

Access to an Asylum Process:

Experiences of the asylum system in Europe from the
perspective of unaccompanied refugee children

Hanna Flood

Abstract

This study examines the asylum process in Europe from the perspective of unaccompanied refugee children affected by the Dublin Regulation. The aim is to explore whether these children get access to a legally certain asylum process in the Common European Asylum System by comparing the experiences of the children with legal documents, directives and guidelines on how the procedure should be implemented. The study has been conducted as a multiple case study where information has been collected from previous research, published stories and reports, news articles, legal documents and an interview with a representative from a local network supporting asylum seekers living in clandestinity. The study uses the theory of Hannah Arendt regarding the right to have rights, examining whether the children's experiences of the asylum process in Europe compared to legal documents show signs of them being excluded from a legally certain process and what that may mean for their human rights to be implemented and protected. International human rights law states that children, and especially unaccompanied refugee children shall always receive special protection due to their vulnerable status and the European Union should guarantee a legally certain asylum procedure for all refugees in all member states. This study illuminates difficulties for unaccompanied refugee children affected by the Dublin Regulation to get access to a legally certain asylum process in Europe and in accordance with the theory of Arendt their functional statelessness tend to exclude them from getting human rights, advocated as universal, fulfilled.

Keywords: Arendt, Dublin Regulation, Refugee, Common European Asylum System, Unaccompanied children

Abbreviations

BMPU – Border Monitoring Project Ukraine

CEAS – Common European Asylum System

CRC – Convention on the Rights of the Child

EU – European Union

Geneva Convention (1951) – Geneva Convention Relating to the Status of Refugees 1951

HRW – Human Rights Watch

MSF – Médecins Sans Frontières

NGO – Non-Governmental Organization

UDHR – Universal Declaration of Human Rights

UNHCR – United Nations High Commissioner for Refugees

Concepts

Asylum process – The judicial process – from application to decision – for a person who has made his or her way to Europe and requested protection against persecution

Asylum-seeker – A person who has made his or her way to Europe and requested protection against persecution, but who has not yet had his or her case finally tried.

Clandestinity – Translates as living hidden or in secrecy and refer in this context to individuals living hidden in a country and risk expulsion due to a rejected asylum application or transfer in accordance with the Dublin Regulation

Dublin Case – An individual affected by the Dublin Regulation and thereby to be transferred to another country within the EU that is considered responsible for trying his or her asylum application

First Country – The first country in the European Union, including Norway, Switzerland and Iceland, that the refugee enter and which is generally decided to be responsible for trying the refugees asylum application

Unaccompanied refugee children – Individuals under the age of eighteen that are crossing borders in order to seek protection and who have been separated from parents or sufficient adults responsible for them

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1 Introduction

The number of unaccompanied refugee children entering the borders of Swedish territory to seek asylum is increasing each year, from 388 children in 2004 to 2393 children in 2010. The estimation for 2011 is slightly higher, around 2400 children, yet to be evaluated as correct (Migrationsverket, 2011a). Not all unaccompanied children who come to Sweden are entitled to seek asylum. In 2010 the number of cases regarding unaccompanied children where decisions were taken on removing them to other countries in Europe decided to be responsible for them in accordance with the Dublin Regulation was 225 individuals (Migrationsverket, 2011b). While the number of unaccompanied refugee children in Sweden is increasing, the number of children disappearing from transit homes is increasing as well. The children are disappearing due to rejected asylum applications, fear of rejection or due to finding out they are so called Dublin cases and to be deported to other countries in Europe, 439 children were reported still missing in the spring of 2011. This high number of missing children whose faith is unknown would probably not be accepted if it would be Swedish children but seem to reflect the status of unaccompanied refugee children in Europe (Svenska Dagbladet, 2011, Sveriges Radio, 2010).

Unaccompanied refugee children are in constant risk of abuse due to their vulnerable status and the border countries of Europe that are often the first country of entry for these children are repeatedly being reported unsatisfactory regarding the treatment of refugees. The high number of disappeared unaccompanied children in Sweden has been the object of critique from the United Nations Committee on the Rights of the Child and it has been questioned whether refugee children do receive the protection they should be entitled to under international and domestic laws (Sveriges Riksdag, 2011). International human rights instruments state that refugee children should be given special protection due to their vulnerable status, something that has been incorporated in European as well as Swedish national law, and the countries of Europe are considered to be equally safe and provide asylum processes that fulfill certain minimum standards.

As a vulnerable group, both as children and as refugees, and on top of that without adult protection, these children seem prone to face problems when entering the Common European Asylum System (CEAS) whose aim of a harmonized asylum process for refugees in the

member states are in the starting pit and yet is far from proved successful. High numbers of unaccompanied refugee children stay clandestine in Sweden where they are not allowed to seek asylum and where they have no legal status in fear of deportation to countries in Europe due to previous experiences. This is relevant since it suggests difficulties for these children to access a legally certain asylum process in the CEAS whose aim is to guarantee that refugees are treated the same and provided a legally certain asylum process in all countries of the EU.

1.1 Aim

The aim of this thesis is to describe and analyze unaccompanied refugee children's experiences of the asylum process in Europe. The focus is on the possibilities to access a legally certain asylum process and on why that is important in the aspect of these children getting their, internationally advocated as universal, human rights fulfilled. The children whose experiences are examined in this paper are so called Dublin cases, they have arrived in Sweden to discover that they are denied to seek asylum there due to the Dublin Regulation and that they risk deportation to the countries in Europe that have been decided responsible for them, so called first countries, a few have already faced deportation. Most of the children in this study have chosen the difficult alternative to stay in clandestinity in Sweden without legal status rather than accepting to be returned to the first countries due to their previous experiences from there. The purpose is to examine similarities in the experiences of the children that may illuminate difficulties regarding the ability to get access to a legally certain asylum process both in Sweden and in the first countries. Though the focus is on the access to a legally certain asylum process the conditions and reception of the children in the first countries will be briefly presented due to those aspects being intertwined and affecting each other. Legal documents will be presented to compare and identify differences in the experiences of the children and how the asylum process in Europe is supposed to look like for unaccompanied asylum seeking children. Furthermore this study intend to explore what a lack of membership of a state may mean for these children for being able to claim and enjoy the human rights they should be entitled to.

1.2 Research questions

The research questions for this study are:

- What are the similarities in the unaccompanied refugee children's experiences of the European asylum process that show signs of exclusion from a legally certain asylum process?
- What are the differences and similarities between the legal framework regarding unaccompanied refugee children seeking asylum in Europe and the children's own experiences?
- Is it possible that unaccompanied asylum seeking children in Europe affected by the Dublin Regulation risk to not get access to a legally certain asylum process and what may that imply regarding their abilities to claim and enjoy their rights?

1.3 Method & Material

This thesis is conducted through a qualitative multiple case study research where the unaccompanied refugee children are in focus, and whose experiences will be analyzed in order to examine if more general conclusions can be drawn. When a research is conducted with limited time frames and sources a case study is practical since the research process itself is a way of collecting data. To conduct a case study is to focus on a certain aspect of a problem, or case, and it is possible to look at the specific case from different perspectives and use different varieties of data (Sundström, 2011).

A case study is an empirical examination where an actual phenomenon is studied in its real context. It builds on a variation of sources and information and takes advantage of previous developments of theoretical hypotheses when gathering data. According to Yin a case study can consist of the studying of one or multiple cases and can furthermore consist of both qualitative and quantitative data. The study can be exploratory and descriptive as well as explanatory (Yin, 2006: 21-32). The focus of the case study, whether studying one or multiple cases, should be rare and of public interest and it is important to look at previous research in order to explore something new which in turn can encourage further studies on the topic (Yin, 2006: 190).

To do a case study is to do an in-depth detailed investigation of a phenomenon within a larger context where it is important to create links between theory and the collection of data. The chosen phenomenon, or case, is of interest due to its specific characters and is not isolated from its context. The analysis of it may be applicable on a wider basis in order to

understand or explore new or emerging processes and behaviors as well as everyday practices, which may not be revealed in brief contact, and what that means for those involved (Hartley, 2004: 323-332). The case study research Flyvbjerg says can though being an in-depth examination of a single example still provide us with more general information about the broader class and the case can thereby be of value by itself (Flyvbjerg, 2004: 420). The case study research seem appropriate for this study due to the ambition to do an in-depth study on the experiences of a particular group of individuals in order to analyze and assume more general assumptions of the access to a legally certain asylum process in Europe for unaccompanied refugee children. According to Flyvbjerg extreme cases can give us the most extensive information and it is in his opinion possible to generalize from a specific case because one intensively studied case can give us information that may not be revealed in studies on a large group or when looking at statistics (Flyvbjerg, 2004: 420-425).

The case study research seems appropriate as well for allowing a broad variation of data since the study consists of a variety of material. Legal documents, directives and guidelines are presented in order to explore what the asylum process in Europe for unaccompanied children is supposed to look like. Further sources such as news articles, comments and reports from non-governmental organizations (NGOs) were used to receive information and to get an overview on opinions on the issue. In order to gain knowledge on the children's own experiences of the asylum system in Europe I have chosen to use secondary sources in the form of previous empirically oriented studies, a book from 2010 consisting of collected stories of unaccompanied children affected by the Dublin Regulation was used, an interview was made with a representative from an activist network supporting refugees living in clandestinity in Malmö and finally a master thesis based on interviews and observations of unaccompanied children affected by the Dublin Regulation. These three kinds of sources were chosen for the different perspectives they offer on the topic, first the children's own presented stories, secondly the children's experiences through interviews and observations in an academic study and finally an interview with someone who on a daily basis interacts with and thereby has a good insight on the situation of unaccompanied refugee children living in clandestinity and their previous experiences.

To base the study on previous research, to use interviews and observations and to conduct an interview of this kind to gain information on the children's experiences instead of trying to establish contact and conduct interviews with the children myself was a conscious decision. Motivated due to the amount of time it takes to establish contact and to conduct interviews and the time frame a thesis at this level offer, but mainly because the experiences

these children share is of a characteristic bound to psychological traumas and I think one should have the knowledge on what talking about this issues can mean for the children. Furthermore I think one should be aware of and have knowledge on what the children's current situations look like in terms of support and follow up, as well as the safety for them as individuals when participating in interviews.

1.4 Theory

This thesis uses the theory of Hannah Arendt regarding the right to have rights and is inspired by Jacqueline Bhabha's development of Arendt's theory regarding refugee children of today. Arendt defines a refugee as someone who has been deprived of citizen's rights due to expulsion from his or her country. This includes expulsion due to a political climate that makes it impossible to enjoy citizenship rights or cause a fear of being persecuted. Refugees according to Arendt are the same as stateless persons since refugees are de facto or functionally stateless; they have lost their rights as citizens and the nation-state that is needed to protect those rights (Cotter, 2005: 96-97). Arendt as a former refugee discovered that the rights of man turned out to be unenforceable for people who lacked their own government, even when they resided in countries who had based their constitutions on human rights (Arendt, 1973: 292-294). She says,

“We became aware of the existence of a right to have rights...and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights...” (Arendt, 1973: 296-297).

Bridget Cotter, Dr. in politics and international relations, argues that it is through the experiences of these, according to Arendt functionally stateless refugees, and their lack of rights that we can see the failures of current practice. The conflict according to Arendt is between the commitments that liberal democracies have to rights being universal and their claims of national sovereignty. Nation states agree to enforce rights within their territory generally exclusive for its own citizens and thereby rights, regardless of the universal claim, apply to those who legally belong to a nation state. Without the membership of a nation state individuals have no one who can protect and enforce their rights (Cotter, 2005: 96-97).

For refugees there exist no laws that can force nations to provide for them and keep them alive, giving them less freedom than individuals in jail according to Arendt. The fact that refugees are thereby dependent on charity shows that the rights of man are only safe within a nation-state. Even if refugees for example enjoy freedom of opinion, it do not matter says Arendt since their opinions matter to no one when they are stateless. Another negative consequence of state sovereignty is that states have the right to deny citizenship within its borders and thereby the citizenship rights it entails. Arendt calls this “the sovereign right of expulsion”. This contradiction between human rights and national sovereignty questions the universality of human rights and is revealed in the difficulties that exist for refugees to claim their rights. Cotter argues that in the post 9/11 world we can see a clear pattern of state sovereignty and state security being used as valid reasons to trump human rights and to exclude individuals from states making this a continuing problematic (Cotter, 2005: 98-100). The displacement of modern (post world war two) refugees is according to Arendt complex and more permanent due to the comprehensiveness of the nation state system. There is nowhere to go since there is no longer a “no-man’s land” left into where individuals can escape and set up a new community, the alternative is simply to try and get access to and membership to another state. The global political situation is now that we live in “One World” says Arendt and thereby the possibility developed that individuals can lose the right to belong to an organized community and not be able to regain it. Meaning that if one loses the legal status of one state one loses the legal status of all states and is thereby excluded from the “family of nations altogether” (Cotter 2005: 104).

Arendt argues that to be able to make human rights a meaningful concept there is a need to create a supranational law that would consist of simply one human right which would be the right to belong to a human community instead of being dependent on the universality of rights that do not exist she says, without a state to protect it. This would solve the problem of that to be stateless mean be subject to rightlessness. The right to have rights means to be able to be judged by one’s opinions and actions in a framework where there is a possibility to contribute and where one has a community willing to guarantee one’s rights. Arendt does not though have an answer for how states would obey this supranational law (Cotter 2005: 109-111).

Jacqueline Bhabha develops Arendt’s arguments regarding the right to have rights when examining the rights situation for migrant children of today. Bhabha says that though Arendt’s theories about refugees lacking the right to have rights has been acknowledged by the international community and measures are considered, it appears that the problem of child

statelessness is growing. The children in Bhabha's focus share the characteristics of being minors, that they are or risk to be separated from their parents or customary guardians and that they, regardless whether they do in law, not have a country to call their own. These characteristics bring potential for rightlessness and make these children functionally stateless since they lack access to state entities that are able and willing to protect them. Noticeable here this group includes migrant children who have traveled alone across borders, a group that face a far greater risk of abuse and exploitation as well as economic, social and psychological dangers due to the vulnerable status of being separated or unaccompanied by parents or other adult custodians. These risks are as existent for unaccompanied migrant children in wealthy democratic states that normally protect children's rights Bhabha says (Bhabha 2009: 411-415). That this group of children is denied fundamental rights is shown by consequences such as that unaccompanied children tend to be treated as adults; they are put in detention centres with adults and they have their cases "age disputed", the latter one claimed to be determined wrongly in many cases resulting in a denial of those individuals child specific protections during the asylum process (Bhabha 2009: 412-417, 428). Bhabha argues, "irregular migration status increases the risk of invisibility and thus gross rights violations" (Bhabha 2007: 419).

In Europe children's rights are recognized in the European Charter of Fundamental Rights, still brutality against migrant children persists in Europe and the problem of implementation strike at children who may lack the status to protest rights violations (Bhabha 2009: 417- 424). Many states in Europe fail to provide unaccompanied or separated child migrants with guardianship and legal representation and there are examples of children residing for instance in Italy for five months and still have not been appointed a guardian. The most serious problem according to Bhabha is that many of the unaccompanied or separated children end up in detention when they enter Europe. Detention camps are spaces outside the law where the normal juridical order ceases to exist and get replaced with an extreme situation of rightlessness. Detention camps are not simply inappropriate environments for children in aspects of arbitrariness and indeterminacy, it also have devastating effects on both physical and psychological health and is the clearest consequence of what being functionally stateless may mean for access to rights protection (Bhabha 2009: 423-432). Rightlessness is the norm for migrant children of today who according to Bhabha "live their lives in the zone of exception", they are weak as right holders and there is weak or non-existent advocacy and will to protect them. Children claim their rights by escaping over borders to seek protection and escaping from mistreatment in detention camps but states answer with punishment and

instead of the expected rights fulfillment in many cases the result is denial of rights and expulsion (Bhabha 2009: 449-450).

1.5 Chapter Outline

This thesis start in chapter one to outline the international human rights instruments and guidelines for protection of unaccompanied refugee children affected by the Dublin Regulation, followed by a chapter on the Common European Asylum System (CEAS) and the European legal framework for asylum seekers with focus on unaccompanied children as well as a short description of the Dublin Regulation. In the next chapter unaccompanied refugee children's experiences of the asylum process in Europe is presented, stemming from three sources; stories told by children themselves, a master thesis based on interviews with unaccompanied children affected by the Dublin Regulation and finally an interview with a representative from a network that supports asylum seekers living in clandestinity in Sweden. The results are then analyzed in part three; the children's experiences are compared to international and European legal framework. Furthermore the children's experiences compared to the legal framework is then looked at from the perspective of Hannah Arendt's theory on the right to have rights.

2 Results

2.1 International protection of children as refugees and asylum seekers

2.1.2 Children as asylum seekers

Asylum seeking minors in general have less knowledge about what rights they are entitled to and worse premises to claim those rights. They are in a vulnerable position characterized by waiting, angst and disturbed routines. Asylum seeking minors are, in a world of sovereign states where individuals are granted many of their rights due to being members of states, juridical non-members who can be excluded (Lundberg, 2010: 129-130).

2.1.3 The right to seek asylum

The right to seek asylum is not concerning merely the right to the procedure of handing in the physical application for protection within another territory but it also include the right to leave one's country in order to seek protection elsewhere. An individual who leaves his or her country in order to seek protection elsewhere should not be rejected or returned without his or her claims of having well-founded fear have been evaluated properly (Goodwin-Gill, McAdam, 2007: 383). International law obliges states to respect individuals right to leave a country and to seek and enjoy asylum in another country. The Universal Declaration of Human Rights (UDHR) from 1948 states in article 13.2 that "Everyone has the right to leave any country, including his own..." and article 14.1 of the same declaration states that "Everyone has the right to seek and to enjoy in other countries asylum from persecution" (UDHR, 1948).

The Geneva Convention relating to the Status of Refugees (hereby the Geneva Convention) from 1951 in article 31 states that refugees who seek entry in a country shall not be penalized for not possessing proper documentation since they may come from a territory where their life or freedom was threatened, will say the circumstances for them leaving their countries may be reasons for the lack of proper documentation including passports and visas.

International law then not requires refugees to enter a country in a regular manner when they are able to provide the cause for the entry and the flight. Article 33.1 of the same convention deals with states and non-refoulement and states that no state may expel or return a refugee to territories where the life or the freedom of the refugee would be threatened (Geneva Convention, 1951, Goodwin-Gill, McAdam, 2007: 383-384). The UDHR and the Geneva Convention both include all individuals regardless of age.

2.1.3 The Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (CRC) from 1989 came into force as international law in 1990 and has been ratified by all countries in the world except Somalia and the United States. The preamble of the CRC states, "...the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". Article 1 state that a child is a human being below the age of eighteen years. Article 3 in the CRC states that

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (CRC, 1989).

This article is binding and cannot be subject to reservations. The monitoring body of the CRC, the Committee on the Rights of the Child has emphasized that the principle of the best interests of the child must be respected during all the stages of the displacement for unaccompanied or separated refugee children (Goodwin-Gill, McAdam, 2007: 323-325). Article 22.1 of the CRC states

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

human rights or humanitarian instruments to which the said States are Parties” (CRC, 1989).

The content of article 22 covers both children who has and who are seeking refugee status, however the provisions of the Convention cover all children within a state parties jurisdiction in article 2 so even those minors who have been denied refugee status should still be protected by the state as long as they remains in the country (Hodgkin & Newell, 1998: 287). Article 37.a of the CRC states “No child shall be subject to torture or other cruel, inhuman or degrading treatment...” and article 37.b that “No child shall be deprived of his or her liberty unlawfully or arbitrarily” (CRC, 1989).

2.1.4 UNHCR Guidelines

In 1997 the United Nations High Commissioner for Refugees (UNHCR) presented “Model Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum” which are not legally binding but should be seen as legal guidance. In relation to article 22 of the CRC these guidelines states “Children should always have access to asylum procedures, regardless of their age” and that children that are seeking asylum, especially unaccompanied, shall not be kept in detention (UNHCR 1997: 2). Furthermore, states are advised to prioritize the asylum applications of refugee children due to their vulnerable status and handle those cases prompt and fair and “In all cases, the views and wishes of the child should be elicited and considered” (UNHCR 1997:2). Refugee children, due to not being legally independent, should be represented by an adult who would protect his or her interests and who also is familiar with the child’s background (UNHCR 1997:2).

2.2 European legal framework

2.2.1 The Common European Asylum System

The process of the Common European Asylum System (CEAS) started in 1999 with the goal to be finally established by 2012. The aim is high standards for the protection of refugees with fair and effective procedures in the EU member states, including Norway, Iceland and Switzerland (hereby included in the concept member states). It should not matter in what

member state an asylum applicant arrives, the procedure should look the same and the refugee receive the same standard of protection. The CEAS shall be based fully on the Geneva Convention relating to the status of Refugees (1951). In order to achieve this, the four most important legislative measures of the CEAS are the Directive on reception Conditions for asylum-seekers, the Directive on qualifications for becoming a refugee or a beneficiary of subsidiary protection status, the Directive on Asylum Procedures and the Dublin Regulation (European Commission, 2011). These directives will be presented in order to outline the standards of a legally certain asylum process for unaccompanied refugee minors in the CEAS.

2.2.2 Legislative measures of the CEAS

The Council Directive 2003/9/EC presents the minimum standards for the reception of asylum seekers in the CEAS. Article 2.b defines the asylum application as made by a third-country national or a stateless person seeking protection in one of the member states. Article 2.h define unaccompanied children as persons under the age of eighteen who arrive without a responsible adult, by custom or law, to one of the member states, including children who are separated from the responsible adult after the entry to the EU. In article 5 it is stated that the member state shall provide the applicant with sufficient information on the asylum process, how to access legal assistance and further available reception conditions such as health care, this shall be made in a language the applicant understands. Article 18.1-2 in line with the CRC states that the best interests of the child shall be a primary consideration for member states on decisions regarding children and that children who have been victims of abuse, torture, suffered from armed conflict, exploitation or other cruel, inhumane or degrading treatment shall receive access to rehabilitation. In article 19.1 it is stated that unaccompanied minor applicants shall be ensured the necessary representation in form of legal guardianship and article 19.2 states that unaccompanied children shall from the time they are allowed into the territory and until they have to leave the same be placed, if relatives are not available, with either a foster-family, in accommodation centres with special provisions for minors or in other accommodation suitable for minors. There are possibilities of exceptions for children over the age of sixteen that may be placed in accommodation centres for adult asylum seekers. Those who are working with unaccompanied minors shall have received the necessary training to fulfill the needs of this group (EU, 2003a).

The Council Directive 2004/83/EC is a directive whose aim is stated in article 1 as minimum norms for when third country members or stateless persons shall be defined as

refugees or as individuals in need of international protection. This directive is based on the Geneva Convention and is compatible with the human rights acknowledged in the European Convention for the Protection of Human Rights and Fundamental Freedoms. Since the content of this directive is minimum standards, states can implement and keep more favorable regulations regarding third country members or stateless persons (Council Directive 2004/83/EC).

The Council Directive on ‘Minimum standards for the procedures of granting and withdrawing refugee status’ is the directive that lays down the standards for the asylum process in the Common European Asylum System (CEAS). The aim is to reduce the disparities between national standards in order to achieve equal standards of the asylum processes in the member states of the EU. According to this directive the member states of the EU shall ensure that asylum applications are examined and the decisions taken “individually, objectively and impartially” (Art.8.2a). Article 17.1.a-b of this directive deals with unaccompanied minors and states that member states shall ensure that a minor is provided with a representative that represents and/or help the minor with the asylum application throughout the examination. This representative shall further inform the unaccompanied minor about the procedure and how to prepare for the same. The representative of the minor shall be allowed to be present during the interview and there make comments and ask questions. When a minor is over sixteen years of age however exceptions may be made by the member states regarding to provide the minor with a representative, unless the minor is unable to handle his/her own case. Article 4 a-b states that the persons interviewing and preparing decisions in cases regarding unaccompanied minors shall have the necessary knowledge of the special needs of minors. Finally article 17.6 states that member states shall consider the best interests of the child when implementing article 17. Article 18.1 of this directive states that member states shall not hold individuals in detention simply for the reason that they are applicants for asylum and further article 18.2 states that if an applicant is held in detention, a “speedy judicial review” shall be ensured by the member states (Council Directive 2005/85/EC).

2.2.3 The Dublin Regulation

Council Regulation (EC) No 343/2003 or the Dublin Regulation from 2003 is the European Unions, including Norway, Iceland and Switzerland, common regulation that establishes criteria and mechanisms to determine which member state that has the responsibility to

examine an individual's asylum application. This generally means that the country where the individual first arrived or first handed in an asylum application is responsible. The Dublin Regulation is European Law founded by the European Union Council of Ministers and shall thereby apply to the member states of the EU and it cannot be overruled, removed or changed by national law (EU, 2003b). The aim of this regulation is to eliminate the chance for refugees to seek asylum in many countries and to avoid refugees 'in orbit'. The Dublin Regulation builds on the assumption that the asylum system looks the same in all countries in Europe. One of the mechanisms used to determine what member state is responsible is Eurodac, the European database for fingerprints of asylum applicants and illegal migrants. If a refugee's fingerprints exist in a state in Europe it generally counts as a valid asylum application and the decision is usually made to return the individual to that state. Three years after the Dublin Regulation was adopted a review made by the European Council on Refugees and Exiles (ECRE) showed flaws in the Regulation and that states failed to implement it properly. Many asylum applicants were, contrary to the aim of the regulation, denied to an asylum process in states responsible and they further lacked an effective opportunity to appeal against being transferred and refugees 'in orbit' did not disappear. To remove an asylum seeker to another country for status determination argues Goodwin-Gill and McAdam do not clear the removing state of its responsibilities under international law and thereby the removing state may be held liable if it removes individuals to countries where they risk mistreatment or persecution (Goodwin-Gill, McAdam, 2007: 400-402).

Article 3.2 in the Regulation, also called the sovereignty clause, says that a member state is allowed to try the asylum application of an individual regardless of whether another member state earlier has claimed responsibility. This article does not mention the kind of circumstances that may lead to exceptions like this; it is up to the state in question to make the judgment. This means that Sweden can make exceptions and try asylum applications regardless of the Dublin Regulation (Barnets bästa främst, 2011). The Swedish Migration Board acknowledges that the situation today looks different in the various countries of the EU but argues that there is a will amongst them to live up to the common regulations. The regulation says that all member states are evaluated as safe countries for refugees to be returned to. The Migration Board further states that they have the possibility to not put the Dublin Regulation into practice but this demands strong humanitarian reasons connected to the personal situation of the minor and the situation in the country of reception is not a valid reason for making such exceptions (Migrationsverket, 2011c).

2.2.4 Council of Europe resolution

The Council of Europe Parliamentary Assembly in January 2011 adopted a draft resolution on unaccompanied children in Europe where it is acknowledged that the treatment of these children varies in different countries in Europe and that some improvements need to be implemented. This draft resolution concludes and recommends to the EU that all unaccompanied refugee children, regardless of whether or not they have submitted an asylum application should be treated first and foremost as children, rather than migrants. Furthermore it states that all unaccompanied children who have entered the EU by law have access to the asylum procedure, the practice however looks different and many children never manage to access the asylum procedure due to factors such as lack of information on the asylum procedure, administrative delays or that they do not have a legal guardian to assist them. It is thereby essential that all unaccompanied children can access the asylum procedure and that obstacles hindering this are eliminated.

Detention should not be allowed and unaccompanied children shall without delay be provided with legal, social and psychological assistance and should be informed, immediately upon arrival in a language they understand, about their rights, including the right to seek asylum and the necessary procedures. Unaccompanied children shall immediately be provided with a legal guardian with the necessary expertise in the field of childcare. Furthermore the asylum applications of unaccompanied children shall be speedy and be given highest priority and the children should receive information and explanations on the decisions affecting them and be able to challenge decisions regarding their asylum application. This draft resolution states that the Dublin Regulation should be revised and that unaccompanied children shall only be transferred in accordance with the Dublin Regulation if that transfer would be in the child's best interest (Council of Europe, 2011).

2.3 The Children's experiences of the asylum procedure in Europe

2.3.1 The children's own stories

I have studied experiences of separated refugee children living clandestine in Sweden published in a book called "Till Sverige" (To Sweden) from 2010. The children featured in this book have in common to be so called Dublin cases, not allowed to seek asylum in

Sweden and at risk of deportation to other countries in Europe. The texts are written down after the children's oral stories via an interpreter and are stressed to be simply fractions of the children's experiences, since they due to their painful character may be too hard to tell or think about. The names of the children in the book are changed for the safety of the individuals and I will use the same names used in the book for simplicity when referring to the children's stories. Since the texts of these minors are their own chosen stories of their experiences there are no specific questions asked to them regarding for example the asylum process, what is presented here is selected parts of the stories that concern the asylum process and the aspects that show access or the lack of access to the same.

Abdifatah, a refugee from Somalia was forced to, after being subject to physical abuse by military personnel, leave his fingerprints when he arrived in Malta. "I did not know what it meant to leave your fingerprints," he says, "I also did not know that one has to seek asylum in the first country". Abdifatah was put in jail for six months in Malta where he was further subject to constant assaults. He witness about not receiving medical care though suffering from a medical condition, extensive racism towards refugees in Malta which he experienced through physical assaults, and he says black people in Malta are treated as animals. He further adds "There is nothing in Malta. I would rather hang myself or throw myself before a train than going back there" (Barnets bästa främst, 2010: 13-17).

Reza from Afghanistan came to Italy where he was arrested at the train station. He did not intend to seek asylum there but was forced to leave his fingerprints by the police who beat him and gave him electric shocks in the neck. He describes the experiences in Italy; "I was in detention with adults and criminals. I never understood what they said and there was no interpreter", he describes the prison environment as constant fear of assaults and sexual abuse by the adult prisoners. He says that he would rather go back to Afghanistan from where he fled due to war if the possibility existed than to go back to Italy and says "I am really tired of life and feel like I cannot take it anymore" (Barnets bästa främst, 2010: 19-25).

Erdo from Afghanistan was arrested in Holland where, after being physically assaulted by the police, he was imprisoned with adults and told to sign a document that he did not understand. About the decision that his asylum application exists in Holland that thereby is responsible for him Erdo says, "...They have my data because I got stuck in a control. I was registered and they probably mean that is an asylum application? I never want to go back to Holland. I have terrible memories from there..." When he found out he was to be deported to Holland, Erdo says he wanted to take his own life (Barnets bästa främst, 2010: 27-33).

Ismail from Afghanistan has during his journey through Europe been imprisoned in Greece, Macedonia and finally Hungary where his fingerprints were registered. He witness about physical assaults and imprisonment with adults. The decision by the Migration Board to send him back to Hungary has affected his psychological health and he have tried to hurt himself several times and says “I do not want to hurt myself but I do not know how to handle the fear of being deported” (Barnets bästa främst, 2010: 35-37).

Najib from Afghanistan was first arrested in Greece where his fingerprints were registered, and where he reportedly suffered physical assaults caused by the police. He continued on to Italy, where his fingerprints were taken by force, he says “they handcuffed us like we had done something criminal”. Italy became the country decided responsible for Najib’s asylum process. Najib suffers from a medical condition for which he received medical care in Sweden, and though his doctor insisted on the deportation to be abolished Najib was deported to Italy. He witness about not receiving medical care for his medical condition in Italy, not being placed in any sort of home or camp, but left to provide for himself. Najib says, “The politicians and the journalists have not with their own eyes seen what is taking place in Italy. I do not want to die under a bridge, or in a church, or on the street” (Barnets bästa främst, 2010: 47-51).

Homayoun from Afghanistan was arrested when entering Greece where he witnesses about the following scenario “I got no information from the police. They just took my fingerprints and sent me to jail”. Homayoun did not know that leaving one’s fingerprints meant to seek asylum. He was imprisoned with adults in a cell with about hundred people and no access to medical care or an interpreter. He continued fleeing, to Italy, where he was forced yet again to leave his fingerprints without receiving any information on the significance of doing so. He continued through Europe and was caught by the police in Holland where he was first imprisoned with criminals and later in a juvenile prison. He refused to apply for asylum in Holland but his fingerprints were taken by force. He was finally informed of the fact that leaving his fingerprints was considered an asylum application but was also informed that his application in Holland was going to be aborted. When participating in the book Homayoun was in Sweden waiting for the decision on which country should be responsible for his asylum process (Barnets bästa främst, 2010: 65-71).

Hassan from Afghanistan was imprisoned In Hungary where his fingerprints were taken without anyone asking about his age. He was not offered an interpreter and did not receive any information on where he was located or what would happen. He further received no access to medical assistance and witnesses about terrible prison conditions. “The police

told me to write my name on the same paper where they had my fingerprints. I could not write my name during the time and the police told me to just draw a line on the paper” he says (p.75). The Swedish Migration Board decided that Hassan should be deported back to Hungary regardless of his protests and stories about his experiences in Hungary. He says “I was better off living under constant threat of death in Afghanistan than in Hungary” (Barnets bästa främst, 2010: 73-77).

2.3.2 ”I am Dublin”

The thesis “I am Dublin” by Emma Söderman consists of interviews and observations with children that due to the Dublin Regulation have been deported to Malta and children that are living in Sweden risking to be deported to Malta. The children in Malta possess legal status in form of temporary residence permits whereas the children residing in Sweden lack legal status (Söderman, 2010: 14). Söderman outlined similarities in the interviews with the children regarding their experiences of Malta. She says that none of the children have been aware of that they by leaving their fingerprints on Malta have applied for asylum there. Further none of the children received access to a trustee and did not get any legal assistance in their asylum applications. All the children were defined as adults by the Maltese authorities and placed in detention between three to nine months with bad or none access to health care. After the release from detention they received temporary permission to stay in Malta for one year (Söderman, 2010: 20-21). The children Söderman met during her field trip in Malta lived in overcrowded tent camps with limited access to water and sanitary facilities and where the lack of space and the psychological health of the people living there often developed into conflicts. The children returned to Malta have tried to get access to attend school without results and in her study Söderman reports that many of the children are in bad psychological health and are very bored. Further racism appears as a repeated problem for the children staying in Malta, in form of how they are treated on a daily basis but also related by the children to as a reason for why they think they receive simply temporary permissions to reside in Malta (Söderman, 2010: 25-27). The health of the children both in Malta and in Sweden is affected by their feelings of angst and they experience problems regarding sleep, stomach problems, headaches and migraine (Söderman, 2010: 31).

The children in Malta see no future and aim for a possibility to return to Sweden, the children in Sweden fight for the possibility to stay. The common and most important for both

groups of children is to receive a residence permit in a country that enables them to build a future and that can guarantee them their fundamental human rights (Söderman 2010: 35). Söderman conclude that the situation in Malta is harder for the children residing there though they possess residence permits, it is temporary but still giving them a legal status, then for the children that are living under the threat of eviction in Sweden, one reason for this she argues is the persisting racism in Malta. In Sweden the children are excluded from the obvious right to attend school, a home and economic support, the children then argues Söderman share the similarities of being excluded and not having their rights fulfilled (Söderman, 2010: 36).

2.3.3 The Asylum Group Malmö

I met with Maria from the Asylum group Malmö, an autonomous local network of activists that support asylum seekers who have been rejected or who due to the Dublin regulation risk expulsion and stay in clandestinity in Malmö. She estimates that the Asylum group right now is in contact with around 20 children staying in clandestinity in Malmö. The children that are affected by the Dublin Regulation risk deportation to countries such as Italy, Hungary, Norway, Malta and Holland. The similarities in the stories and experiences of the children that the Asylum group is in contact with is also reasons for why these children see as their only option to stay in clandestinity in a country without legal status rather than to be returned to the countries in Europe which are decided to be responsible to try their asylum applications. I summarized the similarities that Maria says she can see in the stories and experiences of the children that the Asylum group is in contact with as:

- The children have not been aware of how the European asylum system works before coming here and that you are allowed to seek asylum in one country only, and that is the first country of arrival.
- The children have not been aware of that leaving your fingerprints in a country is considered equal to hand in an asylum application.
- The children have most often been forced under violent forms to leave their fingerprints when being caught and detained by border police without receiving information on what that means for them.
- The children experiences that they have been denied the chance to, or have no future opportunity of getting access to a rightful asylum process in the countries decided responsible for them.

- The children received no juridical assistance or help from adults in the countries decided to be responsible for them.
- The children had no access to school or health care when residing in the countries decided to be responsible for them.
- Most of the children have been subjected to physical violence and/or sexual abuse in the countries decided to be responsible for them.
- The children see no hope for a future in the countries decided to be responsible for them due to experiences of mistreatment during the time they already spent there.
- The children that are decided to be returned to Italy and Malta face only the chance of temporary residence permits and thereby no security. Further the experiences of the asylum processes in those countries show a lack of juridical rightfulness.

Maria says that there is a lot of confusion and frustration among the children when they find out they are Dublin cases since they do not know what it is and do not understand the unfairness of that a friend of theirs might get a permanent permission to stay and they do not although they basically made the same journey and were seeking asylum due to the same causes. Sometimes the only difference is that the border police caught them and thereby their fingerprints exist in another country, counting as their asylum application. I ask Maria about the unaccompanied children's processes with the Swedish Migration Board. In Sweden the unaccompanied children are decided as Dublin cases in the first contact with the Migration Board if their fingerprints exist in the EU database Eurodac. The children are appointed a trustee but no juridical assistance and have three weeks to appeal the deportation decision. The Asylum group have assisted children lacking juridical assistance to appeal their decisions and consider some aspects to be of concern for the best interests of the children, first of all that they lack juridical assistance. Further that individuals affected by the Dublin Regulation, in difference to regular asylum procedures where the appeal counts as part of the asylum process, can be deported while their appeals are processed. The asylum group have experienced that a child have been deported from Sweden while his appeal was in process and then the decision concluded that he had reasons valid for permission to stay. It is in situations like this she says that you can really see how little this children are worth in the eyes of the authorities, an individual can be deported without anyone knowing yet if that is the right decision and whether to a safe environment. The Asylum group Malmö has helped children in some situations where the sovereignty clause (art. 3.2) of the Dublin Regulation has been applied and the children thereby have received permanent permission to stay in Sweden. On

these occasions it has been due to the physical and psychological health of the children and not because of the situation they risk deportation to in the first countries. The experience is though that the criteria and demands from the Migration Board to use the sovereignty clause is getting stricter and stricter by time so that the minors reasons that were valid reasons some year ago might be not valid as a reason anymore, at the same time unaccompanied refugee children to Sweden that turn out to be Dublin cases increase.

The children residing clandestine in Sweden possess no obvious rights to housing, school or health care but are dependent on other individuals good will, voluntarily work and the acceptance of authorities, schools, hospitals among others that they are entitled certain rights regardless of their legal status.

2.4 Reports on the situation for unaccompanied refugee minors in the European asylum procedure

Critique exists on the CEAS regarding that the asylum procedure that should be of equal standard in the member states varies to a great extent within different countries. Further that many states of the EU do not live up to the minimum standards of the directives on receiving, hosting and providing legally certain asylum procedures for refugees. The critique and opinions presented here regards the countries that the unaccompanied children presented in this paper risk transfer to in accordance with the Dublin Regulation and in some cases, regarding Malta, already have been transferred to. Further some comments are presented that cover the topic of the European Asylum procedure in general.

Thomas Hammarberg is the Council of Europe's Commissioner for Human Rights; he says that the Dublin Regulation of today undermines the rights of refugees since the border nations of Europe, where most refugees enter the union, are given too much responsibility. These border nations with Greece and Malta as the most unsuccessful examples, have shown not able to protect the refugees within their borders since the numbers of refugees are exceeding their capacities. The system according to him is uneven and it put the lives of refugees at risk and cannot guarantee that asylum seekers get access to fair and legally certain asylum processes. Hammarberg argues that the Dublin Regulation must be revised and EU states must halt all deportations of refugees to countries in Europe where they face the risk of not getting access to an asylum procedure and where safeguards such as legal aid and interpretation is missing (Hammarberg, 2010).

Human Rights Watch (HRW) evaluated member states of the European Union in 2009 and found that in Greece, based on UNHCR reports, unaccompanied asylum seeking children are subject to physical abuse by the police, often detained with adults, most fail to seek asylum and risk deportation and there is a lack of interpretation and legal aid and HRW recommend EU member states to not return asylum seekers to Greece. Spain receives critique in the same evaluation on the reception and treatment of unaccompanied migrant children and on deporting them to countries on the African continent without adequate safeguards (HRW, 2009). In 2010 HRW again reported about the mistreatment of unaccompanied refugee children in Spain and emphasized that it is unacceptable that children are put in detention centres for a long time under very poor conditions (HRW, 2010a).

In May 2008 the Swedish Migration Board made a decision to stop deportations of individuals to Greece in accordance with the Dublin Regulation. This decision was made after the Migration Board performed a field research trip to Greece and acknowledged the mistreatment of refugees in the country. The Swedish Migration Board performed a similar trip to Malta in 2010 after reports in the media about inhumane treatment of refugees in the country but the evaluation concluded that though adult refugees experience difficulties in Malta, unaccompanied refugee children reside in special living arrangements of good standard, this statement was made without the Migration Board actually visiting any of the children that have been transferred to Malta from Sweden (Migrationsverket, 2011b).

After a field research trip in 2010 Anna Lundberg and Emma Söderman published a report on the living conditions for unaccompanied refugee children in Malta based on the experiences of the children they met in the refugee camps they visited. None of the children Söderman and Lundberg met in Malta had a trustee or a represent to support and help them in the contact with authorities and furthermore they witness about a lack of interpreters. Malta thereby doesn't live up to the minimum directives of the EU or the CRC. This report recommends the Swedish government to stop the transfers of unaccompanied children to Malta (Lundberg & Söderman, 2010: 13-17). Something that is supported by the Swedish Unicef, the Swedish Church, the Red Cross and four of the political parties in the Swedish government (Dagens Nyheter, 2010a).

Sweden must stop the deportations to Malta and Italy says represents from the Swedish party Miljöpartiet (the Green Party) since those countries do not treat asylum seekers humane and not consider that the returned are minors and thereby treating them as adults. Further arguments for a stop of the deportations to Malta and Italy they say are the reports

about children living in prison like detentions and lack access to a trustee and information about their asylum applications (Sydsvenskan, 2010).

Médecins Sans Frontières (MSF) report from Italy in 2011 that unaccompanied children are detained in prison-like closed centres where their mental health suffers due to uncertainty and unacceptable conditions. The refugees says MFS, have little or no access to information about their legal procedures and their rights (MSF, 2011).

Unaccompanied refugee children entering Europe by the borders of Eastern Europe face serious risks and devastating treatment reports the Border Monitoring Project Ukraine (BMPU). Refugee children entering Hungary via Ukraine are generally expelled within the same day back to Ukraine where they face physical abuse; months of detention and their asylum applications are refused or not processed at all (BMPU, 2011).

Human Rights Watch (HRW) in a 2010 report evaluated the treatment of asylum seekers in Hungary, Ukraine and Slovakia based on interviews with refugees, migrants and asylum seekers. This report states that between august 2009 and august 2010 no asylum applications at all were processed in Ukraine. Unaccompanied refugee children according to HRW are particularly vulnerable in these states since they are not allowed to apply for asylum without a legal representative, something the authorities in many cases fail to appoint to them. Unaccompanied children thereby are often excluded from the possibility to enter the asylum process. Among the interviews made by Human Rights about the asylum procedure in Hungary nearly everyone said their requests for asylum had been ignored and that Hungary as a standard return all refugees to Ukraine who they assume have entered from there, unaccompanied children are no exception. HRW states that Hungary and Slovakia are thereby violating the principle of non-refoulement and the EU law to provide access to asylum (HRW, 2010b).

The Swedish EU commissioner Cecilia Malmström has expressed critique on the idea that the Dublin Regulation is not flexible. It is she says possible to make exceptions and especially when it concerns children, even though politicians and individuals in Sweden make it seem the opposite. According to Malmström the Dublin Regulation is only a technical instrument to divide responsibility and decide what country is responsible (Dagens Nyheter, 2010b).

The Swedish Ombudsman for Children Fredrik Malmberg argue that Malmström's directions about the flexibility of the Dublin Regulation should be adapted by the Swedish government, especially concerning unaccompanied refugee children. There should always be an individual trial when applying the Dublin Regulation he says, where the principles of the

best interests of the child must be given higher value. Malmberg express concerns regarding the fact that separated refugee children when facing the risk of deportation to countries as for example Malta are so desperate due to fear that they rather go clandestine (Barnombudsmannen, 2010).

Jonas Lundkvist is the supervisor on a transit home in Skara from where minors that are so called Dublin cases have absconded. Lundkvist says these minors fear to be returned to countries such as Malta and Italy due to experiences of assaults, physical and mental abuse and sometimes slave work, angst and reasons like insecure access to food and other fundamental needs. Olof Risberg is a psychologist at the Swedish Save the Children who expresses concern regarding that such a high number of unaccompanied refugee minors disappear each year in Sweden due to the fear of being deported to uncertain environments. Risberg has met many children that have absconded when finding out that they are Dublin cases or that their asylum applications are denied in his work and says that they live in a very insecure environment with constant risk of being exploited in different ways. He says that it becomes some kind of rightlessness for these minors to not have access to the rights that we all have access to (Sveriges Radio, 2010).

The National Red Cross Societies of the Member States of the EU in November 2011 published a position paper with recommendations to the EU Member States. These recommendations urges the EU and the EU Member States and their agencies to guarantee all potential asylum seekers the right to seek asylum and the access to fair asylum procedures in accordance with international and European human rights law. The Red Cross argues that the EU Member States make efforts to control, prevent and combat irregular migration without considering the rights of asylum seekers and this makes it difficult if not impossible for refugees to reach a safe country in Europe where they can apply for international protection. Thereby the EU and its Member States have denied many migrants the right to a fair status determination and the right to access international protection. Furthermore the Red Cross recommends the EU to consider the establishment of safe ways to enter Europe legally in order to seek asylum so that the current situation of deaths and human suffering along EU borders can be avoided (Red Cross, 2011).

3 Analysis

3.1 The children's experiences of the asylum process compared to the legal framework

The children's experiences of the European asylum system have been presented and the similarities found regarding the access to a legally certain asylum process are here to be outlined. I have chosen to divide different aspects of the asylum process into sections in order to analyze them in comparison with international and European legal documents, directives and guidelines on what the asylum process is supposed to look like for unaccompanied asylum seeking refugee children in Europe. Furthermore the children's experiences and the legal framework is analyzed with Hannah Arendt's theory on the right to have rights in order to examine if to be stateless can mean a state of rightlessness for these children.

3.1.1 Access to information about the asylum procedure

An important aspect of a legally certain asylum procedure for the applicant is to be informed on the asylum process and what it entails in a language that he or she understands. Information should be given on what rights the applicant have, what the asylum process consists of and what is expected of the applicant. Further it is necessary for the applicant to receive information on how to access necessary help such as interpretation and legal assistance in preparation for and during the asylum procedure.

According to article 5 of the Council Directive on 'Minimum standards for the reception of asylum seekers' in the CEAS (2003/9/EC) asylum seekers shall be provided with sufficient information on how to access legal assistance and this shall be made in a language the applicant understands. The Council Directive on 'Minimum standards for the procedure of granting and withdrawing refugee status' (2005/85/EC) states that unaccompanied children shall be provided with a representative that shall inform the child of the asylum process and how to prepare for the same. The Council of Europe Parliamentary Assembly Draft Resolution (2011) emphasize that unaccompanied children should be informed, immediately

when they arrive into a European country, in a language that they understand about their rights and their right to seek asylum and what that entails.

The stories of the children in the book “Till Sverige” share the characteristics of that the children when entering Europe have not been aware of how the European asylum system functions. They have not been aware of that to leave ones fingerprints generally mean to apply for asylum in a country and that you are required to seek for asylum in the first country of entry in Europe. The same applies for the children in Söderman’s study who have not been aware of that they by leaving their fingerprints in Malta have applied for asylum there. The children that the Asylum group Malmö are in contact with have neither been aware of how the European asylum system works before arrival in Europe and that you are allowed to seek asylum simply in the first country of arrival, furthermore they have not been aware of that to leave your fingerprints generally equals handing in an asylum application. Notable in the experiences of the children in this study is that most children in the book “Till Sverige”, the children in Söderman’s study and the children that the asylum group Malmö is in contact with have been forced to leave their fingerprints after being arrested by border police, police or military and many witness about physical violence, assaults and electric shocks by these authorities. Many of the children say that they at the time of leaving their fingerprints did not receive any information on what that would mean for them and neither received information on what would further happen to them or general information on the asylum process. They have further not been provided with interpreters to be able to understand what is happening to them.

One child represented in the book “Till Sverige” says he was informed in Holland about that to leave his fingerprints was considered an asylum application but this was after his fingerprints had been taken by force and after he had been imprisoned, not only in Holland, but also in Greece and Italy where his fingerprints respectively had been taken by force without him receiving any information on what that meant for him.

3.1.2 Detention

The CRC (1989) states that no child shall be deprived of his or her liberty and the UNHCR guidelines (1997) states that especially unaccompanied children seeking asylum shall not be place in detention. The Council Directive on ‘Minimum standards for granting and withdrawing refugee status’ (2005/85/EC) states that in the European asylum system refugees shall not be placed in detention simply for being asylum seekers and when an applicant is

hold in detention the member states shall ensure a “speedy judicial review”. The Council of Europe draft resolution (2011) wants to improve the measures for detention and state that detention should not be allowed at all regarding unaccompanied children. The Council Directive on ‘Minimum standards for the reception of asylum seekers’ (2003/9/EC) states that unaccompanied children with no available relatives shall from the time they enter the territory of a member state until they leave the same be placed in a foster-family or in accommodation centres specifically for children. These Council Directives contradicts the experiences of the child refugees in this study who have been placed in detention, as mentioned most often with adults and even criminals, directly when entering the EU to seek asylum, generally without information on why or for how long they will be detained.

All children in this study from the book “Till Sverige” and all the children in Söderman’s study have been placed in detention when entering the European Union. Among the children that the Asylum group Malmö are in contact with there exist no clear numbers but many of the children have been detained in countries by the EU-borders before they came to Sweden. Often with adults and some children in the book “Till Sverige” say they have been detained with criminals. The children witness about extremely poor living conditions when detained and fear of physical and sexual abuse from adult detainees and the lack of protection towards the same by responsible adults such as police and guards. The children have been detained for various amounts of time, sometimes up to nine months and a similar character is testimonies about the lack of information on why they are detained, for how long they are to be detained and lack of interpreters and thereby the possibility to understand what is happening to them.

Concluding, none of the children in this study have been placed in foster-families or centres specifically for children. Contrary the children have been placed directly in detention. The children in Söderman’s study residing in Malta have after being released from detention been offered no other option than to live in overcrowded tent camps with adults and they are basically left to take care of themselves.

3.1.3 Access to interpretation, trustees and legal assistance

The preamble of the CRC (1989) states that a child due to physical and mental immaturity needs special safeguards, including legal protection. The UNHCR legal guidance for how to deal with unaccompanied children (1997) says that refugee children since not being legally independent should be represented by an adult who would protect his or her interests. This has

been incorporated in the Council Directives for the European asylum system, Council Directive 2003/9/EC states that the EU member states shall provide unaccompanied child asylum seekers with the representation that is necessary in form of legal guardianship, further they shall be provided with a representative that can represent and assist the child in the asylum application during the stages of information, preparation and examination. This representative should be present during the interview with the child to support and ask questions relevant for the child's best interest. An exception may be made for children over the age of sixteen who, regardless of the Council Directives definition of children as individuals under the age of eighteen, may be forced to handle his or her own asylum case without a representative.

None of the children in Söderman's study received access to a trustee or any form of legal aid in their asylum processes in Malta. The representative from the Asylum group Malmö says that the children they are in contact with received no legal aid or help from other adults in form of for example trustees in their asylum processes in the first countries. The children in the book "Till Sverige" not specifically handle the issue of trustees and legal aid in their stories but a consistent aspect in their stories are that they have not been informed about the asylum procedure and what is going to happen to them and furthermore lack of interpretation have often made it impossible for them to understand their situation. Though the children in this book not specifically have dealt with the issue of whether they received help in the asylum process in their stories, the stories continuously lack the presence of legal aid and trustees or other adults helping the children in their contact with authorities. Making it possible to suggest that either legal aid or trustees did not exist or that it did not made much impact on the children's situations.

When analyzing the children's experiences a common pattern is that no trustees, representatives or legal assistance of any kind seem to have been existent to help them in the asylum procedure. It is difficult to say whether children over sixteen, where exceptions may be made in accordance with the Council Directives, have been left without representatives in more cases than for those under the age of sixteen. It rather seems that all children in this study, regardless of age has been treated as adults without any real interest in finding out their real age and that children overall risk to be excluded from representatives, trustees and legal assistance in many countries in Europe.

3.1.4 Arbitrariness and uncertainty

The UNHCR legal guidance for how to deal with unaccompanied children (1997) states that the views and the wishes of the children should be listened to and considered. The Council Directive on ‘Minimum standards for the reception of asylum seekers’ states that when decisions are taken that regards children in accordance with the CRC (1989) the child’s best interest shall be a primary consideration and children who have been victims of abuse, torture, exploitation, suffered from armed conflict, or other cruel, inhumane or degrading treatment shall receive access to rehabilitation.

Important aspects of the asylum procedure are as previously mentioned in this study not just the process of the paper application itself but furthermore the treatment of the applicant during the process and the rights the applicant is entitled to as part of the asylum process and for being a refugee. Different aspects are thereby intertwined and certain aspects of the treatment and reception of the unaccompanied refugee minors are thereby presented as part of the asylum process. Factors such as concern about the wellbeing of the unaccompanied refugee asylum seeking children and providing them rights they are entitled to part of the EU member states responsibilities in the process of providing these children with legally certain asylum procedures. All the children from the book “Till Sverige” presented in this study express feelings of hopelessness and desperation over their uncertain future. They express that they want to attend school and be able to plan for their future. These are fundamental aspects of individual safety for which permanent permission to stay in a country is needed.

The children in Söderman’s study that are residing in Malta see no future in staying in Malta, they have received simply temporary residence permits valid for one year. Söderman argues that both the children in Malta and the ones residing in Sweden in her study have developed physical and psychological conditions and that the most important aspect in these children’s lives is to receive a permanent permission to stay in a country and thereby get access to fundamental rights that they now, both in Malta and in Sweden, are excluded from. The representative from the Asylum group Malmö says that the children they are in contact with due to their previous experiences of the first countries in Europe see no hope for a future there. She says that the children they are in contact with are in bad psychological health due to both their previous experiences and their current situations of uncertainty and that if they are deported to countries such as Malta and Italy they have the chance of receiving simply temporary residence permits.

3.1.5 Access to an asylum process

The UDHR (1948) states that everyone has the right to leave one's country and to seek and enjoy asylum in other countries (Art. 13, 14) and the Geneva Convention (1951) states that refugees shall not be penalized for not possessing proper documentation such as visas and passports (Art. 31). The same convention states that nation-states may not expel refugees from their territory if that may risk the lives or the freedom of the refugee (Art. 33). The CRC (1989) states that child refugees, whether accompanied or unaccompanied, shall receive appropriate protection and humanitarian assistance in accordance with the rights set forth in the CRC as well as other human rights instruments to which the concerned state is a party. The UNHCR legal guidance on how to deal with unaccompanied children (1997) says that children, regardless of age should always have access to asylum procedures, furthermore that children's asylum applications shall be prioritized. This is emphasized by the European Council Parliamentary Assembly in the draft resolution from 2011 that says that unaccompanied children in practice tend to be excluded from the asylum process in Europe. This draft resolution therefore recommends that the member states prioritize the asylum applications of unaccompanied asylum seeking children and make sure their processes are speedy. The Council Directive 2005/85/EC states that the member states of the EU shall ensure that all asylum applications are processed and examined and that the decisions made in these asylum cases are "individually, objectively and impartially".

The children in this study, though their unique experiences, share many similarities regarding difficulties to access the asylum process in Europe. Their status as children, unaccompanied and refugees should entitle them special protection and their asylum applications should be of high priority in the EU member states. In practice however their experiences illuminate similarities in mistreatment by adults and authorities and they have been denied important factors contributing to the possibility of a legally certain asylum process such as information, trustees, legal assistance and representatives. They have been placed in detention and have been denied access to interpretation and basic human rights such as health care and adequate housing when residing in European countries as asylum seekers.

3.2 Exclusion from the asylum process

3.2.1 The importance of access to the asylum process

According to Hannah Arendt a refugee is the same as a stateless person since individuals who have lost a state to call their own have also lost their rights as citizens belonging to that state. An individual needs a nation-state in order to have someone protecting his or her rights. Refugees who are not allowed into the asylum process end up without legal status and as Arendt argues they are excluded from the “family of nations altogether” (Cotter 2005: 104). For the children in this study it is important to access a legally certain asylum process and to receive permanent residence permits in a country in order to receive protection from what they have been fleeing from, but also for them to be able to continue their lives, plan for a future and have access to the rights they are entitled to as children and as human beings. It is says Arendt not much worth to have for example the freedom of opinion if ones opinion is not counted or matter to anyone. To have the right to have rights she says means to belong to the framework of a community where ones opinions and actions matter. International human rights law states that the access to an asylum process is a right entitled to all people, everyone has the right to seek asylum and to enjoy protection from persecution. The access to a legally certain asylum process though is important not simply for what a residence permit may offer the refugee in form of protection from persecution if considering Arendt’s theory valuable. It is also of importance since to receive a membership of a new state will mean for the refugee to have a nation-state that can guarantee and protect their human rights.

3.2.2 Do these children risk to be excluded from the asylum process

The children in this study that are living in clandestinity in Sweden have ended up outside the family of nations and they are not guaranteed their rights by any nation-state. The children that have been deported from Sweden to Malta in Söderman’s study have received temporary residence permits that are valid for only a year. Both these groups of children share the experiences of having been denied access to important contributing aspects of the asylum process such as interpreters, trustees and legal representatives in the first countries. The children residing in Sweden that are risking deportation back to Malta, Italy and Hungary among other countries are not allowed to seek asylum in Sweden due to the Dublin Regulation and they have reason to believe due to previous experiences that they will not get access to a legally certain asylum process if they are deported. The decision to stay in clandestinity regardless of the denial to seek asylum in Sweden have been a difficult decision for these children since they risk to lose the obvious right to certain human rights. They have

done so because the alternative, to be deported to the first countries, do not according to the children's experiences seem to better guarantee the fulfillment of their rights. The previously presented reports by numerous NGOs about the conditions for unaccompanied refugee children in Europe and the analyze by Jacqueline Bhabha on refugee children of today seem to support that deportation for these children might mean to withhold the state of rightlessness.

3.2.3 The sovereignty clause of the Dublin Regulation

This thesis will not focus on solutions for how these children could be guaranteed access to the asylum process in Europe but will briefly deal with the sovereignty clause of the Dublin Regulation (Art.3.2) that gives states the right to try an asylum application instead of deporting the asylum seeker to another country for status determination.

Arendt says that the universality of human rights not mean much if human rights are something that can be protected simply for individuals holding the membership of a nation-state. Even when residing in a country that have based their constitutions on human rights, these rights are difficult to access for an individual not belonging to the nation-state regardless of what is stated in international, and advocated as universal, human rights law. National sovereignty gives states the right to deny citizenship to refugees and to expulse individuals from its territory. State sovereignty also in the case of the Dublin Regulation gives the states the freedom on how to interpret the sovereignty clause (Art. 3.2) of the Dublin Regulation and set up its own criteria for when it should be applied. The possibility thereby exists for Sweden, as well as any other member state, to try an asylum application for any unaccompanied refugee child when considering it necessary.

Thomas Hammarberg argues that countries in Europe should not deport refugees to other countries in Europe where they suspect that a risk exists that the refugees will not get access to a legally certain asylum procedure. EU commissioner Cecilia Malmström says that the Dublin Regulation only is a technical instrument and that it is flexible, thereby exceptions by using the sovereignty clause are possible to a much higher extent, especially when it regards children, then is applied today. The Swedish Ombudsman for Children, Fredrik Malmberg, supports this statement and says that Sweden should apply the sovereignty clause more often, especially regarding unaccompanied children. The Council of Europe Parliamentary Assembly draft resolution from 2011 states that unaccompanied children shall

be deported to other countries in Europe in accordance with the Dublin Regulation simply if that is in the best interests of the child.

3.2.4 Can an exclusion from the asylum process affect the children's right to have rights

The children presented in this study are lacking a permanent residence permit in a nation-state, will say they lack a state to call their own. The children living in clandestine in Sweden have no obvious right to rights. The rights that should be entitled to them regardless of legal status cannot be taken for granted but can be fulfilled only if institutions and individuals accept the children. Furthermore, their position as functionally stateless with the risk of deportation if discovered interfere not only with the children's psychological health but also with how they can act in society and on the possibility for them to claim the rights they are entitled to. The children that have been transferred from Sweden to Malta in Söderman's study holds temporary residence permits which give them certain legal status, however they still lack access to fundamental rights such as adequate housing, school, health care and protection seem to be left to take care of themselves.

Bhabha argues that unaccompanied refugee children are as vulnerable to have their rights violated and for being subject to abuse and exploitation in countries that generally protect children's rights. Considering the situation for the children in this study, in Sweden and in other countries in Europe that are considered to in general protect the rights of children, the children in this study seem to have been treated in a completely different manner than what the legal framework and guidance states for them.

The children in Söderman's study, the children represented in the book "Till Sverige" and the children that the Asylum group Malmö are in contact with share the similarities of lacking access to fundamental rights due to the lack of permanent residence permits. The children staying in clandestinity seem to lack the access to a legally certain asylum process both by staying in Sweden and by returning to some of the countries in Europe that Sweden and the EU consider as 'safe countries'. To be excluded from the asylum process leaves these children in a state of uncertain waiting that despite from being psychologically harmful also suggest rightlessness. The children in this study are functionally, or de facto, stateless. The children staying clandestine in Sweden lack the ability to have a nation state to call their own and who can protect their rights and if they will be returned to the countries in Europe that are

decided responsible to try their asylum applications there are no certainty, rather signs of the opposite, that they would be able to access a legally certain process that may provide them with a permanent residence permit.

An example of discrepancy between rhetoric and practice where it is illuminated that these children can, and do, lose the right to have rights is the example of the child presented in the book “Till Sverige” who was informed in the third country of arrival in Europe what it meant to leave his fingerprints, after have been forced to leave his fingerprints in two other countries in Europe already. Another example is the child that the Asylum group Malmö experienced being deported from Sweden when his appeal was in process; later to be found out the deportation was a mistake since the child’s reasons to receive a permanent residence permit in Sweden was sufficient.

Detention camps are according to Bhabha spaces outside the law where an extreme situation of rightlessness exists. The children presented in this study have generally been put in detention when entering Europe for various amounts of time, often many months. This show that the EU not manage to follow their own directives for how the asylum procedure for unaccompanied refugee children should be implemented and that children inside the EU risk to lose access to their rights by being placed in spaces characterized by rightlessness.

The representative from the Asylum group Malmö says that the children they are in contact with are dependent on the acceptance from institutions and individuals to get access to rights such as school and health care and these children are dependent on the good will and acceptance from individuals to get access to housing and necessities. Sweden could be claimed to hold the responsibility to provide the children with rights such as health care due to article 2 of the CRC (1989) that says that the provisions of the Convention cover all children within a state parties jurisdiction and thereby even children who have been denied refugee status shall be protected as long as they remain in the country. This means that children, no matter legal status, shall always receive appropriate protection and humanitarian assistance in the state they are residing. That refugees are dependent on charity argues Arendt, is a clear sign of that ones rights can only be safeguarded when holding the membership of a nation-state. Arendt seem right to argue that to lose the possibility of a nation-state to call ones own can include to lose the right to have ones “universal” rights fulfilled.

4 Conclusion

This study has examined the experiences of unaccompanied refugee children regarding the asylum process in Europe, in order to examine if differences exist between these experiences and the legal framework and directives on how the system is supposed to look like. The children in focus are affected by the Dublin Regulation and are residing in clandestinity in Sweden or have at some point resided in Sweden but have been deported to the first country in Europe. The study shows that unaccompanied refugee children seeking asylum in Europe tend to experience difficulties to enter the asylum process. The experiences of the children in this study illuminate that they have, in the first countries, most often border-countries of the EU, been treated as adults, placed in detention and have been subjected to physical and psychological abuse.

International human rights instruments and regional directives intended to ensure special protection for unaccompanied refugee children seem to differ from practice when compared to the children's experiences. The unaccompanied asylum-seeking children in this study have been denied fundamental human rights that according to the European directives should be entitled to them as unaccompanied refugee children in Europe. The children are in great risk of not getting access to a legally certain asylum process due to factors such as interpretation, information and legal representatives. The children's experiences combined with the reports of NGOs and human rights advocates on the situation for unaccompanied refugee children in Europe suggests that the children in this study who are denied to seek asylum in Sweden are also prone to risk exclusion from the asylum process in the countries they risk deportation to.

It seems that the children in this study are at risk of being deprived of the rights they are entitled to as humans when excluded from belonging to a community. To belong to a community according to Hannah Arendt is of greatest importance because it is only then that one has an institution that can protect one's rights and where one's voice and actions count. The children have lost their legal status and by that seem to have been excluded from the "family of nations".

Jacqueline Bhabha argues that unaccompanied refugee children tend to, due to their legal status, risk having their rights violated in all countries, regardless of the concerned

country's human rights record. This argument seems applicable to the children in this study. The children residing in Sweden have no obvious access to their rights due to their legal status and the children in Malta who have inherited temporary residence permits have no obvious access to fundamental rights such as housing, school and health care.

Europe's common asylum system seems to face great challenges if the aim of a harmonized European asylum system shall be completed next year in 2012. The Council of Europe for example has acknowledged important factors requiring improvement within the system yet to be seen applied in practice. Until unaccompanied refugee children can be guaranteed legally certain asylum processes in all countries in Europe and their rights protected in accordance with the international and regional human rights instruments, it seems reasonable to argue for more flexibility in the use of the sovereignty clause for countries that suspect that children otherwise might end up excluded from the right to seek and enjoy asylum.

This thesis does not tend to be presenting results applicable to the experiences of the asylum process regarding all unaccompanied children that enter Europe in order to seek asylum. The children's experiences combined with critique from NGOs and human rights advocates on the Dublin Regulation and the CEAS however suggests that unaccompanied refugee children risk to be excluded from the asylum process in Europe. This possible exclusion can further mean that they face difficulties regarding the fulfillment of their rights. The discrepancy between policy and practice in the European asylum system show a system that is still under development and thereby not able to fulfill its aim of offering refugees the same treatment, protection and legally certain asylum processes in all member states.

This study encourages further research on the developments of the Common European Asylum System that are to be finished by the year 2012, with focus on possible improvements for the protection of unaccompanied refugee children in the asylum process. Further research is also encouraged on the possible responsibility for individual states to apply the sovereignty clause of the Dublin Regulation if it seems to be in the best interests of the child.

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