

# Children behind bars

A vulnerability approach to the Norwegian practice of immigration detention of asylum-seeking children

Candidate number: 8009

Submission deadline: 15 May 2016

Supervisor: Kjetil Mujezinović Larsen

Number of words: 18 362



## **Acknowledgement**

I wish to sincerely thank Kjetil Mujezinović Larsen for being one of the most inspiring professors I have ever met and for being an excellent supervisor. He has challenged me to become the most ambitious version of myself. His constructive feedback and an eye for detail have been of great help.

Thank you very much to Fritt Ord for supporting the thesis financially and a special thanks to the Norwegian Centre for Human Rights for providing a highly inspiring and challenging master's programme.

I also want to give a big shout out to my lovely squad on the third floor— Zoë Eunjae Lee, Eivind Digranes, Inga Marie Nymo Riseth and Marianne Angvik— for sharing endless moments of joy and despair. I could not have done it without you.

Lastly, I want to thank my family for always believing in me and supporting my studies. For this I am forever grateful.

*Stine Solvoll Navarsete,*

*Oslo, 15.05.2016.*

## **Abbreviations**

CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
NOAS	Norwegian Organization for Asylum Seekers
PU	The National Police Immigration Service
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

## Table of contents

<b>1</b>	<b>INTRODUCTION .....</b>	<b>1</b>
1.1	Background.....	1
1.2	Increased immigration control: On behalf of children's rights?.....	3
1.3	Definitions and limitations .....	5
1.4	Methodology.....	7
1.5	Reader's Guide .....	10
<b>2</b>	<b>PARTICULAR VULNERABILITY OF ASYLUM-SEEKING CHILDREN... ..</b>	<b>11</b>
2.1	Vulnerability of asylum-seeking children in human rights law .....	11
2.2	The Vulnerability theory .....	14
2.2.1	The Vulnerability Paradox: Particular and Universal vulnerability.....	15
2.2.2	Potential backlash of vulnerable groups .....	16
2.2.3	Resilient, not invulnerable .....	18
2.3	Concluding remarks.....	19
<b>3</b>	<b>NORWAY'S IMMIGRATION CONSIDERATIONS VERSUS THE BEST INTERESTS OF THE CHILD.....</b>	<b>21</b>
3.1	Norway's immigration considerations.....	21
3.1.1	Increased use of immigration detention .....	21
3.1.2	Immigration detention of asylum-seeking children .....	22
3.1.3	Critique of Norway's practice of immigration detention.....	24
3.2	The best interests of the child .....	25
3.2.1	A best interest assessment.....	25

3.2.2	The best interest principle as a safeguard against detention .....	29
3.3	Concluding remarks.....	31
<b>4</b>	<b>THE BALANCING TEST: WHICH IS THE OVERRIDING INTEREST IN THE NORWEGIAN CONTEXT? .....</b>	<b>32</b>
4.1	A balancing of interests: The State versus the individual .....	32
4.1.1	The principle of proportionality .....	32
4.1.2	Proportionality <i>stricto sensu</i> .....	34
4.2	The best interests of the child: A primary or <i>the</i> primary consideration?.....	36
4.2.1	The burden of proof rests on the State .....	36
4.2.2	An overriding principle against non-rights interests .....	38
4.3	Immigration detention: In the best interest of the child or the state? .....	39
4.3.1	The weight added to the Norway's immigration considerations.....	39
4.3.2	Immigration detention of children based on the status of parents .....	41
4.4	Concluding remarks.....	43
<b>5</b>	<b>THE BALANCING TEST SEEN THROUGH A VULNERABILITY LENS... 44</b>	
5.1	Perceptions of vulnerability and its consequences .....	44
5.2	A paternalistic protection approach .....	45
5.2.1	Asylum-seeking children seen as a homogeneous vulnerable group .....	45
5.2.2	Undermining asylum-seeking children as legal subjects .....	48
5.3	Are asylum-seeking children different from Norwegian children? .....	49
5.4	Looking beyond vulnerability .....	52
5.4.1	Identifying resilience.....	52
5.4.2	Supporting resilience.....	54

5.5	Concluding remarks.....	55
<b>6</b>	<b>CONCLUSION .....</b>	<b>57</b>
<b>7</b>	<b>LIST OF REFERENCES.....</b>	<b>59</b>

# 1 Introduction

## 1.1 Background

In 2014, the two year old boy, Wahaj Ali, was kept in immigration detention at Trandum, Norway's only official detention centre, for 11 weeks in relation to the deportation of him and his parents back to Afghanistan.<sup>1</sup> Across the world, thousands of children are being held in immigration detention centres, a practice which has demonstrated to have serious damaging effects on children's well-being. Consequently, on the 25<sup>th</sup> anniversary of the Convention on the Rights of the Child (CRC), the UN High Commissioner for Refugees (UNHCR), Antonio Guterres, urgently called on States to end this practice as it "has devastating effect on the physical, emotional and psychological development of these children".<sup>2</sup> Additionally, he argued that "the practice of putting children in immigration detention is in violation of the CRC in many respects and it should be stopped".<sup>3</sup> In 2014, the Norwegian Government voted in favour of prohibiting immigration detention of children in the Council of Europe (CoE).<sup>4</sup> Paradoxically, 2014 was also the year when 330 asylum-seeking children, an increase of 44 per cent from 2013, were detained in Norway.<sup>5</sup>

As a result, Norway is in a position in which it needs to balance its interests in immigration control with its obligations under international human rights law to protect the rights and liberties of asylum-seeking children. According to paragraph 38(3) of the Norwegian Immigration Act, *the best interest principle* of Article 3(1) in the CRC is an important condition for determining the humanitarian needs of the child in this balancing test.<sup>6</sup> Further, *the best interests of the child* is a particularly interesting element to discuss in the

---

<sup>1</sup> Brakstad, T.H.S. 2014.

<sup>2</sup> UNHCR 2014.

<sup>3</sup> Ibid.

<sup>4</sup> CoE 2014.

<sup>5</sup> NOAS 2014 p.7. There are no updated numbers from 2015.

<sup>6</sup> The Norwegian Immigration Act para 38(3).

balancing test as, in the Norwegian context, it is seen to be in the best interests of the child to be detained together with his or her parents.<sup>7</sup>

Following the recommendations of the UNHCR, “children who arrive in another country in search of international protection are extremely vulnerable and have specific needs”.<sup>8</sup> Therefore, in relation to cases of immigration detention of asylum-seeking children, this particular vulnerability should be an essential part of their best interest assessment. However, whereas the concept of vulnerability is aimed at increasing the protection of these individuals, this thesis seeks to argue otherwise. At present, it seems unclear whether the current balancing test between Norway’s immigration considerations and the best interests of the child in cases of immigration detention is weighed in favour of the asylum-seeking child or the State. While previous research has shown that the practice of immigration detention of children is in violation of international human rights law, it has not pointed to any of the potential underlying causes of this result. Is it in the best interests of asylum-seeking children to be detained together with their parents due to their particular vulnerability, or are the perceptions of their vulnerability making the State decide what is in their best interests? As such, this thesis seeks to analyse this relationship between the State’s immigration considerations and the best interests of the child, and examine whether the particular vulnerability of asylum-seeking children can reveal potential underlying challenges to the current outcome of the balancing test. Accordingly, the research question is as follows:

*How do perceptions of vulnerability of asylum-seeking children influence the balancing test between Norway’s immigration considerations and the best interests of the child in cases of immigration detention?*

In order to support the analysis of the thesis and answer the posed research question, the following sub-questions are added to the analysis:

---

<sup>7</sup> Ot.prp. nr.28 (2006-2007) para 3.5.7 p.14.

<sup>8</sup> UNHCR 2014.



- I. How does the human rights regime acknowledge the particular vulnerability of asylum-seeking children?
- II. How are Norway's immigration considerations and the best interests of the child balanced in cases of immigration detention, and what weight is added to the competing interests?
- III. How can the concept of vulnerability be applied to the balancing test between Norway's immigration considerations and the best interests of the child?

## **1.2 Increased immigration control: On behalf of children's rights?**

As many as 30,000 people applied for asylum in Norway in 2015.<sup>9</sup> As a result, the Norwegian State has allocated major resources to its immigration control. One of the main priorities of the Norwegian immigration policy has been to create an effective return process of those asylum-seekers who have had their request for asylum denied. To achieve this, the Norwegian State has increased its practice of immigration detention to ensure effective deportations, particularly in cases where there is a risk that the asylum-seeker will abscond after being denied asylum. One group particularly influenced by this policy is asylum-seeking children. According to the CoE:

Despite improvements in legislation and practice in some European countries, tens of thousands of migrant children still end up in detention every year. The practice is contrary to the best interest of the child and a clear and unequivocal child rights violation.<sup>10</sup>

Detention of children is not prohibited in international human rights law, but it is emphasised that in order to detain a child it should be “in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.<sup>11</sup> Furthermore, the High Commissioner of Human Rights has stressed that immigration

---

<sup>9</sup> UDI 2016.

<sup>10</sup> CoE 2014.

<sup>11</sup> CRC Art.37(b).

detention of families with children is one of the major challenges for European States' compliance with children's rights.<sup>12</sup>

As the number of refugees and asylum-seekers arriving in Norway increases, the practice of immigration detention has increased accordingly. With the high number of refugees and asylum-seekers that came to in Norway in 2015, the Norwegian State proposed 40 new immigration considerations to increase and improve its immigration control.<sup>13</sup> Especially two of these suggestions, the increased possibility to secure deportation of asylum seekers whose applications have been denied and the increased focus on identity assessments respectively, are examples of immigration considerations that might increase the practice of immigration detention of asylum-seeking children in Norway. Additionally, the proposed budget for 2016 suggests an additional 80 million NOK to complete the extension of the detention centre at Trandum with 90 new spots. This development is particularly worrying considering the critique Norway has received on its practice of immigration detention of children. In both 2014 and 2015, the Norwegian Organization for Asylum Seekers (NOAS) found the practice of detaining asylum-seeking children together with their parents to be in violation of both the Norwegian Constitution and international human rights law.<sup>14</sup> Additionally, a recent report from the Parliamentary Ombudsman also found Trandum to be an insufficient place to keep children due to its social environment that potentially could cause long-term psychological damages to the child affected.<sup>15</sup> Considering Norway's international commitment to prohibit immigration detention of children, this situation portrays a divide between Norway's role as a protector of children's rights and its interests in increased immigration control.

According to Christina Boswell (2005), this situation demonstrates the paradox of Western liberal democracies; on the one side is the obligation to ensure the values of equality and solidarity with the individuals within its jurisdiction and on the other side is the obligation

---

<sup>12</sup> IDC 2014.

<sup>13</sup> The Norwegian Government 2015.

<sup>14</sup> See NOAS 2014 p.12, NOAS 2015 p.13.

<sup>15</sup> The Parliamentary Ombudsman 2015 p.32.

to protect its citizens and borders.<sup>16</sup> By being a welfare state, Norway needs to keep a strict and regulated immigration control in order to secure that the welfare state is not undermined. However, as being ranked as one of the best countries in the world to live in and an international promoter and front figure for the protection of human rights, the point of departure of this thesis is that this role must be maintained when it comes to the protection of children's rights.<sup>17</sup> The 6<sup>th</sup> of October 2016, the Norwegian Government is due to report to the CRC Committee on its compliance with the CRC. With an increasing practice of immigration detention of asylum-seeking children, this establishes an interesting framework for the discussion of this thesis. How can the practice of immigration detention of asylum-seeking children increase in a State where the promotion of children's rights is one of the top priorities? And how are the different interests of the balancing test weighed against each other if increased immigration detention is the outcome? As such, this thesis seeks to bring new insight into the current balancing test between Norway's immigration considerations and the best interests of the child by analysing it from a different point of view, through the concept of vulnerability as attached to the identity of the asylum-seeking child. The aim of this paper is to reveal how the State's perceptions of the vulnerability of asylum-seeking children influence the current outcome of the balancing test and to analyse how the concept of vulnerability can be identified as one of the underlying challenges.

### **1.3 Definitions and limitations**

For the purpose of the thesis it is necessary to introduce some of the core concepts that will be discussed throughout the analysis. As already mentioned, and in future use, the term *balancing test* in this thesis it refers to the process of weighing two competing interests against each other in order to understand how the relationship between the two is balanced. For the purpose of this thesis it will be the balancing between the State's immigration considerations and the best interests of the child. Furthermore, when discussing *immigration detention* of asylum-seeking children, it is in reference to the detention centre

---

<sup>16</sup> Boswell 2005 p.7.

<sup>17</sup> See Henderson 2015.

at Trandum, which is Norway's only officially designated detention centre. Even though it is referred to as detention and not prison, the practice of detention is the same as for a prison. Immigration detention at Trandum means that the asylum-seeker is deprived of the right to liberty; located in a closed facility, is only allowed to go outside at certain times and is not permitted to leave the detention centre at will. While an asylum-seeker can be detained for different reasons related to his or her migrant status, it is the immigration detention prior to deportation that will be the focus of this thesis. Moreover, when referring to *asylum-seekers* in this thesis, it refers to "persons applying for refugee status pursuant to the definition of a refugee in the 1951 Convention".<sup>18</sup> However, it is important to note that the asylum-seeking children discussed in this thesis are accompanying their parents in detention where the parents have received a negative decision on their request for asylum and are awaiting deportation back to their country of origin. Lastly, the research question introduces the term *perceptions* of vulnerability. It should be made explicit that with this reference of inquiry the present author does not seek to identify direct references to the vulnerability of asylum-seeking children in the balancing test between the State's immigration considerations and the best interests of the child, but rather to identify these perceptions of vulnerability through the recommendations from the human rights regime and through the acts and arguments of the State in relation to its practice of immigration detention of asylum-seeking children.

Furthermore, the thesis will limit its discussion to asylum-seeking children under the age of 15 years old accompanied by their parents. This limitation is due to several reasons. First, asylum-seeking children are vulnerable by being children and due to their status as asylum-seekers. Additionally, by accompanying their parents they are also in a situation that might increase their vulnerability as their agency is at risk of being made invisible in the shadow of their parents. Secondly, with a denied request for asylum, these children, together with their parents, are illegal immigrants in Norway which makes it an interesting topic for discussion in relation to Norway's increased immigration control. Lastly, research has

---

<sup>18</sup> UNHCR 2012 p.10.

demonstrated that children accompanied by their parents are more likely to be held in immigration detention than unaccompanied children, which makes it more relevant for the discussion of this thesis to focus on this group of children in particular.<sup>19</sup>

#### 1.4 Methodology

In view of the research question of this thesis, a multidisciplinary research approach is most suitable in achieving the sought aim of the analysis. Furthermore, as the relationship between Norway's immigration considerations and the best interests of the child is embedded both in a legal and a socio-political context, a research approach that combines these two contexts will both broaden the research design and open for an analysis that moves beyond a pure legal discussion of the balancing test. Consequently, this thesis applies the legal tradition of *law in context*, which takes problems in society as the starting point for analysis; in contrast to the tradition of *black-letter law*, which has its starting point from law itself.<sup>20</sup> As an example, immigration regulation and the best interests of the child are both considerations represented in law, through the Norwegian Immigration Act and the CRC respectively. However, the weight attached to the competing interests in the balancing test and the discussion on the State's perceptions of vulnerability cannot be analysed solely from the sources of law. As such, by looking at law in context, the thesis will be able to identify both the problems arising from the law itself and those that are produced from other instances within society.<sup>21</sup>

The thesis is conducted as a qualitative desk-study applying both primary and secondary sources. The primary sources applied in the thesis is represented through international human rights treaties, particularly the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Rights of the Child* (CRC) and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), in addition to domestic law as well as both domestic jurisprudence from the Supreme Court of Norway

---

<sup>19</sup> Husabø & Suominen 2011 p. 32.

<sup>20</sup> McConville & Chui 2007 p. 1-5.

<sup>21</sup> Ibid.

and Oslo District Court and jurisprudence from the European Court of Human Rights (ECtHR). Due to the thesis' special attention to children's rights, the CRC is of particular relevance for the analysis in addition to 'soft law' sources such as General Comments from the Committee on the Rights of the Child (CRC Committee). The treaties are interpreted in accordance with Article 31 of the *Vienna Convention on the Law of Treaties* (VCLT) and Article 38 of the *Statute of the International Court of Justice* (ICJ). The CRC, together with the other international human rights treaties, will provide the thesis with the necessary framework for analysing and discussing the balancing between Norway's immigration considerations and the best interests of the child. Additionally, the CRC represents the best interest principle, and is used as the main source of analysis when addressing the weight attached to this principle in the balancing test.

However, since the thesis builds on a socio-legal approach, it also applies secondary sources by relevant scholars on the topic of both immigration considerations and the best interest principle. In addition to the literature explaining the two competing interests of the balancing test, the thesis will build its arguments on literature on the concept of vulnerability, primarily from the vulnerability theory developed by the scholar Martha Albertson Fineman, one of the leading voices in the vulnerability debate. However, as several skilled authors have contributed to this debate, the thesis will also include their arguments and critical views on the theory of vulnerability. Especially the two authors Anna Grear (2010) and Bryan Turner (2006) have contributed with useful comments on the concept of vulnerability, whereas a recent article by Kirsten Sandberg (2015) provides both critical and supportive arguments to the theory. Additionally, the analysis in the thesis will draw on supporting statements from John Tobin (2015) on the concept of vulnerability in order to emphasise some of the findings. However, while these arguments will support and provide different views to the discussion, the main elements used for the vulnerability discussion will be represented by Fineman's theory, as the structure and arguments of the original theory provides the most applicable framework for the research question of this thesis.

Additionally, in order to discuss the balancing test between Norway's immigration considerations and the best interests of the child, it is necessary to build on secondary sources that reflect the current immigration policy of the Norwegian State and their arguments as well as the meaning and weight of the best interest principle beyond the representation provided in the CRC. As such, the thesis will also draw information from official documents deriving from the UN and EU, governmental documents from the Norwegian Government and official reports from private organisations and news articles. This provides the opportunity to identify the State's argument for immigration detention of asylum-seeking children as well as the public debate surrounding the situation of asylum-seeking children in Norway.

During the starting phase of this thesis I was told that due to the current pressing situation of high numbers of refugees and asylum-seekers coming to Norway, it would be difficult for me to get access to the premises at Trandum for further investigation. As a result, I have chosen not to conduct interviews, but instead to focus primarily on document analysis in order to understand how the relationship between Norway's immigration considerations and the best interests of the child is balanced. While the views and opinions of the children who have experienced immigration detention at Trandum would provide valuable information in discussing the best interests of the child, I find the thesis to analyse the Norwegian practice of immigration detention of asylum-seeking children in a theoretical manner which provides the reader with an insightful understanding of some of the underlying challenges to the balancing test on a more systematic level. Lastly, it is important to keep in mind that I strive to remove any potential biases and conflict of interests I might have in this debate. In spring 2015 I did an internship with NOAS and, as such, I have personally observed and learned the great difficulties that many asylum-seekers face in Norway. However, keeping this in mind I seek to be professional in my analysis and show transparency of my arguments through the data collected.

## 1.5 Reader's Guide

The following analysis strategically introduces the different elements necessary to analyse the posed research question of this thesis. The thesis is divided into *six* main chapters seeking to analyse and understand the current outcome of the balancing test between Norway's immigration considerations and the best interests of child seen through a vulnerability lens. In order to understand the framework and aim of the thesis, *chapter one* presents the situation of increased practice of immigration detention in Norway, the research question, methodology and limitations to the thesis in order to provide the reader with a point of departure for further reading. *Chapter two* will continue to examine the key element of the thesis, which is the particular vulnerability of asylum-seeking children as acknowledged through the human rights regime. By discussing the ECtHR's jurisprudence on vulnerability as a group-centred concept attached to asylum-seeking children, this opens for a further discussion on the role of vulnerability in the balancing test of the thesis. As such, the chapter continues with a theoretical approach to the concept of vulnerability through the vulnerability theory developed by the scholar Martha Albertson Fineman to provide insight into the potential backlash of a vulnerability approach to the protection of asylum-seeking children. In order to provide a framework for analysis, *chapter three* moves on to explore the State's immigration considerations and the best interests of the child as the two main elements of the balancing test. *Chapter four* will then continue to analyse how these two interests are weighed on the balancing scale in the context of Norway today to see if there are any potential weaknesses to the balancing test. However, in order to understand the process of balancing, the chapter starts with a discussion on the principle of proportionality, in a broad and strict sense, as a framework for the balancing test. Following the aforementioned analysis, *chapter five* will revisit the balancing between the interests of the State and the interests of asylum-seeking children through a vulnerability approach in order to reveal potential underlying challenges to the current outcome of the balancing test. The thesis ends with *chapter six*, which provides a short conclusion.



## 2 Particular vulnerability of asylum-seeking children

Whereas the Norwegian State's immigration considerations and the best interests of the child are the two main interests in the practice of immigration detention, the concept of vulnerability presents an interesting element to the discussion of the balancing test. Within the human rights regime, asylum-seeking children are seen as a particular vulnerable group demanding special protection measures from States. However, as demonstrated by the increasing number of detained asylum-seeking children, these individuals often end up in situations that increase their vulnerability. As such, the following chapter seeks to analyse the concept of vulnerability as a group-centred concept attached to asylum-seeking children and examine how it can complement the discussion on the balancing test in this thesis.

### 2.1 Vulnerability of asylum-seeking children in human rights law

The concept of vulnerability as a characteristic attached to specific marginalised groups was first introduced in 2001 by the European Court of Human Rights (ECtHR) in the case of *Chapman v. the United Kingdom*.<sup>22</sup> Whereas the concept of vulnerability as applied in this case concerned a woman's membership in the Roma minority, the case still established group vulnerability as an important element within the ECtHR's jurisprudence.<sup>23</sup> After the case of *Chapman*, the Court developed and broadened its application of the concept to also encompass asylum-seekers and asylum-seeking children respectively. In the two cases *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* and *Muskhadzhiyeva and Others v. Belgium*, the Court found that, both when accompanied by parents and unaccompanied, asylum-seeking children constitute an extremely vulnerable group in need of special protection measures from States.<sup>24</sup> However, it was not until the case of *M.S.S. v Belgium* in 2011 that the concept of group-centred vulnerability was particularly applied to asylum-seekers. According to the ECtHR, the concept of vulnerability is an inherent characteristic

---

<sup>22</sup> *Chapman v. The United Kingdom* 2001 para 96.

<sup>23</sup> Peroni & Timmer 2013 p.1063.

<sup>24</sup> *Muskhadzhiyeva and Others v Belgium* 2010; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* 2006 para 103.

in the status of an asylum-seeker and, as such, asylum-seekers as a group.<sup>25</sup> As a result, it was argued that asylum-seekers constitute a “particularly underprivileged and vulnerable population group in need of special protection”.<sup>26</sup> Thus, instead of assessing the individual vulnerability of each asylum-seeker based on their personal experiences and capacities, the ECtHR “applies vulnerability to asylum-seekers as a group-centred concept”.<sup>27</sup> According to the Court, this was a necessary response to the international consensus on providing special protection measures towards particularly marginalised individuals.<sup>28</sup>

This application of group-centred vulnerability was further demonstrated in relation to asylum-seeking children through the case of *Popov v. France* from 2012 concerning the immigration detention of two minor asylum-seeking children and their parents.<sup>29</sup> In addition to its focus on group-centred vulnerability, the case is also of particular relevance to the balancing test in this thesis as it balances the vulnerability of asylum-seeking children against the State’s immigration considerations. According to the ECtHR, “the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant”.<sup>30</sup> Consequently, the Court found a violation of Article 3 of the ECHR on the prohibition of torture, inhuman or degrading treatment or punishment based on the particular vulnerability of the children, a vulnerability that the Court found to be the primary concern in decisions on detention and which should override potential immigration considerations.<sup>31</sup> Additionally, the ECtHR found that, “children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker statuses”.<sup>32</sup> As a result, this particular

---

<sup>25</sup> M.S.S. v. Belgium and Greece 2011 para 233.

<sup>26</sup> Ibid para 251.

<sup>27</sup> Brandl & Czech 2015 p.249.

<sup>28</sup> M.S.S. v. Belgium and Greece 2011 para 251. See also Oršuš and Others v. Croatia 2010 para 147.

<sup>29</sup> Popov v. France 2012.

<sup>30</sup> Ibid para 91.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

vulnerability of asylum-seeking children is to be a crucial consideration in the assessment of their detention.<sup>33</sup>

In addition to the acknowledgement of the concept of vulnerability within the ECtHR; other human rights bodies have also issued the particular vulnerability of asylum-seeking children to be an important element in decisions on detention. According to the UNHCR, immigration detention of children can have a serious negative effect on their human dignity due to their particular vulnerability in these situations, both alone and when accompanied by their parents. Therefore, children should never be detained.<sup>34</sup> This concern was further issued by the CRC Committee during its Days of General Discussions in 2012 where one of the highlighted issues of the debate was the particular vulnerability of asylum-seeking children and their enjoyment of rights under the CRC.<sup>35</sup> Even if the CRC is to provide equal protection to all children as a response to their shared vulnerability; the CRC acknowledges that some children will be more vulnerable than others requiring special attention from States. Asylum-seeking children are one such group, which is demonstrated through Article 22 of the CRC providing special protection to asylum-seeking children.<sup>36</sup> Taking this into consideration, it is important to acknowledge that whereas the universal vulnerability associated with children in general calls for love and protection, the particular vulnerability associated with the asylum-seeker part of the child stands at risk of bringing with it negative associations as a result of the current media debate on increasing numbers of refugees crossing the borders of Europe. Looking to Norway, the particular vulnerability of asylum-seeking children represents a complex vulnerability that puts them in a different situation than Norwegian children.

As demonstrated by the ECtHR's jurisprudence and the statements from the CRC Committee and the UNHCR; the particular vulnerability of asylum-seeking children as a

---

<sup>33</sup> Ibid para 119.

<sup>34</sup> UNHCR 2014 p.5.

<sup>35</sup> CRC Committee 2012a.

<sup>36</sup> CRC Art.22.

group has become a known concept in the human rights regime and represents, as such, an important element to include when analysing the balancing test between Norway's immigration considerations and the best interests of the child in cases of immigration detention. If immigration detention of asylum-seeking children in Norway is an increasing practice due to Norway's immigration control, is the particular and complex vulnerability of asylum-seeking children as issued through the human rights regime acknowledged in the balancing test, and if so, how does it influence the outcome? To be able to apply this vulnerability approach to the balancing test in a structured and analytical manner, the thesis will draw further support from the theory of vulnerability as developed and presented by the legal scholar, feminist and political philosopher Martha Albertson Fineman.

## **2.2 The Vulnerability theory**

Originally, Martha Fineman's theory of vulnerability was designated to an American audience as a 'disguised human rights discourse' but has later become a significant theory to analyse justice within the human rights discourse.<sup>37</sup> Considering that Fineman's vulnerability theory is a broad and complex theory on the concept of vulnerability, the thesis will draw support from three core elements of the theory. First, it will draw on Fineman's presentation of vulnerability as both a particular and a universal character of human beings and how this establish the so-called paradox of the vulnerability theory making the concept of vulnerability difficult to apply as a protection approach. Secondly, it will draw support from Fineman's critique of designating particular individuals as vulnerable groups within the human rights paradigm and how this can potentially influence the human rights protection of these individuals. Lastly, the thesis will draw on Fineman's presentation of vulnerability as a potential tool to strengthen the resilience within individuals to overcome the particular vulnerable situation in which they find themselves. By examining these three elements of the vulnerability theory, this chapter seeks to establish a framework for analysing how the vulnerability of asylum-seeking children as issued by the human rights regime can potentially be an influencing element for the

---

<sup>37</sup> Fineman 2013 p.13.

outcome of the balancing test between Norway's immigration considerations and the best interest of the child in cases of immigration detention.

### 2.2.1 The Vulnerability Paradox: Particular and Universal vulnerability

According to Fineman, vulnerability is universal, constant and unavoidable and, as such, a characteristic experienced by all human beings on different levels. Considering that vulnerability is something we all inhabit, adults as well as children, Fineman argues it to be the "characteristic that positions us in relation to each other as human beings and also suggests a relationship between the individual and the state".<sup>38</sup> This shared vulnerability is further supported by other authors on vulnerability, such as Bryan Turner (2006) and Anna Gear (2010), arguing this shared vulnerability to constitute the very foundation on which human rights are defined.<sup>39</sup> According to Gear, this universal vulnerability of human beings should be the starting point for international human rights protection; the vulnerable human being, "the human being without citizenship, the human being as juridically naked and excluded".<sup>40</sup> Establishing this relationship between the State and the vulnerable individual calls for the State to respect, protect and fulfil the rights of all human beings as a response to our common vulnerability.<sup>41</sup> Arguably, the State's protection approach should be equal for all children within its jurisdiction, asylum-seeking children and Norwegian children alike, due to their shared vulnerability. However, is it possible to protect the most vulnerable children in society without adding an emphasis on their particular vulnerability?

This represents the paradox of the vulnerability theory. While all children share a universal vulnerability by just being children, the vulnerability theory also acknowledges the particular vulnerability of certain individuals within society, which presents a protection dilemma for the State. According to Fineman, it is the balancing of these two categories of vulnerability, the universal and particular, that establishes the paradox of the vulnerability theory and represents the dilemma of applying the concept of vulnerability as a protection

---

<sup>38</sup> Fineman 2010 p.255.

<sup>39</sup> See Turner 2006 p.6 and Gear 2010 p.166

<sup>40</sup> Gear 2010 p.166.

<sup>41</sup> Fineman 2013 p.13.

approach.<sup>42</sup> Due to different economic and social contexts, human beings will always experience different and unique situations and their vulnerability will change and develop over time.<sup>43</sup> Whereas asylum-seeking children require equal human rights protection as Norwegian children, they also require a special protection due to their particular vulnerable situation of being asylum-seekers. Thus, asylum-seeking children represent a complex vulnerability, being both universally vulnerable as children and particularly vulnerable as asylum-seekers. According to Gear, this demonstrates the complexity of the relationship between vulnerability and human rights protection; whereas human rights are supposed to protect all individuals equally due to their shared vulnerability this protection does not always benefit the most vulnerable.<sup>44</sup> As such, the paradox of the vulnerability theory presents an interesting framework for discussing asylum-seeking children's vulnerability as an element to the balancing test of this thesis as it demonstrates a complex position for the human rights protection of asylum-seeking children within the Norwegian society.

### 2.2.2 Potential backlash of vulnerable groups

As a response to this paradox of the vulnerability theory and the concern posed by Gear; the human rights regime seeks to increase the human rights protection of the most vulnerable individuals in society by designating them as a particular vulnerable group and pointing them out to States. While this would seem as a natural and suitable solution for the protection of these vulnerable individuals, such as asylum-seeking children, Fineman refrains from this practice. While Fineman acknowledges the particular vulnerable situation of asylum-seeking children, she refrains from the practice of designating these individuals as a vulnerable group as it will further increase their vulnerability and undermine their human rights protection. As discussed in the beginning of this chapter, the ECtHR stresses the importance of including the particular vulnerability of asylum-seeking children in the best interest assessment in order to fully understand the child's situation. Looking at

---

<sup>42</sup> Fineman 2010 p.268.

<sup>43</sup> Fineman 2013 p.21.

<sup>44</sup> Gear 2010 p.96-113.

Fineman's vulnerability theory, this protection approach proves to be problematic in three ways.

First, Fineman argues that to use the term vulnerable to set aside some groups considered disadvantaged within the larger society often results in their further stigmatisation as the individuals pointed out to States as a particular vulnerable group are usually already marginalised in society. Additionally, designating these individuals as a particular vulnerable group will further marginalise them as "the term vulnerable population has an air of victimhood, deprivation, dependency, or pathology attached to it".<sup>45</sup> Thus, instead of increasing the human rights protection of the individuals within these groups, it rather increases their stigmatisation and appoints a negative association towards them.<sup>46</sup> Accordingly, the designation of individuals as vulnerable groups will increase the attention from States, but the result is likely to be further stigmatisation supplied with "surveillance and regulation".<sup>47</sup> Additionally, in the situation of asylum-seeking children, the regulation is likely to be of a paternalistic character as their particular vulnerability places them "outside of the protection of the social contract as it is applied to others".<sup>48</sup>

Secondly, Fineman argues that designating individuals as vulnerable groups establishes a risk of making the differences between the individuals within that group invisible.<sup>49</sup> Whereas asylum-seeking children share the same experience of being in flight and find themselves in a particularly vulnerable situation, the individual experience of that situation and the effect it has on that particular child taking the personal background, age and personality into consideration is not similar across the group. As stated by Sandberg (2015), ideally "measures should be adapted to each and every individual child and his or her particular vulnerability".<sup>50</sup> Instead, the practice of defining a group as vulnerable based

---

<sup>45</sup> Fineman 2010 p.266.

<sup>46</sup> Ibid.

<sup>47</sup> Fineman 2013 p.16.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Sandberg 2015 p.237.

on one or two similar characteristics such as being a child and being an asylum-seeker, risks masking the differences between these individuals.

Thirdly, Fineman argues that by defining one group as particularly vulnerable and in need of special protection from the State, there is a risk of excluding this group from the rest of society by hiding the similarities between individuals within the group and the individuals outside the group.<sup>51</sup> However, as criticised by Sandberg, if these particular vulnerable children are not mentioned to States there might be a risk that these children and their rights, for example the right to be heard, become invisible to States.<sup>52</sup> As a solution to this concern, Sandberg introduces the CRC Committee's recent change of communicating 'vulnerable groups of children' to 'children in vulnerable situations'. On the other hand, as these children still tend to be grouped as vulnerable, Sandberg acknowledges Fineman's concern.<sup>53</sup> Consequently, by designating asylum-seeking children as a particular vulnerable group, there is a risk that Norwegian children will represent the 'normal' state of being. According to Fineman, this creates a situation where it is believed that those individuals outside the vulnerable group are seen as 'invulnerable'.<sup>54</sup>

### 2.2.3 Resilient, not invulnerable

However, within the vulnerability theory there is no such thing as being invulnerable. According to Fineman, the opposite of vulnerable is not invulnerable, but resilient, and to become resilient we are dependent upon the state to provide us with the necessary assets and possibilities to acknowledge this resilience.<sup>55</sup> A central component of the vulnerability theory is therefore to analyse how the State is assisting and supporting this resilience within human beings. This view is supported by Turner stating that, the existence of our universal vulnerability does not automatically produce protection as a response to that vulnerability. Instead, our shared vulnerability has the possibility to demand institutions and regulations

---

<sup>51</sup> Fineman 2013 p.16.

<sup>52</sup> Sandberg 2015 p.236.

<sup>53</sup> Ibid.

<sup>54</sup> Fineman 2013 p.16.

<sup>55</sup> Fineman 2010 p.269.



from States, which can assist in overcoming this vulnerability.<sup>56</sup> This focus on resilience is further issued by Sandberg who states that; “children must not only be seen as vulnerable, but as capable as well”.<sup>57</sup> Fineman furthers this argument stating that, “under the vulnerability analysis a state has an obligation not to tolerate a system that unduly privileges any group of citizens over others”.<sup>58</sup> However, if the state seems to tolerate an unequal distribution of privileges, the state would then have an obligation “to offer explanation justifying the disparate circumstances. As a solution, Fineman seeks to eradicate the use of vulnerability as a weak and stigmatising concept and rather portray it as a powerful tool with “the potential to define an obligation for the state to ensure a richer and more robust guarantee of equality”.<sup>59</sup> Fineman’s vulnerability theory therefore seeks to move beyond the concept of vulnerability as a characteristic only appointed to certain vulnerable individuals of society to a concept “defining the very meaning of what it means to be human”.<sup>60</sup> However, to promote and protect this resilience of children, there is a need for structures that identify children not only as a vulnerable group, but also as individual agents of change.

### **2.3 Concluding remarks**

The above discussion of Fineman’s vulnerability theory as a theoretical approach to the ECtHR’s jurisprudence on the particular vulnerability of asylum-seeking children demonstrates the potential pitfalls of applying the concept of vulnerability as a protection approach to the more marginalised individuals in society. This provides an interesting framework for the analysis of the balancing test between Norway’s immigration considerations and the best interests of the child in cases of immigration detention considering how the vulnerability concept is attached to asylum-seeking children within the human rights regime. Acknowledging the complex vulnerability of asylum-seeking children and the potential risks of referring to these children as a particular vulnerable

---

<sup>56</sup> Turner 2006 p.39-43

<sup>57</sup> Sandberg 2015 p.246

<sup>58</sup> Fineman 2010 p.274.

<sup>59</sup> Fineman 2008 p.2.

<sup>60</sup> Fineman 2010 p.266.

group provides an interesting starting point for discussion. Can it be that States have developed perceptions of the vulnerability of asylum-seeking children as a response to the recommendations from the human rights regime to identify asylum-seeking children as a particular vulnerable group, and can this have an influence on the current outcome of the balancing test? If this is the case, will the influence be characterised by the potential dangers posed by Martha Fineman's theory of vulnerability, or has the concept of vulnerability the potential to remove itself from the negative connotations attached to it and reveal the resilience within human beings? In order to analyse the balancing test through this vulnerability approach we first need to introduce the two interests on the balancing scale, the Norwegian State's immigration considerations and the best interest of the child respectively.

### **3 Norway's immigration considerations versus the best interests of the child**

Whereas immigration considerations are usually put up against the humanitarian needs of the applicant in asylum cases; in cases concerning children, the best interest of the child is an essential consideration to discuss in relation to their humanitarian needs. Therefore, when discussing immigration detention of asylum-seeking children, it is the balancing of the interests of the Norwegian State in keeping a strict immigration control against the best interests of the child as protected under Article 3 of the CRC which will be analysed. However, before analysing the balancing test itself, it is necessary to get a deeper understanding of the two interests and what weight can be added to the different sides on the balancing scale. Accordingly, the following chapter seeks to analyse the different arguments for the State's interest in continuing the practice of immigration detention of asylum-seeking children and the interests of the asylum-seeking child.

#### **3.1 Norway's immigration considerations**

##### **3.1.1 Increased use of immigration detention**

A country's immigration considerations usually reflect the current challenges related to the high number of refugees and asylum-seekers arriving to the country.<sup>61</sup> Following these increased numbers, the Norwegian State has throughout the latest years established a stricter immigration control, especially in relation to the practice of deportation of asylum-seekers with a denied request for asylum. In order to protect the welfare state and its citizens, it is crucial for the Norwegian State to control and act towards illegal immigrants within its jurisdiction. When being denied admission to stay in Norway, the asylum-seeker receives a deadline for when to leave the country. However, if the deadline is not upheld by the applicant, the National Police Immigration Service (Politiets Utlendingsenhet (hereafter referred to as PU)) will have the power to intervene in order to hinder that the applicant

---

<sup>61</sup> Ot.prp no.75 (2006-2007) p.145.

absconds and continues to stay illegally in the country. In 2014, as many as 14,000 illegal immigrants were registered in Norway, which poses a serious concern for the Norwegian State in protecting its welfare state and control over its citizens.<sup>62</sup> Consequently, the Norwegian State's interest in controlling this immigration and to ensure effective deportations out of the country has resulted in an increase of the use of detention as a supporting measure.

This interest in increased use of immigration detention is further signalled in the Norwegian State's budgets over the last years. Already in 2015, the Norwegian State allocated 49 million NOK for the establishment of 90 additional spots at Trandum, the only official designated detention centre in Norway controlled by PU. This trend continued in the proposed budget for 2016, where another 80 million NOK was allocated to finalise the extension of Trandum.<sup>63</sup> As a result of the increased focus on effective deportations, as many as 7,825 denied asylum-seekers were forcefully deported during 2015, 525 of these being children.<sup>64</sup> Taking these numbers into consideration in addition to the ongoing debate on the increasing number of asylum-seekers crossing the borders of Europe; there is little to suggest that the trend of immigration detention in Norway will decrease in the coming years.

### 3.1.2 Immigration detention of asylum-seeking children

Detention is the strictest measure applicable to the Norwegian State in the process of deporting denied asylum-seekers and is regulated through the Norwegian Immigration Act paragraph 106. Even though the Act provides two alternatives to detention, residence restrictions and reporting requirement respectively<sup>65</sup>, research has shown that these less intrusive means to detention are rarely used.<sup>66</sup> Detention of asylum-seekers in Norway today takes place at Trandum detention centre which has 127 spots with special rooms for

---

<sup>62</sup> Johansen et. al 2014.

<sup>63</sup> NOAS 2015b.

<sup>64</sup> Aftenposten 2016.

<sup>65</sup> Norwegian Immigration Act para 106 (c).

<sup>66</sup> NOAS 2015.

families. As mentioned, most of the cases of detention are related to asylum-seekers who have got their asylum application denied and are awaiting deportation. This was the case in 98 per cent of the detention cases in 2013 and 97 per cent of the cases in 2014.<sup>67</sup> In 2014, 4,182 asylum-seekers were put in immigration detention in Norway, 330 of them were children.<sup>68</sup> The case from 2014 of two year old boy Wahaj Ali represents the longest period a child has been held in immigration detention in Norway. In relation to the case of Wahaj Ali, the Deputy Leader of the Norwegian Labour Party stated that, “in Norway there is an absolute prohibition against putting children under the age of 15 in prison. This is not without reason. Children do not belong in prison”.<sup>69</sup> However, the practice of immigration detention of asylum-seeking children accompanying their parents in Norway is not unique to two year old Wahaj Ali.

The number of asylum-seeking children put in immigration detention in Norway increased with 44 per cent from 2013 to 2014, a total increase of 229 children.<sup>70</sup> In the Annual Report from PU, there is made no distinction between unaccompanied children and children accompanied by their parents in the official numbers of children detained at Trandum. However, the recently published report from NOAS concluded that it is primarily asylum-seeking children accompanying their parents who are being held at Trandum, which is the focus group of this thesis. One of the main reasons to this practice is related to the best interest of the child, which is one of the main elements of the balancing test in this thesis. According to the Norwegian State, it is in the best interests of the child to accompany his or her parents in detention. While this argument is often related to the risk that the parents will abscond and bring their children with them, it is also argued that the children would not be better off outside the detention centre without their family.<sup>71</sup> This is, as such, an important element to discuss in the balancing test in this thesis, however, before discussing how the practice of immigration detention of asylum-seeking children is challenging the best

---

<sup>67</sup> Ibid p.19.

<sup>68</sup> Ministry of Justice and Public Security 2014.

<sup>69</sup> Lilleås, H.S. 2014.

<sup>70</sup> NOAS 2015 p.10. There has not been published any updated numbers from 2015.

<sup>71</sup> See the assessed cases from the Oslo District Court.

interests of the child, the following section will first discuss two other concerns related to the practice of detention.

### 3.1.3 Critique of Norway's practice of immigration detention

First, in the cases assessed for this thesis, the asylum-seeking child is not always considered as the applicant of the case and is following his or her parents in detention without a separate decision. This concern is one of the main issues in the reports of NOAS on the Norwegian practice of immigration detention, their report from 2014 'Detention of Asylum Seekers' and their recently published report, 'Freedom First ' which was published in 2015 being the most relevant ones. According to NOAS, the Norwegian practice of immigration detention of asylum-seeking children is a clear violation of the Norwegian State's obligations under both the Norwegian Constitution and the International human rights treaties, particularly the CRC. This is due because of several concerns, however, NOAS particularly criticises that the practice of immigration detention does not treat asylum-seeking children as individual legal subjects.<sup>72</sup>

When the two year old boy Wahaj Ali was put in detention together with his parents in 2014, one of the major concerns that were issued in the public debate was the danger of treating asylum-seeking children as the parent's luggage without any individual decision for the child in the case.<sup>73</sup> According to the CRC Committee, in order to assess what is in the best interests of the child, it is crucial that the child is treated as an individual legal subject. According to paragraph 106 of the Norwegian Immigration Act, there are no regulations for the practice of detaining asylum-seeking children accompanying their parents. While detention of children under the age of 18 requires the case to be taken to court no later than 24 hours after the detention, there is no provision regulating the detention of minor asylum-seeking children accompanying their parents.<sup>74</sup> Additionally, paragraph 106 does not provide any age requirement for the practice of detention which

---

<sup>72</sup> NOAS 2015 p.100.

<sup>73</sup> See Hustadnes, H. 2014.

<sup>74</sup> The Norwegian Immigration Act para 106.

opens for the possibility of putting even the youngest children in the detention centre at Trandum.<sup>75</sup> With no regulation on the practice of detaining asylum-seeking children accompanying their parents, the practice has become that the child accompanies his or her parents in detention without an individual assessment.<sup>76</sup>

Secondly, NOAS has also argued the practice of asylum-seeking children accompanying their parents to Trandum to demonstrate a discriminatory practice in relation to Norwegian children in three ways. First, only foreign children under the age of 15 years old can be detained according to the Immigration Act. Secondly, whereas asylum-seeking children do not receive their own decisions regarding the immigration detention, this is a required measure if a Norwegian child is to be put in custody, say, through an institution. Lastly, there is an inconsistency when deciding the time period of the detention of asylum-seeking children whereas this is normally kept to a period of two weeks only if Norwegian children are detained.<sup>77</sup> Considering these concerns together with the Norwegian State's main argument that it is in the best interests of the child to accompany his or her parents to Trandum, it is interesting to take a closer look at the interests of the asylum-seeking child in the balancing test on immigration detention, through the best interest principle respectively.

## **3.2 The best interests of the child**

### **3.2.1 A best interest assessment**

According to the Council of Europe (CoE), the practice of immigration detention of asylum-seeking children is both “contrary to the best interest of the child and a clear and unequivocal child rights violation”.<sup>78</sup> As a solution, the CRC Committee has stated that, “States should adopt alternatives to detention that fulfil the best interests of the child along

---

<sup>75</sup> NOAS 2015 p.99.

<sup>76</sup> Ibid p.106.

<sup>77</sup> Ibid p.108.

<sup>78</sup> CoE 2014 para 1.

with their rights to liberty and family life”.<sup>79</sup> The best interest principle is as such an essential element when discussing the practice of immigration detention of asylum-seeking children and as argued by Stephen Parker (1994), the principle can also function as an important element to analyse and evaluate the laws and practices of the State.<sup>80</sup> Accordingly, this is the principle’s function when discussing the Norwegian practice of immigration detention of asylum-seeking children. The best interest principle is protected through Article 3(1) of the CRC stating 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.<sup>81</sup>

The CRC does not provide its own definition of the principle, which opens for the necessity of assessing what is in the best interests of the particular child in the particular context of a case. According to the UNHCR, such a best interest assessment should entail the well-being of the child taking into account different factors such as age, presence or absence of parents and the child’s personal experiences and situation.<sup>82</sup> Hence, to determine the best interests of the child, one of the conditions that need to be met is the child’s well-being, which is particularly interesting to the context of Norway. According to a recent report from the Parliamentary Ombudsman’s National Prevention Mechanism against Torture and Ill-treatment (hereafter ‘the Ombudsman’) after its unannounced visit at Trandum detention centre in May 2015, Trandum was found to be a highly unsuitable place for keeping children as the environment is dominated by both stress and unrest. Further, the Ombudsman issued a concern on the history of “incidents at the detention centre, including major rebellions that resulted in the smashing of furniture and fixtures, self-harm, suicide

---

<sup>79</sup> CRC Committee 2012a para 79.

<sup>80</sup> Parker 1994 p.27.

<sup>81</sup> CRC Art.3(1).

<sup>82</sup> UNHCR 2008 p.14.



attempts and the use of force”.<sup>83</sup> Additionally, the Ombudsman points to the close location of the single-women’s unit and the family unit which stands at risk of the children experiencing traumatic events, a risk which was reportedly a reality for two minors between the year of 2014 and 2015.<sup>84</sup> As such, the Ombudsman found the environment and living conditions at Trandum “not deemed to constitute a satisfactory physiological environment for children” and as such not in the best interests of the child’s well-being.<sup>85</sup>

This concern posed in the Norwegian context is further demonstrated in the international human rights community, particularly through the report ‘Captured childhood’ developed by the International Detention Coalition (IDC) in 2012. According to the report, immigration detention of children has serious damaging effects on both the physical and psychological development of the child. Additionally, the IDC stresses that even though the longer the period in detention, the greater the effects will be on the child; they also recognise that even the shortest periods in detention can have a serious impact on children’s well-being and future development.<sup>86</sup> Thereby, in order for the Norwegian practice of immigration detention to respect the well-being of the child, it should be a fast and effective process making the time of children in detention to a minimum of 24 hours. However, according to NOAS, the time spent in detention at Trandum has increased together with the number of people detained, which is demonstrated through the case of the two year old boy Wahaj Ali who was detained for 11 weeks together with his parents. According to the recent report from NOAS, as many as 85 children were detained at Trandum for more than 24 hours in 2014, a significant increase from only eight children in 2013.<sup>87</sup> As such, there is a significant risk that asylum-seeking children will be kept in detention for more than 24 hours because of the migrant status of their parents, posing a great risk to children’s well-being.

---

<sup>83</sup> The Parliamentary Ombudsman 2015 p.32.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> IDC 2012 p.55.

<sup>87</sup> NOAS 2015 p.111.

The CRC Committee furthers the concern for children's well-being as one of the main elements of the best interest assessment, but also stresses a particular focus on children's vulnerability. According to the CRC Committee, "an important element to consider in this best interests assessment is the child's situation of vulnerability, such as [...] being a refugee or asylum seeker".<sup>88</sup> This is of particular relevance for this thesis as the best interest assessment also applies to children as a group. According to the CRC Committee, "states have the obligation to assess and take as a primary consideration the best interests of children as a group". However, it is important to stress that asylum-seeking children are not a homogeneous group, but individuals with different needs and backgrounds. As such, the CRC Committee acknowledges that:

The best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation, [...] each child is unique and each situation must be assessed according to the child's uniqueness.<sup>89</sup>

Building on this, the CRC Committee stresses that it is not enough to assess the best interests of the child; the best interest assessment must also be visible from the decisions.<sup>90</sup> Accordingly, the best interest assessment is conducted as a threefold approach; first, the child has a right to have his or her best interests assessed in all decisions affecting the child. Secondly, the best interest principle requires that each decision assesses the potential positive and negative effects it might have on the individual child's well-being and children as a group. Thirdly, when the best interest assessment is conducted it should also be available for others to look into the assessment and understand how the best interests of the child were included in the balancing test.<sup>91</sup> In addition to these requirements, the

---

<sup>88</sup> CRC Committee GC/14 para 75.

<sup>89</sup> Ibid para 76.

<sup>90</sup> Ibid para 14(b).

<sup>91</sup> Ibid para 6.

assessment of the best interests of the child must also be a reflection of the relevant rights of the child as protected under the CRC.<sup>92</sup> According to the CRC Committee:

There is no hierarchy of rights in the Convention; all the rights provided for therein are in the “child’s best interests” and no right could be compromised by a negative interpretation of the child’s best interests.<sup>93</sup>

Thus, an act or decision affecting the child cannot be argued to be in the best interests of the child if it is contrary to the right in question of the child.<sup>94</sup>

### 3.2.2 The best interest principle as a safeguard against detention

As a requirement for the decision of detention to be in accordance with the CRC; the best interest principle becomes an important safeguard for the asylum-seeking child in the case of immigration detention. When discussing the practice of immigration detention of children, it is inevitable to discuss the child’s right to liberty. By being one of the four so-called ‘general principles’ in the CRC together with Article 2 on the prohibition of discrimination, Article 12 on the right to be heard and Article 6 on the right to life, survival and development; the best interests of the child is an essential element in the interpretation of the right to liberty.<sup>95</sup>

Even though the practice of immigration detention is a serious interference with the right to liberty, the practice is not prohibited under international human rights law. At the international level, and relevant for the context of Norway and this thesis, the right to liberty is protected under Article 9 (1) of the International Covenant on Civil and political rights (ICCPR)<sup>96</sup> and Article 5 (1) of the European Convention for the protection of Human

---

<sup>92</sup> Smyth 2014 p.34.

<sup>93</sup> CRC Committee GC/14 para 4.

<sup>94</sup> Smyth p.34.

<sup>95</sup> Ibid p.32.

<sup>96</sup> ICCPR Art.9(1).

Rights and Fundamental Freedoms(ECHR)<sup>97</sup>respectively. Additionally, the right of the child to liberty is, due to their particular vulnerability, further protected through the CRC under Article 37 (b) which states that; “no child shall be deprived of his or her liberty unlawfully or arbitrarily”. Since the right to liberty is not an absolute right, it allows for limitations of the right if the practice follows certain criteria. According to Article 37 (b) second sentence, “the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest period of time”.<sup>98</sup>

According to Smyth (2014), these criteria are impossible to comply with without an individual best interest assessment that includes other alternatives to detention that are less intrusive to the child’s well-being. This is further required through the CRC as the best interest principle’s role is to guide the fulfilment of the other rights of the Convention and is , as such, an important element in the limitation on the right to liberty.<sup>99</sup> The requirement of a best interest assessment is further evident in the limitation on the right to liberty as protected in the ICCPR. According to Article 9 (1) of the ICCPR, “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention”.<sup>100</sup> According to the Human Rights Committee (HRC), this provision is applicable to “all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.”.<sup>101</sup> Even though there is no specific mentioning of the best interests principle within the ICCPR, the HRC has interpreted it to fall within Article 24 (1) which states that “Every child shall have, without any discrimination [...] the right to such measures of protection as are required by his status as a minor”.<sup>102</sup> Consequently, the best interest of the child is an essential element in discussing the immigration detention of

---

<sup>97</sup> ECHR Art.5(1).

<sup>98</sup> CRC Art.37 (b).

<sup>99</sup> Smyth 2014 p.214.

<sup>100</sup> ICCPR Art.9(1).

<sup>101</sup> HRC GC/8 para 1.

<sup>102</sup> Ibid para 9.7.

asylum-seeking children, as it requires an individual assessment of the best interest of the particular child in question by looking at the particular situation, needs and experiences of that child.<sup>103</sup> Additionally, the best interest principle is also an essential element in the limitation of the child's right to liberty as both the CRC and the ICCPR requires an individual best interest assessment for the limitation to be in accordance with the Convention. However, a more detailed discussion on these limitations will be provided in the following chapter.

### **3.3 Concluding remarks**

This chapter has outlined the two competing interests of the balancing test in this thesis; Norway's immigration considerations and the best interests of the child respectively. In particular, the chapter has sought to present the weight added to the State's interests in keeping a strict immigration control and the weight added to the best interests of the child. Accordingly, the chapter has demonstrated that while it is clear that the high number of refugees and asylum-seekers coming to Norway presents a pressing problem for the Norwegian State in terms of protecting its welfare state and the lives and interest of the Norwegian citizens, it is also clear from the critique posed by NOAS and the Ombudsman that the current practice of immigration detention of asylum-seeking children represent a protection problem for asylum-seeking children's rights. Further, the discussion on the best interest principle explains how the Norwegian State needs to assess the child's well-being and vulnerable situation in order for the decision on detention to be in accordance with both the CRC and ICCPR. The following chapter will further examine how these two competing interests are balanced and what weight is added to the different sides of the balancing scale in the Norwegian context.

---

<sup>103</sup> Smyth 2014 p. 216.

## **4 The balancing test: Which is the overriding interest in the Norwegian context?**

This thesis acknowledges the importance of the Norwegian State to keep an effective immigration control; however, the aim of the thesis is rather to identify how this sovereign interest of the State is balanced against competing interests of the individual, and to analyse how the current outcome of this balancing test seems to be in the favour of the State. Consequently, the following chapter will examine how the relationship between the Norwegian State's immigration consideration and the best interests of the child is balanced in cases of immigration detention. However, in order establish a framework for examining this balancing test; the chapter will start with a discussion on balancing through the principle of proportionality.

### **4.1 A balancing of interests: The State versus the individual**

#### **4.1.1 The principle of proportionality**

Following the ECtHR's jurisprudence, there is a general consensus that the State has a sovereign right to control the entry and removal of individuals within its jurisdiction.<sup>104</sup> Immigration regulation is necessary in order for the Norwegian State to protect the welfare state from being undermined and to protect the lives and security of the Norwegian citizens and, as such, an effective immigration control is essential for the further protection of democracy. Without an effective immigration control, there might be both negative effects for the process of immigration of foreigners and for the well-being and rights of the citizens already living within the receiving country.<sup>105</sup> However, these regulations still have to be in accordance with international human rights law and acted out with respect towards the human being who is interfered with.<sup>106</sup> According to Brochmann and Hammer (1999), "the core dilemma in any policy of immigration control seems to be how to strike the balance

---

<sup>104</sup> See Saadi v. UK 2008 para 64.

<sup>105</sup> Ibid p.327.

<sup>106</sup> Brochmann & Hammer 1999 p.1.

between respect for personal integrity and national interests”.<sup>107</sup> This dilemma is, according to Barak (2010), a consequence of the relationship between human rights and interests of the individual and the interests of the society. Accordingly, “human rights are rights of humans as members of society vis-à-vis others whether collectively or individually” and it is up to the society to “confront the basic dilemma of determining: which limitations should be placed on an individual’s will or interests”.<sup>108</sup> Consequently, the regulation of immigration introduces a balancing between the interests of the individual against the public interests of the State.<sup>109</sup>

The principle of proportionality is an important analytical tool in defining this appropriate relationship. The term proportionality originates from the wording of “pro portio” meaning “equal shares”. According to Christoffersen (2009), the principle of proportionality, as such, implies a balancing of weights of competing interests, requiring the State to “strike a fair balance between opposing forces”.<sup>110</sup> The principle of proportionality in a broad sense can be further divided into three required sub-principles; legality, legitimacy and the principle of proportionality in a strict sense (proportionality *stricto sensu*).<sup>111</sup> Accordingly, for the limitation of the right based on the interests of the State to be justified, the limitation must be prescribed by law, the means used to achieve the pursued aim must be suitable and there must be a proportionality in the strict sense requiring that the suitable measure do not interfere with the essence of the right in question.<sup>112</sup> As such, the principle of proportionality, in a broad sense, justifies the State to limit certain rights of the individual for the necessity of protecting its public interests; however, it also requires the limitation to meet certain conditions. Therefore, in the case of immigration detention of asylum-seeking children accompanying their parents, the limitation of their individual rights requires an assessment of proportionality in a broad sense assessing the relationship between the means

---

<sup>107</sup> Ibid p.327.

<sup>108</sup> Barak 2010 p.3.

<sup>109</sup> Alexy 2002 p.311

<sup>110</sup> Christoffersen 2009 p.35

<sup>111</sup> Barak 2010 p.5.

<sup>112</sup> Christoffersen 2009 p.70; Barak 2010 p.6.

used and the goals achieved. This is particularly interesting taking into consideration the principle of the best interests of the child and how this also applies to children as group. Thus, in order for the State to comply with the proportionality assessment it is necessary to consider how the limitation of the child's right to security and liberty will affect the protection of asylum-seeking children as a group.

#### 4.1.2 Proportionality *stricto sensu*

The group approach to the proportionality assessment is also demonstrated through the principle of proportionality in a strict sense. Whereas the previous section demonstrates proportionality on a more systematic level, the principle of legitimacy, as one of the three sub-requirements of the proportionality test, also includes the principle of proportionality in a strict sense, so-called proportionality *stricto sensu*. According to Barak, the proportionality *stricto sensu* test aims at identifying the relationship between the benefits of the practice and the limitations it poses on the right in question.<sup>113</sup> However, when analysing the different interests, Barak stresses the importance of keeping the comparison between the marginal benefit of the State and the marginal harm to the rights of the individual concerned.<sup>114</sup> Consequently, when analysing the relationship between Norway's immigration considerations and the best interests of the child in cases of immigration detention, one must weigh the *marginal* benefit of the State from detaining children together with their parents against the *marginal* harm caused to the child affected by the practice. Thus, to analyse the proportionality of the balancing test in this thesis, it is necessary to identify the scope of the right in question and the legal limitations that applies to it.<sup>115</sup> According to Barak, the scope of the right represents the right's underlying purpose and will not be affected when in conflict with other interests. However, it is the exercise of the right, which will be challenged by competing interests.<sup>116</sup>

---

<sup>113</sup> Barak 2010 p.7.

<sup>114</sup> Ibid p.8.

<sup>115</sup> Ibid p.5.

<sup>116</sup> Ibid.



The practice of immigration detention of asylum-seeking children, either unaccompanied or accompanying parents, is a serious interference with the child's right to security and liberty as protected under Article 5 of the ECHR and the right to respect for private and family life as protected under Article 8 of the ECHR. However, following the limitation clauses of these provisions, interference with the rights is allowed on certain conditions. According to Article 8 (2):

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>117</sup>

Similar limitations to the right to liberty are found within all the sub-paragraphs of Article 5(1) with paragraph (f) being of most relevance, as it allows for a limitation if the deprivation of liberty is "taken with a view to deportation".<sup>118</sup> Hence, interference with both the right to liberty and security and the right to private and family life are permitted if they are prescribed by law and necessary in a democratic society. In other words, States are allowed to interfere, but only if the limitations meet the conditions of the proportionality test of legality, legitimacy and proportionality *stricto sensu*.

Interestingly, the condition of proportionality *stricto sensu* introduces an additional element that should be included in the State's proportionality test of the detention of asylum-seeking children. As discussed in the previous chapter, this is demonstrated through Article 8 of the ECHR, which introduces the group aspect to the proportionality test. Whereas the limitation clause of Article 8 (2) permits the State to limit the exercise of the right, it still

---

<sup>117</sup> ECHR Art.8(2).

<sup>118</sup> ECHR Art.5(1)(f).

requires the State to assess the vulnerability of the group affected by its decision in order for the limitation to comply with the proportionality test. This is demonstrated through the case of *Yordanova and Others v. Bulgaria* where the Court argued that:

In the context of Article 8, in cases such as the present one, the applicants' specificity as a social group and their needs must be one of the relevant factors in the proportionality assessment that the national authorities are under a duty to undertake.<sup>119</sup>

Hence, for the State to comply with the principle of legitimacy, the State also needs to consider the particular vulnerability of the group of individuals in question.<sup>120</sup> This is an interesting element to the proportionality test as it requires the State to include the particular vulnerability of asylum-seeking children as a group when assessing whether the practice of immigration detention is justified. As such, the subsequent section will examine how the relationship between Norway's immigration considerations and the best interests of the child is balanced in cases of immigration detention in accordance with the elements of the proportionality test discussed in this section. Are the limitations put on asylum-seeking children's rights justified from the principle of proportionality, and what weight is added to the different interest?

## **4.2 The best interests of the child: A primary or *the* primary consideration?**

### **4.2.1 The burden of proof rests on the State**

In the asylum context there is a general concern that the State's immigration considerations are given due weight in the balancing test against the best interest of the child. According to Article 3(1) of the CRC, the best interests of the child should be *a* primary consideration in all actions concerning children, but it does not mean that it is *the* primary consideration

---

<sup>119</sup> *Yordanova and Others v. Bulgaria* 2012 para 129.

<sup>120</sup> Peroni & Timmer 2013 p.1080

when balanced against other considerations.<sup>121</sup> As the provision does not set out an exhaustive list of competing interests that can override the best interest principle, there are no clear guidelines from the best interest provision itself on what weight it should be added when balanced against competing interests. Already during the drafting of the CRC there was a divide between those arguing for the best interest principle to be ‘a primary consideration’ and those who argued for the principle to be ‘the paramount consideration’.<sup>122</sup> While the word ‘paramount’ would imply that no other considerations could affect the outcome of the case, the word ‘primary’ entails that the best interests of the child should be the ‘first consideration’ in a balancing test with competing interests.<sup>123</sup> However, even if the best interest principle is to be the first consideration it does not mean that it has an absolute priority over other considerations.<sup>124</sup> According to Alston (1994), the indefinite article of the principle and the uncertainty towards the weight added to the principle was a deliberate decision from the drafters of the Convention as they wanted the principle to be more flexible towards competing interests in extreme cases, such as a situation of childbirth where the mother’s life is put up against the best interests of the child.<sup>125</sup> Further, Alston finds this formulation to strengthen the principle as it leaves it to the decision-maker to prove that there were no other acceptable and less intrusive alternatives in overriding the best interests of the child.<sup>126</sup>

Therefore, in cases of immigration detention of asylum-seeking children, the burden of proof is on the Norwegian State to demonstrate how the practice is the only and most suitable alternative in the current situation and can thus override the best interests of the child. Arguably, while the indefinite article of the best interest principle itself does not immediately override the Norwegian State’s immigration considerations in the case of

---

<sup>121</sup> Emphasis added by the present author.

<sup>122</sup> Alston 1994 p.12.

<sup>123</sup> Freeman 2007 p.61.

<sup>124</sup> Alston 1994 p.12.

<sup>125</sup> Ibid p.13.

<sup>126</sup> Ibid.

immigration detention, it rather leaves it to the Norwegian State to justify how the practice of immigration detention of asylum-seeking children is the most suitable alternative.

#### 4.2.2 An overriding principle against non-rights interests

While it at first seems like the best interests of the child is just one of many considerations in the decision on immigration detention, the CRC Committee presents a stronger case for the best interest principle in the balancing test. According to the CRC Committee, to include the best interest principle in the balancing test “means that the child’s interests have high priority and [is] not just one of several considerations”.<sup>127</sup> This means that in the balancing test between the best interests of the child and Norway’s immigration considerations, “a larger weight must be attached to what serves the child best”.<sup>128</sup> Further, whereas the previous section of this chapter argued for a flexibility of the best interest principle towards competing interests of other individuals, the CRC Committee stresses that “non-rights based arguments such as, those relating to general migration control, cannot override best interest considerations”.<sup>129</sup> Arguably, from the views of the CRC Committee, the best interests of the child should outweigh the interests of the Norwegian State in keeping a strict immigration control. As such, it is crucial that the case of the child is analysed through an individual best interest assessment taking into consideration the particular context and protection needs of the child.<sup>130</sup>

The child’s right to protection due to the status as a minor is represented through Article 24 of the ICCPR, providing the State with an obligation to protect all children within its jurisdiction without discrimination.<sup>131</sup> According to the HRC, this obligation requires the State to issue reports describing:

---

<sup>127</sup> CRC Committee GC/14 para 39.

<sup>128</sup> Ibid.

<sup>129</sup> CRC Committee GC/6 para 85.

<sup>130</sup> Sandberg 2015 p.293.

<sup>131</sup> ICCPR Art.24(1).

How legislation and practice ensure that measures of protection are aimed at removing all discrimination in every field, [...] particularly as between children who are national and children who are aliens.<sup>132</sup>

As a result, in order to justify the practice of immigration detention of asylum-seeking children, the Norwegian State needs to demonstrate how this is the most suitable alternative as well as how this practice complies with its obligation to protect every child within its jurisdiction equally without establishing discriminatory protection approaches towards asylum-seeking children and Norwegian children. Against this background, given the previously mentioned criticism of Trandum along with the burden of proof that is on the State, it is interesting to analyse how the Norwegian practice of immigration detention assesses and defines the best interests of the asylum-seeking child in the balancing test.

### **4.3 Immigration detention: In the best interest of the child or the state?**

#### **4.3.1 The weight added to the Norway's immigration considerations**

How Norway should consider the humanitarian needs of children in flight and at the same time keep a strong and consistent immigration control, is a complicated question.<sup>133</sup>

This quote was presented in the Norwegian Government's White paper on the situation of asylum-seeking children in 2011 and addresses the core dilemma of this thesis. Even though the aforementioned analysis has demonstrated that the best interest of the child is to be a *primary* consideration in all decisions concerning children, the principle is still critically challenged by Norway's immigration considerations.<sup>134</sup> In its Concluding Observations to Norway in 2010, the CRC Committee issued a concern on Norway's lack

---

<sup>132</sup> HRC GC/17 para 5.

<sup>133</sup> Meld.St.27 (2011-2012) p.7.

<sup>134</sup> Rt. 2009 S1261 para 78.

of applying the best interest principle in all matters concerning children, especially in immigration cases.<sup>135</sup> Accordingly, the CRC Committee recommended a strengthening of the best interest assessment on a case-to-case basis to analyse the particular situation of the child affected.<sup>136</sup> However, this does not automatically imply that the best interests of the asylum-seeking child overrides the State's immigration considerations, which is clear from the Norwegian State's immigration policy. According to the Norwegian Government, in some cases the "immigration considerations might be so significant as to override the best interest of the child".<sup>137</sup> Additionally, the Norwegian State has also expressed that even with an individual best interest assessment; the CRC does not provide any direct regulations on how the findings of this assessment should affect the outcome of each case. Hence, competing interests such as the Norwegian State's immigration consideration might still be added the similar amount of weight as the best interests of the child, or even more, in the balancing test.<sup>138</sup>

Norway's immigration considerations are regulated through the Norwegian Immigration Act paragraph 38. Even though the provision is mainly related to asylum cases concerning residence permit; the provision still provides the necessary framework to discuss the weight attached to Norway's immigration considerations in relation to immigration detention of asylum-seeking children accompanying their parents. According to paragraph 38 (b) of the Immigration Act, weight can be added to the State's immigration considerations as respect for other provisions of the Act and override the best interests of the child.<sup>139</sup> The practice of immigration detention of asylum-seekers to control potential absconding before deportation falls within this provision.<sup>140</sup> Since avoiding deportation out of Norway is considered an act that does not respect the provisions of the Immigration Act, immigration consideration will

---

<sup>135</sup> CRC Committee 2010 para 22.

<sup>136</sup> Ibid.

<sup>137</sup> Rt. 2012 1985 para 134.

<sup>138</sup> Ot.prp.nr. 75 (2006-2007) p.160.

<sup>139</sup> The Norwegian Immigration Act para 38 (b).

<sup>140</sup> Øyen 2013 p.329. See also Ot.prp.nr.75 (2006-2007) p.17.2.2.2 p. 343.

be added an overriding weight in these cases.<sup>141</sup> However, while it is normally the parents who are at risk of absconding prior to deportation and not the child, it is not the act of the asylum-seeking child that is challenging the respect towards the Norwegian Immigration Act, but the migrant status of the parents.

#### 4.3.2 Immigration detention of children based on the status of parents

One of the main reasons for detaining asylum-seeking children at Trandum is because it is seen to be in the best interest of the child to be together with his or her parents.<sup>142</sup> Not all cases concerning immigration detention of families have considered the best interests of the child, but in those cases that do mention it as an element, it is just mentioned briefly. While immigration detention has been argued to have a serious damaging effect on the well-being of children, which should be an essential element of the best interest assessment, this is not considered to be a determining element in the best interest assessment of the cases analysed for this thesis. In a case from 2015 regarding the detention of a mother and her two children, Oslo District Court stated that “the children will not be worse off being at Trandum then if they had to be somewhere else, away from their mother”.<sup>143</sup> This case demonstrates the general trend of these cases of immigration detention; when the best interest of the child is assessed it is only mentioned briefly and it is normally concluded that it *is* in the best interests of the child to accompany his or her parent(s) to Trandum.

However, this practice has been argued by the ECtHR to both be contrary to the best interests of the child and an act which places the child in an even more vulnerable situation. This is demonstrated through the ECtHR’s jurisprudence, particularly in the case of *Muskhadzhiyeva and others v. Belgium* from 2010, which is of relevance due to the Court’s focus on the particular vulnerability of the children.<sup>144</sup> The applicants, the mother Aina Muskhadzhiyeva and her four minor children, alleged a violation of Article 3 (prohibition

---

<sup>141</sup> Meld.St.27 (2011-2012) p.57.

<sup>142</sup> Ot.prp. Nr.28 (2006-2007) para 3.5.7 p. 14. See also 14-056478ENE-OTIR/03 p.3.

<sup>143</sup> 15-117888ENE-OTIR/0 p.3.

<sup>144</sup> *Muskhadzhiyeva and others v Belgium* 2010.

of torture, inhuman or degrading treatment) and Article 5 (the right to liberty and security) due to their immigration detention in Belgium while awaiting deportation to Poland.<sup>145</sup> The ECtHR found a violation of both Articles in relation to the children stressing that the immigration detention of children, whether unaccompanied or accompanied by parents, does not comply with the special protection needs of children and is strictly prohibited.

This argument is further issued by the UNHCR, which has stated that even if children accompany their parents in detention, the detention still “has a devastating effect on the physical, emotional and physiological development of these children”.<sup>146</sup> According to the Norwegian State, however, the general practice in these situations is that the deportation of the family will normally proceed the day after detention, and if not then the whole family will be released from the detention centre instead of prolonging the time in detention.<sup>147</sup> However, as demonstrated in the abovementioned chapter, this is usually not the case.<sup>148</sup> Accordingly, the CRC Committee has argued that children should never be detained on the basis of the migrant status of their parents on the premises that this would be in the interest of maintaining the family unit and respecting the child’s right not to be separated from his or her parents as stated in Article 9 of the ICCPR. Such a practice would not only serve contrary to its purpose but also be a clear violation of the principle of the best interests of the child.<sup>149</sup> Instead, the CRC Committee has argued that “when it is in the best interests of the child to remain with his or her parents, States should abstain from depriving the parents of their liberty”<sup>150</sup> and further recommended that States “completely cease the detention of children on the basis of their [the parents’] immigration status”.<sup>151</sup> According to the IDC, “the primary focus should be one the child’s dual right not to be detained and to have their parents and family reside with them in the community”.<sup>152</sup> Further, States are encouraged

---

<sup>145</sup> Ibid.

<sup>146</sup> UNHCR 2014.

<sup>147</sup> Ot.prp.nr.138 L (2010-2011) p.54.

<sup>148</sup> See 14-078758ENE-OTIR/08 where the two year old boy was detained for 11 weeks.

<sup>149</sup> UNHCR 2012a p.3.

<sup>150</sup> UNHCR 2012b p.23.

<sup>151</sup> UNHCR 2012a p.18.

<sup>152</sup> IDC 2012 p.31.



to look beyond alternatives to detention and establish community-based non-custodial arrangements for children to stay with their families instead of being held in detention centres.<sup>153</sup>

#### **4.4 Concluding remarks**

As this chapter has demonstrated, a problem arises in the current balancing test in relation to the individual assessment of the best interests of the child. While it is stated by the CRC Committee that the best interests of the child should override non-rights interests, such as the State's immigration considerations, the number of asylum-seeking children detained in Norway continues to increase. According to the Norwegian State, it is in the best interests of asylum-seeking children to be detained together with their parents instead of being placed somewhere else. Considering the damaging effects that detention has proved to have on children's well-being even if the detention is only short-term, makes this argument difficult to understand. How can the State argue that a practice which undermines children's rights as protected under the CRC is in fact in the best interests of the child? While asylum-seeking children's particular vulnerability is stressed to require special protection measures, there is a risk that the best interests of the child might be used as a measure that allows for a practice which further increases children's vulnerability rather than to protect them. Therefore, the following chapter will analyse and examine whether the State's perceptions of the vulnerability of asylum-seeking children might be one of the influencing elements to the current outcome of the balancing test, and if so, how?

---

<sup>153</sup> UNHCR 2012a p.7.

## **5 The balancing test seen through a vulnerability lens**

While it is stated in the international human rights regime that detention of children is never in the best interests of the child and must be stopped; the cases assessed in this thesis demonstrate the opposite arguing that it is in the best interests of asylum-seeking children to accompany their parents to Trandum. Thus, the following chapter seeks to analyse this inconsistency between the protection of asylum-seeking children's rights under the CRC and the current practice of immigration detention of asylum-seeking children in Norway. In particular, the chapter will revisit some of the weaknesses discovered in the balancing test in chapter four to see whether the State's perceptions of the vulnerability of asylum-seeking children might have influenced the current outcome of the balancing.

### **5.1 Perceptions of vulnerability and its consequences**

As discussed through Martha Fineman's vulnerability theory, our vulnerability is a paradox; it is universal and shared among all human beings. At the same time some of us will be particularly vulnerable due to a vulnerable situation. However, to designate certain individuals as more vulnerable than the rest of society can have serious consequences for the human rights protection of this group. Interestingly for the balancing test of this thesis, asylum-seeking children have been acknowledged by the international human rights regime to constitute a particular vulnerable group in need of special protection measures. There is no doubt that asylum-seeking children are particularly vulnerable due to their age, past experiences, uncertainty of being in a foreign country and their status as asylum-seekers. However, a child is first and foremost a child, and this is applicable also in terms of their vulnerability. Whereas the focus on asylum-seeking children's vulnerability is initially aimed at providing the necessary human rights protection to these children as a response to their needs, this chapter seeks to demonstrate that the concept of vulnerability might actually act contrary to its purpose and be the vulnerability of the balancing test itself. As such, this chapter will strive to go deeper into the different elements of the balancing test in order to identify and analyse whether State's perceptions of asylum-seeking children's vulnerability might have influenced the current outcome of the balancing test as warned through Martha Fineman's vulnerability theory discussed in chapter two.

As such, the following analysis will be built on two hypotheses developed from the main elements of Fineman's vulnerability theory. The first hypothesis argues that because asylum-seeking children are designated as a particular vulnerable group, this has made the differences between the individuals within that group invisible and increased their stigmatisation in society. Consequently, the balancing test will not assess the best interests of the individual asylum-seeking child of the case, but what is considered to be the best interests of asylum-seeking children as a group. By not seeing the individual asylum-seeking child and its agency; this creates the risk that the Norwegian State establishes paternalistic protection approaches on behalf of these children. The second hypothesis argues that as a further consequence of designating asylum-seeking children as a vulnerable group, a divide has been established between asylum-seeking children as 'vulnerable' and Norwegian children as 'invulnerable' or 'normal'. Accordingly, the Norwegian State will protect these two groups of children differently due to the perceived vulnerability of asylum-seeking children. As a result, there is a risk that what is considered to be in the best interests of an asylum-seeking child will be defined differently from the best interests of a Norwegian child due to the perceived differences in vulnerabilities and, as such, capabilities. In the subsequent sections, these two hypotheses will be applied to the current outcome of the balancing test between Norway's immigration considerations and the best interests of the child in cases of immigration detention as discussed in chapter four.

## **5.2 A paternalistic protection approach**

### **5.2.1 Asylum-seeking children seen as a homogeneous vulnerable group**

As discussed through the balancing test in this thesis, the best interest of the child is barely mentioned in court decisions. Instead, it seems like the State itself decides what is in the best interests of asylum-seeking children as a group, and this is to keep the family unit together. Thus, this is used as the main argument of the Norwegian State in detaining children with their parents at Trandum. However, looking at this approach through a vulnerability lens might increase our understanding of the current outcome of the balancing test. As stated by John Tobin (2015):

If children are presumed to be vulnerable and are defined by their vulnerability, there is a risk that the assessment of their vulnerability will [...] be clouded by assumptions about their lack of capacity to protect themselves.<sup>154</sup>

In order for the CRC to have any value for children's human rights protection, it is vital that they are allowed to express their own thoughts and opinions about what is in their best interests. The burden of proof is therefore on the Norwegian State to demonstrate that the practice of immigration detention is in fact in the best interests of the child through conducting an individual best interest assessment. However, such an individual best interest assessment is not reflected from the case law concerning immigration detention of asylum-seeking children accompanying their parents in Norway.

According to the first hypothesis taken from the vulnerability theory; the designation of individuals as a homogeneous vulnerable group can contribute to a further stigmatisation of these individuals and mask the differences between the individuals within the group. As highlighted by the human rights regime; asylum-seeking children represent a complex vulnerability by being both universally vulnerable as children and particular vulnerable due to their situation as asylum-seekers. According to the hypothesis, there is a risk that by designating asylum-seeking children as such a vulnerable group, their different experiences, needs and interests as individuals will become invisible and masked behind their characterisation as vulnerable. This concern has been appropriately expressed through the words of Tobin who states that, by defining children as a homogeneous vulnerable group:

Children's vulnerability becomes their defining characteristic which obscures the capacity of adults to recognise children's potential for insight and understanding with respect to their own interests.<sup>155</sup>

---

<sup>154</sup> Tobin 2015 p.167.

As a result, there is a risk that the protection approach of the Norwegian State is clouded by perceptions of asylum-seeking children as a homogeneous vulnerable group and is as such not acknowledging these children as individuals with different backgrounds, needs and interests. Thus, “children are conceptualised as being vulnerable and in need of assistance”.<sup>156</sup>

Consequently, if vulnerability is seen as an essential characteristic belonging to asylum-seeking children, there is a risk that the best interest assessment is influenced by these perceptions of vulnerability resulting in a paternalistic protection approach of the Norwegian State determining what the State finds to be in the best interests of the child without consulting or listening to the child’s own interests and opinions.<sup>157</sup> This is particularly interesting looking back at Sandberg’s critique of the vulnerability theory in chapter two. According to Sandberg, the main concern with the vulnerability theory is its resentment of designating individuals as vulnerable groups which she further explains by stating that; “if they are not identified, they may not be given the opportunity of expressing their views on laws and policies at all”.<sup>158</sup> However, when looking at the current outcome of the balancing test; asylum-seeking children are identified and addressed as a particular vulnerable group, but their own views and opinions on the practice of immigration detention are not detectable from the cases assessed. Without a detailed description of the best interest assessment in the cases on detention, it is difficult to analyse and determine whether the Courts did consider the needs and interests of the individual child of the case, or if the best interest assessment was simply based on the State’s perceptions of asylum-seeking children’s vulnerability and their protection needs as a vulnerable group. However, it is noteworthy that the general consensus in the assessed cases argued for a best interest of

---

<sup>155</sup> Ibid p.171.

<sup>156</sup> Ibid p.169.

<sup>157</sup> Ibid.

<sup>158</sup> Sandberg 2015 p.235.

the child that goes against all recommendations from the human rights regime and civil society related to the practice of immigration detention of children.

### 5.2.2 Undermining asylum-seeking children as legal subjects

This paternalistic approach is also evident elsewhere in the balancing test, more specifically in the absence of an individual decision of the child in the case of detention. According to the second paragraph of the non-discrimination provision as protected under Article 2(2) of the CRC, discrimination or punishment is prohibited in any matter concerning the child also those matters which are due to acts of the child's parents.<sup>159</sup> Whereas some of the assessed cases mention the particular child in the decision, many of them simply refer to the best interest principle as protected under Article 3 of the CRC. This has been one of the highly debated concerns of the Norwegian practice of immigration detention of asylum-seeking children. As stated by Sandberg, "they should be seen as subject of rights rather than their parents' property".<sup>160</sup> Being treated as a part of their parents' court decision make asylum-seeking children invisible as individual legal subjects and it becomes easier for the State to make decisions for them. As such, there is a risk that the Norwegian State's approach towards these asylum-seeking children fits within the first hypothesis of this chapter; overlooking the individual needs of asylum-seeking children and responding with a paternalistic protection approach viewing it to always be in the best interests of asylum-seeking children to be together with their parents due to their vulnerability of being children in a foreign country and their status as asylum-seekers.

This invisibility of asylum-seeking children as individuals with different needs and interests is further demonstrated through the absence of a regulation on the detention of asylum-seeking children accompanying their parents. Whereas the practice of detaining both unaccompanied children and adults are regulated under the Norwegian Immigration Act; asylum-seeking children accompanying their parents are not acknowledged as a

---

<sup>159</sup> CRC Art. 2(2).

<sup>160</sup> Sandberg 2015 p.222.

category within this regulation. Notwithstanding that the regulation of detention of unaccompanied asylum-seeking children is a welcoming response; these children are less likely to be put in detention than asylum-seeking children accompanying their parents. Additionally, by coming to the country alone, it is easier to identify unaccompanied asylum-seekers as individual legal subjects than asylum-seeking children accompanying their parents. Arguably, this absence of regulation might be another trait of how the Norwegian State's perceptions of vulnerability have masked the differences between the individuals within the group of asylum-seeking children and consequently undermined their individual agency as individual legal subjects. However, in addition to masking the differences between the individuals within the group of asylum-seeking children, the concept of vulnerability can also mask the similarities between the asylum-seeking children and the children 'outside' the group, Norwegian children respectively.

### **5.3 Are asylum-seeking children different from Norwegian children?**

Following the second hypothesis from the vulnerability theory; designating individuals as a vulnerable group establishes a risk that these individuals will be discriminated against the individuals 'outside' the group considered to be *invulnerable* representing the normal state of being.<sup>161</sup> As the Norwegian State is under an obligation to treat all children within its jurisdiction equally, it is interesting to analyse how the perceptions of differences between children can amount to a differential protection approach towards these groups. As such, the following sections will analyse and seek insight into how the vulnerability approach to the balancing test can identify the underlying challenges to the equal treatment in relation to the practice of detention of children within the Norwegian context.

While the balancing test in this thesis concludes that the practice of immigration detention is in the best interests of asylum-seeking children, it is interesting to look at how this seems to be different from what is considered to be in the best interests of Norwegian children. This is demonstrated through two main issues as presented in chapter four. First, under

---

<sup>161</sup> Emphasis added by the present author.

Norwegian law, only foreign children under the age of 15 can be put in detention. Secondly, while asylum-seeking children do not receive their own decision when detained, this is a required practice if a Norwegian child were to be put in custody within an institution.<sup>162</sup> According to Article 2 of the CRC, “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind”.<sup>163</sup> This is further supported by the CRC Committee, which has stated that “The principle of non-discrimination [...] prohibits any discrimination on the basis of the status of the child as being unaccompanied or separated, or being a refugee, asylum seeker or migrant”.<sup>164</sup> This lays the foundation for protecting asylum-seeking children as any other children within the Norwegian jurisdiction. As stated by the CoE:

A child is first, foremost and only a child [...] when looking at undocumented migrant children and their rights, one should first look at the issue from the child’s perspective and not the migrant status perspective.<sup>165</sup>

As a child is first and foremost only a child it requires the protection towards asylum-seeking children to be the same as that of Norwegian children. However, asylum-seeking children are not only at risk of being discriminated due to their status as asylum-seekers; also the perceptions of these children as more vulnerable than the Norwegian children contribute to a differential treatment.

To be invulnerable is according to Fineman’s vulnerability theory impossible; we all share a universal vulnerability and to designate some individuals within a vulnerable group would then imply that those children outside the group do not experience vulnerability. Accordingly, by identifying a group of individuals as more vulnerable than other individuals within a society, we “obscure the similarities between members of the group

---

<sup>162</sup> See section 3.1.3.

<sup>163</sup> CRC Art.2.

<sup>164</sup> CRC Committee GC/6 para 18.

<sup>165</sup> CoE 2011.



and members of the larger society”.<sup>166</sup> In order for a State to protect all the children within its jurisdiction, the CRC Committee requires that States “identify individual children and groups of children the recognition and realization of whose rights may demand special measures”.<sup>167</sup> As a result, for the Norwegian State not to discriminate towards children within its jurisdiction it is required to identify those children defined as more vulnerable within society that might be in need of special protection to enjoy their rights as protected through the CRC. Thus, one could argue that within the balancing test it is necessary for the Norwegian State to identify the particular vulnerable situation of asylum-seeking children in order to protect their rights in accordance with the Convention. However, by identifying this vulnerability, the vulnerability hypothesis of this section argues that this will amount to a discriminatory protection approach towards asylum-seeking children. Consequently, asylum-seeking children are separated from Norwegian children due to their particular vulnerable situation, but also as a result of the response towards that vulnerability by the Norwegian State.

By applying these two vulnerability hypotheses to the balancing test between Norway’s immigration considerations and the best interests of the child it has become more clear why the current outcome of the test is resulting in an increase of immigration detention of children. Even though the concept of vulnerability as applied within the human rights regime aims at identifying the most vulnerable individuals and point them out to States to ensure their future human rights protection; it can be argued that these perceptions of the vulnerability of asylum-seeking children establish a paternalistic protection approach towards asylum-seeking children that undermine their human rights as protected under the CRC. As stated by Fineman, vulnerability is not a permanent characteristic and should not be treated as one. On the contrary, one of Fineman’s main arguments in the vulnerability theory is the ability to see all human beings as vulnerable and respond to that vulnerability by identifying the resilience within each individual. By identifying this resilience within

---

<sup>166</sup> Fineman 2013 p.16.

<sup>167</sup> CRC Committee GC/5 p.4.

individuals it will make it possible for individuals to move out of the particular vulnerable situations in which they find themselves. The State plays an important role in this process. As stated by the scholar Jenny Kitzinger, we need to think of ‘vulnerability’ as ‘oppression’ in order to get the accurate picture of the situation.<sup>168</sup> Asylum-seeking children are simply not just vulnerable by being asylum-seekers and children; their vulnerability is also increased by the State’s justification of power over that vulnerability.<sup>169</sup> As such, the next section will analyse and seek insight into how the State can potentially respond to this vulnerability by moving away from the paternalistic protection approach to an approach that sees beyond the vulnerability as an essential characteristic of asylum-seeking children that determines their needs and rather supports the resilience of children to move out of the vulnerable situation themselves.

## **5.4 Looking beyond vulnerability**

While the concept of vulnerability is attributed to asylum-seeking children in order for States to identify them and provide them with the necessary protection according to their needs, as this thesis has demonstrated, the concept of vulnerability can function both as a measure for increased protection of asylum-seeking children as well as a measure that undermines their individual legal subject and their human rights protection. Thus, by identifying asylum-seeking children as a particular vulnerable group we stand at risk of undermining their individual capacities as rights bearers. The question is then how these children should be protected in cases of immigration detention; by identifying their vulnerability we stand at risk of undermining their human rights, however, if this vulnerability is not pointed out to States, will their needs be acknowledged? Arguably, there is a need to look beyond vulnerability for future solutions.

### **5.4.1 Identifying resilience**

According to Alexandra Timmer (2013), who has analysed the application of vulnerability in the ECtHR’s jurisprudence; the vulnerability approach to human rights protection has

---

<sup>168</sup> Kitzinger 1997 p.177.

<sup>169</sup> Herring 2012 p.257.

the possibility to act as “a conceptual way to bridge the gap between the legal subjects as currently conceived of and real human beings”.<sup>170</sup> Instead of viewing asylum-seeking children as a homogeneous vulnerable group it is time to approach these individuals in accordance with the core value of the CRC, as individual legal subjects. Whereas the previous sections have shown the potential influences that the perceptions of vulnerability can have on the protection of asylum-seeking children’s rights in the balancing test of this thesis, this part of the chapter thus seeks to move away from this position of vulnerability and rather identify the potential strength of the concept to add to our understanding of what it means to be human and how we should understand and respond to the protection of children’s rights. By removing vulnerability from its traditional negative associations, Fineman argues that the concept is capable of revealing the ‘hidden assumptions and biases’ that exists in the current legal practice.<sup>171</sup> This is an interesting approach to the finalisation of the analysis of this thesis as it makes us rethink the current legal practices on immigration detention and identify the underlying challenges of protecting asylum-seeking children’s rights in the Norwegian context.

As discussed through the vulnerability theory, there is no such thing as invulnerability. According to Fineman, the opposite of vulnerable is not invulnerable, but resilient. In order to respond to the demonstrated weaknesses of the balancing test in this thesis, it is necessary to acknowledge that vulnerability is a universally shared characteristic among human beings and it is through resilience that individuals are able to move out of particular vulnerable situations. If applied correctly, this focus of the concept of vulnerability will not lead to paternalistic protection approaches from the State, but rather provide us with ‘the potential to define an obligation for the State to ensure a richer and more robust guarantee of equality’.<sup>172</sup> Consequently, for the balancing test to acknowledge asylum-seeking children as individual legal subjects with different needs and different interests, it is necessary to identify the resilience that exist within all children and support the exercise of

---

<sup>170</sup> Timmer 2013 p.148.

<sup>171</sup> Fineman 2008 p.9.

<sup>172</sup> Ibid p.2.

it. Thus, the question should not be how the Norwegian State acknowledges and responds to the particular vulnerability of asylum-seeking children in the cases of immigration detention, but rather how the State supports the resilience of children to move out of the particular vulnerable situation in which they find themselves and further develop as human beings.

#### 5.4.2 Supporting resilience

Therefore, in order to make their way out of vulnerability, asylum-seeking children are dependent upon the State to recognise this resilience which they inhabit and to provide them with the necessary assets and possibilities to exercise it.<sup>173</sup> Accordingly, when analysing the balancing test between Norway's immigration considerations and the best interests of the child, it is necessary to focus on the institutions and support mechanisms of the State, which can provide asylum-seeking children with the applicable means to conquer their vulnerability instead of applying paternalistic protection approaches which is only *believed* to be in their best interests. Children are the ones most capable of understanding what is in their best interests in that particular situation and should play an important part in expressing these views in the proportionality test on immigration detention. However, if children are not given the possibility to define their own vulnerability, then the State needs to provide the necessary structures for the child to complain on the decisions made on their behalf. As stated by Fineman, "under the vulnerability analysis a state has an obligation not to tolerate a system that unduly privileges any group of citizens over others".<sup>174</sup> Accordingly, if the state seems to tolerate such an unequal distribution of privileges, the state would have an obligation "to offer explanation justifying the disparate circumstances".<sup>175</sup>

This explanation is not possible for asylum-seeking children to receive if they are not able to bring their case into an arena where the State can explain its practice of immigration

---

<sup>173</sup> Fineman 2010 p.269.

<sup>174</sup> Ibid p.274.

<sup>175</sup> Ibid.

detention of children and justify its best interest assessment in these cases. The third Optional protocol to the Convention on the Rights of the Child is one such arena which this thesis seeks to promote. The protocol entered into force in April 2014 and is now ratified by 27 countries; however, Norway is not one of them. Endorsing the third Optional Protocol would be an important measure to be introduced by the State in order to further support the resilience of asylum-seeking children within the Norwegian context.<sup>176</sup> Providing asylum-seeking children, and Norwegian children, with the possibility to bring their complaints to the CRC Committee is an important step towards recognising children as individual legal subjects and agents of change. In order to protect children from vulnerability, they need to be involved in the decision-making as active participants in their own lives with the possibility of exercising their resilience to move out of vulnerable situations. Only by recognising that vulnerability is a characteristic shared by all human beings alike and is not only defining certain groups in society, can we treat and respond to other human beings equally.

## **5.5 Concluding remarks**

Through a vulnerability approach, this chapter has analysed the weaknesses of the balancing test between Norway's immigration considerations and the best interests of the child in order to identify some of the underlying challenges to the protection of asylum-seeking children's rights in the balancing test against the State's immigration considerations in cases of detention. Whereas asylum-seeking children find themselves in a particular vulnerable situation due to their young age, status as asylum-seekers and past experience fleeing from their country of origin; States' perceptions of this vulnerability might act contrary to the protection it sought to achieve. As demonstrated through the analysis, there is a risk that the best interest assessment conducted by the Norwegian State in relation to the immigration detention of asylum-seeking children does not include an assessment of the individual child's vulnerability but rather sees and responds to asylum-seeking children as a homogeneous vulnerable group. This is further evident from the

---

<sup>176</sup> See NOAS 2015 p.110; Innst.24S (2014-2015).

differential treatment in the Norwegian Law providing different regulations for the protection of the right to liberty for asylum-seeking children and Norwegian children. Consequently, the State's perceptions of vulnerability can be seen as having an influence on how much weight is added to the asylum-seeking child's scale in the balancing test and is, as such, influencing the current outcome of the test. However, by looking beyond vulnerability and towards the resilience of children, this chapter has also sought to provide insight into potential improvements of the protection of asylum-seeking children's rights. This is possible by demanding that States respond to the resilience within human beings and provide the necessary structures in order for individuals to both identify and exercise their resilience.

## 6 Conclusion

A prevalent response to the increasing number of refugees and asylum-seekers coming to Norway the latest years is the State's need to balance its interests in keeping a strict immigration control against the rights and interests of the individuals within its jurisdiction. While previous research has shown that the practice of immigration detention of asylum-seeking children is a clear violation of both the Norwegian Constitution and international human rights treaties, it has not identified the potential underlying causes to the current outcome of the balancing test. Looking at this thesis as a whole demonstrates how the concept of vulnerability, as stressed by the human rights regime, might actually be the vulnerability of the balancing test itself. While the analysis of sub-question one identified how the human rights regime encourages States to recognise the particular vulnerability of asylum-seeking children; the subsequent analysis of sub-question two demonstrated how this concept of vulnerability undermines the best interest principle as a safeguard against immigration detention of asylum-seeking children.

This raises the question of whether it is possible to rebalance the relationship between Norway's immigration considerations and the best interests of the child by making a shift from vulnerability protection to resilience building, posed in the third sub-question of the thesis. Following Fineman's vulnerability theory, we should strive to move beyond the application of vulnerability as an essential characteristic that designate individuals into one homogeneous group. While asylum-seeking children find themselves in a particularly vulnerable situation, it is not a permanent state of being. Therefore, the existence of resilience should be the point of departure for the State's protection approach towards these children, not the concept of vulnerability. Only by letting the children themselves express their opinion can we really know what is in their best interests in that particular situation. However, for the full realisation of their agency, the State must also provide the necessary structures for these children to identify and exercise their resilience.

Taking the analysis of this thesis into consideration, the present author hopes it has contributed with a broader understanding of the Norwegian practice of immigration detention of asylum-seeking children and provided the debate on the balancing test between Norway's immigration considerations and the best interests of the child with critical and innovative arguments for future analysis. With the Norwegian State's upcoming reporting to the CRC Committee the 6<sup>th</sup> of October 2016, the thesis hopes to be a motivating contribution to initiate further responses from the Norwegian State in its protection approach towards asylum-seeking children in cases of immigration detention prior to deportations.



## List of references

### International treaties and statutes

CRC	UN General Assembly, <i>Convention on the Rights of the Child</i> , 20 November 1989, United Nations, Treaty Series, Vol. 1577, p. 3.
ECHR	Council of Europe, <i>European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14</i> , 4 November 1950, ETS 5.
ICCPR	UN General Assembly, <i>International Covenant on Civil and Political Rights</i> , 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171.
Statute of the ICJ	United Nations, <i>Statute of the International Court of Justice</i> , 18 April 1946, United Nations.
VCLT	United Nations, <i>Vienna Convention on the Law of Treaties</i> , 23 May 1969

### Norwegian laws and regulations

Norwegian Immigration Act	LOV-2008-05-15-35 <i>Lov om utlendingers adgang til riket og deres opphold her (utlendingsloven).</i> [Act relating to the control of the entry and removal of immigrants]
---------------------------	--

## List of Judgments

### The European Court of Human Rights (ECtHR)

*Case of Yordanova and others v. Bulgaria* (Application No.25446/06). Judgement: Strasbourg 24 April 2012

*Case of Popov v. France* (Application No.39472/07;39474/07). Judgement: Strasbourg 19 January 2012

*Case of M.S.S. v. Belgium and Greece* (Application No.30696/09). Judgement: Strasbourg 21 January 2011

*Case of Oršuš and Others v. Croatia* (Application No.15766/03). Judgement: Strasbourg 16 March 2010

*Case of Muskhadzhiyeva and others v. Belgium* (Application No.4144/07). Judgement: Strasbourg 19 January 2010

*Case of Saadi v. United Kingdom* (Application No.13229/03). Judgement: Strasbourg 29 January 2008

*Case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (Application No.13178/03). Judgement: Strasbourg 12 October 2006

*Case of Chapman v. the United Kingdom* (Application No.27238/95). Judgement: Strasbourg 18 January 2001

### Supreme Court of Norway

Rt-2012-1985 21.12.2012

Rt-2009-1261 09.10.2009

### Oslo District Court (cases assessed for the thesis)

14-056478ENE-OTIR/03 02.04.2014

14-128871ENE-OTIR/05 12.08.2014

14-106948ENE-OTIR/06 26.06.2014

15-066531ENE-OTIR/07	09.07.2015
15-035122ENE-OTIR/08	27.02.2015
15-117888ENE-OTIR/04	22.07.2015
15-6370ENE-OTIR/04	01.10.2015

### **Official documents issued by the UN and EU bodies**

#### UN High Commissioner for Refugees

United Nations High Commissioner for Refugees (2014) *Beyond Detention- A Global Strategy to support governments to end the detention of asylum-seekers and refugees 2014-2019*. Available at: <http://www.unhcr.org/pages/53aa90d86.html>, Accessed: 12.05.2016

United Nations High Commissioner for Refugees (2012) *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*. Available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=503489533b8>, Accessed: 12.05.2016

United Nations High Commissioner for Refugees (2008) *UNHCR Guidelines on Determining the Best Interests of the Child*. Available at: <http://www.refworld.org/docid/48480c342.html> , Accessed: 12.05.2016

#### Committee on the Rights of the Child

UN Committee on the Rights of the Child, *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.

UN Committee on the Rights of the Child, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, 28 September 2012a.

UN Committee on the Rights of the Child, *Committee on the Rights of the Child, 2012 Day of General Discussion Background Paper*, August 2012b.

UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child, Norway*, 29 January 2010, CRC/C/NOR/CO/4 (2010).

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

UN Committee on the Rights of the Child, *General comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the child*, 27 November 2003, CRC/GC/2003/5.

#### UN Human Rights Committee

UN Human Rights Committee, *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989.

UN Human Rights Committee, *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982.

#### Council of Europe

Council of Europe (2014a) *The alternatives to immigration detention of children*. Res2020. Council of Europe: Parliamentary Assembly, *Resolution 2020- The alternatives to immigration detention of children*, 3 October 2014, Resolution 2020 (2014)

Council of Europe (2011) *Undocumented migrant children in an irregular situation: a real cause for concern*, Report, Doc. 12718. Available at:  
<http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13007&lang=en>

#### **Norwegian official documents**

Innst.24S (2014-2015)

Innstilling til Stortinget fra utenriks- og forsvarskomiteen, 22 October 2014.

Meld.St.27 (2011-2012)

*Barn på flukt*, Ministry of Justice and Public Security, 8 June 2012.

Ot.prp.nr.138L (2010-2011)

*Endringer i utlendingsloven (utvidet adgang til fengsling mv.)*, Ministry of Justice and Public Security, 24 June 2011

Ot.prp.nr.75 (2006-2007)

*Om lov om utlendingers adgang til riket og deres opphold her (utlendingsloven)*, Ministry of Labour and Social Affairs, 29 June 2007.

Ot.prp.nr.28 (2007-2008)

*Om lov om endringer i lov 17.juli 1992 nr.100 om barnevernstjenester mv. (Omsorgen for enslige mindreårige asylsøkere inntil besetting eller retur)*, Ministry of Children and Equality, 18 January 2008.

### Secondary literature

Alexy, R. (2002) *'A Theory of Constitutional Rights'*. Oxford, Oxford University Press.

Alston, P. (1994) *'The Best Interests of the Child: Reconciling Culture and Human Rights'*. Oxford, Oxford University Press.

Barak, A. (2010) 'Proportionality and principles balancing'. *Law and Ethics of Human Rights*, 4(1), pp.3-18.

Brandl, U. and Czech, P. (2015) 'General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their needs?' In: Ippolito, F. & Sánchez, S.I, eds. *Protecting Vulnerable Groups: The European Human Rights Framework*. Oxford and Portland, Oregon, Hart Publishing, pp. 247-271.

Boswell, C. (2005) 'Migration in Europe- A paper prepared for the policy Analysis and Research Programme of the Global Commission on International Migration'. *Migration Research Group*, Hamburg Institute of International Economics.

Brochmann, G. and Hammer, T. (1999) *'Mechanisms of Immigration Control- A Comparative Analysis of European Regulation Policies'*, Oxford, Berg.

Christoffersen, J. (2009) *'Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights'*. Leiden, BRILL.

Fineman, M. A. and Gear, A. (2013) *'Vulnerability: Reflections on a New Ethical Foundation for Law and Politics'*. England, Ashgate Publishing Limited, pp.1- 218.

- Fineman, M.A. (2013) 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics'. In: Fineman, M.A. and A. Grear, eds. *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, England, Ashgate Publishing Limited, pp.1-13.
- Fineman, M. A. (2008) 'The Vulnerable Subject: Anchoring Equality in the Human Condition'. *Yale Journal of Law & Feminism*, 20(1), pp. 1-23
- Fineman, M.A. (2010) 'The Vulnerable Subject and the Responsive State', *Emory Law Journal*, 60(2), pp. 251-275.
- Freeman, M. (2007) 'A Commentary on the United Nations Convention on the Rights of the Child: Article 3 The Best Interests of the Child'. Leiden, BRILL.
- Grear, A. (2010) 'Redirecting Human Rights- Facing the Challenge of Corporate Legal Humanity'. New York, Palgrave Macmillan.
- Herring, J. (2012) 'Vulnerability, Children, and the Law. *Law and Childhood Studies: Current legal issues*', 14, pp. 244-273. Available from doi:10.1093/acprof:oso/9780199652501.003.0016.
- Husabø, E. J. & Suominen, A. E. (2011) 'Forholdet mellom straffeprosesslovens og utlendingslovens regler om fengsling og andre tvangsmidler', Bergen.
- Kitzinger, J. (1997) 'Who are you kidding? Children, Power and the Struggle Against Sexual Abuse'. In (eds.) James, A. and A. Prout, *Constructing and Reconstructing Childhood*, London, pp.157-181.
- McConville, M. & Chui, W. (2007) 'Research methods for law'. Edinburgh, Edinburgh University Press.
- Parker, S. (1994) 'The Best Interests of the Child- Principles and Problems'. In: Alston, P., eds. *The best Interests of the Child: Reconciling Culture and Human Rights*. Oxford, Oxford University Press, pp.26-42.
- Peroni, L. & A. Timmer (2013) 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention Law'. *International Journal of Constitutional Law*, 11(4), pp. 1056-1085.
- Sandberg, K. (2015) 'The Convention on the Rights of the Child and the Vulnerability of Children'. *Nordic Journal of International Law*, 84, pp.221-247.
- Smyth, C. (2014) *European Asylum Law and the Rights of the Child*. New York, Routledge.

- Timmer, A. (2013) 'A Quiet Revolution: Vulnerability in the European Court of Human Rights'. In: Fineman, M. A. and A. Gear, eds. *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*. Fanham, Ashgate, pp.147-171.
- Tobin, J. (2015) 'Understanding Children's Rights: A Vision Beyond Vulnerability', *Nordic Journal of International Law*, Vol. 84, pp.155-182.
- Turner, B. S. (2006) '*Vulnerability and Human Rights*', Pennsylvania, The Pennsylvania State University Press.
- Øyen, Ø. D. (2013) '*Lærebok I Utlendingsrett*,' Universitetsforlaget.

### Web sources

- Aftenposten (2016) '*Rekordmange utlendinger uttransportert i fjor*', Available at: <http://www.aftenposten.no/nyheter/iriks/politikk/Rekordmange-utlendinger-uttransportert-i-fjor-8313271.html>, Accessed: 12.05.2016.
- Brakstad, T.H.S. (2014) '*Lille Wahaj Ali (2) har vært fengslet I Norge I ti uker*', Nettavisen, Available at: [http://www.nettavisen.no/nyheter/lille-wahaj-ali-\(2\)-har-vrt-fengslet-i-norge-i-ti-uker/8448529.html](http://www.nettavisen.no/nyheter/lille-wahaj-ali-(2)-har-vrt-fengslet-i-norge-i-ti-uker/8448529.html), Accessed: 12.05.2016.
- Council of Europe (2014b) '*Vote on Resolution*', Available at: <http://www.assembly.coe.int/nw/xml/Votes/DB-VotesResults-EN.asp?VoteID=35279&DocID=15212>, Accessed: 12.05.2016.
- Henderson, E. (2015) '*Norway is the best place to live in the world, according to the UN*', The Independent, Available at: <http://www.independent.co.uk/news/world/europe/the-best-places-to-live-in-the-world-is-norway-according-to-the-un-s-human-development-report-a6773891.html> Accessed: 12.05.2016.
- Hustadnes, H. (2014) '*Barneombudet bekymret for barn som fengsles før de kastes ut*', Dagbladet, Available at: [http://www.dagbladet.no/2014/07/03/nyheter/asylpolitikk/politiets\\_utlendingsenhet/34167461/](http://www.dagbladet.no/2014/07/03/nyheter/asylpolitikk/politiets_utlendingsenhet/34167461/), Accessed: 12.05.2016.
- International Detention Coalition (2014) '*CoE HR Commissioner names child immigration detention top priority*', Available at: <http://idcoalition.org/news/coe-hr-commissioner-names-child-immigration-detention-top-challenge-europe/>, Accessed: 12.05.2016.
- Johansen et.al (2014) '*14.000 utlendinger er registrert med ulovlig opphold i Norge*', Aftenposten, Available at: <http://www.aftenposten.no/nyheter/iriks/14000->

- [utlendinger-registrert-med-ulovlig-opphold-i-Norge-7689580.html](http://www.regjeringen.no/no/dep/just/utlendinger-registrert-med-ulovlig-opphold-i-Norge-7689580.html), Accessed: 12.05.2016.
- Lilleås, H.S (2014) '*Barn har individuelle rettigheter*', Nettavisen, Available at: <http://www.nettavisen.no/politikk/--barn-har-individuelle-rettigheter/5180171.html> Accessed: 12.05.2016.
- Ministry of Justice and Public Security (2014) '*Årsrapport 2014: Tilsynsrådet for Politiets Utlendingsinternat, Trandum*', Available at: <https://www.regjeringen.no/no/dep/jd/org/styre-rad-og-utval/permanente-rad-utvalg-og-arbeidsgrupper-/tilsynsradet-for-politiets-utlendingsint/id547242/>, Accessed: 12.05.2016.
- Norwegian Organization for Asylum Seekers (2015a) '*Frihet først- En rapport om alternativer til internering*'. Available at: <http://www.noas.no/lovstridig-internering-av-barn-pa-trandum-3/>, Accessed: 12.05.2016.
- Norwegian Organization for Asylum Seekers (2015b) '*Anundsen velger fengsling av asylsøkere*', Available at: <http://www.noas.no/anundsen-velger-fengsling-av-asylsokere/7>. Accessed: 12.05.2016.
- Norwegian Organization for Asylum Seekers (2014) '*Detention of Asylum Seekers- Analysis of Norway's International obligations, domestic law and practice*'. Available at: <http://www.noas.no/publikasjoner/>, Accessed: 12.05.2016.
- The Norwegian Directorate of Immigration (UDI), '*Statistikk og analyse*', Available at: <http://www.udi.no/statistikk-og-analyse/>. Accessed: 12.05.2016.
- The Norwegian Government (2015) '*Tiltak for å møte flyktningkrisen*', Available at: <https://www.regjeringen.no/no/aktuelt/tiltak-for-a-mote-flyktningkrisen/id2469066/>. Accessed: 12.05.2016.
- The Parliamentary Ombudsman Norway (2015) '*National Preventive Mechanism against Torture and Ill- Treatment*'. Visit Report- The police immigration detention centre at Trandum, 19-21 May 2015. Available at: <https://www.sivilombudsmannen.no/whats-new/the-parliamentary-ombudsman-is-critical-of-how-detainees-are-being-treated-at-trandum-article4190-2945.html>, Accessed: 12.05.2016.
- United Nations High Commissioner for Refugees (2014) '*Press release on the Anniversary of the CRC*', Available at: <http://www.unhcr.org/546de88d9.html> , Accessed: 12.05.2016.
- UDI (2016) '*Statistikk og analyse*', Available at: <https://www.udi.no/statistikk-og-analyse/>, Accessed: 12.05.2016.