 establishes that the right to primary and lower secondary education applies when it is probable that the child will reside in Norway for a period of more than three months, and this right lasts until completion of the

[172] Vollebæk 2012:49-50
[173] Meld.St.27(2011-2012):49
[174] Meld.St.27(2011-2012):71

tenth year of schooling. Thus, the asylum seeking child up to 16 years has the same right as the Norwegian child to education according to the principle of non-discrimination.[175]

However, in regards to the access to schooling for asylum seekers aged 16 to 18, the picture become more complex. Firstly, in order to attend upper secondary school it is necessary to have completed primary and lower secondary school or equivalent.[176] Secondly, only those with legal residence may apply to be accepted. However, although asylum seeking children above 16 have *legal residence* while they wait for the decision to be made concerning their asylum application, they are *not entitled* to attend upper secondary school. In practice, the county councils may still take an independent decision to accept them while they wait for the decision, but the children will not be allowed to complete the school year if their application is rejected.[177] The CESCR has criticised this practice and encouraged Norway to ensure that asylum seekers are not restricted in their access to education while they wait for the decision.[178] This is supported in NOU 2010:7 and a 2009 report on the CRC and Norwegian national legislation.[179]

If the unaccompanied children above 16 are granted a temporary permit, and fulfil the above-mentioned criteria, they may apply to attend school until their 18th birthday. However, it is important to note that among the youths who are granted this type of permit, there exist large differences in respect of their aspirations and educational needs. In Sønsterudbråten's report from Salhus, it was remarked that although having access to a training program was very important to the children with temporary status, they were also susceptible to loosing their motivation due to feelings of living 'on hold'.[180] Although a new program has been set up for these children, the worries about their residence permit and the possibility of return are still described as overwhelming. This reflects itself through mental stress, uneasiness and absence from school. Lidén and colleagues underscore that this absence is often related to the children having trouble sleeping and thus a hard time

[175] Brekke and Vevstad 2007:23
[176] The Education Act §3-1
[177] Utdanningsdirektoratet (2011).
[178] CESCR Concluding Observations: Norway (2005), para 22 and 44
[179] See NOU 2010:7 and Søvig (2009)
[180] Ibid:51

concentrating.[181] Findings from Denmark also shown that unaccompanied children granted temporary permits are less motivated to learn and educate than other unaccompanied children.[182] Irrespective of the type of education program the unaccompanied children would receive, this would most likely not solve these existential problems.[183] Hence, could we say that education outweighs the negative effects of temporary permits?

According to Teilberg Jørgensen, in her study on temporary permits in Denmark, as long as the municipalities offer an education program and thus gives them the opportunity to educate and develop as long as they have a residence status, it is hard to argue that the State is in breach of Article 6 (2) of the CRC. She also outlines the possibility of gathering the children with temporary permits in one place, as it is economically demanding for some municipalities to establish an individualised training program. Jørgensen argues that this would enable Denmark to better live up to the demands in Article 6 (2) concerning the psychological development of the children, as they would benefit from being around children in the same situation as themselves.[184] However, taking into account the knowledge that has been produced about the situation at Salhus, and the grave mental health implications of the temporary status, I find this to be a too narrow conclusion.

In sum, I argue that Norway should ensure, *de jure* and *de facto*, access to schooling for unaccompanied children aged 16 to 18 years, irrespective of their asylum status. Moreover, I find that providing a specialised training program for these children, in addition to regular schooling, is important for the children's sense of stability and predictability. Thus, it most likely has a positive effect on their development. However, as evidenced above, education does not outweigh the negative effects of temporary permits, as the children's mental health is critical and several children have disappeared from reception centres. Based on the experience from the Bosnian refugee situation and as postulated by Sønsterudbråten and Lidén, it is the temporary status in itself that is difficult to live with.

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[181] Lidén et. al 2013:147
[182] Teilberg Jørgensen 2012:44-45
[183] Sønsterudbråten 2010:51
[184] Teilberg Jørgensen 2012:47

## 4.4 The Right to be Heard

> *States Parties shall assure to the child who is capable of forming his or her 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…* - CRC Article 2 (1)

As evidenced above, there is no doubt that the outcome of asylum procedures has substantial consequences for the rights and entitlements of unaccompanied children. In this regard, many researchers have underscored that children "are not adults in miniature" and that they often find administrative and legal procedures as extremely complex and confusing.[185] The CRC Committee establishes that Article 12 is a unique right, and that it constitutes one of the fundamental values of the Convention.[186] Moreover, Article 12 (2) enshrines that the "child shall in particular be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child", such as in immigration cases. In what follows, I will therefore briefly address if Norway is in compliance with Article 12.

### 4.4.1 A Culture of Disbelief?

In regards to unaccompanied children with temporary permits a report shows that while some describe that they were well taken care of during the asylum interview, others have stated that they did not understand what they were a part of. Many of them often recall the interview and wonder if there is something they could have done differently had they known how important it would be to their lives.[187] In Ravi Kohli's words, these children often find themselves in a difficult situation when arriving in the host country, as some have rehearsed their stories with family or smugglers in order to maximise their chances to stay, while some keep silent for other reasons, trying to cope with various forms of trauma. Caseworkers must therefore listen to what children say, but also to what they do not say.[188]

The last few years, the child's procedural rights have been strengthened through the

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[185] Bhabha and Young (1999); CRC GC No.12, para 40-47
[186] CRC GC No.12, para 1
[187] Save the Children 2010:16
[188] Kohli 2006:709-710

new Immigration Act and the establishment of an own children's unit in the UDI. In § 17 (1) of the Immigration Regulations it is also established that considerations concerning children will be *mentioned* and *weighed* in the decisions.[189] As stated by Kirsten Sandberg, the law is thereby in compliance with Article 12 of the CRC.[190]

In 2009, however, the NGO Forum for the CRC and the Ombudsman for Children expressed that the right to be heard is violated with an alarming frequency in Norway, and that research suggests that there is a gap between law and practice in this area.[191] In their Concluding Observations to Norway in 2010, the CRC Committee also expressed concern that, in practice, the right to be heard was not fully implemented, or effectively practiced, in all phases of immigration decisions relevant to the children's lives. In 2012, Save the Children maintained that this gap between law and practice still existed.[192]

Research from the UK indicates that many legal representatives and unaccompanied children believe that they are granted a temporary permit without their asylum application being given an adequate consideration. According to Finch, there is a widespread belief amongst caseworkers that the majority of unaccompanied children are sent by their parents to obtain better education opportunities. The research also reveals that it is difficult for the immigration caseworkers to acknowledge that these children can both be in need of protection and have the same genuine fear of persecution as an adult. This 'culture of disbelief' also becomes evident in questions as to whether the unaccompanied child is *actually* a child, and the increased use of age determination procedures.[193]

As I have not analysed any individual decisions, I do not have any grounds to say that these findings are applicable to Norway. However, I do recommend that a study be carried out which analyse the decisions of the children granted temporary permits to better assess the impacts of the tightening measures. Considering that several of the measures were directly targeted at unaccompanied children, having access to legal advice and a legal guardian is of paramount importance to safeguard the right of the child to be heard.

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[189] Meld. St. 27 (2011-2012):35-36
[190] Høstmælingen et. al 2012:296
[191] Norwegian Forum for the CRC 2009:11; The Ombudsman for Children in Norway 2009:13
[192] Save the Children 2012:5
[193] Eide 2012:55

### 4.4.2 The Importance of Legal Guardians

One of the features of the temporary model, as referred to in Chapter 2.4, is that it has both a *soft* side and a *hard* side. The soft side - being granted a leave to remain - appears first, and only later does the restrictive side - the return - come to the fore.[194] In the UK, research show that when children are granted temporary residence permits, it is often not fully appreciated by the child himself that he has not been recognised as a refugee. This highlights the importance of children having access to legal guardians that may explain the implications of the permit and the consequences it has on the day they turn 18.[195]As underscored by Vevstad and Nordby, the unaccompanied children with temporary permits are the group of children that the guardians find the most challenging to work with.[196]

In the 2010 Concluding Observations to Norway, the CRC Committee moreover expressed its concern that guardians are overburdened and unable to adequately exercise their role. The Committee recommended that Norway "expedite the assignment of a guardian to assist asylum-seeking children in understanding the procedures".[197] In a report to the Human Rights Council, the Norwegian Forum for the CRC also expressed that "…there are great variations in both terms of recruitment and training of legal guardians, resulting in arbitrary differences in representation."[198] In 2010, a countrywide study showed that out of 1300 guardians only 10 % had received training through a course.[199]

In order to meet some of these concerns, a system for the quick appointment of guardians in the transit phase was put in place from 1 June 2011. The organisation Norwegian People's Aid (NPA) has a secretariat with the overall responsibility of recruitment, training and follow-up, and this system now ensures that all unaccompanied children receive a guardian as soon as their asylum application is registered at the police.[200]

Moreover, an amendment to the Immigration Act was adopted in March 2012 that introduces a new Chapter 11A, which will come into force at the same time as a new

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[194] Brekke 2001b:17
[195] Dorling and Hurrel 2012:10-12
[196] Vevstad and Nordby 2012:58
[197] CRC Concluding Observations:Norway (2010), para 51 (c) and 52 (b)
[198] Norwegian Forum for the CRC 2009:6.
[199] Norwegian People's Aid 2011:1
[200] Vevstad and Nordby 2012:31-35

Guardianship Act in July 2013. This amendment replaces guardians in the transit phase with representatives that lasts until the child, eventually, has been granted permanent residence and settlement. At that time, the legal guardians will take over. According to the government, this new system of representatives will improve the protection of unaccompanied children and provide official standards for recruitment, training and monitoring. The role of the representative will be to assist the unaccompanied child with the asylum case by, *inter alia*, being present at conversations with the authorities and having contact with the child's lawyer.[201] NPA emphasise, however, that there should be an upper limit on how many children each representative has responsibility for, as the children with temporary permits, in particular, demand a lot of capacity of the guardians.[202]

## 4.5 Summary

On the one hand, this Chapter has shown that there have been positive developments in taking the disappearances of unaccompanied children more seriously and that the procedural standards concerning the child's right to be heard have been improved. Moreover, there are reasons to believe that the new system of representatives will enhance the protection of unaccompanied children, and it is shown that training and education is important for the unaccompanied children's sense of stability and predictability. On the other hand, I have argued that the government's justification for not transferring the reception and care responsibility to the child welfare services does *not* pursue a legitimate aim and consequently may be a breach of Article 2 (1). It is further held that providing education does not always outweigh the negative effects that the temporary permits have on the children's development, as enshrined in Article 6 (2). In sum, it is therefore questionable whether Norway fulfils the proportionality test in regards to Article 2 (1) and 3 (1) of the CRC. Before making the final conclusion, however, I find it important to investigate what happens to the unaccompanied children after they turn 18.

[201] Vevstad 2011:38
[202] Norwegian People's Aid 2011:2

# 5 The Difficulty of Turning 18

Having examined the multiple disadvantages faced by unaccompanied children granted temporary permits there is no doubt that this status leaves them in a vulnerable position when they turn 18. Now being *former* unaccompanied children, these young persons often take one of the three following paths: return voluntarily to their country of origin, be forcibly returned, or try to avoid deportation by disappearing into an irregular status.[203]

This Chapter builds on the premise that when determining what is in the best interest of the child, one must consider, *inter alia*, whether the decision allows the child to "enter adulthood as far as possible without disadvantage"[204] while taking into account both the short-term and *long-term* impact of each option, including the prospects for a durable solution.[205] In this respect, although they are no longer covered by the CRC, it is highly relevant to address what actually happens to the youths after their 18th birthday.

## 5.4 The 'Trauma of Return'

The Immigration Regulations § 8 (8) clearly establish that the temporary permit granted to unaccompanied children ends on the day they turn 18. Thereafter, the former unaccompanied child has a duty to return, and the permit may not be renewed. Nonetheless, as contended by Brekke, in the context of the Bosnian refugees, one of the features of the temporary model is that it is "time fragile". This means that "as time passes it will become increasingly difficult for the authorities to uphold the premise of return".[206] Does this feature also apply in regards to the former unaccompanied children at focus in this thesis?

### 5.4.1 Voluntary Return

Return measures are an important part of every 'comprehensive approach' to immigration that includes a temporary protection scheme.[207] In this regard, it is a priority of the

[203] Gladwell and Elwyn 2012:9
[204] Freeman 2007:27
[205] UNHCR 2008:14, 67
[206] Brekke 2001b:17
[207] Norwegian Ministry of Education and Research et. al 2012:32

Norwegian government that as many as possible return voluntarily.[208] Hence, since 2002, the government has established Voluntary Assisted Return Programs (VARPs), which are funded by the UDI, and carried out by the International Organisation for Migration (IOM).[209] These programs include, *inter alia*, information and counselling, assistance to obtain valid travel documents, travel arrangements and post-arrival reception.[210]

According to the White Paper *On Asylum Seeking Children* the return and reintegration programme that is established for Afghanistan also has been expanded to meet the special needs of young persons between 18 and 23 years, providing them with six months of free food and accommodation upon return, as well as a training program of the same duration.[211] In addition, the IOM has established a Vulnerable Groups Project, where one of the target groups are the 'aged-out minors' who arrive as unaccompanied children, but who turns 18 during their stay in Norway. This is in line with the *Statement of Best Practice* established by the Separated Child in Europe Programme (SCEP) and the Council of Europe Recommendation No. 1596, on the situation of young migrants in Europe.[212]

However, despite these comprehensive return programs, *only 13 out of the 160* unaccompanied children granted temporary permits have chosen to return with the IOM.[213] This confirms what Norwegian NGOs have reported, namely that for many of the unaccompanied children, return is simply not seen as an option.[214] According to Lidén, one of the main mechanisms employed by unaccompanied children in coping with the insecurity of their everyday lives in Norway is simply ignoring the prospects of return.[215]

In the study *Broken futures: young Afghan asylum seekers in the UK and on return to their country of origin* (2012), a five-fold explanation to a similar low return rate was examined. Shortly summarised, the Afghan youths cited reasons such as (a) being genuinely afraid of returning, (b) having become accustomed to western life and culture;

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[208] ECRE and Save the Children 2011:53
[209] Meld.St.27 (2011-2012):81
[210] Norwegian Ministry of Education and Research et. al 2012:32
[211] Meld.St.27 (2011-2012):81
[212] SCEP (2004); Council of Europe (2003)
[213] UDI (2013)
[214] SEIF et. al 2009:55
[215] Lidén et. al 2013

(c) feelings of honour, shame and obligation; (d) hoping that their situation will change; and (e) hearing disturbing rumours about the ones who actually have returned.[216] In addition, as time passes, the integration in the host country rises and the attachment to their home country is weakened.[217] In the abovementioned White Paper, the government acknowledges that when granting temporary permits instead of rejections, this may create an expectation of further residence that not necessarily motivates children to return.[218]

### 5.4.2 Forced Return

As the motivation for voluntary return decreases, the number of cases that involve force will rise.[219] As of 25 April 2013, 68 former unaccompanied children with expired temporary permits have an obligation to return to their country of origin. Furthermore, out of 160 unaccompanied children granted this type of permit *the police have only returned 8*.[220] In my view, this supports the CRC Committee's statement in General Comment No. 6, that one of the protection gaps in the treatment of unaccompanied children is that some "are granted only temporary status, which ends when they turn 18, and there are few effective return programs".[221] SCEP thus argues that the "durable solution is unlikely to be durable if it is based upon a decision to allow the child to remain up to their 18th birthday".[222]

As regards the children who *have* been forcibly returned, I have found little information on what happens after they have left the country. As mentioned in Chapter 3.2.3, the right of non-refoulement applies to all persons under temporary protection and forbids Norway to return a person to a situation that would threaten one's life or freedom.[223] However, in order to address whether Norway is in breach of its non-refoulement obligations, there must be effective and transparent monitoring mechanisms.

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[216] Gladwell and Elwyn 2012:10-13
[217] Brekke 2001b:16
[218] Meld.St. 27 (2011-2012):49
[219] Brekke 2001b:16
[220] UDI (2013)
[221] CRC GC No. 6:5
[222] SCEP 2004:33
[223] CAT art 3, ECHR art 3

Seeing that Norway has implemented the EU Return Directive,[224] the state is bound by Article 8 (6), which enshrines that the "Member States shall provide for an effective forced-return monitoring". However, according to the Norwegian Organisation for Asylum Seekers (NOAS), in practice, it is only the conditions at Trandum Detention Centre that is monitored. Based on these grounds, NOAS finds that Norway does not fulfil its obligations in accordance with Article 8 (6), as all phases of the return process must be monitored.[225]

Hence, it is clear that there is a need for an improved monitoring system that can protect the former unaccompanied children in the post return-phase. In addition, more research is needed to better understand the conditions of return, how this impacts on the former unaccompanied children, and how their situation is after they have been returned.[226]

### 5.4.3 Establishing Care Centres in Afghanistan and Iraq?

As part of the tightening measures in 2009, the Norwegian government proclaimed that there is a need to ensure that those unaccompanied children "who do not have needs for international protection are assisted to create a sound future in their home countries".[227] In consequence, the government decided that it would take steps to establish care centres, primarily in Afghanistan and Iraq.[228] In collaboration with Sweden, the Netherlands, Great Britain and Denmark, this project is now continued through the European Return Platform for Unaccompanied Minors (ERPUM). The target group for these centres are youths aged 16 to 20 whose only ground to stay is that they are without parental care on return.[229]

Thus, if these centres are set up, it may have two possible outcomes for the children at focus in this thesis. Firstly, it could make the temporary residence scheme superfluous, as the unaccompanied children above 16 from Afghanistan and Iraq could be returned to a care facility in their home country. Secondly, for the youths whose permit expires at 18, this could be an option for reintegration during the post-return period. On face value, this

[224] ECRE and Save the Children 2011:45
[225] NOAS 2013:23
[226] UNICEF 2011:93
[227] Ministry of Labour (2009)
[228] Ministry of Labour (2009)
[229] Meld.St.27 (2011-2012):88

appears as a reasonable solution for the concerned states in the event of return of unaccompanied children who are not found eligible for asylum or humanitarian protection.

However, the government does acknowledge that, except for the Dutch facilities in Angola and DR Congo, there exist little experience with such centres, and that it is a challenge to find, and gain access to, adequate care centres in Afghanistan and Iraq.[230] To date, ERPUM has not been able to establish the centres, and according to ECRE it would appear that "the promotion of the centres have been mostly for their "symbolic" value, based on the premise that they act to prevent migration in the first place..."[231] Yet, should the centres be opened, it is still questionable whether they can provide the returned youths a sufficiently safe environment in the worn-torn countries of Afghanistan and Iraq. Several NGOs have remarked that returnees are extremely vulnerable as "they are easily identified by traffickers due to their western way of behaviour, use of language and clothing".[232]

In any event, *if* the care centres are set up, it is important that they are not used to undermine the existing obligations of the cooperating states, for instance, in tracing the children's family or carrying out individual determinations of the best interest of the child.[233] I also find it important to discuss what the aftermath of the ERPUM project could be, and to highlight that through this project, Norway could become a forerunner in the deportation of unaccompanied children without parental care to war-torn countries. Yet, as this is currently *not* a return option, neither for the unaccompanied children nor for the youths with expired permits, the most likely path taken at 18 is to remain in Norway.

## 5.5 Cutting of Support: A Transition into Irregularity?

For the unaccompanied children who do not return voluntarily, or, for various reasons, are not returned by force, life after 18 may become difficult. In addition to not having a legal status, the asylum system and the CRC defines 18 as the cut-off point at which these young persons suddenly become adults. In consequence, they are transferred to ordinary reception

[230] Meld.St.27 (2011-2012):88
[231] ECRE and Save the Children 2011:88
[232] Ibid:89
[233] Ibid:89

centres, lose their right to education and are only entitled to emergency health services.[234] According to a study from the UK, this cut-off in support may leave these youths even more vulnerable and at risk than what they were during the temporary residence scheme.[235]

These findings are supported in the report by Lidén and colleagues (2013), which in particular highlight the problems that appear when the child looses the right to education. This is extremely difficult for the child itself, but also for the school involved. One headteacher explained that they often meet children with tears in their eyes, pleading to be allowed to continue, knowing that the school has available places. For many of these youths, going to school has been what helps them structure their everyday life and has created stability and predictability in an insecure situation.[236] Taking into account the extremely low-return rate of the former unaccompanied children, it is regrettable if these youths are not allowed to finish their education while they are still present in Norway. In my opinion, an extension of the voluntary departure period in order to finish their education could potentially prevent youths in disappearing from reception centres before or after they turn 18. Such a practice is common in several countries, such as in Denmark and the UK.[237] Recalling the discussion in Chapter 4.3.2, it is 50 out of 160 unaccompanied children granted temporary permits that are labelled by the UDI as 'private'/ 'disappeared'. Of these 50 youths, 34 are now over 18 and have an obligation to leave the country.[238] Whereas some of them have probably re-migrated elsewhere in Europe, others are reported as staying in the streets, trying to make a living through work or criminal activity, while some are living at private addresses, managing through support by friends or family.[239] Given the current circumstances as outlined above, this begs the question whether Norway, by *not* properly following-up on these youths *or* managing to return them, is not unintentionally contributing to increasing Norway's so-called 'irregular' underclass?

As irregular migrants, the former unaccompanied children are protected, *inter alia*,

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[234] Norway's Fifth Report to the CESCR (2012), para 267
[235] Gladwell and Elwyn 2012:14
[236] Lidén et. al 2013:146
[237] ECRE and Save the Children 2011:49-50
[238] UDI (2013)
[239] Norwegian Ministry of Education and Research et. al (2011-2012):31

by the ECHR and the ICESCR, and are thus entitled to health care, food and shelter. Yet, as noted by Øien and Sønsterudbråten "irregular migrants' rights represent a complicated terrain where law and practice sometimes diverge".[240] According to the authors, there are several factors at the national, local, and individual level that limit the degree to which irregular migrants may actually benefit from these rights, such as having the ability to pay for the medical services.[241] As the former unaccompanied children are obliged by law to leave the country, their financial support is also decreased, from 3200 NOK a month to 1960 NOK.[242] In the NOU 2011:10, it was recommended to increase these basic allowances to prevent asylum seekers from living in poverty over longer periods of time.[243]

In the UK, the authorities have tried to remedy these abrupt transitions at 18 by introducing the Children (Leaving Care) Act, which recognises that interrupted education and other effects of poor care may require support beyond their 18th birthday. As stated by Crawley, the "consequences and effects for separated asylum seeking children are arguably even greater and therefore the leaving care duties imposed on local authorities are as important, if not more so, for this group of young people".[244] In the *Best Practice* established by SCEP, it is held that unaccompanied children: "should not receive lesser treatment than national children leaving care and should be afforded support via an after-care programme, to assist them in their transition to living independently.[245] As the situation is in Norway, however, the unaccompanied children above 16 are not under the responsibility of the child welfare services, and are thereby seldom eligible to aftercare.

Thus, based on the above, I find it is questionable whether the granting of temporary residence permits, when taking into account the *long-term impacts* of the decisions, are generally to the best interest of the child. As it is today, few unaccompanied children return voluntarily, and even fewer are forcibly returned. This is, without doubt, the greatest challenge of the government in bringing the temporary model to its end.

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[240] Øien and Sønsterudbråten 2011:37
[241] Ibid:37
[242] Lidén 2013:77
[243] NOU 2011:10:103
[244] Crawley 2006:30-31
[245] SCEP 2004:39

# 6 Concluding Remarks

In 2001, Jan Paul Brekke posed the question: Is it possible to carry out a policy of temporary protection in Norway? And secondly, is it the 'right' policy?[246] In this thesis, I have applied both *lex lata* (the law as it is) and *lex ferenda* (the law as it should be) perspectives on temporary residence permits to unaccompanied children in Norway. As a starting point, I advocated that as a welfare state, and a country looked upon by others for best practice, Norway should be at the forefront when it comes to children's rights. In this regard, the CRC should be seen as the benchmark for Norwegian asylum policy. Hence, how does the government's tightening measure stand when compared to the CRC?

## 6.4 'Kids in Limbo?' Research Question Revisited

The foregoing Chapters have clearly demonstrated that the tightening measures introduced by the Norwegian government have had far-reaching consequences for unaccompanied children above 16 years, whose only ground for protection is that they are without adequate care on return. I arrive at this conclusion based on the following observations:

*Firstly*, the findings from, *inter alia*, Sønsterudbråten and Lidén have shown that unaccompanied children aged 15 to 18 are in a disadvantaged position in relation to younger children in a similar situation as regards reception and care. As the progressive realisation of economic, social and cultural rights must be fulfilled without discrimination, Norway is in violation of Article 2 (1) of the CRC when only transferring the reception and care responsibility of unaccompanied children under 15 years to the child welfare services.

*Secondly*, as regards Article 3 (1) of the CRC, the Norwegian Supreme Court has determined that immigration-regulating considerations, such as "a desire to protect other children from ending up in the same situation" could 'trump' the child's best interests.[247] In many cases, it may therefore be difficult to say that Norway is directly in breach of Article 3 (1). Yet, in making an assessment of the child's best interests the authorities must also take into account the long-term impacts of the decisions, including the prospects for a

[246] Brekke 2001a:314
[247] Rt.2009 p.1261, para 62

durable solution. Thus, the advantages of the temporary model are dependent on a return policy that *actually works*. As shown above, only 21 of the 160 unaccompanied children granted this type of permit have been returned.[248] Recalling the outcome of the Bosnian refugee situation, this illustrates the problem of implementing a refugee policy on the national level that is based on global arguments. Consequently, I find that *if* the temporary model does *not* lead to durable solutions, we may end up with a policy that only involves considerable costs for the individual child, without being able to show that the policy achieves its higher goal of preventing children from embarking on a dangerous journey. I find it reprehensible if such 'symbolic politics' may outweigh the child's best interests.[249]

*Thirdly*, the critical question one must ask is whether it is *proportional* to set the child's best interest aside, that is, whether there is a reasonable relationship between the means employed and the aims sought to be realised. As shown in Chapter 4.3, the mental health implications of being 'in limbo' could hardly be seen as "conducive for the child's development" in accordance with, *inter alia*, Article 6 (2). Rather, it is a well-known fact that temporary protection may create feelings of uncertainty and powerlessness that is harmful to the individual refugee. In 1996, it was this acknowledgement, in part, that led the government to repeal the temporary permits and grant the Bosnians permanent residence. Bearing this in mind, it is remarkable that the government, only twelve years later, chose this type of policy for *children* who arrive *unaccompanied*. As shown, the children's long-term stay at reception centres, in combination with an inadequate nutritious diet and the burdens of their status, lead to critical mental health problems. Moreover, Save the Children reports that the care situation and the temporary permits have on several occasions been a direct hindrance in providing necessary aid to children exploited by human trafficking.[250] These difficulties are exacerbated by the abrupt transitions at 18.

*Cumulatively*, I therefore argue that although providing these children with education and legal guardians, which have a positive effect for their well-being, this does not *always* outweigh the negative effects of temporary permits. Thus, in many cases, there

[248] UDI (2013)
[249] Brekke 2001b:13
[250] Vollebæk 2012:49-50

will *not* be a reasonable relationship between the means employed and the aims sought to be achieved. Bearing in mind that the aim and purpose of the CRC is to *enhance* the protection of all persons less than 18 years, I therefore conclude that temporary residence permits, in many instances, may lead to breaches of Articles 2, 3 and 6 of the CRC.

## 6.5 Are There Any Alternatives to Temporary Residence Permits?

One of the aims of this thesis is to shed the light on some of the areas in which Norwegian law and practice may be improved. In such an exercise, I find it important to not only highlight the negative aspects, but also to constructively engage in finding possible solutions. In this regard, I find that there are three possible alternatives to today's practice.

*The first alternative*, as postulated by the government, is the establishment of care facilities in the home countries of unaccompanied children. Although these facilities are not yet in place, they could in the future be applied to return unaccompanied children who do not have traceable caretakers in their countries of origin. However, as argued above, there is a need for more research on the human rights consequences of such a return policy. As the preparatory works to the Immigration Act sets out: "a return situation regarded as safe for adults may actually constitute inhuman and degrading treatment if the child is returned without proper care".[251] I question whether care facilities in worn-torn countries such as Afghanistan and Iraq may provide unaccompanied children a sufficiently safe environment.

*The second alternative* is to continue to grant temporary residence permits, but to improve the living conditions of the unaccompanied children whilst in Norway. A starting point is to improve the number of staff per child, staff skills and competences, housing standards and environmental resources.[252] In doing so, it is my opinion that the reception and care responsibility should be transferred to the child welfare services, in order to strengthen the offer in the first phase when the children arrive in the country, and to provide adequate follow-up *until* their possible return. This includes tailored support also after the children's 18th birthday in order to prevent them in becoming even more vulnerable and at risk than what they were during the temporary residence scheme.

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[251] Ot.prp. nr 75 (2006-2007):92-93
[252] Lidén et. al 2013:9-10

*The final alternative*, as put forward by most NGOs in Norway, is to repeal § 8 (8) of the Immigration Regulations, thus bringing the temporary policy to an end. Although not explicitly stated by many NGOs, I assume that when proposing this solution it implies a return to the granting of *renewable* permits that could form the basis for *permanent* settlement. It follows from long-term and established practice that the authorities *may* grant such permits to unaccompanied children without proper care on return, and it is in accordance with § 38 (2) (a) of the Immigration Act. *If* the government choose to amend the Regulations and return to this practice, this would also dilute the discriminatory treatment of unaccompanied children above 16 years. Based on my previous assessments, it is also discernible that the multiple disadvantages faced by unaccompanied children are all inherently linked to their temporary status. Consequently, although it is hard to argue principally against the use of temporary permits as a 'tool' for international protection, I find that countries should be *extremely careful* in its use towards unaccompanied children.

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| CA | Act No. 7 of 8 April 1981 relating to Children and Parents (The Children Act), with amendments 9 April 2010. No. 13 |
| CAT | Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. New York. 10 December 1984 |
| CRC | Convention on the Rights of the Child. New York 20. November 1989. |
| CWA | Act of 17 July 1992 no 100 relating to Child Welfare Services (the Child Welfare Act), with amendments as of 19 June 2009 No. 45, in force as of 1 January 2010. |
| DRC | UN General Assembly, Declaration of the Rights of the Child, 20 November 1959, Resolution 1386 (XIV) |
| EA | Act of 17 July 1998 no. 61 relating to Primary and Secondary Education and Training (the Education Act), with amendments as of 25 June 2010 and 31 May 2011, in force as of 1 August 2011. |
| ECHR | The European Convention for the protection of human rights and fundamental freedoms. Rome. 4 November 1950. |
| GA | Act No. 3 of 22. April 1927 relating to Guardianship for minors (The Guardianship Act), with amendments as of 12 December 2003 No. 113 |
| HRA | Act relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act). June 2009. |
| ICCPR | International Covenant on Civil and Political Rights. New York. 16. December 1966. |
| ICESCR | International Covenant on Economic, Social and Cultural Rights. New York. 16. December 1966. |

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|---|---|
| RD | Directive 2008/115/EC of the European Parliament and of The Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive). |
| TPD | Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Temporary Protection Directive). |
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