



## **SCHOOL OF GLOBAL STUDIES**

UNIVERSITY OF GOTHENBURG  
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### **The Swedish Migration Court of Appeal position on the principle of the best interests of the child**

A qualitative content analysis on how the principle of the best interests of the child is interpreted after the Swedish incorporation of the Convention on the Rights of the Child.

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## Abstract

As of 2020, the Convention on the Rights of the Child (CRC) was incorporated into Swedish law. The Swedish media has since then reported about the lack of consideration for children's rights in the Swedish migration process. Later the same year of the incorporation, the Swedish Migration Court of Appeal's made precedent judgement regarding the principle of the best interests of the child in a migration case. The case concerns a 14-year-old child who has been in Sweden for a long time. According to the Swedish Migration Agency, the child would be deported with her parents because the family was overstaying their visa. Despite this, the Swedish Migration Court of Appeal emphasized in accordance with the principle of the best interests of the child, to allow the child and parents to stay in Sweden. In the Court's judgement of the case a balance of interests was made where the Court decided that the child should stay due to the child's long stay and connection to Sweden. The Court referred to the Committee of the Rights of the Children's general comment where it gives guidance in how to interpret the principle. For this study, a qualitative content analysis has been made to examine the Swedish Migration Court of Appeal's precedent judgment and the Committee of the Rights of the Children's general comment concerning the principle of the best interests of the child. Previous research has criticized the principle of the best interests of the child for being too general and mainly the risk for children in migration processes of having their interests weighed out against the state's interests in controlled immigration. From what has been found using a qualitative content analysis has been analyzed with the chosen theoretical framework Jacqueline Bhabha taken on Hannah Arendt's political theory with focus on today's migrants' children. The results of this study have found that an incorporation of the CRC can make sure that children's rights are considered. It should be noted that there is no guarantee for all children to have the principle of the best interest of the child fully considered. Despite this, the results of this study, like previous research have shown that it is not enough to "only" incorporate an international convention in order to protect the interests and the rights of children in migration process.

**Keywords:** Swedish Migration Court of Appeal, Convention on the Rights of the Child, The principle of the best interests of a child, Incorporation, Human Rights

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## 1. Introduction

In January 2020, the Convention on the Rights of the Child (CRC) was incorporated into Swedish law. The primary purpose of the incorporation was to strengthen children as rights holders in Sweden.<sup>1</sup> In December the same year, the Swedish Migration Court of Appeal gave a precedent decision regarding children in migration processes due to the incorporation of the CRC. In Swedish law when a case is brought up to the highest judicial body in Sweden it is called a precedent judgement or case. In this case the Court's judgement can give a guidance in how to interpret new laws into future cases and decisions in Sweden.<sup>2</sup> The Swedish Migration Court of Appeal is the highest instance for migration cases in Sweden. The court has therefore as previously mentioned a function to create guidance to courts and authorities in how to interpret the law.<sup>3</sup> The precedent case regarding children in migration processes was the first case brought up to the court after the Swedish incorporation of the CRC. The case was about a 14-year-old girl born and raised in Sweden. The girl got her asylum application rejected from The Swedish Migration Agency.<sup>4</sup> The main legal question in the case was whether if there was distressing circumstances for the child and if a deportation would be conflicting towards the principle of best interests of the child in CRC.<sup>5</sup>

Since the incorporation of the CRC various other migration cases concerning children have received attention. Several news articles have been published about the lack of consideration of the principle of the best interests of the child for children in migration processes. One noticeable case involving a new-born baby whose parents were from Belarus. Since birth, the baby was taken into care by Swedish authorities as the parents could not ensure the baby's survival. The Swedish Migration Court stated in the judgment that the child would be deported with his parents back to Belarus. The case got attention from the media as it emphasized that a deportation would encounter with the principle of the child's best interests.<sup>6</sup>

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<sup>1</sup> Regeringskansliet (2020). *Barnkonventionen blir till svensk lag*. Accessed 2021-03-24 from <https://www.regeringen.se/pressmeddelanden/2020/01/idag-blir-barnkonventionen-svensk-lag/>

<sup>2</sup> Jareteg, Frida. (2021, 9<sup>th</sup> February). *Nya prejudikatet kan häva systranas utvisning*. SVT Nyheter. Accessed 2022-02-01 from <https://www.svt.se/nyheter/lokalt/stockholm/14-arig-flicka-fick-uppehallstillstand-nar-barnkonventionen-trumfades-utlanningslagen>

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*, p. 1.

<sup>5</sup> Rädda Barnen (2021). *Rädda Barnen kommenterar viktig dom i Migrationsöverdomstolen*. Accessed 2021-03-23 from <https://press.raddabarnen.se/pressreleases/raedda-barnen-kommenterar-viktig-dom-i-migrationsoverdomstolen-3065168>

<sup>6</sup> Dragic, Marijana. (2021, 2<sup>th</sup> February). *Nyfödd omhändertogs enligt LVU – utvisas med biologiska föräldrarna*. Dagens Nyheter. Accessed 2021-03-23 from <https://www.dn.se/sthlm/nyfodd-omhandertogs-enligt-lvu-utvisas-med-biologiska-foraldrarna/>

In the beginning of 2021 another case got attention involving two teenage sisters who had lived most of their lives in Sweden. The Swedish Migration Agency decided that the sisters should be deported back to Bangladesh. The sisters were early taken into care by Swedish authorities as their mother could not take care of them. The Swedish Migration Court decided that the sisters would be deported to Bangladesh together with their mother. This case got much attention through social media, where the two sisters talked about their situation in a published video. The court later announced that the decision would change into allowing the sisters to stay in Sweden with a temporary residence permit. The court stated that due to the distressing circumstances in the sisters' situation a deportation would go against the principle of the best interest of the child.<sup>7</sup>

## 1.2 Research issue

The Swedish incorporation of the CRC has been seen as a conquest for children's rights, but there has been criticism towards the incorporation. The recurring criticism is that the incorporation does not strengthen children's rights.<sup>8</sup> Save the Children in Sweden has stated that Swedish law or decisions must be compatible with the CRC.<sup>9</sup> A doctoral student from Linköping University stated in an interview that an incorporation of the CRC cannot be the only thing done to strengthen children's rights. That risks other effective ways to strengthen children's rights being ignored.<sup>10</sup>

The United Nations High Commissioner for Refugees (UNHCR) published in May 2020 recommendations for Sweden. The recommendations from the UNHCR points out that the principle of the child's best interests is not always considered as an essential factor in migration and asylum cases. Sweden must ensure that the principle of the best interests of the child is interpreted in every step of the migrations process.<sup>11</sup>

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<sup>7</sup> Kjellström, Sandra. (2021, 13<sup>th</sup> February). *Systrarna Rudmila och Montaha får stanna i Sverige*. SVT Nyheter. Accessed 2021-03-23 from <https://www.svt.se/nyheter/lokalt/stockholm/systrarna-rudmila-och-montaha-far-stanna-i-sverige>

<sup>8</sup> Lind, Jacob. (2020, 1<sup>th</sup> October). *Svarare för papperslösa barn i Sverige sedan 2015*. Forskning.se. Accessed 2021-03-23 from <https://www.forskning.se/2020/10/01/svarare-for-papperslosa-barn-i-sverige-sedan-2015/>

<sup>9</sup> Rädda Barnen (2021). *Rädda Barnen kommenterar viktig dom i Migrationsöverdomstolen*. Accessed 2021-03-23 from <https://press.raddabarnen.se/pressreleases/raedda-barnen-kommenterar-viktig-dom-i-migrationsoeverdomstolen-3065168>

<sup>10</sup> Pravitz, Gunilla. (2016, 16<sup>th</sup> October). *Kritik mot att barnkonventionen föreslås bli lag*. Linköpings University. accessed 2021-03-23 from <https://liu.se/artikel/kritik-mot-att-barnkonventionen-foreslas-bli-lag>

<sup>11</sup> United Nations High Commissioner for Refugees (2020) *UNHCR recommendations to Sweden on strengthening refugee protection in Sweden, Europe and globally*. p. 3. Accessed 2021-03-24 from

The same year as Sweden incorporated the CRC, the Swedish government proposed changes to the Swedish Alien Act. In short, the Swedish government suggested that all residence permits should be time limited.<sup>12</sup> This was criticized by several organizations. For example, by Amnesty International. They believe that the new changes into the migration law would not be compatible with children's rights, especially not with the principle of the best interests of the child.<sup>13</sup> The United Nation Children's Fund (UNICEF) did also criticize the Swedish government's suggestions. UNICEF stated that it was remarkable that there aren't any exceptions from the Swedish government suggestions, especially for children.<sup>14</sup>

## 2. Aim & Research Questions

In this chapter, this study's purpose and aims will be presented together with the selected research questions. A delimitation will be given to show what has been considered for this study. Two definitions will also be clarified and described in this chapter. The CRC conception of a child and the principle of the best interests of the child will be defined. This is to clarify what this study means when using these two definitions.

### 2.1 Aim

The purpose of this study is to critical examine how the Swedish Migration Court of Appeal interpret the principle of the best interests of the child after the Swedish incorporation of the CRC. With help of a qualitative content analysis the precedent case from the Swedish Migration Court of Appeal<sup>15</sup> will be analysed together with the Committee on the Rights of the Children General comment No. 14 (2013).

### 2.2 Research Questions

1. What function can the principle of the best interests of the child have for children in migration processes?
  - How is the principle of the best interests of a child highlighted in the collected material?
  - Are there any significant factors related to the principle concerning children in the migration process?

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<https://www.unhcr.org/neu/wp-content/uploads/sites/15/2020/06/UNHCR-recommendations-to-Sweden-on-strengthening-protection-of-refugees-May-2020.pdf>

<sup>12</sup> Prop. 2020/21:191, Stockholm: Justitiedepartementet, p. 1.

<sup>13</sup> *ibid*, p. 55.

<sup>14</sup> Regeringen (2020). *UNICEF Sveriges remissvar på betänkandet (2020:54) "En långsiktig hållbar migrationspolitik"*. Stockholm: Justitiedepartementet. p. 2. Accessed 2021-05-30 from

<https://www.regeringen.se/4ae45c/contentassets/b8e8b3d4997c4e439d373eec8bfafa08/unicef.pdf>

<sup>15</sup> Migrationsöverdomstolen, dom MIG 2020:24.

2. What impact can the incorporation of the CRC into Swedish legislation have on children in migration processes?

### **2.3 Delimitations**

The CRC includes many different articles about the rights of the children. For this study, the focus has been mainly on how the Swedish Migration Court of Appeal positions regarding the principle of the best interests of the child. This study has chosen to focus on only one article by the CRC, which is article 3 (1) regarding the principle of the best interests of the child as the aim of the study is to examine how the principle is interpreted by Swedish Migration Court of Appeal. Other articles of the CRC will be addressed but no further examined.

As previously mentioned, the aim of this study is to examine the precedent case from the Swedish Migration Court of Appeal. The specific precedent case has been chosen as it was the first case after the Swedish incorporation of the CRC where the Court tries the CRC against the Swedish Alien Act and must take a position of the principle of the best interest of the child. The precedent case is a central part of this study as the interpretation of the principle of the best interests of the child made by the Swedish Migration Court of Appeal can guide other decisions-makers in migrations cases.<sup>16</sup> During the course of the study, only the Swedish Migration Court of Appeal has been studied because that is the final instance for migration cases in Sweden. Therefore, the lower instance such as the Swedish Migration Court has not been included for this study. The Swedish Migration Court of Appeal has referred in the precedent case to previous cases from the Court and the European Court of Justice. It is in this study interest to examine how Swedish law has been affected by the incorporation of CRC, therefore a delimitation has led to only examining the precedent case from the Swedish Migration Court of Appeal. Due to the conflict of interest that the Swedish Migration Court of Appeal has reasoned in its judgment, only certain parts of the Swedish Alien's Act and the Swedish temporary law regarding migration and the possibility of obtaining a residence permit have been included. This is because the reasons for the judgment contain a thorough analysis regarding how the principle of the best interests of the child should be assessed and weighed against other interests from example other national legislation.

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<sup>16</sup> Sveriges Domstolar (2019). *Information about the Migration Court of Appeal – English translation*. Accessed 2021-05-13 from [https://www.domstol.se/globalassets/filer/domstol/migrationsoverdomstolen/ovrigt/engelska\\_migrationsoverdomstolen.pdf](https://www.domstol.se/globalassets/filer/domstol/migrationsoverdomstolen/ovrigt/engelska_migrationsoverdomstolen.pdf)

## 2.4 Definitions

### 2.4.1 Definition of a child

The term "child" is recurring in this study. For what includes children, it is defined for what is provided in Article 1 of the CRC. Article 1 of the CRC contains the definition of "child". The article states that all people under the age of 18 shall be referred to as children.<sup>17</sup> The Committee on the Rights of the Children's has in the general comments emphasized that a child is anyone who is under the age of 18 and falls within the jurisdiction of a state party of the CRC.<sup>18</sup>

### 2.4.2 Definition of the best interests of the child

In this study, the definition of the principle of the best interests of the child will be defined under what is described in the CRC. Article 3 (1) of the CRC states that all measures concerning children, whether implemented by public or private social welfare institutions, courts, administrative authorities, or legislative bodies, must consider the best interests of the child.<sup>19</sup>

## 3. Background

The background to the Swedish incorporation of the CRC will be presented. The report from the Child Rights Inquiry (SOU 2016: 19) is the report that was made due to the Swedish government wanting to incorporate the CRC. The report from the Child Rights Inquiry did examine how an incorporation of CRC would affect children's rights in Sweden and whether Swedish legislation was compatible with the CRC. In this chapter, the Swedish Migration Court of Appeal's precedent case will also be presented. To gain an understanding of the aim of the study, it has been essential to present what was found from the Child Rights Inquiry before the Swedish incorporation of the CRC and the Swedish Migration Court of Appeal's precedent case after the incorporation.

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<sup>17</sup> UN General Assembly (1989). *Convention on the Rights of the Child*. 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, article 1. Accessed 2021-12-06 from: <https://www.refworld.org/docid/3ae6b38f0.html>

<sup>18</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children 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)\**, p. 7. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>19</sup> UN General Assembly (1989). *Convention on the Rights of the Child*. 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, article 1. Accessed 2021-12-06 from: <https://www.refworld.org/docid/3ae6b38f0.html>

### 3.1 Report from the Child Rights Inquiry (SOU 2016:19)

The CRC was adopted by United Nations General Assembly back in 1989. Since then, 196 different states have chosen to ratify it. This means that CRC is one of the most ratified conventions.<sup>20</sup> In 2013, the Swedish government decided to appoint a special group of experts to examine if Swedish legislation were compatible with the CRC. The special group was also given the mission to examine how children's rights in Sweden could be strengthened.<sup>21</sup> The special group was named the Child Rights Inquiry.

The Child Right Inquiry needed to examine the advantages and disadvantages of incorporating CRC into Swedish law.<sup>22</sup> It was argued from the final report from the Child Rights Inquiry that children in migration processes are in a vulnerable situation, therefore, authorities' decisions can have major consequences for the individual child.<sup>23</sup>

In the report the Child Rights Inquiry stated that there were weaknesses in the principle of the best interests of the child. A similar principle like the principle of the best interests of the child can be found in Swedish national legislation.<sup>24</sup> It can be found in the Swedish Social Services Act (2001: 453) that the Swedish social services has an ambition in actions taken concerning children to consider the best interests of the child.<sup>25</sup> In other Swedish legislation such as the Swedish Aliens Act (2005: 716), it can be found that in cases involving children, the child's health, development and the child's best interests must be considered with an overall perspective.<sup>26</sup> In 2015, a temporary law was passed regarding migration in Sweden. This was done due to the large number of people who applied for asylum in Sweden. The purpose of the temporary law was to sharply reduce the number of asylum seekers. In the Swedish temporary law, it is not possible to find anything about the principle of the best interests of the child.<sup>27</sup>

The Child Rights Inquiry found that the principle of the best interests of the child was not always considered by the decision-maker. The report stated that they found that decision-makers did not always motivate which interests of the child had been considered as it was

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<sup>20</sup> Wouters, J. et al., (2018). *International Law – a European perspective*. Oxford: Hart Publishing, p. 690.

<sup>21</sup> Regeringskansliet (2015). *Tilläggsdirektiv till Barnrättighetsutredningen*. Accessed 2021-03-23 from <https://www.regeringen.se/rattsliga-dokument/kommittedirektiv/2015/02/dir.-201517/>

<sup>22</sup> SOU 2016:19. *Barnkonventionen blir svensk lag*. Stockholm: Elanders Sverige AB. p, 19.

<sup>23</sup> *ibid.*, p. 20.

<sup>24</sup> *ibid.*, p. 21.

<sup>25</sup> SFS 2001:453. *Socialtjänstlagen*. Stockholm: Socialdepartementet, 1 kap. 2§.

<sup>26</sup> SFS 2005:716. *Utlänningslag*. Stockholm: Justitiedepartementet, 1 kap. 10§.

<sup>27</sup> Migrationsöverdomstolen, dom MIG 2020:24, p. 6.

more common to simply refer to Swedish legislative history, policy document or other guidelines. The report did point out that there were no guidelines in how to interpret or assessing the principle of the best interests of the child. The report highlighted that the perception of children as their own rights bearers is not always considered by the authorities. This is due to the fact that children gets treated differently from the adults in migrations processes, mainly because the children's interest is seen as more limited.<sup>28</sup>

The advantages of incorporating the CRC into Swedish law were found by the Child Rights Inquiry to be that officials or other decision-makers must take the CRC into account. This would mean that CRC must be considered and used as a basis for authorities' decisions that concerns all children. Sweden was already bound by the CRC at this time, but by incorporating the convention the Child Rights Inquiry stated it would require even more from Sweden to act from what is stated by the convention. The Child Rights Inquiry found in their report that by incorporating the CRC it can have an impact for children's rights in Sweden. In legislation matter an incorporation would affect new laws as the legislator needs to take children's rights into account. The main advantage of an incorporation would be that children's rights would have a stronger position.<sup>29</sup>

The report from the Child Rights Inquiry reflected over the difficulties that would come with incorporating the CRC into Swedish law. In the report, it was stated that articles in the convention are too generally, which can be difficult when interpreting the CRC into practice<sup>30</sup>. The Child Rights Inquiry stated that although the Committee on the Rights of the Children general comments can provide some guidance, there may still be difficulties in how to legally interpret articles with general formulations into practice.<sup>31</sup> The main difficulty that was pointed out by the Child Rights Inquiry was that in Swedish law the legislative history of a law can be used as guidance. For the CRC there exists no legislative history. Therefore, it can be difficult in Swedish law on how to interpret an international convention.<sup>32</sup> The Swedish government submitted a government bill in 2018 to incorporate the CRC. The government bill stated that incorporating CRC into Swedish law would mean that the

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<sup>28</sup> SOU 2016:19. *Barnkonventionen blir svensk lag*. Stockholm: Elanders Sverige AB. p, 21.

<sup>29</sup> *ibid.*, p. 22.

<sup>30</sup> *ibid.*, p. 22.

<sup>31</sup> *ibid.*, p. 22.

<sup>32</sup> *ibid.*, p. 23-24.

convention gets a position where in all cases must consider the CRC.<sup>33</sup> On 1 January 2020, the CRC was incorporated into Swedish law. Articles 1-42 of the CRC can be found in the Swedish national legislation.<sup>34</sup>

### **3.2 The Swedish Migration Court of Appeal precedent judgement (MIG 2020:4)**

The Swedish Migration Court of Appeal is the court in Sweden that handles migration cases. The Swedish Migration Court of Appeal is the highest instance when it comes to these cases. The Court's primary purpose is to guide other courts or authorities in how to interpret the law.<sup>35</sup>

#### **3.2.1 Swedish migration law**

In December 2020 a precedent migration case regarding the principle of the best interests of the child was brought up to the Swedish Migration Court of Appeal. The migration case was concerning a 14-year-old child who was born and raised in Sweden. The child's parents were from Lebanon and sought asylum for the whole family. In the asylum proceedings, the family was denied a residence permit by the Swedish Migration Agency. According to the Swedish Migration Agency there were no distressing circumstances in the family's case. In Swedish migration law it can be found that if the individual has no other grounds for a residence permit such as the protection grounds there has to be distressing circumstance in order to be granted a residence permit. Distressing circumstances for children can be how long the child has been in Sweden or how the child's connection to his or her country of origin is.<sup>36</sup> The temporary migration legislation was adopted in 2015 in Sweden. The main purpose of the law is mainly to reduce the number of asylum seekers. According to the Swedish temporary migration legislation, an individual can only be granted a residence permit if it would be conflicting towards Swedish convention obligation.<sup>37</sup>

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<sup>33</sup> Prop. 2017:18:186. *Inkopporering av FN:s konvention om barnets rättigheter*. Stockholm: Socialdepartementet, p. 1.

<sup>34</sup> Regeringskansliet (2020). *Barnkonventionen blir till svensk lag*. Accessed 2021-03-23 from <https://www.regeringen.se/pressmeddelanden/2020/01/idag-blir-barnkonventionen-svensk-lag/>

<sup>35</sup> Sveriges Domstolar (2019). *Information about the Migration Court of Appeal – English translation*. Accessed 2021-05-13 from [https://www.domstol.se/globalassets/filer/domstol/migrationsoverdomstolen/ovrigt/engelska\\_migrationsoverdomstolen.pdf](https://www.domstol.se/globalassets/filer/domstol/migrationsoverdomstolen/ovrigt/engelska_migrationsoverdomstolen.pdf)

<sup>36</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 5

<sup>37</sup> *ibid.*, p. 5.

The Swedish Migration Agency stated in the precedent case that a deportation of the family would not conflict with a Swedish convention obligation.<sup>38</sup> In the Swedish Aliens Act, Chapter 1, 10§ it is described that in migration cases involving children the child's health and development should be considered. In the same legal rule it can be found that the best interests of the child in general should also be considered.<sup>39</sup> Due to the temporary migration law an individual can as previously mentioned only be granted a residence permit if it would be contrary towards Swedish convention obligation to deny it. In the legal reasoning it can be found that the convention obligation only concerns legislation that has been incorporated. For example convention such as the CRC or European Convention on Human Rights.<sup>40</sup>

### **3.2.3 The Court reasoning about the principle of the best interests of the child**

In the precedent judgement from the Swedish Migration Court of Appeal it can be found that the Court refers to as previously mentioned the Swedish Aliens Act, Chapter 1, 10§.<sup>41</sup> In the national legislation the Court refers to legislative history regarding the best interest of the child. The legislative history has stated that the child's interests must be weight against the interests of the society.<sup>42</sup> It is stated in the judgement of the precedent case that there is no specific article of the CRC that can grant a child to get a residence permit.<sup>43</sup>

From the Court's reasoning of the precedent case the Court has considered Sweden's obligations to various conventions, but foremost the CRC. The Court has referred article 3 of the CRC regarding the principle of the best interests of the child. The Court points out that the principle of the best interests of the child must be interpreted individually for each child and must contain a motivation. In the motivation it needs to be clear with which interests the decision-maker has considered. If the decision would go against with what is in the child's interests this needs to be stated in the decision and the decision-maker needs to motivate it as well.<sup>44</sup> The Court takes help of which factors that should be considered when interpreting the principle of the best interests of the child and refers to Committee on the Rights of the Children General comment No. 14 (2013) in its legal reasoning. The Court name a few factors from the Committee's general comments such as the child's opinions, identity, family

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<sup>38</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20., p. 1.

<sup>39</sup> *ibid.*, p. 4.

<sup>40</sup> *ibid.*, p. 6.

<sup>41</sup> *ibid.*, p. 4.

<sup>42</sup> *ibid.*, p. 4.

<sup>43</sup> *ibid.*, p. 8.

<sup>44</sup> *ibid.*, p. 6.

environment and the maintenance of relationships, care and the child's protection and safety, vulnerable situations and the right to health and education.<sup>45</sup> When interpreting the principle of the best interests the Court states with help of the general comments that a child age can be a guidance on which interests that should be considered.<sup>46</sup>

### **3.2.4 The Court's balance of interests**

The Swedish Migration Court of Appeal raises several circumstance of the case that could be distressing. For example that the child was born in Sweden and had spent her entire life there and because of it lacks social contacts in Lebanon. The Court also considered the child had never been to Lebanon. Even though it has been found that the child does not have specific grounds of protection, the Court believes that the parents left Lebanon due to the risks. This could in one way or another affect the child and her view of the country. The Court also considered the child age. It was stated by the Court that the child in the case was in an identity-creating age and therefore due to her connection and contacts in Sweden would probably get absent if the child was deported from Sweden. The Court, therefore, stated that since the child has been in Sweden for a long time, there are bigger interest for the child to stay in Sweden.<sup>47</sup> The Court points out in their legal judgement that the CRC requires that a balance of interests is made.<sup>48</sup>

The Swedish Migration Court of Appeal did state in their judgement of the precedent case that children should be seen as independent rights holders. The child had been in Sweden for a long time, but it was also brought up to the Court that the child had stayed in Sweden for an illegal time. This is because the family had a previous deportation decision and did not leave Sweden even though there was a decision about it. The Court argued that the child could not have influenced her parents' decision to stay illegally in Sweden. Despite this, the Court considered that during the past four years, the child has been in Sweden legally due to her asylum application. This is seen by the Court as a long time considered her age.<sup>49</sup> The Court stated that in an overall assessment of the circumstances of the case and with special regard to the child's strong connection to Sweden, the Court found that it was in the best interests of the child that outweighed the opposing interests. According to the Court, a deportation to

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<sup>45</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20., p. 7.

<sup>46</sup> *ibid.*, p. 7.

<sup>47</sup> *ibid.*, p. 8.

<sup>48</sup> *ibid.*, p. 8.

<sup>49</sup> *ibid.*, p. 8.

Lebanon was not considered equivalent to what was in the best interests of the child. A deportation of the child would be contrary to the CRC in this case.<sup>50</sup> The Court referred to previous legislative history when also grant the parents of the child a residence permit in this case. In accordance to article 8 of the European Convention on Human Rights it would be conflicting to Swedish convention obligation to separate the family.<sup>51</sup> In the Court's legal reasoning of the case the Court referred to a previous precedent case. The case was about an 8 year old boy and his family who was denied of family reunification. The Court stated in that case that the principle of the best interests of the child is of primary consideration when it comes to the right of family life in the European Convention on Human Rights and needs to be considerate.<sup>52</sup>

## **4. Previous Research**

This study has examined previous research that concerns issues such as incorporation of the CRC and the principle of the best interests of the child in migration processes. For this study incorporation of the international convention such as CRC has been looked at whether if an incorporation can be an approach to ensure all children's rights especially regarding children in migration processes. There has also been looked at precious research regarding the interpretation of the principle of the best interests of the child for children in migration processes. For example, which ideas or difficulties there are in applying the principle for Swedish migration processes? It has therefore been in primary consideration when finding precious research that it has examined Swedish migration process.

### **4.1 Direct incorporation of the CRC**

Sweden has, as previously mentioned, incorporated CRC into national law. This has been done with help of a direct incorporation. Direct incorporation means transforming or completely transporting an international convention into national legislation. This means, for example, that national authorities or officials are bound by the international convention.<sup>53</sup> McCall-Smith have pointed out that a state choosing to directly incorporate an international convention, such as the CRC, does not automatically include protection of children's rights. Although CRC is central to children's rights, it is emphasized that legislation and commitment

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<sup>50</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20., p. 9.

<sup>51</sup> *ibid.*, p. 9.

<sup>52</sup> *ibid.*, p. 8.

<sup>53</sup> McCall-Smith, Kasey (2019). *To incorporate the CRC or not – is this really the question?*. The International Journal of Human Rights, 23:3, p. 430.

to change are required in order to protect children's rights.<sup>54</sup> Incorporating the CRC is not a solution to immediately get protection for children's rights. In order to protect children's rights this is according to McCall-Smith fully up to the state on how to do it. A state should take general measures for legal and social changes to strengthen children's rights. The idea of requiring an incorporation of CRC from the states to increase children's rights has been seen as problematic. Incorporating an international convention should be seen as a state setting a standard in their work of protecting human rights. Therefore, can an incorporation of the CRC works as an approach in order to maintaining protection of the children's right. In one of the studies of incorporation, the CRC refers to a report published by UNICEF in 2007.<sup>55</sup>

*"There is no single approach that is best suited to all countries, and no single method is sufficient to translate the breadth of the Convention into the national legal framework".<sup>56</sup>*

Lundy, Kilkelly and Byrne have criticized that in international convention regarding human rights it does not always specify which type of measures a state party should take in order to meet the requirements of the convention. In the CRC it is described that a state should take "all appropriate measures". This means on the other hand that it is simply up to a state party itself to decide how to best implement their international treaty obligations.<sup>57</sup> How a state chooses to incorporate the CRC may vary.<sup>58</sup>

From a legal perspective, an incorporation of an international convention can take place in different ways. This may, for example, be about the legal status that CRC receives upon incorporation. In the jurisdictions of some states, the CRC is seen as a national law. It has been found in Lundy, Kilkelly and Byrne that it has been more common for states to incorporate only specific articles of the CRC, instead of incorporating the entire convention. It's mainly regarding the principle of the best interests of the child and a child's right to be heard that can be found in article 3 and 12.<sup>59</sup> Lundy, Kilkelly and Byrne has shown in their study that it is about how motivated a state is to determine children's rights. By incorporating

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<sup>54</sup> McCall-Smith, Kasey (2019). *To incorporate the CRC or not – is this really the question?*. The International Journal of Human Rights, 23:3, p. 431-432.

<sup>55</sup> *ibid.*, p. 436-37.

<sup>56</sup> *ibid.*, p. 436-37.

<sup>57</sup> Lundy, Laura, Kilkelly, Ursula, Byrne, Bronagh, (2013). *Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review*. International Journal of Children's Rights, 21(3), p. 443.

<sup>58</sup> *ibid.*, p. 446.

<sup>59</sup> *ibid.*, p. 446.

the CRC, it can have a significant value to children as rights holders and that education in the field of children's rights must also be supported. Roles such as media and NGOs have important roles. For example, Lundy, Kilkelly and Byrne states that NGOs can contribute to knowledge, observation, and examine what the work for children's rights looks like within the society.<sup>60</sup>

#### **4.2 Principle of best interests of child for children in migration processes**

For Swedish officials or authorities, they are obliged to respect the principle of the best interests of the child in all actions and decisions concerning children according to article 3 of the CRC due to the incorporation. This means for example that officials in the Swedish Migration Agency have to respect and protect children's rights in connection with the Swedish asylum process.<sup>61</sup> One of the problems with the principle of the best interests of the child is according to Lundberg that it's not definite which makes the principle unclear on what should be considered by the decision-maker.<sup>62</sup> It is, for example, that the principle states that the best interests of the child should be the primary consideration in cases and decisions concerning children. In practice, however, it happens that the best interests of the child are ignored in favour of other interests. This is according to Lundberg a problem as it is a mandatory obligation to take into consideration the best interests of the child.<sup>63</sup> The real problem with the principle of the best interest of the child is how to interpret it and what should be taken into consideration. For example, Lundberg states that in the Swedish asylum process, it rarely happens that one considers the principle with a long- and short-term perspective. A decision-maker in Sweden will look at legislative history and see how the principle of the best interests of the child has been interpreted before, which can also affect a decision regarding the child as the principle needs to be considered the individual circumstances or factors.<sup>64</sup>

One way to gain a better understanding of the best interests of the child is to try to understand the entire CRC. To understand and define the principle of the best interests of the child it has to be done with all articles in the CRC.<sup>65</sup> For example, specific rights can create a certainty in

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<sup>60</sup> Lundy, Laura, Kilkelly, Ursula, Byrne, Bronagh, (2013). *Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review*. International Journal of Children's Rights, 21(3), p. 463.

<sup>61</sup> Lundberg, Anna (2011). *The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights*. Journal of Human Rights Practice, 3(1), p. 50.

<sup>62</sup> *ibid.*, p. 54.

<sup>63</sup> *ibid.*, p. 54.

<sup>64</sup> *ibid.*, p. 54.

<sup>65</sup> *ibid.*, p. 54.

what is the best interests of the child. It can be found in article 12 that a child has the right to be heard, therefore it should be in the best interests of the child to consider this. A study regarding children in asylum processes in Sweden states that there should be a checklist using questions as "Will the child have access to education under article 28 of CRC?" or "Will the child have access to health care under article 24 of CRC?" This can be a way to uphold the principle of the best interests of the child.<sup>66</sup>

Previous research has shown that there is an unwillingness among officials of the public sector in Sweden to fulfil the rights of asylum-seeking children. Lundberg highlights in her study that there are differences in how the interests of the children in migration process are respected in practice. It also found by the study that there is officials within migration authorities in Sweden that believe that most of the children that are seeking asylum in Sweden do not have real reasons for it. This is of course worrying that these ideas exist within the authorities in Sweden.<sup>67</sup> In addition to this problem, it has once again been found in previous research that there are weaknesses in the handling of asylum cases, such as how to interview children. There have been several studies from Scandinavia that have found that there are ideas or perceptions that people who are seeking asylum are a threat to the welfare state.<sup>68</sup> Josefsson points out there are conflicts between what is in the best interests of the child and the state's interest in immigration control. In those cases, for example, it is obvious that children's interests' conflict with parents 'illegal stay, crime or proof of identity. All legal rules, principles and procedures relating to the asylum process, has in one way or another, a purpose of controlling immigration.<sup>69</sup> How to implement the principle of the best interests of the child also depends on migration policy. This is to be able to gain an understanding of why certain ideas exist, but also to take into account the general norms and ideas that exist about children in migration processes. Even though the principle of the best interests of the child has been criticized as previously mentioned for its vagueness, it is still a very important principle for children.<sup>70</sup>

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<sup>66</sup> Lundberg, Anna (2011). *The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights*. Journal of Human Rights Practice, 3(1), p. 55.

<sup>67</sup> *ibid.*, p. 65-66.

<sup>68</sup> *ibid.*, p. 66.

<sup>69</sup> Josefsson, Jonathan (2017). *Children's Rights to Asylum in the Swedish Migration Court of Appeal*. International Journal of Children's Rights, 25(1), p. 109-110.

<sup>70</sup> Lundberg, Anna (2011). *The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights*. Journal of Human Rights Practice, 3(1), p. 66.

Lundberg points out a solution to strengthen children's protection in migration processes is to use a checklist or an assessment template based on the rights in the CRC. Questions such as "Have the child have access to basic health care and education regards to articles 24 and 28 of the CRC?" clearly designates a child rights approach. These questions are an example of what needs to be assessed in order to respect the rights of the children for children in migration processes. A refers to the fact that Sweden had ratified the CRC before 2018 and was already obligated to respect, protect and fulfilling the rights of all children living in the country.<sup>71</sup> According to Josefsson, the principle of the best interests of the child is more of an open nature which can raise several theoretical questions for the decision-maker that need to be further examined. One issue that Josefsson have risen is which norms of a child's best interests can be determined and what weight should it have in regard to the state's interest, especially in control of immigration. What are the obligations for example of a court when children are rejected with regard to Sweden's immigration control? This shows in many ways the challenges to interpret the principle of the best interests of the child in a migration process. The main challenges is to interpreted human rights in migrations process where it is in a state's interests to follow their principle about regulated and controlled immigration.<sup>72</sup>

## **5. Theoretical framework**

The study's chosen theoretical framework will be presented in this chapter. To examine what the study aims at; the chosen theoretical framework is Jacqueline Bhabha concept on Hannah Arendt's political theory. The choice of Bhabha's take on Arendt's theory has been considered as the most appropriate theoretical framework for this study as Bhabha mainly focuses on and applies Arendt's theory on today's migrant children and their rights to have rights. Arendt's political theory will be presented with a focus of human rights and then get further into Bhabha's concept of the theory.

### **5.1 Hannah Arendt's political theory and human rights**

German philosopher Hannah Arendt fled Nazi Germany in 1933, which resulted in her becoming stateless. She was not granted citizenship until 1951 when she got American citizenship. This experience led Arendt to develop her own political theory dealing with statelessness and the right to have rights. In her political theory, she emphasizes that people

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<sup>71</sup> Lundberg, Anna (2011). *The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights*. *Journal of Human Rights Practice*, 3(1), p. 67.

<sup>72</sup> Josefsson, Jonathan (2017). *Children's Rights to Asylum in the Swedish Migration Court of Appeal*. *International Journal of Children's Rights*, 25(1), p. 111.

are aware of their own rights and belonging to a community when other people have lost their rights or political status because they had to flee from their country.<sup>73</sup>

Arendt has, with the help of her political theory, tried to theoretically work out the fundamental right to have rights.<sup>74</sup> Arendt has criticized the modern formulation of human rights. According to her, universal human rights have only been available to enjoy for a state's own people. It is emphasized by Arendt that rights shouldn't always be focus on freedom and justice. Arendt argues that being a citizen is a more fundamental right. For what Arendt believes is that there are more fundamental rights such as the right to action or opinion, but above all the right to belong to a political community.<sup>75</sup> People who are stateless or have lost their citizenship are also losing their human rights. According to Arendt, this means that stateless people have a form of "rightlessness" as they, for example, lost to be part of a political community that could recognise their legal, political, and human rights.<sup>76</sup> Terms like statelessness are not limited to those who do not hold citizenship or legally bond to a state. Arendt emphasised that people who are forced to flee to another country have their rights affected.<sup>77</sup> Arendt emphasised a difference between how human rights should be working and how it works in practice.<sup>78</sup> Arendt's ideas on human rights have been criticized for not giving any further theoretical formulations of what it actual may entail. The philosopher Michael Ignatieff has referred to Arendt's political theory regarding human rights. Ignatieff has pointed out that because the concept of human rights does not have a theological basis, he believes that the theoretical claims about human rights will always be vague. Ignatieff believes that the focus should be on what human rights can do. Furthermore, Ignatieff underlines that human rights are important in order to protect people from violence and oppression.<sup>79</sup> In Arendt's political theory, she emphasizes the importance of having a universal principle regarding humanity. This is to be able to guarantee for human dignity. Arendt emphasizes that it is therefore important that humanity itself ensures that the right to have rights actually exists.<sup>80</sup>

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<sup>73</sup> Arendt, Hannah (1979). *The Origins of Totalitarianism*. San Diego: Harcourt Brace Jovanovich. p. 297.

<sup>74</sup> Birmingham, Peg (2006), *Hannah Arendt and Human Rights: The Predicament of Common Responsibility*, Bloomington: Indiana University Press., p. 1.

<sup>75</sup> *ibid.*, p. 36.

<sup>76</sup> Hayden, Patrick (2014), *Hannah Arendt: Key Concepts*. London: Routledge., p. 170.

<sup>77</sup> *ibid.*, p. 153.

<sup>78</sup> Isaac, Jeffrey. C. (1996). *A New Guarantee on Earth: Hanna Arendt on Human Dignity and the Politics of Human Rights*. *American Political Science Review*, Vol. 90, No. 1, p. 68.

<sup>79</sup> Isaac, Jeffrey. C. (1996). *A New Guarantee on Earth: Hanna Arendt on Human Dignity and the Politics of Human Rights*. *American Political Science Review*, Vol. 90, p. 2.

<sup>80</sup> *ibid.*, p. 6.

## 5.2 Arendt's children

Jacqueline Bhabha has taken Arendt's political theory a step further and applied it on today's migrants' children, also called "Arendt's children". The main question is whether migrant children have the right to have rights. For this study, Bhabha's concept of migrant children's right to have rights will be applied. With the help of Arendt's political theory, it can gain an understanding of what happens to the rights for those individuals that are forced to flee from their homes to another country. Arendt has in her political theory as previously stated that individuals that become stateless or is not part of an organised community will get their rights affected. Bhabha refers to this in accordance with international law, which emphasises that a person can be considered stateless if it is not considered as a state citizen any longer by law. Being stateless can be divided into two groups. The first group is the individual who does not have citizenship or as for the second group is functionally stateless, according to Arendt definition. It means for example the loss of being part of a community. In one way or another, both groups cannot fully enjoy their rights that they have the right to.<sup>81</sup> Bhabha states that migrant children have a statelessness that is not that obvious as Arendt's definition. Bhabha has taken Arendt's definition into her own conception. According to Bhabha undocumented children or trafficking victims can be a form of statelessness.<sup>82</sup> Another group that Bhabha addresses is, for example, the migrant children who have applied for asylum. For example, these children can lose their rights if they remain in the country which can as a result cause them to lose access to state protection. Bhabha has identified this group as "Arendt's children". This means that they are minors, at risk of being separated from family or not having a country to call their home. Bhabha means that this group is broad and includes for example, children who are first-generation citizens whose parents have got a deportation decision or are undocumented.<sup>83</sup> To be functionally stateless can be hard for an individual's economic, social, or psychological factors.<sup>84</sup> These children may experience this in states that are wealthy or democratic, but also in states that emphasise children's rights.<sup>85</sup> The migrant children described as Arendt's children do have human rights. Unfortunately, it is emphasized by Bhabha that even though migrant children have rights, they are limited.

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<sup>81</sup> Bhabha, Jacqueline (2009). *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*. The Johns Hopkins University Press: Human Rights Quarterly, May, 2009, Vol. 31, No. 2 (May, 2009), p. 411.

<sup>82</sup> *ibid.*, p. 412.

<sup>83</sup> *ibid.*, p. 413.

<sup>84</sup> *ibid.*, p. 414.

<sup>85</sup> *ibid.*, p. 415.

In the Universal Declaration of Human Rights (UDHR), it is stated that all people have rights and freedoms. It is nowhere to be found in UDHR if there is an age limit, maturity criterion, requirement of a citizenship.<sup>86</sup> Bhabha emphasises that even though the CRC has almost become a universal convention it is however not applied effectively as other human rights.<sup>87</sup> For example, in the Canary Islands, the former President of the island Adán Martín Menis said that migrant children from Morocco should not be protected. The former president meant that these children should be treated as adults. Bhabha emphasises that even if judges, officials, or other state functions are usually not allowed to share their personal views, their actions speaks louder.<sup>88</sup> The UN Special Rapporteur on the Human Rights of Migrants stated that children are deprived of their rights under the CRC or UDHR. Examples of this are by detaining children or deprived their rights of care, protection, or education.<sup>89</sup>

In Arendt's political theory she has stated that people who are stateless lose their human rights.<sup>90</sup> In Bhabha's take on Arendt's political theory she has broader the stateless concept and implemented on today's migrant children. As Bhabha has previously stated that statelessness for migrant children can be much broader than escaping to another country. For today's migrant children it can be situation were the family is staying illegally in a country or trafficking victims.<sup>91</sup> This children can't according to Bhabha's concept enjoy their rights under CRC or UDHR as there are not in the state's interests. Bhabha emphasised that this shows Arendt's political theory regarding the state's primary interest in upholding the rights to their own citizens.<sup>92</sup>

Arendt has pointed out in her political theory that there is a difference in how human rights should be working and how it actually works in practice.<sup>93</sup> In Bhabha's take on Arendt's political theory on today's migrant children she has pointed out that because children in migration can't fully enjoy their rights in practice there needs to be a greater determination

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<sup>86</sup> Bhabha, Jacqueline (2009). *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*. The Johns Hopkins University Press: Human Rights Quarterly, May, 2009, Vol. 31, No. 2 (May, 2009), p. 420.

<sup>87</sup> *ibid.*, p. 422.

<sup>88</sup> *ibid.*, p. 417.

<sup>89</sup> *ibid.*, p. 423.

<sup>90</sup> Hayden, Patrick (2014), *Hannah Arendt: Key Concepts*. London: Routledge., p. 170.

<sup>91</sup> Bhabha, Jacqueline (2009). *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*. The Johns Hopkins University Press: Human Rights Quarterly, May, 2009, Vol. 31, No. 2 (May, 2009), p. 412.

<sup>92</sup> *ibid.*, p. 435.

<sup>93</sup> Isaac, Jeffrey. C. (1996). *A New Guarantee on Earth: Hanna Arendt on Human Dignity and the Politics of Human Rights*. American Political Science Review, Vol. 90, No. 1, p. 68.

and political will to let the rights of the children function as they were created. There is a problem with just assuming that children in migration have rights due to the practical differences.<sup>94</sup> Bhabha does point out in her concept “Arendt’s children” the importance of using human rights instruments and doing this with a will or aspiration to be able to transform this into practice. There are no shortcuts to upholding human rights. In order to uphold human rights for migrant children it has to be a will to both change and actually put it into practice to make migrant children’s rights visible.<sup>95</sup> Bhabha emphasizes in her concept that formulating and passing laws is the first step and possibly also the easiest in terms of turning rights into practical realization. Despite this, Bhabha highlights difficulties in the criticism that exists regarding the lack of states’ involvement in how they choose to approach the various human rights instruments. It is emphasized that states can choose to take part in human rights instruments without really being interested in how to adopt this in actual practice. As Bhabha believes is due to the lack of holding states responsible for it.<sup>96</sup>

## **6. Methodology**

The method of this study will be presented in this chapter. This study has chosen to use a qualitative content analysis to examine the study's aim. The choice of method will be presented together with the measuring instrument that has been created for this study. The reliability and validity of the chosen method will also be discussed in this chapter. For example, how the chosen material has been interpreted and what has been essential to keep in mind when examine the material. It is followed by a discussion regarding the various method choices that was considered at the beginning of this study. The choice of material that has been examined will be presented. The chosen material for this study is the precedent judgment from the Swedish Migration Court of Appeal and the UN Committee on the Rights of the Children General comment no. 14 (2013). A source-critical discussion has been made regarding the two different materials to show the source criticism that has been reflected.

### **6.1 Choice of analysis method**

In this study, a qualitative content analysis will be used. Content analysis is a method that, through objectivity and systematics, tries to distinguish specific attributes in the materials that

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<sup>94</sup> Bhabha, Jacqueline (2009). *Arendt’s Children: Do Today’s Migrant Children Have a Right to Have Rights?*. The Johns Hopkins University Press: Human Rights Quarterly, May, 2009, Vol. 31, No. 2 (May, 2009), p. 450.

<sup>95</sup> *ibid.*, p. 451.

<sup>96</sup> *ibid.*, p. 425.

are to be examined to provide a conclusion.<sup>97</sup> Using a qualitative content analysis means to systematically select words or sentences in order to describe the meaning of the examining material.<sup>98</sup> A researcher needs to be systematic when using content analysis. This means that a researcher should not add or remove a category during the process in order to reduce mistakes.<sup>99</sup> Therefore, a qualitative content analysis is a suitable method for materials that needs a special interpretation.<sup>100</sup> A method such as qualitative content analysis means that the researcher read the material entirely to highlight specific words, sentences or concepts. A qualitative content analysis makes it possible for a researcher to analyse the whole or certain parts of the material.<sup>101</sup> With the help of content analysis, a researcher can examine how something is valued or produced.<sup>102</sup> Content analysis is suitable for this study mainly because this method provides the opportunity to be able to pick out specific sentences that contain information that can later be used in an analysis. In a content analysis it is required to be objective when categorizing the material. It is needed for the researcher to be transparent and not influence the process with their own values.<sup>103</sup>

## 6.2 Coding scheme

For this study, a coding scheme has been created as an analysis instrument. The coding scheme is based on a qualitative content analysis method. This type of analytical instrument as a coding scheme can help the researcher to code or categorize what has been noted in the examined material.<sup>104</sup> It is important for researchers to become familiar with the examined material to design a coding scheme. By doing a coding scheme it can encode all the data relating to an object.<sup>105</sup>

The coding scheme has been constructed into two different templates. The sub question of the first research question will be examined with help of a coding scheme. The research question that has been examined with help of a coding scheme is “1 (1) How is the principle of the best

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<sup>97</sup> Bryman, Alan (2012). *Social Research Methods*. New York: Oxford University Press, p. 288.

<sup>98</sup> Esaiasson, Peter, et al., (2017). *Metodpraktikan: konsten att studera samhälle, individ och marknad*. Stockholm: Wolters Kluwer, p. 3.

<sup>99</sup> Bryman, Alan (2012). *Social Research Methods*. New York: Oxford University Press, p. 289.

<sup>100</sup> Esaiasson, Peter, et al., (2017). *Metodpraktikan: konsten att studera samhälle, individ och marknad*. Stockholm: Wolters Kluwer., p. 2.

<sup>101</sup> Boréus, Kristina, Bergström, Göran (2018). *Textens mening och makt*. Lund: Studentlitteratur AB, p. 50.

<sup>102</sup> *ibid.*, p. 53.

<sup>103</sup> Bryman, Alan (2012). *Social Research Methods*. New York: Oxford University Press, p. 289.

<sup>104</sup> Boréus, Kristina, Bergström, Göran (2018). *Textens mening och makt*. Lund: Studentlitteratur AB, p. 50.

<sup>104</sup> *ibid.*, p. 58.

<sup>105</sup> Bryman, Alan (2012). *Social Research Methods*. New York: Oxford University Press, p. 298.

interests of a child highlighted in the collected material?” and “1 (2) "Are there any significant factors related to the principle concerning children in the migration process?". The coding scheme template has been constructed that in the heading of the template it is specified which research question the coding scheme has examined.

In the template of the coding scheme different heading can be seen. This first heading is called “Coding units”. Under this section it states which of the material has been coded. For this study it means that in the coding scheme it has to specify which of the different material has been coded. For this study as previously stated the material that will be used for analysis is the Swedish Migration Court of Appeal precedent judgement and Committee on the Rights of the Children General comment No. 14 (2013). In the coding scheme the Swedish Migration Court of Appeal precedent judgement is categorized in two categories. This has been done to separate the legal reasoning and legal judgement from each other. This is done to better understand and clarify how the Court has in the case reasoned regarding the principle of the best interests of the child. For example, how the Court have reasoned legally about the CRC in regard to other national legislation. The same goes for the Court’s legal judgement. It is separated to see how the Court in its judgement proceeds and takes a position to the principle of the best interests of the child. In the coding scheme this is marked with a bold highlighted text with the precedent case shortening such as “The legal reasoning from MIG 2020:4” and “The legal judgement from MIG 2020:4”. The two different section of the material regarding the coding unit for the Swedish Migration Court of Appeal precedent case are in the template of the coding scheme marked in the bold text under the headline of coding units, and each has its own column in the template of the coding scheme.

In the coding scheme the different coding categories can be seen as centrally marked on the coding scheme template. It is marked with the heading "Coding categories". The coding categories have five different categories. These categories are "Citation unit from the document", "Condensation", "Code", “Sub-category” and "Category". This step of the coding scheme is to easily see how the selected text from the material has been valued.

The coding category "Citation unit from the document" contains pieces from the actual documents from the two different materials. In the category "Condensation" the original text has been distinguish from what is perceived by the researcher. The next step of the coding scheme is the category “Code”. The purpose of this step is try to code from what has been perceived by the researcher. This can be done by describing a theme or short description of

what has been observed. This means that the category “Code” is converting the findings from the material into a shorter code. The next step of the process with the coding scheme is trying to categorise the code. There is two different section when categorising the code. The two categories are “Sub-Category” and “Category”. The section “Sub-Category” is a secondary group of a larger group of the section “Category”. For example, “Right to life” or “Right to education” would be categorized in the next section “Category” to the category of “Rights”. This means which categories have been discovered or created as a result of what has been found from the material. The choice of creating the coding scheme like this is to easily demonstrate of how the findings in the materials has been perceived. With help of the template of the coding scheme it makes it possible to see how all the findings have been interpreted in the process of using a qualitative content analysis. It is essential when a researcher is creating a coding scheme to have clear instructions. Each category should be clear when assigning codes. It is important to show the clear distinction between what material has been encoded.<sup>106</sup>

### **6.3 Reliability and validity**

As previously stated, a qualitative content analysis will be used for this study. A coding scheme has been designed in accordance with qualitative content analysis. The template of the coding scheme is shared as an appendix in this study. This can be a way to show how, as the material has been interpreted by the researcher. It can be both good and problematic when it comes to intersubjectivity.<sup>107</sup> The reliability of qualitative content analysis can be difficult. This is mainly due to the intersubjectivity, which focus on comparing the results by examining the same way again in order to test the reliability of the study. If several different researchers do the study the same way, the results should be the same because the study has a high intersubjectivity. To have a solid intersubjectivity varies for different science's theoretical basis.<sup>108</sup> Achieving a complete intersubjectivity is seen as impossible. A researcher can still be transparent in its study, even though, there is difficulties with the intersubjectivity.<sup>109</sup> A researcher needs to be as neutral as possible when observing something and striving for transparency. A researcher must show methods and results openly and tell what has been examined in the study.<sup>110</sup> It should be ideal for a reader to follow a researcher's

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<sup>106</sup> Bryman, Alan (2012). *Social Research Methods*. New York: Oxford University Press, p. 303.

<sup>107</sup> Boréus, Kristina, Bergström, Göran (2018). *Textens mening och makt*. Lund: Studentlitteratur AB, p. 35.

<sup>108</sup> *ibid.*, p. 40.

<sup>109</sup> Boréus, Kristina, Bergström, Göran (2018). *Textens mening och makt*. Lund: Studentlitteratur AB, p. 41.

<sup>110</sup> Sohlberg, Britt-Marie, Sohlberg, Peter (2019). *Kunskapens former*. Stockholm: Liber AB, p. 273.

reasoning from the beginning with the research question to the study's conclusion.<sup>111</sup> For this study it has been important to clarify how the theoretical and the method has been used practically. In connection with a content analysis of the material, it has also been chosen in the coding scheme to use parts or quotations directly from the material in order to strive for transparency. This is done so that the reader can understand the steps that the researcher has taken in order to make a conclusion.<sup>112</sup> It is recommended for a researcher to do a pilot version of the coding scheme in order to see if there are any difficulties in applying the coding scheme. This can be a way to see if there are any difficulties or uncertainties. For example, if there are any categories that tends to be similar or if it's needed clarification. By doing a pilot coding scheme it can be a way to gain reliability. It is essential to be consistent as a researcher when using a coding scheme.<sup>113</sup> For this study a pilot version of the coding scheme was done as recommended. This was done to see if there were any confusion with categories. After the pilot version of the coding scheme, it was found that when studying the material from the Swedish Migration Court of Appeal it was needed to separate the Court's legal reasoning from the legal judgement for clarification within the coding scheme. Content analysis can be a transparent research method. The coding scheme can be clearly stated so that replications and follow-up studies are possible.<sup>114</sup>

When examining if the measuring instrument measures what it is supposed to measure this is called a study's validity.<sup>115</sup> For this study, the purpose is to examine the child's best interests in migration processes after the Swedish incorporation of the CRC. As previously stated, this study's material is the precedent case from the Swedish Migration Court of Appeal and the general comments from the Committee on the Rights of the Children as it has been considered relevant to investigate. Qualitative content analysis has been considered to be the method that was suitable in order to examine the study's purpose.<sup>116</sup> It should be emphasized that validity is usually about measuring, observing, or identifying what the study intends to do. The validity of a measurement is often applied to quantitative research.<sup>117</sup> For this study, it is not intended to use a quantitative measurement. As previously mentioned, a coding scheme has

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<sup>111</sup> Sohlberg, Britt-Marie, Sohlberg, Peter (2019). *Kunskapens former*. Stockholm: Liber AB, p. 276.

<sup>112</sup> Boréus, Kristina, Bergström, Göran (2018). *Textens mening och makt*. Lund: Studentlitteratur AB, p. 41.

<sup>113</sup> Bryman, Alan (2012). *Social Research Methods*. New York: Oxford University Press, p. 304.

<sup>114</sup> *ibid.*, p. 304.

<sup>115</sup> Kvale, Steinar, Brinkmann, Svend (2014). *Den kvalitativa forskningsintervjun*. Lund: Studentlitteratur AB, p. 296.

<sup>116</sup> Boréus, Kristina, Bergström, Göran (2018). *Textens mening och makt*. Lund: Studentlitteratur AB, p. 50.

<sup>117</sup> Bryman, Alan (2012). *Social Research Methods*. New York: Oxford University Press, p. 47.

been made in accordance with research questions and qualitative content analysis. This can be a way to show that the measuring instrument, such as using a coding scheme, tends to measure what the research questions intends to do. It has been important for this study to show the reasoning about the material and method's choice and process. By showing the categorizations that have been chosen and described for the coding scheme it can help achieve validity. It is important in order to show how the study has examined the material with the method's help to see if it has examined what is actually intended to do. This can be one way to increase the validity of the study.

#### **6.4 Discussion of method choices**

A qualitative content analysis was considered to be the most appropriate method based on the study's aims, research questions and material.<sup>118</sup> For this study it has been essential to understand and examine how something is valued or presented in the chosen material.<sup>119</sup> At the beginning of the study, there was an idea that a critical discourse analysis would be an appropriate method for this study. Critical discourse analysis can analyse different elements or levels such as words, grammar and argumentation.<sup>120</sup> As one of the materials is the precedent judgment from the Swedish Migration Court of Appeal, it was considered relevant and appropriate to see how the Court argues regarding the principle of the child's best interests with critical discourse analysis. With the help of critical discourse analysis, a researcher can study critical concepts in a text. For example, what is considered essential regarding the child's best interests and which perspective are produced?<sup>121</sup> Despite this, it was considered that a qualitative content analysis was most appropriate for this study. A qualitative content analysis let the researcher pick out from the material for what is relevant in regards to the study's aims and research questions.<sup>122</sup> For this study it was of interests to see how the both material was describing the principle of the best interests of the child. Do they use similar phrases or factors when implementing the principle of the best interests of the child? A qualitative content analysis gives the researcher the possibility to pick out text or words specifically from the material to deeper analyse it. This was therefore considered as the most appropriate measure for this study. A critical discourse analysis has it purpose to see how something or a theme is talked about. This method demands in one way or another the researcher to be fully aware of how the theme or something is talked about by both the

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<sup>118</sup> Boréus, Kristina, Bergström, Göran (2018). *Textens mening och makt*. Lund: Studentlitteratur AB, p. 50.

<sup>119</sup> *ibid.*, p. 53.

<sup>120</sup> Bryman, Alan (2012). *Social Research Methods*. New York: Oxford University Press, p. 305.

<sup>121</sup> *ibid.*, p. 345.

<sup>122</sup> Boréus, Kristina, Bergström, Göran (2018). *Textens mening och makt*. Lund: Studentlitteratur AB, p. 50.

material but also outside of it.<sup>123</sup> As the aim and the research questions of this study is limited to “only” examine how the principle of the best interests of the child is presented in the precedent judgment from the Swedish Migration Court of Appeal and the UN Committee on the Rights of the Children General comment no. 14 (2013), a qualitative content analysis was considered to be most appropriate for this study.

## 6.5 Material

The empirical material for this study consists of the precedent judgment from the Swedish Migration Court of Appeal and the UN Committee on the Rights of the Children General comment no. 14 (2013). The precedent case from the Swedish Migration Court of Appeal is a central part of this study. This is because this study aims to investigate how Sweden considers the principle of the child's best interests after incorporating the CRC. The Swedish Migration Court of Appeal is the highest instance regarding migration cases in Sweden and where their decisions in individual cases can be significant for other cases.<sup>124</sup> The Swedish Migration Court of Appeal's precedent case was the first judgment brought up to the Court regarding children's best interests after the Swedish incorporation of the CRC.<sup>125</sup> The Court seeks to take a position regarding the principle of the child's best interests.<sup>126</sup>

The other material that has been analysed is the UN Committee on the Rights of the Children, general comment no. 14 (2013). The document was issued by the UN Committee on the Rights of the Children. General comment is a document on how to interpret an article of a treaty. The purpose of the general comments is to seek clarification and guidance for implementing the articles of a treaty.<sup>127</sup> The choice to use material such as the Committee on the Rights of the Children general comments is because the document is trying to clarify and guide state parties of the CRC regarding the principle of a child's best interest. The Swedish Migration Court of Appeal has referred in their judgment from the precedent case to the

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<sup>123</sup> Winther Jorgensen, Marianne, Phillips, Louise (2000). *Diskursanalys som teori och metod*. Lund; Studentlitteratur AB, p. 28.

<sup>124</sup> Sveriges Domstolar (2019). *Information about the Migration Court of Appeal – English translation*. Accessed 2021-05-13 from [https://www.domstol.se/globalassets/filer/domstol/migrationsoverdomstolen/ovrigt/engelska\\_migrationsoverdomstolen.pdf](https://www.domstol.se/globalassets/filer/domstol/migrationsoverdomstolen/ovrigt/engelska_migrationsoverdomstolen.pdf)

<sup>125</sup> Ferhatovic, Marina & Karlsson, Thomas (12<sup>th</sup> January 2021). *Barnkonventionen trumfar utlänningslagen: 14-åring får stanna*. *Dagens Nyheter*. Accessed 2021-05-13 from <https://www.dn.se/sverige/barnkonventionen-trumfar-utlanningslagen-14-aring-far-stanna/>

<sup>126</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 1.

<sup>127</sup> United Nations Human Rights Office of the High Commissioner, (u.å). *Human Rights Treaty Bodies – General Comments*. Accessed 2021-04-19 from <https://www.ohchr.org/en/hrbodies/pages/tbgeneralcomments.aspx>

general comments on the principle of the child's best interests. For example, the Court highlighted which factors should be taken into account in connection with the principle of the child's best interests.<sup>128</sup> This choice of the two different materials is based on the research questions that the study has and based on what they see in connection with the chosen analysis method, to see, for example, how a legal court interprets a concept of the best interests of the child after national incorporation of an international convention.

## **6.6 Source-critical discussion regarding the material**

As previously mentioned, this study aims to investigate how the function and impact the Swedish incorporation of CRC can have regarding the principle of the child's best interests for children in migration processes. The material analysed is a precedent judgment from the Swedish Migration Court of Appeal and the UN Committee on the Rights of the Children. 14 (2013). These two documents are available via the internet and are open to the public. There are particular principles regarding source criticism on the internet and how researchers can assess if that information can be considered reliable.<sup>129</sup> For this study, documents from a national court and a UN Committee have been the materials to be examined. To assure the authenticity of these two documents, it has been necessary to ensure the source's authenticity. Authenticity means if the source is what it claims to be. The risk of falsifications and that information is presented incorrectly exists, and therefore it is essential to examine this.<sup>130</sup> It has been considered by going directly to the original websites of two actors. That is, to go directly to the Swedish Court Authority's website where it has posted the precedent judgement. Same for the document from the Committee on the Rights of the Children. This has been done to find the relevant documents from the actor's own websites. It should be considered that anyone who is part or interested in the source needs to be questioned of unreliability. This is a way to uphold a source-critical thinking.<sup>131</sup> Sources that have more credibility than other sources can still show or have mistaken.<sup>132</sup> Sources as official institutions, such as the Swedish Court Authority's website and the UN Committee on the Rights of the Children, should be regarded as credible and considered as tendentious sources.

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<sup>128</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 7.

<sup>129</sup> Leth, Göran, Thurén, Torsten (2000). *Källkritik för internet*, Stockholm. Stockholm: Styrelsen för psykologiskt försvar, p. 22.

<sup>130</sup> Leth, Göran, Thurén, Torsten (2000). *Källkritik för internet*, Stockholm. Stockholm: Styrelsen för psykologiskt försvar, p. 24.

<sup>131</sup> Leth, Göran, Thurén, Torsten (2000). *Källkritik för internet*, Stockholm. Stockholm: Styrelsen för psykologiskt försvar, p. 26.

<sup>132</sup> *ibid.*, p. 26-27.

It should be considered that sources with tendency can have in their own interest in how they present information, facts or explanations. However, it should be emphasized that all sources have a tendency and that all sources are products of the culture in which they have existed and exist in.<sup>133</sup> As previously mentioned, it has been necessary to consider that the material comes from a credible source. As the designation of a website may indicate the domain of the sources. For example, the term ".org" indicates that the website belongs to a non-profit organisation, which can show that the website and organization are serious. It should be emphasised that the material from the UN Committee on the Rights of the Children is taken from a source with ".org" and is part of the UN's Human Rights Office of the High Commissioner and shows seriousness.<sup>134</sup>

## **7. Results**

In this section, the results will be presented. With help of a qualitative content analysis the findings that has been found from the collected material The Swedish Migration of Appeal's precedent case and The Committee of the Rights of the Children's general comments will be presented. The result has been divided into three different headings such as the child as an individual, interests and conflicting interests based on what has been found using the code scheme that has been constructed for this study.

### **7.1 The child as an individual**

In the collected material it has been found that both materials have reasoned about the function of the principle of the best interests of the child. For what has been found to be common with the help of a qualitative content analysis is that the two materials highlight that the principle of the best interests of the child should be applied individually. In the Committee of the Rights of the Children's general comments it can be found in numerous parts of the text descriptions that the principle should be considered individually.<sup>135</sup>

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<sup>133</sup> Leth, Göran, Thurén, Torsten (2000). *Källkritik för internet*, Stockholm. Stockholm: Styrelsen för psykologiskt försvar, p. 30.

<sup>134</sup> *ibid.*, p. 32.

<sup>135</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children 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)\**, p. 4. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

**Table 1. Coding scheme over Committee on the Rights of the Children’s General comments No. 14 (2013)**

CODING UNITS	CODING CATEGORIES				
	<i>Citation unit from the documents</i>	<i>Condensation</i>	<i>Code</i>	<i>Sub-category</i>	<i>Categories</i>
<b>Committee on the Rights of the Children’s General comments No. 14 (2013)</b>	The concept of the child’s best interests is complex and its content must be determined on a case-by-case basis. It is through the interpretation and implementation of article 3, paragraph 1, in line with the other provisions of the Convention, that the legislator, judge, administrative, social or educational authority will be able to clarify the concept and make concrete use thereof. Accordingly, the concept of the child’s best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. <sup>136</sup>	The principle should be interpreted on a case-by-case basis. This makes the principle flexible and adaptable. The principle should be applied and defined based on the individual child. What concerns the child’s situation or needs should be taken into account when interpreting the principle.	The principle is flexible and adaptable as it is interpreted on a case-by-case basis.	-Case-by-case basis  -Flexible and adaptable	Individually

Table 1 shows the coding scheme of what has been found in the general comments from the Committee of the Rights of the Children. The Committee has emphasized that the concept of the principle can be complex to interpret. It is therefore important to interpret the principle on a case-by-case basis. This must be done on an individual basis. This mean for example that one needs to be considering the individual child's situation or needs.<sup>137</sup> It has also been found in the general comments that the Committee has stated that a state is obligated to see the child as an individual and that his or her best interests should be of primary consideration in decisions concerning the individual child.<sup>138</sup>

In the precedent case from the Swedish Migration Court of Appeal similarities can be found. The Court makes it clear that the interpretation of the principle should be applied individually for each child.<sup>139</sup> In the Court's legal reasoning it is stated that the principle should be interpreted individually together with a motivation that specify what has been considered for the individual child. From what is shown in Table 2, this is similar to the Table 1 from what has been found in the general comments from the Committee. The Court emphasizes further

<sup>136</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children 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)\**, p. 9. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf).

<sup>137</sup> *ibid.*, p. 9.

<sup>138</sup> *ibid.*, p. 7.

<sup>139</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 6.

in its legal reasoning regarding that the decision-maker must in the motivation indicate which aspects or interests that has been considered in regards to the principle of best interests of the child.<sup>140</sup>

**Table 2. Coding scheme over the Migration Court of Appeal legal reasoning from MIG 2020:4**

CODING UNITS	CODING CATEGORIES					
		<i>Citation unit from the documents</i>	<i>Condensation</i>	<i>Code</i>	<i>Sub-category</i>	<i>Categories</i>
<b>Migration Court of Appeal judgement (MIG 2020:4)</b>	<b>The legal reasoning from MIG 2020:4</b>	The best interests of the child cannot be defined once and for all but must be linked to the individual child and the child's situation. The principle of the best interests of the child must be seen as an approach in every decision-making process in which children are involved. Furthermore, every decision concerning one or more children should contain a justification where, among other things, it should be clear which aspects the decision-maker has considered relevant in the assessment of the child's best interests. <sup>141</sup>	The principle should be interpreted to the individual child and the child's situation. The principle of the best interests of the child should be applied in every decision regarding children. There should be a motivation with the decision over which aspect has been considered when interpreting the principle.	The principle should be interpreted individually with a motivation of what has been considered for the individual child.	-Individual child  - Motivation	Individually

In the Court's legal judgment this is implemented as shown in Table 3. The Court applies the principle by describing in their legal judgment that the child's situations must be assessed individually with a motivation of which aspects that has been considered. Table 3 illustrates an introduction to this.

<sup>140</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 6.

<sup>141</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 6.

**Table 3. Coding scheme over the Migration Court of Appeal legal judgement from MIG 2020:4**

CODING UNITS	CODING CATEGORIES					
		<i>Citation unit from the documents</i>	<i>Condensation</i>	<i>Code</i>	<i>Sub-category</i>	<i>Categories</i>
<b>Legal judgement from MIG 2020:4</b>	Given her individual situation, she should be able, despite the socio-economic and security situation in Lebanon, to adapt to the new conditions that such a break-up would entail. Here, however, it must be taken into account that the parents once left Lebanon because they considered themselves at risk of persecution there. <sup>142</sup>	The Child's individual situation has been consider with the aspect of new conditions in Lebanon.	The principle implementation with aspects of the child's individual situation.	-Individual Child -Motivation	Individually	

For example, in the precedent case the Court has observed the child's interests. In the precedent case it is in the child's best interests to stay in Sweden. The Court consider that specific interests and motivates with what kind of advantages and disadvantages of granting the child a residence permit in Sweden. In the judgement of the precedent case the court states as seen in Table 3 that due to the child's individual situation aspects such as the new conditions in Lebanon must be taken.<sup>143</sup> The Court do in some way motivates that the child could be able to cope with a deportation to Lebanon, but motivates as the Court take into other perspectives such as why the parents actually left the country from the beginning. In the judgement by the Court they raise up a lot of different interests that are of advantages and disadvantages of granting the child a residence permit in Sweden. This is the function of the principle. The Committee has required in their general comments to have the principle function as the Court interpreted it. It certainly means that the function of the principle requires the decision-maker to motivate which circumstances, factors or interests has been considered for the decision. A decision-maker also needs to motivate which interest has been weighed against each other. In the precedent case this has been done, for example the conditions in Lebanon versus the child's ability to adopt the new conditions in Lebanon. The Committee also demands that if the decision concerning the child differs from what the child actually wants this must also be stated. The Committee mean that it is not enough to simply state that other interests has weighed out the child's interests.<sup>144</sup> Which the Court has practically shown in their judgement how this can be done.

<sup>142</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 8.

<sup>143</sup> *ibid*, p. 8.

<sup>144</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a*

## 7.2 Variety of interests

When dealing with the principle of the best interests of the child, a balance of interests must be made. The two materials from both the Court and the Committee have emphasized about the balance of interests and suggest in different ways how the interests must be interpreted. In the general comments from the Committee it has been found that a decision-maker do not only need to be considering the principle on an individual basis, but also reflecting over the different interests.<sup>145</sup> When considering the balance of interests regarding the principle the Committee points out the importance of considering specific circumstances. As seen in Table 4 the Committee suggests circumstances that is something that concerns such as a child's age, sex, the level of maturity or experience that needs to be considered. This is circumstances according to the Committee that needs to be consider when assessing the principle.<sup>146</sup> In the coding scheme the main category is interest. This has to do with that the Committee has in the general comments reasoned about the different interests were they have divided the different interests that needs to be consider in different formulations. The first sub-category under the category of interests in this coding scheme is "Circumstances".

**Table 4. Coding scheme over Committee on the Rights of the Children's General comments No. 14 (2013)**

CODING UNITS	CODING CATEGORIES				
	<i>Citation unit from the documents</i>	<i>Condensation</i>	<i>Code</i>	<i>Sub-category</i>	<i>Categories</i>
<b>Committee on the Rights of the Children's General comments No. 14 (2013)</b>	These circumstances relate to the individual characteristics of the child or children concerned, such as, inter alia, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc. <sup>147</sup>	In a balance of interest's circumstances that can relate to the characteristics or concern the child such as age, sex, level of maturity, experience, minority, physical, sensory or intellectual disability, absences/presence of parents, relationships, environment and safety.	In a balance of interests there is circumstances to consider	Circumstances	Interests

*primary consideration (art. 3, para. 1)\**, p. 20. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>145</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children 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)\**, p. 10. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>146</sup> *ibid.*, p. 12.

<sup>147</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a*

What has been found interesting is that the Committee has section the different interests into two groups. One is circumstances that concerns as previously mentioned the child's age, sex and maturity. The other group is called by the Committee for elements. The Committee has in their general comments pointed out specific elements that also needs to be considered when assessing the balance of interests. In Table 5 it is shown how the Committee has identified elements such as the child's view or identity. In the general comments the Committee has argued that this should be seen as a list of a non-hierarchical character which provides an opportunity to go beyond and further to consider other element or circumstances from what is listed by the Committee.<sup>148</sup>

**Table 5. Coding scheme over Committee on the Rights of the Children's General comments No. 14 (2013)**

CODING UNITS	CODING CATEGORIES				
	<i>Citation unit from the documents</i>	<i>Condensation</i>	<i>Code</i>	<i>Sub-category</i>	<i>Categories</i>
<b>Committee on the Rights of the Children's General comments No. 14 (2013)</b>	<p>Elements to be taken into account when assessing the child's best interests Based on these preliminary considerations, the Committee considers that the elements to be taken into account when assessing and determining the child's best interests, as relevant to the situation in question, are as follows.</p> <ul style="list-style-type: none"> <li>(a) The child's views.</li> <li>(b) The child's identity</li> <li>(c) Preservation of the family environment and maintaining relations</li> <li>(d) Care, protection and safety of the child</li> <li>(e) Situation of vulnerability</li> <li>(f) The child's right to health</li> <li>(g) The child's right to education</li> </ul>	<p>There are elements that needs to be considered when interpreting the principle of the best interests of the child such as The child's views and identity, Preservation of the family environment and maintaining relations, care, protection and safety of the child, Situation of vulnerability, The child's right to health and The child's right to education.</p>	<p>In a balance of interests there is elements to be considered</p>	<p>Elements</p>	<p>Interests</p>

From what has been showed in Table 4 and 5 the Committee believes that this makes the interpretation of the principle when assessing a balance of interests more flexible.<sup>149</sup> In the coding scheme for both Table 4 and 5 it has been found that the Committee has divided interests into two groups that needs to be considered when assessing the balance of interests.

*primary consideration (art. 3, para. 1)\**, p. 12. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>148</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 12.

<sup>149</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children 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)\**, p. 12. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

The different interests are divided by the Committee in circumstances and elements to suggest what should be considered by the decision-maker. As previously mentioned there is no hierarchical list over the all interests that the Committee has pointed out. It is more argued by the Committee that a balance of interests must be made and there can be circumstances and elements that needs to be considered when making decision regarding children. The Committee do believe that some interests can be weighed against each other.<sup>150</sup>

**Table 6. Coding scheme over the Migration Court of Appeal legal reasoning from MIG 2020:4**

CODING UNITS	CODING CATEGORIES					
		<i>Citation unit from the documents</i>	<i>Condensation</i>	<i>Code</i>	<i>Sub-category</i>	<i>Categories</i>
<b>Migration Court of Appeal judgement (MIG 2020:4)</b>	<b>The legal reasoning from MIG 2020:4</b>	These factors are the child's opinions, the child's identity, the preservation of the family environment and the maintenance of relationships, care for the child and the child's protection and safety, vulnerable situations, the child's right to health and the child's right to education. The child's age and maturity should guide how different considerations are weighed against each other. Account must also be taken of the fact that the child's abilities will be developed, which is why both short-term and long-term consequences for the child must be taken into account. That the child's best interests should be taken into account in the first place means that the child's interests have a high priority and are not just one of several considerations. Greater weight must be attached to what is best for the child. <sup>151</sup>	When interpreting the best interests of the child factors such as the child's opinions, identity, family environment, maintenance of relationship, care, protection, safety, health and right to education needs to be considered together with the child's age and maturity. The factors should be considered in short-and long-term consequences. The child's interests are of priority.	Factors needs to be considered when interpreting the principle of best interests of the child. Perspectives on short- and long-term consequences. The child's interests are of priority.	- Factors - Perspectives - Priority	Interests

The Swedish Migration Court of Appeal refers to the Committees' elements and circumstances as factors. In the Courts legal reasoning the Court refers to the sub-category of interests as factors. Factors includes the child's opinions, identity, maintenance of the family environment and relationships. It has been found interesting that the Court refers to the general comments from the Committee and merging the elements and circumstances together

<sup>150</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children 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)\**, p. 12. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>151</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 7.

as shown in Table 6 as a form of interests when assessing the principle of best interests of the child. The Court has addressed that a short- and long-term perspective should be taken when considering the different factors of the child's interests.<sup>152</sup> For example in the precedent case, the Court has considered over the fact that the child wanted to stay in Sweden. The Court did then in their judgement state that due to the child's age and the need of maintaining social contacts would mean in a longer perspective if she had to leave Sweden would not maintain if she had to be deported.<sup>153</sup>

### 7.3 Conflicting interests

When assessing the principle of the best interests of the child a balance of interests must be done as previously mentioned. It has been found that when assessing the balance of interests there is not only the child's own interest's needs to be considered. In the precedent case the Court did consider the state's interest in regulating immigration. In the Court's legal reasoning it has been found that the Court needs to consider the state's interests in upholding the migration policy.<sup>154</sup>

**Table 7. Coding scheme over the Migration Court of Appeal judgement from MIG 2020:4**

CODING UNITS	CODING CATEGORIES					
		<i>Citation unit from the documents</i>	<i>Condensation</i>	<i>Code</i>	<i>Sub-category</i>	<i>Categories</i>
<b>Migration Court of Appeal judgement (MIG 2020:4)</b>	<b>The legal judgement from MIG 2020:4</b>	The opposing interests that the Swedish Migration Agency has highlighted are circumstances that fall under the concept of maintaining migration policy/regulated immigration and that a large part of M's stay has been without a permit as a result of the parents not following legally binding expulsion decisions. <sup>155</sup>	There is in the Swedish Migration Agency interests to maintain the Swedish migration policy and regulated immigration. It is also in the Swedish Migration Agency interests to deport the child due to her illegal stay.	To maintain migration policies and regulated immigration. Consideration of illegal stay.	- Migration control - Illegal stay	State's interests

<sup>152</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 7.

<sup>153</sup> *ibid.*, p. 8.

<sup>154</sup> *ibid.*, p. 2.

<sup>155</sup> *ibid.*, p. 7.

The Migration Agency has as the Court points out as shown in Table 7 the interests in upholding regulated immigration. In the precedent case the Migration Agency have the opinion that the child should get deported from Sweden due to upholding current legislation regarding migration. It also due to the fact that the child stayed illegally in Sweden for a time. Despite this, the Court has in its judgment emphasized that children should be seen as independent rights holders. Which the Court further emphasizes that children may have their own reasons for a residence permit.<sup>156</sup> In its judgment, the Court has taken into account the child's various interests, but there has not been found anything further regarding the state's interest in regulated immigration. In the Committee's general comments when it comes to children in migrations processes it tends to focus more on which decisions are covered by the principle of the best interests of the child. This may mean that authorities that, for example, affect migration must also uphold the principle of the best interests of the child in their decisions.<sup>157</sup> The Committee has stated in their general comments that migrant children should not because of their vulnerable situation as a migrant get their rights such as expressing their view deprived by the decision-maker.<sup>158</sup> The Committee do state that when assessing a balance of interests there is a need to consider the other part's interest and not only the child's. As shown in Table 8 the Committee do once again point out the implementation of the case-by-case basis and the importance of consider all interests.<sup>159</sup>

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<sup>156</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20., p. 9.

<sup>157</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children 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)\**, p. 9. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>158</sup> *ibid.*, p. 13.

<sup>159</sup> *ibid.*, p. 10.

**Table 8. Coding scheme over Committee on the Rights of the Children’s General comments No. 14 (2013)**

CODING UNITS	CODING CATEGORIES				
	<i>Citation unit from the documents</i>	<i>Condensation</i>	<i>Code</i>	<i>Sub-category</i>	<i>Categories</i>
<b>Committee on the Rights of the Children’s General comments No. 14 (2013)</b>	Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. The same must be done if the rights of other persons are in conflict with the child’s best interests. If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child’s interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best. <sup>1</sup>	In a situation where the parties are in conflict in assessing the principle there should be a consideration based on case-by-case basis. All interests of the parties must be considered. Children’s interests is of priority.	All interests of the parties must be considered but with a special priority of the children’s interests when assessing a balance of interests.	- Case-by-case basis - All parties interests -Children’s interests is of priority	Conflict

In the general comments the Committee brings up that all parties interests’ needs to be considered. If there is a situation if both parties can’t compromise the Committee has the view that the child’s interests has a higher priority in those situations.<sup>160</sup>

## 8. Analysis

### 8.1 The child’s best interests in migration

Both the Committee on the Rights of the Child and the Swedish Migration Court of Appeal has made it clear that the principle of the best interests of the child needs to be interpreted individually. The Committee has emphasize for a case-by-case basis method when interpreting the principle.<sup>161</sup> It is simply emphasized by the Court that the principle must be applied individually in every decision regarding children.<sup>162</sup> Due to the Swedish incorporation of the CRC this cannot be too surprising that both the Committee and Court are agreeing on this. The Committee do in fact state in their general comments that the principle is flexible as it allows a decision-maker to be a little more flexible when making decision regarding children in different situations.<sup>163</sup> The idea of having the principle of an individual function is

<sup>160</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children 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)\**, p. 10. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>161</sup> *ibid.*, p. 9.

<sup>162</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 8.

<sup>163</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a*

something that can be positive for all children. Based on the chosen analysis method it has not been found that neither the Committee nor the Court has made a distinction that could affect or divide children. The CRC do actually state that the convention concerns all children.<sup>164</sup> In Bhabha's concept "Arendt's children" of Hannah Arendt's political theory she points out that there is a problem with just assuming that because the CRC actually states that it concerns all children, there still is practical differences in how children get to enjoy their rights.<sup>165</sup> Previous research has criticized the principle of best interest of the child for this.<sup>166</sup> Although that the principle has its primary function to protect the interests and rights of children there is a concern over the fact that it still needs to be weight against other interests such as the state's interests to uphold a state's migration policy. The balance of interests can therefore be tough for children in migrations process. Bhabha has pointed out the importance of using human rights instruments.<sup>167</sup> The principle of the best interests and the balance of interests that comes with it can be a helpful interpretation of human rights in order to actually see children as an independent right holders and to make sure that rights or interests are considered by a decision-maker. It is clear by the CRC and by the collecting material that the function of the principle of the best interests of the child is to make sure that in every situation that the individual child's rights and interests is considered.<sup>168</sup> Although that the principle of the best interests of the child has an individually function there is nothing from the collected material that state that the principle should be interpreted differently.

When assessing the balance of interests both the Committee and the Court gives similar suggestions of interests that can be considered regarding the child. However, both collected material do use different formulation when describing the variety of interests. The Court refers to interests such as the child's opinions or maintenance of relationships as factors.<sup>169</sup> The Committee on the other hand has divided the different interests in two groups such as circumstances and elements. Circumstances is something that concerns the individual child

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*primary consideration (art. 3, para. 1)\*.*, p. 12. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>164</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 7.

<sup>165</sup> Bhabha, Jacqueline (2009). *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*. The Johns Hopkins University Press: Human Rights Quarterly, May, 2009, Vol. 31, No. 2 (May, 2009), p. 450.

<sup>166</sup> Josefsson, Jonathan (2017). *Children's Rights to Asylum in the Swedish Migration Court of Appeal*. International Journal of Children's Rights, 25(1), p. 111.

<sup>167</sup> Bhabha, Jacqueline (2009). *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*. The Johns Hopkins University Press: Human Rights Quarterly, May, 2009, Vol. 31, No. 2 (May, 2009), p. 451.

<sup>168</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 9.

<sup>169</sup> *ibid.*, p. 7.

such as age or the level of maturity.<sup>170</sup> Elements concerns interests such as the child's view and identity.<sup>171</sup> This makes the principle of the best interests of the child very general as it has to be flexible and interpreted individually. At the same time this can bring up difficulties in the actual interpretation of the principle. Both the collected material can work as a guidance which makes it also difficult for the decision-maker to actual know which variety of interests to consider as it can look very differently for individually child. This illustrates the problem of the principle having an individual function. Despite that both the collected materials of this study have exalted for the principle to be have an individual function, it can at the same time give difficulties with the practical interpretation. When to consider the principle of the best interest of the child the individual decision-maker can go further from the interests listed by both the Committee and the Court.<sup>172</sup> Which is encouraged by the collected material due to the individual function of the principle. This can bring out difficulties as it falls back to the individual decision-maker to identify the different interests and be able to motivate it. In the precedent case it was in the interests of the Swedish Migration Agency to deport the child due to her illegally stay in Sweden and to maintain regulated immigration. The child according to the Court should not be held responsible for choices or actions made by the parents, even in migrations cases. This is because the child is its own right holder.<sup>173</sup> According to Josefsson, this may show many difficulties in how children's rights should be implemented in connection with migration processes. It can bring difficulties in upholding the child's rights and interests towards the state's interests for children in migration processes. The interests of the Swedish state is to have regulated and controlled immigration.<sup>174</sup> Which means that children in migration processes in a balance of interests get their interests weight against a state's interest in immigration control.<sup>175</sup> In the general comments from the Committee who has sympathized that all interests of the parties must be considered when assessing the balance of interests. This may be extremely challenging for children in migrations processes. It can be perceived as quite simple as the Swedish Migration Agency in the precedent case, the interests to uphold the current migration legislation.<sup>176</sup> Which once again points to the problems that the principle

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<sup>170</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children 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)\*.*, p. 12. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>171</sup> *ibid.*, p. 13.

<sup>172</sup> *ibid.*, p. 9.

<sup>173</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 9.

<sup>174</sup> Josefsson, Jonathan (2017). *Children's Rights to Asylum in the Swedish Migration Court of Appeal.* International Journal of Children's Rights, 25 (1), p. 109-110.

<sup>175</sup> *ibid.*, p. 111.

<sup>176</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 2.

of the best interests of the child actually gives a decision-maker a freer "interpretation and consideration" of the various interests. Bhabha has stated that there must be a will for letting migrant children enjoying their rights.<sup>177</sup> For a child in a migrant process who has its interests weighed against the state's interest in migrants this can be of an enormous pressure. It may be seen as the migrant child against the "giant" state. A situation can easily come up where the big state has more to point to than the individual child. The principle of the best interests of the child has a noble ground, but for the vulnerable children as children in migrant processes, it automatically makes their interests even more vulnerable. Although Sweden has chosen to incorporate CRC, the principle of the child's best interests may be challenging to apply into practice with actually taken migrant children's interest into fully consideration. The main problem is that there can be a conflict of interest regarding the principle of the child's best interests and the principle of regulated immigration.<sup>178</sup> At the same time it has been found that the Committee has stated in the general comments that if there are conflicting interests when assessing the principle of the best interests of the child it is the child's interests that should be of primary consideration.<sup>179</sup> For what does it really mean for the principle of the best interests of the child when it entails such practical risks that the state's interest outweighs the child's own interests?

Lundberg has emphasized that there is a lack of an actual motivation from the authorities in connection with the interpretation of the principle of the best interests of the child. It is up to the individual decision-maker to consider the all different interests and do it with a short and long-term perspective.<sup>180</sup> It is once again up to the individual decision-maker to ensure that they make their assessment as objectively as possible and to actually consider a child's interests. However, there is no guarantee for that, which again makes children in migration processes interests vulnerable. Despite the fact that, like the collected material, has pointed out over and over again that the principle should be interpreted individual, it falls back on the decision-maker's knowledge, objectivity and interests. This shows once again the difficulties

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<sup>177</sup> Bhabha, Jacqueline (2009). *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*. The Johns Hopkins University Press: Human Rights Quarterly, May, 2009, Vol. 31, No. 2 (May, 2009), p. 451.

<sup>178</sup> Josefsson, Jonathan (2017). *Children's Rights to Asylum in the Swedish Migration Court of Appeal*. International Journal of Children's Rights, 25(1), p. 111.

<sup>179</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children 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)\**, p. 10. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>180</sup> Lundberg, Anna (2011). *The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights*. Journal of Human Rights Practice, 3(1), p. 54.

of the practical implications of the principle where it has become very clear that how to choose to use the principle of the best interests of the child for children in migration processes takes place on the premises of the state's own interest and migration policy. Based on Hannah Arendt's political theory, she has emphasized that human rights only apply to the state's "own people". Which may actual happen when interpreting the principle of the best interest of the child.<sup>181</sup> Bhabha's concept of the Arendt's political theory has also emphasized that when the individual is no longer part of a society or "stateless", his or her human rights are affected in one way or another. For children in migration processes, according to Bhabha, this means that their rights are limited.<sup>182</sup> Previous research confirms both Hannah Arendt's political theory and Bhabha's take on it, that the rights of migrant children are affected when it is not in the state's interest. The problem with assessing a very general principle like the principle of the best interest of the child is that children in more vulnerable situation get their interests put against a state's interests which can be far greater than the individual child. Lundberg has suggested how to ensure in a practical way that children in migration processes also enjoy their rights. One suggestion is to have a checklist for decision-makers to make it easier for them about what to consider in connection with the principle of the child's best interests and its balance of interests, and in this way can also justify why and how this has been taken into account.<sup>183</sup> For this could facilitate those practical difficulties that actually prevails.

## **8.2 The incorporations effects over the interpretation of the principle**

In the Committee on the Rights of the Children general comments it is stated that the principle of a child's best interests is a fundamental right.<sup>184</sup> A state party of the CRC should primarily consider the child's best interests and is obligated to take all necessary measures to implement this right.<sup>185</sup> In the precedent case the Swedish Migration Court of Appeal interpret a balance of interest in accordance with the principle of best interest of the child. The Court also refers to the Committee's general comments in their judgement. This can be an effect from the

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<sup>181</sup> Birmingham, Peg (2006), *Hannah Arendt and Human Rights: The Predicament of Common Responsibility*, Bloomington: Indiana University Press. p. 36.

<sup>182</sup> Bhabha, Jacqueline (2009). *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*. The Johns Hopkins University Press: Human Rights Quarterly, May, 2009, Vol. 31, No. 2 (May, 2009), p. 411.

<sup>183</sup> Lundberg, Anna (2011). *The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights*. Journal of Human Rights Practice, 3(1), p. 65-66.

<sup>184</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children 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)\**, p. 3. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>185</sup> *ibid.*, p. 5.

Swedish incorporation of the CRC.<sup>186</sup> Incorporating the CRC has been done according to the Swedish government to strengthen children as rights holders.<sup>187</sup> Due to the Swedish incorporation of CRC the Swedish Migration Court of Appeal had to positioning of the principle of the best interest of the child for children in migrations processes. The Swedish Migration Court of Appeal is the highest instance of migration matters and aims to guide how to interpret Swedish legislation.<sup>188</sup> This mean that the Court's legal reasoning and judgment can give guidance to other Courts or authorities in how to interpret new legislation. In the Court's legal reasoning it states that the principle of best interest of the child can't guarantee a child to stay in Sweden, even after the incorporation of the CRC.<sup>189</sup>

It has been found that an incorporation can't be the only solution to strengthen children's rights. The practical interpretation of the articles in CRC can bring difficulties as it very general like the principle of the best interests of the child.<sup>190</sup> The general comments from the Committee can of course work as guidance on how to interpret articles such as the principle of the child's best interests or guide in which circumstances or elements that should be considered.<sup>191</sup> Although it has been found by, for example, The Child Rights Inquiry that general formulations can create struggles in how to practical interpret children's rights.<sup>192</sup> As for the precedent case, the influence that the Swedish incorporation of the CRC have can be found in the Courts legal reasoning. The Court interprets a balance of interests and a motivation of which interests have been observed. It is not only the child's interest brought up in the legal reasoning in the case. The Swedish Migration Agency's interests in upholding the principle of regulated immigration is also brought up and considered by the Court as previously mentioned.<sup>193</sup> This shows a possible effect that an incorporation of an international convention like the CRC can have. The higher instances of the state agencies put CRC and the

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<sup>186</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 7.

<sup>187</sup> McCall-Smith, Kasey (2019). *To incorporate the CRC or not – is this really the question?*. The International Journal of Human Rights, 23:3, p. 430.

<sup>188</sup> Sveriges Domstolar (2019). *Information about the Migration Court of Appeal – English translation*. Accessed 2021-05-13 from

[https://www.domstol.se/globalassets/filer/domstol/migrationsoverdomstolen/ovrigt/engelska\\_migrationsoverdomstolen.pdf](https://www.domstol.se/globalassets/filer/domstol/migrationsoverdomstolen/ovrigt/engelska_migrationsoverdomstolen.pdf)

<sup>189</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 8.

<sup>190</sup> SOU 2016:19. *Barnkonventionen blir svensk lag*. Stockholm: Elanders Sverige AB. p. 22.

<sup>191</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children 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)\**, p. 12. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>192</sup> SOU 2016:19. *Barnkonventionen blir svensk lag*. Stockholm: Elanders Sverige AB. p. 22.

<sup>193</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 9.

principle into actual use. The question that may arise instead is how this should infuse to the rest of the society? As previously mentioned, the Swedish Migration Court of Appeal has a function to give guidance in how interpreting new legislation. This guidance is directed to other decision-making bodies within the state.<sup>194</sup> In the precedent case, the Court stated in their judgement that it was in the child's interest to stay in Sweden. The Swedish Migration Agency, on the other hand, claimed the opposite, among other things based on the state's interest in regulated immigration.<sup>195</sup> The question is how to get a principle like the principle of the best interests of the child effectively and practically to the individual decision-maker at a state authority. How can it be made easier for the decision-maker to consider the interests in a more objectively perspective without the guidance of the Court or the general comments from the Committee?

The Swedish incorporation of the CRC may be a first step in the right direction, but that there may still bring difficulties in interpreting CRC and the principle of the best interests of the child into practice. Based on the chosen theoretical framework, Bhabha has emphasized that a state choosing to take legal action, for example, form laws or incorporate an international convention, can be a first step to practically begin to interpret children's rights, especially for migrant children.<sup>196</sup> Bhabha has also emphasized that for rights to fulfil their full function, it is necessary to take action to really implementing the rights of the children into practice.<sup>197</sup> As has been found in study from Lundy, Kilkelly and Byrne that there is no particular way of how to incorporate an international convention, this is up to the state itself on how to do it.<sup>198</sup> Implementing a direct incorporation of children's rights must be something that all children must be able to invoke which automatically demands on adults such as individual administrators, social services workers, or decision-makers fully consideration. For whom do a state incorporate CRC for? Is it for the children who go to school, the children who having a hard time at home or for the children in processes as migrants? A state needs to consider all children and the different situations and challenges one may face when incorporating a CRC.

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<sup>194</sup> Sveriges Domstolar (2019). *Information about the Migration Court of Appeal – English translation*. Accessed 2021-05-13 from [https://www.domstol.se/globalassets/filer/domstol/migrationsoverdomstolen/ovrigt/engelska\\_migrationsoverdomstolen.pdf](https://www.domstol.se/globalassets/filer/domstol/migrationsoverdomstolen/ovrigt/engelska_migrationsoverdomstolen.pdf)

<sup>195</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 7.

<sup>196</sup> Bhabha, Jacqueline (2009). *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*. The Johns Hopkins University Press: Human Rights Quarterly, May, 2009, Vol. 31, No. 2 (May, 2009), p. 425.

<sup>197</sup> *ibid.*, p. 450.

<sup>198</sup> Lundy, Laura, Kilkelly, Ursula, Byrne, Bronagh (2013). *Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review*. International Journal of Children's Rights, 21(3), p. 443.

How does the state ensure that the interests of all children are taken into account in each individual decision-making process? As this study has shown in its collected material, incorporation has a great effect on the higher bodies of the state. As Bhabha has pointed out and as previous research does, more actions must be taken to ensure that children in migration fully enjoy their rights. As Lundy, Kilkelly and Byrne highlights the essential and critical role of NGOs in investigating and contribute awareness about what the specific situation for children and their rights looks like.<sup>199</sup> The work to ensure children's rights in migration processes must continue. As Bhabha has emphasized, there are no shortcuts to uphold human rights.<sup>200</sup>

## 8. Conclusion

Children in migration processes are vulnerable.<sup>201</sup> This must be considered when making decision that concerns children, especially for children in migrant processes. A decision made by an authority concerning a child can have weighty effects for the child.<sup>202</sup> With the help of the principle of best interests of the child, a balance of interests can be made. In the Swedish Migration Court of Appeal legal reasoning of the precedent case, it was emphasized that the child's best interests should be seen as an approach in every decision concerning children.<sup>203</sup> This shows the influence that an incorporation can have, but that's not enough. Previous research has highlighted that a state that chooses to incorporate CRC directly does not automatically protect children's rights. Although that Sweden has incorporated the CRC the UNHCR did point out that Sweden should ensure that the principle of the child's best interests is considered every step of the migration process.<sup>204</sup> The principle should have a function as an approach in every decision-making process involving children but the problem remains that there is differences in how children in migration processes' interests and rights are respected.<sup>205</sup>

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<sup>199</sup> Lundy, Laura, Kilkelly, Ursula, Byrne, Bronagh, (2013). *Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review*. International Journal of Children's Rights, 21(3), p. 463.

<sup>200</sup> Bhabha, Jacqueline (2009). *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*. The Johns Hopkins University Press: Human Rights Quarterly, May, 2009, Vol. 31, No. 2 (May, 2009), p. 451.

<sup>201</sup> SOU 2016:19. *Barnkonventionen blir svensk lag*. Stockholm: Elanders Sverige AB. p. 20.

<sup>202</sup> *ibid.*, p. 20.

<sup>203</sup> Migrationsöverdomstolen, dom 2020-12-22, mål UM 2944-20, p. 6.

<sup>204</sup> United Nations High Commissioner for Refugees (2020) *UNHCR recommendations to Sweden on strengthening refugee protection in Sweden, Europe and globally*. p. 3. Accessed 2021-03-24 from <https://www.unhcr.org/neu/wp-content/uploads/sites/15/2020/06/UNHCR-recommendations-to-Sweden-on-strengthening-protection-of-refugees-May-2020.pdf>

<sup>205</sup> Lundberg, Anna (2011). *The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights*. Journal of Human Rights Practice, 3(1), p. 65-66.

The Court and the Committee have suggest which interests should be considered when assessing a balance of interests. The basic idea of the principle is good as it should be applied to each individual child s as their situation, circumstances or factors can look very different. However, it should be pointed out that this leads to just as Bhabha has stated in her concept of Arendt's political theory on today's migrant children that these children cannot fully enjoyed their rights. It is the society's view and interests of migrants that is of priority to ensure rather than to actually make sure that migrant children can enjoy their rights.<sup>206</sup> As previously mentioned, Sweden was already before the incorporation obligated to consider the principle of the best interests of the child, even for children in migrant processes.<sup>207</sup> The recurring problem with the principle of the best interests of the child is that in connection with the balancing of interests it can be easy to negotiate away the child's interest. Bhabha has emphasized in her theory that human rights are simply to the state's own citizens.<sup>208</sup> Although CRC is part of national law in Swedish legislation, there is still a lot to be done. It all depends on how determined a state is to protect children's right.<sup>209</sup> For migrant children it all depends on what the national migration policy is when assessing the principle.

An incorporation can give an effect like the precedent case shows as the Court interpret the principle together with a balance of interests. Although there is still a need of determination in order to fully secure that children's right to be considered in migrations processes. With help of the recommendation by the UNHCR and the precedent case from the Swedish Migration Court of Appeal it can give guidance in how to ensure that children in migrations processes gets their rights and interests considered in decision regarding them. Even though it has been shown a resistance to recognize migrant children rights or interests, a state party is still obligated to do so.<sup>210</sup> If an incorporation of the CRC is to fulfil its function, it may not be sufficient to only implement the text of the convention into national legislation. Hopefully, the Swedish incorporation of CRC can keep up what has been recommended by the UNHCR,

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<sup>206</sup> Bhabha, Jacqueline (2009). *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*. The Johns Hopkins University Press: Human Rights Quarterly, May, 2009, Vol. 31, No. 2 (May, 2009), p. 411.

<sup>207</sup> Lundberg, Anna (2011). *The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights*. Journal of Human Rights Practice, 3(1), p. 67.

<sup>208</sup> Bhabha, Jacqueline (2009). *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*. The Johns Hopkins University Press: Human Rights Quarterly, May, 2009, Vol. 31, No. 2 (May, 2009), p. 435.

<sup>209</sup> Lundberg, Anna (2011). *The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights*. Journal of Human Rights Practice, 3(1), p. 66.

<sup>210</sup> United Nations Human Rights Office of the High Commissioner (2013). *Committee on the Rights of the Children 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)\**, p. 3. Accessed 2021-04-19 from [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

but also to make sure that every decision or process regarding a child have the principle of the best interests of the child interpreted for each child, especially for children in migration processes.<sup>211</sup>

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<sup>211</sup> United Nations High Commissioner for Refugees (2020). *UNHCR recommendations to Sweden on strengthening refugee protection in Sweden, Europe and globally*. p, 3. Accessed 2021-03-24 from <https://www.unhcr.org/neu/wp-content/uploads/sites/15/2020/06/UNHCR-recommendations-to-Sweden-on-strengthening-protection-of-refugees-May-2020.pdf>

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## Appendix

### Appendix 1

#### RESEARCH QUESTION NR. 1 (1)

“How is the principle of the best interests of a child highlighted in the collected material?”

CODING UNITS	CODING CATEGORIES				
	<i>Citation unit from the documents</i>	<i>Condensation</i>	<i>Code</i>	<i>Sub-category</i>	<i>Categories</i>
Migration Court of Appeal judgement (MIG 2020:4)	The legal reasoning from MIG 2020:4				
	Legal judgement from MIG 2020:4				
Committee on the Rights of the Children's General comments No. 14 (2013)					

## Appendix 2

### RESEARCH QUESTION NR. 1 (2)

“Are there any significant factors related to the principle concerning children in the migration process?”

<b>CODING UNITS</b>	<b>CODING CATEGORIES</b>				
	<i>Citation unit from the documents</i>	<i>Condensation</i>	<i>Code</i>	<i>Sub-category</i>	<i>Categories</i>
<b>Migration Court of Appeal judgement (MIG 2020:4)</b>	<b>The legal reasoning from MIG 2020:4</b>				
	<b>Legal judgement from MIG 2020:4</b>				
<b>Committee on the Rights of the Children’s General comments No. 14 (2013)</b>					