

**Observations by the United Nations High Commissioner for Refugees Regional  
Representation for Northern Europe on the Inquiry “Barnkonventionen blir svensk lag”  
SOU 2016:19**

## I. INTRODUCTION

1. The United Nations High Commissioner for Refugees (hereafter “UNHCR”) Regional Representation for Northern Europe (hereafter “RRNE”) is grateful to the Government of Sweden for the invitation to provide observations on the inquiry “Barnkonventionen blir svensk lag” SOU 2016:19, (hereafter the “Inquiry”) proposing to incorporate the United Nations Convention on the Rights of the Child<sup>1</sup> (hereafter the “CRC”) as domestic legislation, and with proposals for amendments to, and continuous transformation of, relevant legislation necessitated by the incorporation.
2. As the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, seek permanent solutions to the problems of refugees,<sup>2</sup> UNHCR has a direct interest in law and policy proposals in the field of asylum. According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”.<sup>3</sup> UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention<sup>4</sup> and in Article II of the 1967 Protocol relating to the Status of Refugees<sup>5</sup> (hereafter collectively referred to as the “1951 Convention”).<sup>6</sup> It has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (hereafter “TFEU”).<sup>7</sup>
3. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereafter “UNHCR Handbook”) and subsequent Guidelines on International Protection.<sup>8</sup> UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.
4. The CRC provides a comprehensive framework for the responsibilities of its States Parties to all children within their jurisdiction, without discrimination of any kind, including those who

---

<sup>1</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>

<sup>2</sup> UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html> (hereafter “UNHCR Statute

<sup>3</sup> *Ibid.*, para. 8(a).

<sup>4</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

<sup>5</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>

<sup>6</sup> According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

<sup>7</sup> European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

<sup>8</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

are of concern to UNHCR. Moreover, as a United Nations Convention, it constitutes a normative frame of reference for UNHCR's actions.<sup>9</sup>

5. The following comments are based on international refugee and child protection standards, set out in the 1951 Convention, the CRC, Conclusions on International Protection of the UNHCR Executive Committee (hereafter "ExCom"), UNHCR guidelines and General Comments of the United Nations Committee on the Rights of the Children (hereafter the "CRC Committee"). While neither UNHCR ExCom Conclusions nor UNHCR guidelines, or the guidance of the CRC Committee are binding on States, they contribute to the formulation of *opinio juris* by setting out standards of treatment and approaches to interpretation which illustrate States' sense of legal obligation towards asylum-seekers and refugees.<sup>10</sup> As a member of the UNHCR ExCom since its inception in 1958, Sweden has contributed extensively to the development of the Conclusions on International Protection, adopted unanimously by the ExCom.

## II. GENERAL OBSERVATIONS

6. UNHCR wishes to commend the Government for its explicit commitment to incorporate the CRC into Swedish law, and welcomes the proposals of the Inquiry. The Inquiry has surveyed four particular areas in-depth, one of which is entitled "children in the migration process". The present observations of UNHCR are limited in scope to the findings and proposal in this area, in line with the mandate of UNHCR.
7. At the outset, the Inquiry points out a number of shortcomings relating to how the CRC is implemented in current Swedish practice. The Inquiry states that "[t]he shortcomings are most obvious with regard to the principle of the best interests of the child and the child's right to express his or her views." The Inquiry further notes that although there are explicit provisions on the best interests of the child in Swedish legislation concerning children in the migration process, the best interests assessments undertaken are frequently not based on the individual circumstances of the child, but on general observations of law and policy. The Inquiry also notes that "[w]ith respect to children's opportunities to be heard, the survey shows that often no discussions are held with children, and in many cases no motivation is given for this decision." Finally, the Inquiry also notes that the manner in which children are treated by the authorities reveals that the authorities' actions are not based on children as rights holders.<sup>11</sup>
8. UNHCR will, in its observations below, address the issues on which the Inquiry has found reason to present proposals, namely, children as rights holders, the application of the principle of the best interests of the child and the right to be heard. UNHCR will also address the child's right to family unity.

## III. SPECIFIC OBSERVATIONS

### Children as rights holders

9. The Inquiry found that children's individual reasons for needing protection are, to a large extent, overshadowed by the parent's claims, and that the children thereby risk not receiving an individual assessment of their claims. Consequently, the Inquiry sees a risk that children are not treated as individual rights holders by the Swedish Migration Agency (hereafter the

<sup>9</sup> UNHCR, *UNHCR Policy on Refugee Children*, 6 August 1993, EC/SCP/82, available at: <http://www.refworld.org/docid/3f9e6a534.html> [accessed 11 October 2016]

<sup>10</sup> Goodwin Gill/McAdam, *The Refugee in International Law*, Oxford University Press, 2007, p. 217.

<sup>11</sup> The Inquiry, page 53.

“SMA”).<sup>12</sup> The Inquiry thus proposes that, in cases where the applicant is a child, the child’s specific reasons for the application must be assessed and stated in the decision of the SMA, and that the SMA’s the assessment shall be child-focused.<sup>13</sup> UNHCR agrees with the Inquiry and further recommends that the obligation to assess each child’s individual reasons for needing international protection, and explaining how these have been considered in the decision, is expanded to encompass not only the SMA but also the judiciary.

10. The Inquiry further suggests that case officers handling asylum claims of children are provided continuous and mandatory training. UNHCR agrees that one way of ensuring a child-sensitive application of the refugee definition is to provide training to case officers managing child asylum claims.<sup>14</sup> UNHCR thus supports the Inquiry’s proposal in this regard, and recommends that the requirement for continuous capacity building is expanded to also include the judiciary.
11. UNHCR’s ExCom has called on States to adopt a rights-based approach to the protection of children, “recognizing children as active subjects of rights”.<sup>15</sup> UNHCR’s Guidelines pertaining to child asylum claims also note that a rights-based approach to the protection of asylum-seeking children entails adopting a child-sensitive interpretation of the refugee definition in the 1951 Convention.<sup>16</sup> Understanding that there are child-specific rights, such as the right to education; child-specific forms of persecution, such as Female Genital Mutilation and underage recruitment; and child-specific manifestations of persecution on a child, who is more vulnerable to harm than a fullgrown adult, is part of a child-sensitive interpretation of the refugee definition.
12. In the CRC Committee’s Concluding Observations to Sweden’s most recent periodic report, the Committee urged Sweden to explicitly include child-specific forms of persecution in its domestic legislation.<sup>17</sup> Without prejudice to the form in which it should be provided, i.e. in the legislation itself, in preparatory works, or in guidelines, UNHCR recommends that interpretative guidance is provided to the SMA and the judiciary on child-specific forms of persecution, child-specific manifestations of persecution, and other elements which are essential for ensuring a child-sensitive interpretation of the international protection criteria in child asylum claims, regardless whether the child concerned is accompanied or unaccompanied.

---

<sup>12</sup> *Ibid.*

<sup>13</sup> The Inquiry, pages 174-175.

<sup>14</sup> *Ibid.*, paragraph 72.

<sup>15</sup> UNHCR, *Conclusion on Children at Risk*, 5 October 2007, No. 107 (LVIII) - 2007, paragraph (b)(x), available at: <http://www.refworld.org/docid/471897232.html>.

<sup>16</sup> UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, available at: <http://www.refworld.org/docid/4b2f4f6d2.html>.

<sup>17</sup> CRC, *Concluding observations on the fifth periodic report of Sweden*, 6 March 2015, CRC/C/SWE/CO/5, available at: <http://www.refworld.org/docid/566e7e8c4.html>

## RECOMMENDATIONS CONCERNING CHILDREN AS RIGHTS-HOLDERS

UNHCR recommends that:

- The Government regulates an obligation on the SMA and the judiciary to assess the individual child's specific reasons for needing international protection, and to motivate, in the decision, how these reasons have been considered.
- That staff who manage child asylum claims, at the SMA as well as at the judiciary, are provided continuous and mandatory training concerning the assessment of child asylum claims.
- The Government ensures that explicit interpretative guidance is provided, to the SMA as well as to the judiciary, on how to ensure a child-sensitive interpretation of the protection criteria in all child asylum claims, regardless whether the child concerned is accompanied or unaccompanied. This should include guidance on how to identify child-specific forms of persecution and child-specific manifestations of persecution.

### The principle of the best interests of the child

13. The Inquiry found that although reference is made to the principle of the best interests of the child in the decisions, a deeper assessment of what is in the best interests of the child is seldom recorded by the SMA.<sup>18</sup> The Inquiry therefore suggests that the reference to the principle of the best interests of the child in Chapter 1, Section 10 of the Alien's Act is amended so that it stipulates that in cases concerning children, the best interests of the child shall be examined and given "particular regard", and that the child's views shall be taken into consideration in the examination of the best interests of the child.<sup>19</sup>
14. UNHCR understands that the Inquiry's proposed amendment suggests a three-fold responsibility for the authorities: a) to ensure that the best interests of the individual child is "given particular regard" in all measures affecting children, b) to carry out best interests assessments as a continuous process in all cases concerning children, and c) to ensure that all children's right to be heard is fulfilled. UNHCR will address this three-fold proposal in that order below.
15. UNHCR welcomes the Inquiry's suggestion to explicitly refer to the obligations flowing from Article 3(1) of the CRC directly in the Alien's Act. However, UNHCR notes that the Inquiry has chosen to phrase the obligation to take into account the best interests of the child as a primary consideration, as an obligation to "give particular regard" to the best interests of the child. UNHCR understands that the Inquiry has chosen the proposed wording based on a recommendation from the Council of Legislation concerning a legislative proposal in 1996,<sup>20</sup> but that the wording nonetheless shall be interpreted as meaning that the best interests of the child shall be taken into regard as a primary consideration, in line with Article 3(1) CRC.
16. In this context, UNHCR recalls General Comment No. 14 of the CRC Committee, where the CRC Committee emphasizes the strength of the legal obligation to give the child's best

<sup>18</sup> The Inquiry, pages 162 – 168.

<sup>19</sup> The Inquiry, pages 175-178.

<sup>20</sup> The Inquiry, page 177, footnote 32.

interest primary consideration, and that “a larger weight must be attached to what serves the child best” compared to other interests.<sup>21</sup> Further, as noted in the CRC Committee’s General Comment No. 6, “non-rights based arguments such as those relating to general migration control, cannot override best interests considerations”.<sup>22</sup>

17. UNHCR is of the view that in order for the State to fulfil its obligation to assess and ensure that the best interests of the child is given primary consideration in all actions or decisions that concern the child, it is necessary that the wording of the legal obligation is unequivocal in this regard. UNHCR fears that the wording suggested by the Inquiry risks diminishing the primacy of the best interests principle, leading the principle to be interpreted not as an obligation to afford the child’s best interests *primary* consideration, but merely as one of many considerations. UNHCR therefore strongly recommends that the same wording as in the CRC is used in the Alien’s Act.
18. UNHCR welcomes the proposal to make it an obligation to carry out best interests assessments as a continuous process in all cases concerning children, in line with the interpretation of the principle of the best interests of the child as encompassing a rule of procedure.<sup>23</sup> While the CRC Committee’s General Comment No. 14 states that a formal best interests determination (hereafter “BID”) is only necessary “where a decision will have a major impact on a child”, the CRC Committee underlines that it is necessary to undertake an assessment of the child’s best interest as a primary consideration in every action relating to a child.<sup>24</sup> The Inquiry also refers to the CRC Committee’s guidelines in this regard.<sup>25</sup>
19. Recognizing the difficulties in operationalizing the best interests principle, UNHCR, together with the United Nations Children’s Fund, UNICEF, have developed a guidance document entitled “Safe and Sound – What States Can Do to Ensure Respect for the Best Interests of Unaccompanied and Separated Children in Europe” (hereafter the “Safe and Sound guidance”).<sup>26</sup> The Safe and Sound guidance aims to support States to identify the optimal means to fulfil their responsibilities to protect the rights and best interests of displaced children in Europe.
20. In the Safe and Sound guidance, UNHCR and UNICEF differentiates between two types of procedures to consider the best interests of a child, the first is a so-called best interests assessment, or BIA, which is to be undertaken as soon as an individual child is identified as being at risk, and before any action affecting an individual child is taken, as part of a continuous process. A BIA is a simple, on-going procedure for making decisions about immediate actions in the child’s best interests. A BIA could be used for example before deciding on the placement in specialized care, before deciding on whether to undertake an age assessment, or before deciding to initiate family tracing. The key characteristics of the BIA, is that it is “holistic and conducted by staff with relevant professional expertise”. Necessarily, the BIA involves gathering the views of the child, as well as the views of other

---

<sup>21</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, paragraphs 36 and 39, available at: <http://www.refworld.org/docid/51a84b5e4.html>

<sup>22</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, paragraph 86, available at: <http://www.refworld.org/docid/42dd174b4.htm>

<sup>23</sup> *Ibid*

<sup>24</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, paragraphs 17 and 20, available at: <http://www.refworld.org/docid/51a84b5e4.html>

<sup>25</sup> The Inquiry, page 485-486.

<sup>26</sup> UNHCR, *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October, 2014, (hereafter “Safe and Sound”) available at: <http://www.refworld.org/docid/5423da264.html>

professionals with the relevant expertise, any other information as needed, and weighing the elements of the child's circumstances.<sup>27</sup>

21. The other procedure is the BID, which is a more formal procedure with specific procedural safeguards, used when significant decisions that will have a fundamental, long-term impact on the child's future development are made, e.g. when deciding on a durable solution for a child.
22. UNHCR places particular importance on the holistic nature of the best interests assessment and best interests determination processes, meaning that professionals with different relevant expertise shall collaborate in making the decisions on what would be in the best interests of a child. During spring 2016, UNHCR undertook a profiling survey of unaccompanied asylum-seeking Afghan children in Sweden.<sup>28</sup> Although the functioning of the Swedish child-protection system was not part of the study, UNHCR noted several gaps in how the child-protection system in Sweden applies to asylum-seeking children, notably that a holistic best interests procedure is not in place. UNHCR recommends that the Government, in taking the Inquiry's proposal further, investigate how the child-protection system available for asylum-seeking and refugee children in Sweden functions, regardless of whether the children are unaccompanied or accompanied by their care givers, and take measures to ensure that a holistic child-protection system is in place.
23. UNHCR is pleased to note the Inquiry's reference to the right of all children to be heard. As the Inquiry also notes throughout the proposal, the child's right to express his or her views and have them taken into account is inextricably linked to the assessment of the child's best interests. UNHCR has also stressed that "the right of children to express their views and to participate in a meaningful way" is an important aspect in the context of ensuring a child-sensitive interpretation of the refugee definition.<sup>29</sup> Further, to ensure that "the child has the opportunity to express these views and needs requires the development and integration of safe and child-appropriate procedures and environments that generate trust at all stages of the asylum process."<sup>30</sup>
24. UNHCR notes that the Inquiry has found that the staff of the SMA at times finds it difficult to interview children and give due weight to the views expressed by the children.<sup>31</sup> UNHCR finds that key to fulfilling the obligation to provide the opportunity for all children to express their views freely in all matters affecting them is that the staff who interact with the children have proper qualifications and training.<sup>32</sup> UNHCR welcomes the Inquiry's proposal to engage in capacity-building activities during a three-year period following the incorporation of the CRC, to ensure that professionals working with children are capacitated to fulfil the obligations of the State towards the children.

---

<sup>27</sup> Safe and Sound, page 20.

<sup>28</sup> The study examined the profile, experiences and reasons for flight of unaccompanied and separated children from Afghanistan who applied for asylum in Sweden in 2015. The study will be available on the UNHCR Regional Representation for Northern Europe webpage by 25 October 2016, see [www.unhcr-northerneurope.org](http://www.unhcr-northerneurope.org).

<sup>29</sup> UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, paragraph 70, available at: <http://www.refworld.org/docid/4b2f4f6d2.html>.

<sup>30</sup> *Ibid.*

<sup>31</sup> The Inquiry, page 166.

<sup>32</sup> See UNHCR, *The Heart of the Matter - Assessing Credibility when Children Apply for Asylum in the European Union*, December 2014, pages 95-96, available at: <http://www.refworld.org/docid/55014f434.html>.



## RECOMMENDATIONS CONCERNING THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

UNHCR recommends that:

- The same wording is used in the Alien's Act Chapter 1, Section 10 as in the CRC Article 3(1), namely that the best interests of the child shall be examined and given *primary consideration*.
- The Government, in taking the Inquiry's proposal further, investigate how holistic best interests assessments and determinations can be better integrated into the asylum and migration processes in Sweden, to ensure that the best interests of all asylum-seeking children, accompanied or unaccompanied, are given primary consideration.

### The Child's Right to Family Reunification

25. Although the Inquiry does not mention the child's right to family life, or the right to family reunification, UNHCR wishes to take this opportunity to highlight the importance of ensuring the child's right to family life, and to grow-up with his or her family, in view of the substantial challenges some asylum-seeking and refugee children face when trying to reunify with family members. In some instances, law and practice today makes it impossible for a child who has been separated from his or her family to reunify.
26. UNHCR expressed concerns regarding the restrictions on children's possibility to reunite with family members in its observations on the Government's proposal for a temporary law.<sup>33</sup> In these observations, UNHCR recalled that a child's right to family life is specifically protected under Articles 9, 10 and 16 of the CRC, which, *inter alia*, provide that a family reunification application involving a child should be dealt with in a positive, humane and expeditious manner, and that the child has the right to maintain regular and direct contact with both parents. The CRC Committee has also reminded States parties of their obligations in this respect, noting that "[w]hen family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best-interests-based balancing test has decided against return, the obligations under Articles 9 and 10 of the Convention come into effect and should govern the host country's decisions on family reunification therein".<sup>34</sup> Denying or delaying the right of children to reunite with their parents, guardians and other family members, whether it is the child who is the sponsor, or the applicant for family reunification, could be at variance with Sweden's obligations under international and regional law, including the CRC.
27. Against this background, UNHCR would like to underline that also in cases concerning family reunification, it is essential to ensure that the best interests of the child are given primary consideration, and that the child is provided the opportunity to express his or her view and participate in a meaningful way. An incorporation of the CRC into Swedish law

<sup>33</sup> UNHCR, *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the draft law proposal on restrictions of the possibility to obtain a residence permit in Sweden ("Begränsningar av möjligheten att få uppehållstillstånd i Sverige – utkast till lagrådsremiss")*, 10 March 2016, available at: <http://www.refworld.org/docid/56e27d7e4.html>

<sup>34</sup> See CRC, General Comment No. 6, para. 83.

would therefore require a review of existing legal provisions pertaining to family reunification, including those set out in the Alien's Act and in the Law on Temporary Restrictions of the Possibility to Obtain Residence Permit<sup>35</sup>, to ensure that children who are involuntarily separated from their family members can have their, or their family member's application for family reunification dealt with in a positive, humane and expeditious manner.

#### **RECOMMENDATIONS CONCERNING THE CHILD'S RIGHT TO FAMILY REUNIFICATION**

UNHCR recommends that relevant legislative acts are reviewed with the aim of ensuring that the principle of the best interests of the child, as well as the provisions in Articles 9, 10 and 16 of the CRC are fully incorporated into the Swedish legislation, and applied in practice.

**UNHCR Regional Representation for Northern Europe**

*14 October 2016*

---

35 Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2016752-om-tillfalliga-begransningar-av\\_sfs-2016-752](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2016752-om-tillfalliga-begransningar-av_sfs-2016-752)