To Believe or Not to Believe
– Is That the Question?

To Believe or Not to Believe – Is That the Question?

A critical study of how the Swedish migration courts handle their responsibility to judge in asylum cases

Annkatrin Meyerson

JURIDISKA INSTITUTIONENS SKRIFTSERIE
HANDELSHÖGSKOLAN VID GÖTEBORGS UNIVERSITET

Juridiska institutionens skriftserie
Handelshögskolan vid Göteborgs universitet/
School of Business, Economics and Law
Skrift 40
2023

To Believe or Not to Believe – Is That the Question?

A critical study of how the Swedish migration courts handle their responsibility to judge in asylum cases

© Annkatrin Meyerson, Göteborg 2023

Cover: Tommy Olsson
Print: Stema specialtryck AB, Borås
ISBN: 978-91-87869-27-3

The book is published with the support from Emil Heijnes Foundation for legal research and Department of law, University of Gothenburg.

"Step swift thereto, and in your left hands hold with reverence, the white-crowned wands of suppliance, the sign beloved of Zeus, compassion's lord, and speak to those that question you, words meek and low and piteous, as beseems your stranger state, clearly avowing of this flight of yours the bloodless cause; and on your utterance see to it well that modesty attend; from downcast eyes, from brows of pure control, let chastity look forth; nor, when ye speak, be voluble nor eager—they that dwell within this land are sternly swift to chide. And be your words submissive: heed this well; for weak ye are, outcasts on stranger lands, and froward talk beseems not strengthless hand."

"Skynden eder och bären på er vänstra arm högtidligt den ullombundna kvisten av oliv, som helgats himmelens Zeus, den Misskundsamme, och svaren främlingarna fromt och sorgset, som flyktingar tillkommer, gören klart att eder landsflykt är från blodskuld fri. Må ingen djärvhet röjas i er röst, och låten ej en fåvitisk uppsyn grumla er lugna blick, er pannas klara ro. Tag ej för snabbt till orda och var ej för lång i talet: man är hetsig här. Och minns att giva efter, du, en stackars långväga flykting. Allt för dristigt språk och oförväget anstår ej de svaga."

Aeschylus, *The Suppliants* [1]

---

[1] The quote is taken from the Greek drama *The Suppliants* by Aeschylus. The line is pronounced by Danaos, the father of the female Danaids, who flies with his daughters from Egypt to Argos where they apply for asylum because of the threat that his daughters may be forced to marry their cousins.

Abstract

In this dissertation, the Swedish migration courts' handling of the risk responsibility of judging in asylum cases is studied. An empirical study of cases from the migration courts is followed by a critical analysis of the findings considered against the background of the asylum legal framework. The judges' choices of what to present in their judgements is then analysed through the lens of Hannah Arendt's theory of 'the faculty of judging'; the responsibility to judge in high-stakes situations. The results show that, the emphasis in the judges' argumentation lies on the criteria used as indicators to assess the credibility of the asylum seeker's narrative, while arguments on law, facts, circumstances, and the foundations of these arguments are less frequently emphasized. The analysis of these results in the light of the legal framework makes visible a shift of emphasis at different levels; from an assessment of the risk of return based on law and facts, to an assessment of the quality of the asylum seeker's narrative. Through these shifts, credibility is given the status of a legal requisite detached from the principle of *non-refoulement*. By making uncertainties, ambiguities, doubts and choices about facts and law invisible, the judgments lack essential parts of that which, according to Arendt, constitutes the faculty of judging. The outcome is presented as the only possible one, thereby leaving little room for the application of the principle of evidentiary alleviation; 'benefit of the doubt', established in asylum law, which serves to ensure the maintenance of *non-refoulement*. By choosing to narrow down the legal question to a decontextualised assessment of the credibility of the asylum seeker's narrative, the core issue – the potential risk of sending the asylum seeker back to an area where she or he is at risk of being subjected to ill-treatment prohibited by law – recedes into the background. What emerges is a reluctance to judge on that which is at stake in asylum cases.

Acknowledgements

First and foremost, I want to thank my principal supervisor, Sara Stendahl and co-supervisor Pernilla Rendahl for the patient, empathetic, and wise guidance that I have received throughout my PhD studies. Without your invaluable never-ending support and believe in me and the project I would never have been able to finish it. That is for sure. I am grateful to Rebecca Thorburn Stern, who was my co-supervisor in the beginning of the project, for sharing her valuable knowledge in asylum law with me and for introducing me to the field of international migration law.

Many thanks to Gregor Noll and Anna Kaldal for their interesting and valuable comments on my text at both the text seminar and the final seminar. They gave me new, important perspectives. In addition, Gregor has been an important sounding board in and out of seminars from the beginning, always interested in and curious about the progress of the project.

I am indebted to all my colleagues at the legal department at Gothenburg University. Being a social individual, I knock on doors, ask questions and start discussions. So many of you have tried to answer my questions or been involved in my legal considerations. Or non-legal ones when I've needed to chat away moments of restlessness or frustration. The discussions, the laughs and the support of my doctoral student colleagues have been decisive. Special thanks to Erik Björling, Anna Wallerman, Sebastian Wejdal, Merima Bruncevic, Jannice Käll, Tormod Johansen, Otto Swedrup, Kristina Wejstål, Kristina Hultegård, Erik Mägi and David Jivegård for discussing theoretical matters with me, for reading and commenting on my texts and for giving me your advice and support. I am also grateful to Eva-Maria Svensson, Håkan Gustavsson and Moa Bladini for sharing their experiences and thoughts and for always having been supportive and taken an interest in my project. For technical problems I was lucky to have Jeffery Johns at the department who answered my emergency calls.

It has been a privilege to take part in the Gothenburg/Lund/ Uppsala Migration Law Network (GLUMIN) and to share knowledge and experiences with you all. A special thanks to Isa Cegrell Karlander for the intensive discussions we have had on Swedish asylum procedure. I also want to acknowledge the contribution of Thomas

Frid and John Panofsky, who provided an important link to asylum law practitioners.

Philip Linné's inspiration was crucial. His method of prioritizing cultural activities as a pathway to the completion of his dissertation proved well worth emulating. I think it saved my body and soul. The dance sessions with Stina Hedberg and Katarina Eriksson, the creative writing sessions with Christine Hellqvist and all the others in the writing group, the jam sessions, and all the inspiring music at the jazz club Brötz, all deserve and receive my deep appreciation. Special thanks to my son Love Meyerson and to Emma Augustsson for joining me on the journey of my music project. And how would I have survived the pandemic without all you wonderful women in the Tuesday hiking group? I am also indebted to Ingrid Lomfors and Lisa Åkesson, my two supportive walk-and-talk friends, for their success in turning my whining into constructive work, many times over, in the last years of struggle. All of the above have contributed by helping me find a space of freedom beyond the lonely hours chained to the computer.

A very dear and close friend to whom I want to extend my deep appreciation is Viveka Hellström, my constant shadow supervisor and 'helpdog'. Many thanks for your comforting patience and your persistent support and comments.

I am also grateful for all the support given me by my mother Ulla and my three sisters, Eva, Sanna and Pernilla, who always seemed to believe that I was in the right place even when I myself was full of doubt.

Of course, I must thank (or blame) the two people whose merit (or fault) it is that I got started on this journey in the first place into the world of law as a consequence of our experiences of the legal effects of the EU summit in 2001; my son Niklas Meyerson, who has often led me to stretch my thinking, and my friend Ebba Junker, a true master of persuasion.

Finally, I owe endless gratitude to my partner of these past 40 years, Tommy Olsson, for your continuous warm presence in my life, your interest in my work and for all of your inconvenient questions and remarks that have forced me to think again so many times.

Gothenburg, 14 April 2023, Annkatrin Meyerson.

Prologue

Through my work as a clerk in the Migration Court in Gothenburg, I experienced the asylum procedure from the inside. As I am now studying this procedure from the outside, I will not be able to explicitly draw on my experiences from the court in my research. Unavoidably, however, my experience will constitute a frame of reference for my understanding of the object I intend to study, or, to use Gadamer's hermeneutical expression, my experience will constitute a pre-understanding[2]. My approach to the topic as a researcher is marked by my experiences from the court and how these have affected me. One important experience of mine, which has had an impact on my research interest, is the realisation that different judges had different approaches to not only judging in general, but to judging in asylum cases specifically. I experienced a difference between judges who equalised asylum cases with other administrative cases and those who treated asylum cases as a special kind of cases that needed a specific approach. This seemed to have consequences, for instance, in how evidentiary rules were used and thus lead to, as I perceived it, different outcomes. This experience has guided me towards an interest in the approach to judging: the judges' perceived scope for possible interpretation of the law. Thus, this dissertation is meant to be a contribution not to exactly how legal requisites should be interpreted, but rather to a way of thinking about judging in cases including high risk factors, and how to take responsibility for these assessments.

[2] According to the German philosopher Hans-Georg Gadamer, the first of all hermeneutic conditions is the pre-understanding (Gadamer 2002, p. 140).

Part I – Introduction

Part II – A study of court cases from Swedish migration courts 2014–2015

Part III – Identifying the space for legal interpretation in asylum adjudication as presented by Swedish migration courts – critical reflections

Part IV – “The faculty of judging” – a critical analysis of the Swedish migration courts’ handling of the responsibility to judge in asylum cases in the light of the theories of Hannah Arendt

Contents

Part I – Introduction ... 1

1 The responsibility to uphold the principle of non-refoulment – politics, law, and morals ... 3

1.1 The act of judging in a complex and politically and individually sensitive area ... 7

1.2 Aim and research questions ... 16

1.3 The relation between "the risk upon return" and a judgment that is "correct in substance" ... 17

1.4 Method and material ... 22

1.4.1 Reflections on material and method ... 22

1.4.2 Reflections on the time factor ... 30

1.5 Disposition ... 31

Part II – A study of court cases from Swedish migration courts 2014–2015 ... 33

2 A study of court cases from Swedish migration courts 2014–2015 ... 35

2.1 The production of the judgment ... 35

2.2 Choice of methods and material ... 45

2.3 The categories ... 47

3 Formal data – Results ... 50

3.1 Formal data: The courts ... 50

3.2 Formal data: The asylum seeker – personal data **51**

3.3 Formal data: Outcome correlated to formal data **52**

3.4 Formal data – Concluding remarks **52**

4 The bases for assessing the risk upon return with specific focus on the credibility of the asylum seeker's narrative as presented by the Swedish migration courts **55**

4.1 Arguments and sources of information in the courts' reasoning – the general pattern **55**

4.2 Legal sources: ***How, and to what extent, if at all, do the courts base their assessments on legal sources?*** **(Category 1)** **62**

4.3 External sources: ***How, and to what extent, if at all, do the courts base their assessments on external sources of information?*** **(Category 2)** **67**

4.3.1 The situation in the country of origin: *How, and to what extent, if at all, do the courts base their assessments on sources of information as regards the situation in the country of origin?* (Category 2A) 67

4.3.2 Written documents: *How, and to what extent, if at all, do the courts base their assessments on written documents?* (Category 2B) 69

4.3.3 Witnesses: *How, and to what extent, if at all, do the courts base their assessments on witnesses?* (Category 2C) 71

4.3.4 Experts: *How, and to what extent, if at all, do the courts base their assessments on experts?* (Category 2D) 71

4.4 The quality of the asylum seeker's narrative: ***How, and to what extent, if at all, do the courts base their assessments on the quality of the asylum seeker's narrative?*** **(Category 3)** **73**

4.5 The asylum seeker's behaviour, actions or activities: ***How, and to what extent, if at all, do the courts base their assessments on the asylum seeker's behaviour, actions or activities?*** **(Category 4)** **75**

4.6 Co-applicants: ***How, and to what extent, if at all, do the courts include the co-applicants in their assessments?*** **(Category 5)** **77**

4.7 Individual facts and circumstances: ***How, and to what extent, if at all, do the courts base their assessments on individual facts and circumstances?*** **(Category 6) 78**

4.8 General risk considerations: ***How, and to what extent, if at all, do the courts base their assessments on arguments connected to general risk considerations?*** **(Category 7) 79**

4.9 Procedural deficiencies: ***How, and to what extent, if at all, do the courts base their assessments on procedural deficiencies? (Category 8)*** **........ 81**

4.10 Correlations between the results in the different categories and the outcome of the cases 81

4.11 Compilation of the main findings 83

Part III – Identifying the space for legal interpretation in asylum adjudication as presented by Swedish migration courts – critical reflections 91

5 Critical legal reflections on the identification of points of law as presented by Swedish migration courts 93

5.1 The adjudication of the prohibition of refoulement in relation to status determination 93

5.1.1 The relation between *non-refoulement* and status determination in international and EU law 93

5.1.2 The relation between *non-refoulement* and status determination in Swedish asylum law 112

5.1.3 A shift of emphasis from *non-refoulement* to status determination 123

5.2 Assessment principles in relation to the assessment of the risk upon return 125

5.2.1 "Forward-looking" and "individual" as a point of departure for the assessment of the risk upon return 125

5.2.2 The relation between the burden and standard of proof, evidentiary alleviation, and the State's duty to investigate 128

5.2.2.1 International and EU law 129

5.2.2.2 Swedish law 137

5.2.3 A shift of emphasis from the State's duty to investigate and evidentiary alleviation to the burden of proof for the asylum seeker 145

5.3 A shift of emphasis from an assessment of the risk of *refoulement* to a question of burden and standard of proof – Concluding reflections 147

6 Critical legal reflections on the Swedish migration courts' identification, presentation, consideration, and evaluation of facts and circumstances 149

6.1 The consideration and evaluation of individual and personal facts and circumstances in relation to the assessment of the risk upon return 149

6.1.1 The content of an individual assessment 150
6.1.2 Specifically, about women and children as co-applicants 157
6.1.3 The lack of consideration and evaluation of individual and personal facts and circumstances 167

6.2 Consideration and evaluation of external sources of information 169

6.2.1 Country of origin information 170
6.2.2 Experts 181
6.2.3 Written documents 190
6.2.4 The lack of consideration and evaluation of external sources of information 192

6.3 Differences coupled to the outcome of the case and dissenting jurist judges 193

6.4 A shift of emphasis from an assessment of facts and circumstances to an assessment of credibility – Concluding reflections 195

7 Assessment of the asylum seeker's narrative – Critical reflection on credibility as a legal phenomenon in the asylum procedure 196

7.1 The function of credibility assessment in asylum adjudication 197

7.1.1 The significance of credibility assessments 197

7.1.2 Credibility assessment as admissibility or acceptance of evidence in a pre-requisite evidential step....203
7.1.3 Credibility assessment in relation to the principle of the "benefit of the doubt"....206
7.1.4 Credibility assessment in Swedish asylum law....212
7.1.5 Attempts to steer away from subjectivity and the Swedish discussion on credibility and reliability....223
7.1.6 Separating the assessment of the credibility of the asylum seeker's narrative from the assessment of the risk upon return – a risk factor....227

7.2 The content of credibility assessments....231
7.2.1 Credibility indicators....232
7.2.2 The asylum seeker's behaviour, actions, or activities as indicators for credibility....241
7.2.3 An analysis of four cases from the Swedish migration courts 246
7.2.4 Credibility indicators as the main basis for the assessment of the risk upon return – a risk factor....254

7.3 The shift of emphasis from assessing the asylum seeker's narrative in context to assessing the quality of the narrative based on credibility indicators – Concluding reflections....258

Part IV – "The faculty of judging" – a critical analysis of the Swedish migration courts' handling of the responsibility to judge in asylum cases in the light of the theories of Hannah Arendt....261

8 The faculty of judging and the responsibility to judge....263

8.1 The responsibility to judge in exceptional and high-stakes situations....263

8.2 The faculty of judging....267

8.3 Judgment and reality....276

8.4 The responsibility to judge and the responsibility in judging – Concluding reflections....285

9 To believe or not to believe – is that the question?....289

Epilogue **293**

Bibliography **295**

Appendix 1 .... **1**

Appendix 2 .... **1**

Appendix 3 .... **1**

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ComAT	Committee against Torture
EAC	European Asylum Curriculum
EASO	European Asylum Support Office
ECHR	European Convention for the Protection of Human Rights
ECRE	European Council on Refugees and Exiles
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EU Charter	Charter of Fundamental Rights of the European Union
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
HHC	Hungarian Helsinki Committee
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LBGTI	Lesbian, Gay, Bisexual, Trans and gender diverse, Intersex
MIG	Directing rulings from the Migration Court of Appeal
MIÖD	Other rulings from the Migration Court of Appeal
NGO	Non-Governmental Organisation
Prop.	Proposition
SOU	Statens offentliga utredningar (Swedish Government Official Reports)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	The United Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund

Part I – Introduction

This part includes one chapter and provides a problem-oriented introduction to the subject, a presentation of the aim of the dissertation, the research questions, and the chosen methods and material.

1 The responsibility to uphold the principle of non-refoulment – politics, law, and morals

Throughout history, people, for different reasons, have been forced to cross borders, flee and seek refuge in other places. In our time, marked as it is by regulated immigration and international corporation, a successful escape has become increasingly dependent on being granted permission to enter somewhere else as well as being given permission to stay. The essential part of deciding on who has the right to asylum is the assessment of the risk of returning the asylum seeker to her or his country of origin. This obligation is legally expressed and codified in international, regional, and national law through the principle of *non-refoulement*.[3] The principle expresses a prohibition on any State to return any individual to an area where she or he would be at risk of being subjected to ill-treatment prohibited by law.

Prior to 1992, decisions on asylum in Sweden were carried out by one public authority: the Immigration Agency of the State (*Statens invandrarverk*).[4] The Aliens Appeal Board was established in 1992 as a reaction to the overload of appealed cases to the Government, which, at the time, was the general appeal instance.[5] The Aliens Appeal Board was in one sense a traditional Swedish judicial body as it included both jurist judges and lay judges, but it remained a one-party administrative public authority. The development towards moving the asylum adjudication from a political to a legal procedure emanated from public

---

[3] The content of the principle will be further explored below in section 5.1.

[4] The Immigration Agency of the State was established in 1969 (Wikrén and Sandesjö 2017, p. 26). The name was changed to the Migration Board, in 2000 (*Migrationsverket*). (The English translation changed name to the Swedish Migration Agency to clarify that the authority is an Agency and not a Board. Looking further back at the time of the introduction of a Swedish Aliens Act in 1937, taking decision about residence permits were mainly an administrative task made by the immigrant office, an office within the Social Agency (Geverts 2008, p. 50 f.). However, if the issue was refusal of entry or expulsion the Aliens Agency had to make a statement and a decision regarding visa was then taken by the Ministry for Foreign Affairs. The Government could make decisions concerning these issues in case of war or threat of war, (Ibid).

[5] SOU 1994:54, p. 59 f. The Government kept the possibility to govern the development of case law though still gave the Aliens Appeal Board the possibility to transfer cases to the Government if they were of special importance or of principle matters. The transferred cases mostly concerned security matters or medical matters that would lead to a significant cost for the State (ibid).

criticism of the asylum procedure system. Confidence and trust in the former Aliens Appeal Board was weak because of the lack of transparency as well as the lack of oral hearings. In 2006, a two-party court system was established in the new migration procedure as a way to respond to the duty to investigate "the case as its characteristics require".[6] An enhanced possibility for an oral hearing was established and the Government argued that it would provide better opportunities to assess a person's credibility and clarify misunderstandings.[7] Furthermore, it would be an important measure in order to fulfil the enhanced requirement of transparency in the asylum procedure and the individual's perception of being heard in the procedure was emphasised.[8] The aim was, as formulated by Johannesson, to provide administrative justice and prescribe "the courts as the solution to the problems of inhumane rejections of asylum claims…".[9] The humanitarian problem was rather seen as a problem of implementation than of policy formulation[10]

The tension between law and politics was present at the time of implementing the courts. In the process of implementing the migration courts within the administrative court system, several judicial bodies were reluctant to do so.[11] In its critique, the Council on Legislation (*Lagrådet*) claimed that the imprecise regulation, in the Aliens Act, includes "adjudication on suitability" (*lämplighetsprövning*) rather than being a strict legal adjudication. This, according to the Council, would be more suitable in bureaucratic decision-making, which allows more room for discretionary and political considerations.[12] The Council further suggested that the independence of the administrative courts would be difficult to uphold if they should be burdened with tasks that may require them to take standpoints on issues with distinctly politically

[6] Prop. 2004/05:170, p. 105.
[7] Ibid.
[8] Ibid.
[9] Johannesson 2017, p. 89.
[10] Ibid.
[11] See Johannesson 2017, p. 82 ff. for an account of the fear that the introduction of judiciary bodies would lead to a politicisation of the courts.
[12] Opinion of the Counsel on Legislation (*Lagrådet*) 2002, p. 9 f. and 2005 in Prop. 2004/5:170 p. 488 f. and Johannesson 2017, p. 83.

elements.[13] Also, the courts could not be expected to possess expert knowledge concerning the situation in the country of origin.[14]

In spite of these objections, the former administrative procedure – with the Migration Agency as the decision-making authority and the Aliens Appeal Board as the authority reviewing the decisions of the Migration Agency – was transformed into a procedure where the Migration Agency was retained as the decision-making authority whereas the migration courts and the Migration Court of Appeal replaced the Aliens Appeal Board. The migration courts were incorporated in the administrative court system and the Migration Court of Appeal became part of the Administrative Court of Appeal in Stockholm (*Kammarrätten*).[15] As a consequence, the migration courts are not directly separated from other areas of administrative law. Migration cases since 2013 have been the largest group of cases in the administrative courts, and their number has continuously increased, constituting approximately a third of all cases in 2017.[16]

The legal framework governing the asylum field has expanded from being an issue for the nation state to a complex legal field governed by international and EU law.[17] While the asylum field, on the one hand, has been subject to a growing "juridification" whereby close links to political decisions have weakened,[18] on the other hand, today the field remains a highly politicised area.[19] The political dimension in asylum adjudication is evident in the fact that the aim of the EU asylum legislation – namely, to harmonise the asylum adjudication in order to give asylum seekers equal treatment and equal assessments regardless of which Member State is responsible for the adjudication[20] – seems to have failed. Although seeking protection from the same country of

---

[13] Ibid.

[14] Ibid. See Johannesson 2017, Chapter 5, for a thorough account of the background and political discussions before the introduction of the migration courts.

[15] Section 6 of the Regulation on the Competence of the Public Administrative Courts etc. (*Förordning (1977:937) om allmänna förvaltningsdomstolars behörighet m.m.*).

[16] Statistics from the Swedish National Courts Administration (*Domstolsverket*) at https://www.domstol.se/om-sveriges-domstolar/statistik-styrning-och-utveckling/statistik/officiell-domstolsstatistik/

[17] See Brännström 2011, p. 17 on transnational constitutionalising.

[18] See Guild and Carrera 2010, p. 7 on the trend in EU.

[19] Brännström, *Juridik som politik och behovet av kritik* in Pelling and Hall 2017, pp. 60–74.

[20] European Council, The Stockholm Programme – *An Open and Secure Europe Serving and Protecting Citizens* (2010/C 115/01), para. 6.2.

origin, statistics show major divergences in granting rates between the Member States, which cannot be explained solely by individual differences.[21]

As noted above, since 2006, the responsibility of finally deciding who has the right to protection in Sweden, and hence the responsibility of fulfilling the obligation of *non-refoulement*, lies largely with the courts. The Swedish court practice in this area of law is relatively new. Social discussions and critiques aimed at asylum adjudication are mainly focused on politicians as law makers and practice at the level of the public authority, i.e. the Swedish Migration Agency. However, the fact that the migration courts, mostly, have the final say in asylum cases means that it is crucial to study how the courts uphold the principle of *non-refoulement*. How the migration courts handle their responsibility to make assessments and judgments, against the backdrop of uncertainties and an increasingly complex legal landscape, forms an important part of how the State of Sweden succeeds in fulfilling its human rights obligations.[22]

The consequences of an asylum decision for the individual asylum seeker can be a matter of life and death. Since such decisions are carried out in the context of a legal proceeding in a sensitive political field, involving assessments being made under a cloud of uncertainty, raises questions on how certain we can be that these decisions are correct and that no one is forced back to a place where she or he would be subject to death or irreparable harm prohibited by law. [23] The high-stakes situation, tensions, and dilemmas that the judges face in asylum cases, in turn, raise questions about the content of the responsibility to judge in these cases, i.e. how to handle these elements within the scope of the judge, being an expert on law. The interplay between applying legal methods as an important extension of democracy and the uncertainties and risks inherent in judging in asylum cases specifically highlights the

---

[21] Parusel and Schneider 2017, section 5.4.

[22] Stern 2014.

[23] See reports on forced returns: Justice First 2011*: Unsafe Return. Refoulement of Congolese Asylum Seekers* and Amnesty International 2010*:* Public Statement: *European states must stop forced returns to Iraq* and Urgent Action: Sweden and the appeal from Amnesty International 2011: *Denmark forcibly return 26 Iraqis,* EUR 42/002/2011.

lacuna between applying a traditional legal method and the political and moral implications involved in judging.[24]

1.1 The act of judging in a complex and politically and individually sensitive area

Besides being faced with a complex legal web with different underlying values, the migration judge has the difficult task of judging on a prospective future for the asylum seeker that might lead to death or irreparable harm for the individual. In the assessment of the eventual risks that the asylum seeker may face upon return to her or his country of origin, extra-legal knowledge plays a significant role. Extra-legal knowledge means that the judge often has to deal with facts and knowledge, which are not included in her or his professional education but that she or he is dependent on in order to judge.[25] Assessment in asylum cases includes interpretations and analyses of interrelated causes such as the political, cultural, and social situation in the country of origin as well as of the asylum seeker's individual circumstances.[26] As a result of the intertwined legal field described above, case law from UN human rights committees[27], the European courts, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) constitute important legal sources. Additionally, a

[24] See Brännström 2011, pp. 16–17 and 2020 on how the transformation from politics to law means that, on the one hand, politicians use legal means to obtain political goals, and, on the other, there is a limiting of the political scope of acting.
[25] Johannesson 2017, p. 179 and Sandgren 1999, II. See about the significance and problems of using expert witnesses (*sakkunniga*) in court: Sutorius 2014, section 10.5 (on evidentiary evaluation in cases concerning sexual crimes); Stendahl 2003, p. 186 ff. and Stendahl and Torén 2011 (on the administrative courts' use and interpretation of arguments from medical experts in sickness cash benefit); Whalberg 2010 (on experts in environmental law); Diesen and Lagerqvist Veloz Roca 2003, p. 24 and p. 28 f. (administrative cases); Diesen et al. 2015, p. 280 ff. (criminal cases); and Diesen in Andersson et al. 2018, p. 272 ff. (asylum cases).
[26] Interviews with Swedish migration judges show that their perception of considering extra-legal knowledge differs and is coupled to the judges' perception of how active they should or could be in the fact-finding role (Johannesson 2017, p. 127). Furthermore, the interviews indicated that knowledge and experience about matters other than the law could be perceived as a threat to the independence of the judge (Johannesson 2017, p. 119).
[27] The Human Rights Committee (HRC), Committee against Torture (ComAT), the Committee on the Rights of the Child (CRC) and the Committee on the Elimination of Discrimination against Women (CEDAW).

large number of guidelines on how to interpret legal issues and how to assess facts and circumstances in asylum cases are provided by UN and European bodies,[28] national migration agencies as well as non-governmental organisations (NGOs). Some of these bodies also provide a vast amount of country reports which are more or less easily found in different data bases.[29] The available information as regards a certain country can be overwhelming in quantity and at the same time insufficient on specific issues that are relevant to the individual case. Additionally, there is a great deal of uncertainty in the assessment of the country of origin information due to the time aspect and sources of information.[30] In conclusion, the asylum adjudication is governed by a multi-layered legal field and includes a complex assessment of general and individual facts and circumstances marked by a high degree of uncertainty.

The fact that relevant extra-legal knowledge can be difficult to obtain and that the adjudication should be individual often puts the assessment of the asylum seeker's narrative concerning past events and personal circumstances at the centre of the asylum adjudication. Assessing an unknown person's narratives, in a legal context, in terms of "credibility" has been subject to research and debate. In Sweden, the use of credibility criteria as a way of assessing statements from the parties, and witnesses in both criminal cases and asylum cases, has been criticised as these criteria lack a scientific basis, thus contributing to an increased procedural risk.[31] In the light of the above-mentioned difficulties and uncertainties surrounding fact-finding in asylum cases, the assessment of an asylum seeker's statements in terms of them being credible or not has become crucial and adds to the uncertainty in the assessment of the risk upon returning the asylum seeker to her or his country of origin.

---

[28] Ibid. and the United Nations High Commissioner for Refugees (UNHCR), the European Asylum Support Office (EASO).
[29] See, below, under section 6.2.1.
[30] Ibid.
[31] Sutorius 2014, section 10.6. Andersson 2004, p. 202 f., Schelin 2006, pp. 185 ff. and 209 ff., the forensic psychologists Willén and Strömwall 2011, Mellquist 2013, and Diesen 2015, p. 278 f., and p. 448 (on criminal cases); and Diesen and Andersson in Andersson et al. 2018, p. 267 ff. and section V; and Granhag et al. 2005 (on asylum cases).

The concept of "credibility" in the context of the asylum procedure has become an important issue and has gained special attention in legal reasoning both in international and national decisions and judgments, as well as in legislation and other documents recognised as legal sources.[32] Moreover, attempts to develop methods for credibility assessments in asylum cases have been presented in different national and international guidelines and reports.[33] The risk of biases and lack of knowledge on how to analyse and evaluate the asylum seeker's statements have been highlighted in a number of research projects and empirical studies. Studies from different disciplines, as well as reports from the UNHCR and NGOs, have put forward the need for training and education for asylum adjudicators concerning experiences and knowledge as regards the political situation and conflicts in foreign countries, cross-cultural communication (cultural differences and their impact on narrating), and psychological issues such as biases and trauma.[34] Efforts have been made to provide guidelines, methods, training programmes based on the knowledge gleaned from this research.[35] The Migration Agency has provided guidelines on credibility assessments in the form of a "legal position paper" and a "decision support" (*beslutsstöd*).[36] The judges in the Swedish migration courts are offered further education on different subjects, of which credibility

---

[32] See, for instance, Article 4.5(e) of the EU Qualification Directive, and the UNHCR Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979 (hereafter the UNHCR Handbook), paras. 195 and 204.

[33] See, below, Chapter 7.

[34] See among legal scholars: Kjærum 1987, Macklin 1998, Kagan 2003, Cameron 2008 and 2010, Sweeney 2009, Baillot et al. 2013, Spijkerboer et al. 2013 concerning credibility assessment as to specific groups; Millbank 2002, 2009 ('The ring of truth') and 2009 (From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom), Millbank and Dauvergne 2003, Millbank and Berg 2009 (sexual orientation) and Thorburn Stern and Wikström 2016, p. 163 ff. (sexual orientation and converts). Psychology and psychiatric studies: Granhag et al. 2005, Herlihy and Turner 2006 and 2009, and Herlihy et al. 2002, 2010 and 2012. Political science: Johannesson 2017, p. 179. Sociology: Wettergren 2010 and Magalhães 2016. Communication and Journalism: McKinnon 2009 and a multidisciplinary study by Rousseau et al. 2002. The multidisciplinary issue is further explored in Chapter 7.

[35] See, below, section 7.2 on, for instance, the CREDO project initiated by the UNHCR 2013.

[36] See more on the content in these documents, below, section 7.2.

assessment is one, arranged by the Swedish National Courts Administration (*Domstolsverket*).[37]

It is expected that judges in the court arrive at a decision. The judge has the power to decide on other people's lives and at the same time cannot refrain from taking a decision unless she or he decides to quit her or his job. Hence, there is an absolute requirement to make a decision even if it seems impossible to know whether the outcome is correct. The act of judging always includes an element of inequality in respect of the balance of power in that the judge has the power to finally decide on the life of another person. The unequal balance of power is prominent in the asylum procedure as an alien lacks the same fundamental rights as a citizen in a democratic state: to stay and to vote. Hence, the asylum seeker, having left her or his country of origin and pleading for protection in a country where she or he is an alien, is in an extremely vulnerable situation. In the power to judge, there is a general expectation that the judge, as an expert on law, is well acquainted with the legal concepts and ways to interpret them.[38] The general idea about the role of the judge is that she or he should, impartially, objectively, and independently, arrive at a just judgment, leading to an outcome that is correct in substance (*materiellt riktig*), based on law and facts, that is neutral in relation to the parties and free from political and personal considerations.[39] In line with the prevailing democratic idea, it is mainly through legislation that law is created and changed, and the decision-makers and judges, as an extension of democratically made decisions, have to apply these laws. However, to apply the law involves making choices about which provisions are relevant, how to interpret them, which facts are relevant and how to assess them and relate them to the relevant provisions. This constitutes the scope of action: the

[37] https://www.domstol.se/globalassets/filer/gemensamt-innehall/jobba-hos-oss/utbildningskataloger/utbildningskatalog---juridiska-utbildningar.pdf

[38] See Eva-Maria Svensson 2007 in *Boundary-Work in Legal Scholarship* where she shows how boundaries of what constitutes knowledge in the field of jurisprudence are decided by so called *Boundary-Work* and the need of critical feministic jurisprudence as a way of challenging these borders.

[39] See SOU 2003:102, p. 270, 270 f. and SOU 2008:106, p. 14 on the content of the requirement for "skill and merit" stipulated in Chapter 11 of the 6 of the Constitutional Act and section 4 of the Public Employment Act.

discretionary space for the judge.[40] It could be expressed as the space in which the actual act of judging occurs.

It is further expected, in a democratic society, that the judges justify their judgments by communicating their reasons for their decisions in the public sphere in a manner that is comprehensible to the individual concerned, other jurists, as well as the public in general.[41] Also, it is expected that the judgments should be communicated in a transparent manner not only in order to be able to execute but also to gain legitimacy and to form a basis for changing laws by the legislature as a result of political debate.[42] Even though what is actually the basis for the outcome of the case may differ from what is written down in the judgment, i.e. the judge may base her or his assessments on reasons that she or he chooses not to reveal, the legal expression of the courts is the "written" judgment; the written judgment in asylum cases is the legal document in which the judges arrive at an outcome with the consequence of either granting protection or expelling the asylum seeker. How the judges choose to express themselves, and what they choose to include and exclude in the written judgment, what arguments they choose and how they choose to substantiate these arguments is what leads to the consequences and becomes part of the law.

Independence and objectivity are put forward as fundamental values in the act of judging.[43] In the recruitment of Swedish judges, the requirement for "skill and merit" is stipulated by law.[44] The notion of "skill" is defined not only in terms of independence and objectivity, but also as including good knowledge about the legal system and an ability to apply it well, discernment (including behaviour that will create confidence), personal maturity, the ability to cooperate, efficiency

---

[40] Lindell 1987, p. 47, p. 98, p. 101 and p. 131. Strömholm 1996, p. 432 f.

[41] See, below, section 2.1.

[42] Stendahl 2003, p. 75 and Koskelo 2014.

[43] Chapter 1, section 9 of the Constitutional Act. See also the preparatory work to Chapter 35, section 1 of the Swedish Code of Judicial Procedure (*Rättegångsbalk (1942:740)*) on the limits of the discretionary room for the judge, stating that: "The rule concerning the judge's discretion as regards evidentiary assessment does not mean that he may base his judgment on a purely subjective perception concerning the value of the different pieces of evidence. His conviction must be objectively grounded and therefore based on reasons that can be accepted by other reasonable persons" (NJA II 1943 s. 444 f. The author's translation.

[44] Chapter 11, section 6 of the Constitutional Act and section 4 of the Public Employment Act.

without sacrificing quality, and the ability to express her- or himself clearly and comprehensibly both orally and in writing.[45] According to the Swedish Government Official Report on the recruitment procedure of judges, independence includes that the judge must be able to treat equal cases equally without irrelevant considerations and that her or his judgment must be the result of a pure application of law, which does not mean that the judge should seal her- or himself off from debates happening in society.[46] Within the frames of the regulations, the court rulings should be in accordance with the basic values that characterise the rule system even if the judge does not sympathise with them.[47] To be efficient without sacrificing quality means that the judge must be able to make decisions of good quality within a reasonable timeframe and be able to stand for her or his decisions.[48] Personal maturity is put forward as an important part of the judging skill, in order to be able to be sensible to, and understand what, the parties want to bring about.[49]

According to interview studies carried out with Swedish judges, the idea of objectivity and independence seems to be anchored in the judges' perceptions of their own role.[50] This prevalent idea as regards independence and objectivity among Swedish judges is seen to include maintaining a distance not only from the parties in the process but also

---

[45] SOU 2003:102, p. 270 f. and SOU 2008:106, p. 104 and p. 149. See also the policy document published by the Swedish National Courts Administration (*Domstolsverket*), concerning ethics and responsibility in judging, *God domarsed - om etik och ansvarstagande* 2011, p. 7 where the main role for the court is stated to be "to uphold the legal order".
[46] SOU 2003:102, p. 270 f. and SOU 2008:106, p. 104 and p. 149.
[47] Ibid., and Ställvik 2009, p. 45.
[48] SOU 2003:102, p. 270 f. and SOU 2008:106, p. 104 and p. 149.
[49] Ibid.
[50] In interviews conducted with migration judges by Johannesson, the independence criterion is strongly foregrounded by the judges. Jurisprudence is perceived as more objective than if, for instance, a psychologist or sociologist were the decision-makers (2017, pp. 116–117). See also Ställvik 2009, p. 212 and p. 217. In his interview with judges as regards significant criteria for being a good judge, they included integrity, empathy, good knowledge of human nature, the ability to talk to all kinds of people, good legal knowledge, effectiveness, efficiency, diligence, and hard work. Judging in court in general was expressed in terms of: an elite profession which requires high ideals, including loyalty to the State and the reason for choosing to become a judge was mainly because of the freedom and independence in the job but also to provide justice and to engage in downright law. See also the judges' answers concerning ethical aspects in a document published by the Swedish National Courts Administration (*Domstolsverket*), *God domarsed - om etik och ansvarstagande* 2011, p. 85 f.

from emotional influence.[51] However, research has shown that the impact of different biases on decision-makers cannot be overlooked whether they are based on emotions or a result of ideas of professionalism or political opinions.[52]

Susceptibility to political fluctuations have been shown to be capable of impacting on courts. Graver has studied how courts acted in the transformation of a State from a democracy to dictatorship in Nazi Germany, Chile, and South Africa. The results showed that the political transformation caused the courts to judge in a more oppressive manner than the current law required even though their constitutional role as independent courts was not changed.[53] In Sweden, political bias among lay judges in Swedish migration courts, in asylum cases, has been shown by Martén.[54] Her study reveals that Swedish lay judges, who are members of political parties expressing a clear negative view towards immigration, more often vote for a rejection of the asylum application. Furthermore, her study also shows that, except for those lay judges who are members of the party with the most negative view on immigration (the Swedish Democrats), the jurist judges are more

---

[51] Johannesson 2017, p. 120. See also the study by Wettergren and Bergman Blix 2016, which shows how the emotive-cognitive judicial frame systematically silences emotions and how judges and prosecutors in criminal cases avoid showing strong emotions by transforming them into small signs that can be interpreted by the other jurist actors in the courtroom; and see Wettergren 2010 on how officials at the Swedish Migration Agency manage emotions by "performing the emotional regime of *procedural correctness*" in order to maintain the continuity of self as a morally good person which, according to Wettergren, leads to a an "organisation that becomes an emotionally self-enclosed system". She advocates that this management of emotion "must be seen as inherent to a larger nationalist project to safe-guard the (increasingly perceived as threatened) privileges of Swedish citizens by controlling the influx of destitute foreigners, without recognizing the dehumanization of both the self and the others involved in this practice". See also Baillot et al. 2013 about emotional coping strategies by legal and quasi-legal asylum adjudicators meeting repeated narratives of persecution and violence resulting in emotional detachment and detachment from responsibility demands. See, also, Svensson 1997 where she uses the concept; "The logic of detachment" (*Avskiljandets logik*) as a way of describing how the jurisprudence creates a truth as to what is relevant to the law and what is outside the law which leads to that the gender structures which subordinates women becomes invisible.

[52] Martén 2015 and Gräns 2005. See also Rousseau et al. 2002 who highlight the problems connected to the aims of neutrality and objectivity, which are themselves cultural constructs, taken together with the numerous errors of cultural interpretation occurring in refugee hearings.

[53] Graver 2015, pp. 45 f. and 59 f.

[54] Martén 2015. See more on lay judges, below, section 2.1.

restrictive in granting asylum than the lay judges in general. This tendency finds support in the interviews conducted by Johannesson in which some of the judges emphasise the difference between themselves and the lay judges in terms of the lay judges being more emotional and affirmative towards the asylum seeker. Affirmative approaches are perceived to be connected to political agendas, while sceptical approaches are viewed as more neutral and judicially correct.[55] The perception of the jurist judges as being objective and independent of political consideration, according to Johannesson, "…operates through presumptive scepticism towards the asylum seeker".[56] This can be connected to the results of the interviews conducted by Ställvik, where judges expressed that their role as neutral judges is derived from the role of being loyal to the State.[57]

In addition, the inevitable arbitrary and subjective character of credibility assessments in asylum adjudications has been analysed in the light of political dimensions. The arbitrary and subjective character can be seen as challenging the idea of the perception of the judge as neutral and objective and as provider of justice based on objective and verifiable facts.[58] This, in turn, creates a discretionary space that leaves room for political dimensions.[59] As mentioned above, the studies by Johannesson and Martén indicate a generally sceptical approach

---

[55] Johannesson 2017, p. 177.

[56] Ibid., p. 128 f. See also Wikström and Johansson 2013 on "normative leakage" concerning gender and class in asylum adjudication.

[57] Ställvik 2009, p. 230 f. and p. 236.

[58] Johannesson 2017, p. 179. The study showed that the judges had difficulties openly discussing how they make credibility assessments without jeopardising their professional identities. Compare Kaldal 2012, as regards credibility assessments in cases concerning compulsory care of children, where serious accusations from the parents against each other shift from an objective-based investigation to a neutral approach in relation to the conflict in which information from people other than the parents is of great importance. See also Macklin 1998 who highlights the fact that migration judges often try to avoid assessing credibility. Macklin recognises the discretionary space and argues that the judge makes a choice and that this choice has to be transparent. Avoiding strategies were also recently expressed by a Swedish judge as follows: "Also, I have, when writing the judgments myself, tried to avoid the concept of credibility. There is nothing that forces me to use it". (a quote from a judge in the court of appeal, Hjalmar Forsberg, published, 28 February 2019 in Dagens Nyheter. (The author's translation.)

[59] Compare Crépeau and Nakache 2008 who use the concept of "the critical space" to describe the different discretionary spaces in different levels of the asylum adjudication where the adjudicators must reflect.

towards the asylum seekers among Swedish migration judges based on the perception that this constitutes a more neutral approach.

Noll has explored the political dimension of credibility assessments in relation to the legal requisite in the refugee provision. He defines the function of credibility assessments as a translation from culture to politics.[60] Noll holds that the vague definition of the requisite "persecution" in the refugee definition opens the way for a construction of cultural differences of human rights and, hence, "…the applicant cooperates in the construction of cultural difference…". The decision-maker is an interpreter of these human rights and the asylum seeker is expected to tell the "truth" and by this to "confess" to the culture of the host country. According to Noll "… the production of credibility takes place in the vacuum left by human rights formalism. Filling this vacuum in a manner acceptable to the self-imagination of lawyers is what we call 'credibility'". Through framing it in human rights arguments, "the subjectivity of the decision maker is merged into the collective identity of the state of asylum, and becomes objective…". This "acculturation" has, according to Noll, a political function to reproduce the distinction between, and the different responses in international law to, liberal democracies and rogue states.

Rousseau et al. also highlight the fact that the adjudicators' political, economic, cultural, and moral discourses impact on the assessment as to who can be, or what kind of actions performed by the asylum seeker can be seen as, "political".[61] An example of this is gender-biased perceptions such as failure to see rape as a political action or the political implication of the refusal to wear certain proscribed clothes or behave in certain ways.[62] Hence, credibility assessments construct "… a discourse separating 'deserving' refugees from those deemed to be 'undeserving' or 'false'…" which "… governs and restricts the acceptance of refugees".[63]

To conclude, the high degree of uncertainty, the high stakes for the individual involved, and the political sensitivity of the area, accounted for above, emphasise the discretionary space for judging in asylum cases and challenge the expectations placed on the judge to impartially,

---

[60] Noll 2006.
[61] Rousseau et al. 2002.
[62] Ibid. See also Millbank 2003 and 2009, and Wikström and Johansson 2013.
[63] Rousseau et al. 2002.

objectively, and independently arrive at a decision that is correct in substance.

1.2 Aim and research questions

The serious consequences that are at stake and the high degree of uncertainty in asylum cases put the judges in a decision-making situation that entails a risk that the outcome will lead to a breach of the principle of *non-refoulement*. The aim of the present research project is *to make visible and critically examine how Swedish migration judges, in their written judgments, handle the risk and responsibility for judging who does or does not need protection and, thus, who can or cannot be sent back to her or his country of origin.*

To address these three steps, three research questions are answered. In a first step, the first and the second questions are answered based on empirical studies of the written judgments where the normative content expressed in the Swedish migration courts' everyday practice is scrutinised. The first two questions address the concrete content in the judgments to make visible how the judges choose to argue and substantiate their arguments. The first question addresses the substantial core of the asylum adjudication, i.e. the arguments made by the judges related to the uttermost risk of sending an asylum seeker back to the country from which she or he seeks protection:

1. *How, and to what extent, if at all, do the Swedish migration judges substantiate their arguments regarding the assessment of the risk of sending the asylum seeker back to her or his country of origin?*

The second question specifically addresses the migration judges' argumentation on the credibility of the asylum seeker's narrative. This part of the argumentation is chosen to highlight the particular difficulties that this type of assessment entails. This question is parallel to the first but differs in character as it addresses the specific evidentiary assessment act where credibility is used as a measure to evaluate the asylum seeker's narrative.

2. *How, and to what extent, if at all, do the Swedish migration judges substantiate their arguments regarding the assessment of the credibility of the narrative presented by the asylum seeker?*

In a second step, the Swedish migration judges' handling of the risk and responsibility involved in judging asylum cases is examined

critically from a legal perspective, where the answers to the first and second research questions are analysed against the background of the legal framework for asylum.

In a third step, the results from the first two steps are analysed on a theoretical level that provides answers to the third research question:

3. *How can the Swedish migration judges' handling of the assessments of a risk, under great uncertainty where the life and freedom of the asylum seeker potentially are at stake, be understood in the light of the theories by Hannah Arendt on "the faculty of judging"?*

The third question is answered based on the theories on "the faculty of judging" as developed by Hannah Arendt. Her theories are used to discuss how we can understand the Swedish migration judges' handling of the risk and responsibility involved in judging asylum cases on a theoretical level. The purpose of using Arendt's theories is further developed below in section 1.4.1. and in Chapter 8.

1.3 The relation between "the risk upon return" and a judgment that is "correct in substance"

Given the grave consequences in case of a wrongfully rejected claim for protection, the responsibility to arrive at an outcome that is "correct in substance" is significant in asylum cases. Arriving at "a judgment that is correct in substance" was an explicit purpose of the Swedish administrative court procedure when implementing the administrative courts.[64] However, the content of the notion has not been put forward and discussed as much as the notion "legal certainty".[65] In early preparatory works, the notion was linked to the implementation in Swedish procedural law of "free admission of evidence" where the aim with the implementation was to arrive at an outcome that was "true" in substance.[66] In the discussions on the purpose of arriving at a

64 Prop. 1971:30 Del 2, p. 278, Stendahl and Torén 2011 and Bylander 2006, p. 349.

65 See the discussions, among Swedish legal scholars, as regards the content of a judgment that is correct in substance and its relation to legal certainty, Lindell 1987, p. 103, Ragnemalm 2014, p. 150, Marcusson 2010, Sandgren 2008, Stendahl and Torén 2011, Bylander 2006, p. 331 ff. and von Essen 2017, p. 17.

66 Lindell 1987, p. 90. See, also, and the Swedish Government Official Report that preceded the Procedural Act where it was stated that: "In the legal life, […], there must not be a deliberate distinction between what is true and what can be proved" (SOU 1926:32 s 26). (The author's translation.)

judgment that is "correct in substance", it has been claimed that the judgment should correspond to the purpose and content of the substantial rules and, thereby, influence people's actions in society. (*handlingsdirigerande*).[67] This view, in turn, has been criticised on the basis that such a purpose of the legal judgments – to govern actions in society – could not be equated with the purpose of arriving at a substantially correct judgment.[68] This notion has also been linked to issues such as the character of the case, the position of the parties and the principles as regards who bears the risk for uncertainties, and what quantity of facts and evidence is required in order to fulfil this burden.[69] In addition, it has been highlighted that from the aim in all administrative cases – namely, to arrive at a judgment that is correct in substance – there follows an obligation for the courts to see to it that the case is sufficiently investigated before taking a decision.[70]

Even though the principle of substantial correctness is not under question within the administrative court procedure, the notion seems to have been phased out in favour of, or equated with, the notion of "legal certainty".[71] In Government Bills regarding the development of the administrative courts, the notion "correct in substance" is seldom found and, when mentioned, it is taken as a given, whereas "legal certainty" has become a prominent notion, frequently referred to and

---

[67] Ekelöf et al. 2016, Rättegång I, p. 20, Lindblom 1999, Ragnemalm 2014, p. 30 f, Diesen in Andersson et. al. 2018, p. 220 and p. 226.

[68] See Lindell 1987, p. 361 on the legal concept of true as functional rather than divided into formal/substantial. He opposed Ekelöf's idee that the purpose of the legal judgments, to govern actions in the society, could be equated with the purpose of arriving at a substantially correct judgment (p. 286).

[69] von Essen 2017, p. 87 ff. and Diesen and Lagerqvist Veloz Roja 2003, p. 73 ff.

[70] The relation between the burden and standard of proof and the duty for the State to investigate in asylum cases will be further explored in section 5.2.2.

[71] For a developed theory on "legal certainty" see, for instance, Peczenic 1995, section 1.6 on formal and legal certainty in substance (*formell och material rättssäkerhet*). According to Peczenic, the decision-makers have a social responsibility to apply legal certainty in substance which is the purpose of law. See also Gustavsson 2002, p. 386 f. who advocates for a definition of the concept as being contextual and polyvalent, i.e. dependent on its function in different legal fields that are coupled to different legal systematic value contexts. See also Ragnemalm 2014, p. 35 f, who argues that in implementing a unified regulation in the beginning of the 1970s, on how to handle administrative cases, in the name of aspiring to "legal certainty", the procedural rules became coupled to the substantial content of the administrative activity rather than to the character of the case and its significance for the citizens.

put forward as a basic value in the procedure.[72] However, while arriving at a judgment that is "correct in substance" must be regarded as the purpose of the administrative court procedure, a correct procedure is a way of reaching this purpose but cannot be equated with an outcome that is correct in substance.[73] A correct procedure is rather to be related to the notion of "legal certainty" which includes that procedural rights and obligations for the parties involved have been fulfilled and correspond to the notion of a "fair trail" as stated in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the ECHR). A correct procedure does not necessarily lead to an outcome that is correct in substance, and a correct outcome does not necessarily include a correct procedure.[74]

While "true in substance" indicates a real world to which the judgment is supposed to correspond, the use of the expression "correct in substance" or "legal certainty" distances itself from this reality. The legal discussions tend to get stuck in circular legal reasoning where the "legal" reality is divorced from the lived reality,[75] i.e. the legal detaches

---

[72] Proposition 2004/05:170, p. 105, p. 108 f. and p. 135, SOU 2008:106, *Enhanced confidence in the courts*, SOU 2014:76 *Continued development of the administrative courts* (where an entire chapter is devoted to the issue of legal certainty, see chapter 4), Prop. 1995/1996:22, *Two party process, etcetera, in the public administrative courts* (uniform legal application is emphasised as an aim, p. 76), Prop. 2012/13:45, *A more purposive administrative procedure*.

[73] Stendahl and Torén 2011 and Bylander 2006, p. 333.

[74] Bruun and Wilhelmsson 1983, Lindell 1987, p. 103, Stendahl and Torén 2011, and Bylander 2006, p. 338, and Official report from JO (*ämbetsberättelse*) 2013/14 s. 342.

[75] See Bladini on how the lived reality is lacking in legal doctrine (2013, p. 241 ff). Compare Gustavsson 2011, p. 60, who argues that legal concepts do not correspond to something real but rather encompass a number of circumstances and conditions that they cannot or were not meant to encompass. According to Gustavsson, this does not mean that the concepts are meaningless but rather signifies something meaningful in the legal discourse that makes it possible for the jurists to speak about certain phenomena in a certain way and holds that the problem occurs when these social constructions are regarded as something existing or hermeneutically given, as the risk in this case would be that they become counterproductive and would generate new fictions or dichotomies (footnote 63). Also, Minna Gräns identifies the problem with applying concepts in relation to knowledge about reality and expresses it as follows: "Which meaning a concept is given by an actor always depends on the context and our understanding of it. It is more about the vagueness, ambiguity or insufficiency of the knowledge about the reality and the circumstances that the legal norms refer to and about our way of understanding and handling knowledge about reality than the norms' semantic

itself from the real world experienced by real human beings which the law is supposed to serve whether it is expressed in terms of the impossibility of reaching any absolute truth in legal judgment,[76] putting forward the purpose of effectuating the legal rules,[77] effectivity or focusing on legal certainty.

Arriving at a judgment that is "correct in substance" is to judge in such a way that the outcome becomes correct. Asylum law is based on a balance between the State's aim of a regulated and controlled migration and the risk of returning the asylum seeker to her or his country of origin. However, the purpose of the asylum adjudication is to assess the risk for the asylum seeker to return to her or his country of origin, legally expressed in the principle of *non-refoulement*. In asylum cases, this means that the outcome must never lead to an asylum seeker being expelled to a country where she or he runs the risk of being subjected to the ill-treatment covered by the content of *non-refoulement*. This could be seen as included in the fulfilling of the substantial rules in accordance with democratic principles. Given my normative standpoint on democratic principles as including more than legal principles, a judgment should also correspond to a physical reality.[78] However, in this sense the idea of a judgment being "correct in substance" as something corresponding to physical reality, on the one hand, must be a fiction as the judge can hardly ever be sure as to the consequences of the judgment, and yet, on the other hand, must not at all be a fiction as a physical reality will appear upon return.[79] Furthermore, it is a fiction in another aspect: even if it was shown that the expelled asylum seeker was not subjected to the ill-treatment

ambiguity, vagueness, insufficiency" (Gräns 2006, p. 66. The author's translation). See also Westerhäll 2013 who puts forward the "good decision" as a way of relating the decision to reality.

[76] Marcusson 2010.

[77] Ekelöf et al. 2016, Rättegång I, p. 20 and Lindblom 1999.

[78] See Peczenik 1995, section 8.4, on theories concerning the concept of truth. He advocates for a correspondence theory, i.e. a statement is true when it exists in a relation to facts; a correspondence between belief and facts (p. 655).

[79] Gustavsson 2002, p. 428 notes a problem with the correspondence theory: because it requires a possibility to compare the veracity of a statement with empirical facts, it is difficult to define "real facts" and what it is supposed to correspond to. The statement may be probable but nevertheless false. See also Bladini 2013, p. 57 f. and 2016 on truth being produced through the fact that the person who searches for knowledge is part of that process and of what becomes the truth, i.e. how I search for and assess knowledge is what becomes the truth.

prohibited by law, a real risk might, anyhow, have existed at the time of the judgment. This challenges the distinction between the physical reality and an abstract legal reality: the concrete consequences in contrast to an abstract legal reality in the sense that, even though the judge will never know what actually did happen to the asylum seeker or will happen when she or he, due to an outcome in disfavour of the asylum seeker's claims, is forced to return to the country of origin, such a physical reality exists. Hence, a judgment that leads to an outcome that is correct in substance is related to a fictional, but at the same time a physical, future reality. This connects reality and the risks connected to uncertainties in the procedure, to an "outcome that is correct in substance". It is more about focusing on the real risk than searching for the "truth".[80] In this process, the knowledge or lack of knowledge about the reality becomes an important issue.[81]

Although having the same main purpose of protecting the asylum seeker from prohibited ill-treatments upon return, the asylum law has distinguished the assessment of the risk expressed in the principle of *refoulement* from the risks expressed in determining protection status (refugee or subsidiary status). As my understanding of "correct in substance" addresses the real consequences for the asylum seeker in an eventual return, a judgment that is correct in substance includes the need to assess the risk upon return regardless of whether it is done within the scope of the principle of *non-refoulement* or within the determination of protection status. (The relation between the principle of *non-refoulement* and status determination is scrutinised below, in section 5.1.)

Legal decision-making always operates with uncertainties and, hence, the risk of arriving at an outcome that is incorrect in substance. One way of dealing with this risk is to assess how the rules on who bears the burden of proof, the standard of proof required, the scope and content of the investigation, and who has the responsibility for the investigation are balanced against each other. An incorrect judgment can go both ways. In asylum cases, this means that the aim of a regulated and controlled migration is balanced against the risk upon

---

[80] According to Kaldal, the assessment of a future level of risk can neither be true nor false; it can only express a particular degree of certainty (2010, p. 184).

[81] See Kaldal, who argues that the assessment of a future risk in the individual case is an epistemological adjudication (2010, p. 182 ff.).

return for the asylum seeker, not only by legal definitions of who has the right to asylum, but also through the balance between the rules on burden and standard of proof and the duty to investigate. The level of risk that the society perceives as being acceptable to take for an incorrect judgment and who bears this risk is constructed by how these rules are applied and balanced against each other. How these balances are constructed and applied is further scrutinised in section 5.2.2.

1.4 Method and material

The research project is carried out in three steps. The first step includes an empirical study of court cases from the migration courts. In the second step, the results of the empirical study of court cases are critically analysed in the context of the asylum legal framework. Finally, the third step offers an analysis of the results based on the theories on responsibility to judge and the faculty of judging as formulated by Hannah Arendt. While a detailed presentation of the chosen research design of the empirical study of court cases is presented in Chapter 2, more overarching reflections on material and method are given below.

1.4.1 Reflections on material and method

In the first step of the dissertation, the first and second research questions are answered. In this part, the research focuses on an empirical study of judgments in asylum cases from the Swedish migration courts. The point of departure of the asylum adjudication is the asylum seeker's narrative. However, several different narratives are produced in the asylum procedure from the different actors in the procedure.[82] While the point of departure for the asylum adjudication is what the asylum seeker states, this narrative is produced and developed in a certain context and in relation with the agents at the Migration Agency, the interpreter and the legal counsellor. Questions are posed both by the agents in interviews at the Migration Agency and by the legal counsellor at her or his office and in both cases with an interpreter as a necessary

[82] In this dissertation *narrative* is used both in its most basic meaning – that is, as an account of an event either real or imagined – a set of statements made in a certain context (Bergström and Boreus 2011, p. 229), and as a way of understanding how we produce meaning by structuring our experiences in order to make them comprehensible (ibid., p. 224).

tool for communication. The narrative of the legal counsellor on how she or he has perceived the asylum seeker's narrative is presented in a brief to the Migration Agency and the decision-maker at the Migration Agency in turn produces the narrative of the asylum seeker's situation and events in the decision. Hence, all these actors are part of the production of the narrative as regards the asylum seeker and her or his situation.[83] If the asylum seeker's application is rejected and she or he appeals the Migration Agency's decision to the migration court, the different narratives continue to develop in briefs submitted to the court from the two parties. In addition, if an oral hearing is held, the questions posed during the hearing are part of the production of the narrative regarding the asylum seeker's situation. Finally, the court presents its own narrative on the asylum seeker's claims and situation in the ruling. Thus, the initial account made by the asylum seeker develops, through the procedure, to finally become the court narrative describing the experiences of the asylum seeker, her or his situation, the risk upon return, and her or his potential need for protection.

This production of the asylum seeker's narrative includes risk components such as difficulties to communicate and lack of knowledge. Only the asylum seeker knows the situation and what she or he has been through. Cultural and language barriers make the communication difficult and information about the situation in the country from where the asylum seeker originates and written documents from the country of origin are not easy to interpret. While the asylum seeker owns the experienced reality, the Migration Agency, the legal counsellor, and the courts own the power to produce the narrative about the asylum seeker's situation. Moreover, they own the narrative about the law. There are many ways and levels of understanding and exploring how these narratives are produced and how decisions are arrived at, including studying the different contexts where the decisions are taken, the political and legal culture and ideology, the institutional setting as well as individual and social psychological factors.[84] While some of these are more or less explored

[83] See Bladini 2013, p. 208 ff. on different evidentiary assessment theories and specifically the narrative theory model based on psychological research concerning people's way of handling information by constructing narratives.
[84] See Ställvik 2009 and Sandgren 1999, I and II (interviews with judges), Latour 2010 (anthropological methods on how a judgment is produced) and Granhag et al. 2005 (psychological experiments with asylum adjudicators).

or referred to in different parts of this dissertation, the empirical study is limited to the narrative produced by the migration courts of the risks upon return as expressed in the written court judgments.

Since the basis for the asylum adjudication is the asylum seeker's narrative, I choose, as an example of the risk assessment, to specifically study the court's assessment of whether it finds the asylum seeker's narrative credible. This choice is made because the assessment of the narrative sheds light on the uncertainties and discretionary space in judging in asylum cases and therefore highlights the need for what Arendt describes as the "faculty of judging".[85] Whether the credibility of the asylum seeker's narrative is a conflicting issue is an explicit decision made by the courts before the hearing, as it is one condition for holding an oral hearing.[86] This means that cases where the court has decided that the question is limited to whether the claims made by the asylum seeker constitute sufficient grounds for protection and the credibility of the asylum seeker's narrative is not contested have not been included in the study.[87] In a majority of the asylum cases, no oral hearing is held, which means that this study's selection is made on a minority of the asylum cases.[88] It can be discussed if this selection of cases means that only the hard cases are chosen. However, this practice of distinguishing between "credibility" and "sufficiency" cases can be disputed, as credibility issues can easily be concealed by this distinction.[89] Also, the difficulties judging in asylum cases are manifold and complex, and are not just connected to credibility issues. Hence, my choice is not one of choosing the hard cases but is undertaken to be able to study the arguments on the credibility of the asylum seeker's narrative and the basis for these arguments as expressed in the written court judgments. Thus, the study focuses, on the one hand, on the courts' perception of risk upon return, and, on the other, on the courts' perception of what constitutes a credible or not credible narrative. Using the term "narrative" in the context of the courts' asylum adjudication assumes an understanding of how the choice of information, the choice of what to recount or present, forms a kind of

---

[85] See below, section 8.2.
[86] See below, Sections 2.1 and 7.1.4 on the division between credibility and sufficiency cases in the Swedish migration courts as a basis for when to hold an oral hearing.
[87] Ibid.
[88] Appendix 1, Chapter 1.
[89] See below, Section 7.1.4.

truth about the asylum seeker's circumstances, events in the past as well as what may happen to the asylum seeker upon a future return, or, in short, forms the truth about the risk upon return.[90]

In Sweden, there has been a discussion about trying to steer away from subjectivity when analysing and evaluating the statements from parties and witnesses in legal procedures by applying a structured method (*utsagesanalys*).[91] The method has its basis in witness and forensic psychology. An important part of the method is to distinguish between the notion of credibility – which is seen as the initial, inevitably more subjective part of the assessment – and reliability, where the parties' and witnesses' statements are analysed and evaluated towards facts in the case and based on a set of criteria as indicators of a (non-)credible narrative.[92] The word "reliable" is not used as a notion to assess the asylum seeker's narrative in the international or EU asylum context and it is rarely found in the Swedish court judgments on asylum. Hence, for the purpose of this dissertation, I have chosen to only use the word "credibility", as my focus is on the courts' argumentation regarding the asylum seeker's narrative and the basis for this argumentation is whether they use the word "credible" or "reliable". The distinction between reliability and credibility in the Swedish legal context is further discussed in Part III of the dissertation, section 7.1.5.

The court narrative is built on arguments serving to justify the findings made by the judges and the outcome of the case. The arguments may or may not be substantiated with different sources of information such as sources on law, sources as regards the asylum seeker and her or his individual situation as well as sources concerning the situation in her or his country of origin. While the court judgments are the material used, the focus of this study is on the sources used by the court to support their argumentation. My interest is in what the judges, on a general level, choose to emphasise in their rulings. What I am looking for is, initially, the manifest components of the court narrative that can be found in the reasoning and that are possible to quantify.[93] Studying the manifest argumentation in the rulings may not

---

[90] Bergström and Boreus 2011, p. 227.
[91] Diesen 2018, p. 267 ff. and Sutorius 2014, p. 328 ff.
[92] Ibid.
[93] Esiasson et al. 2012, p. 197f and Begström and Boréus 2011, p. 77.

tell us the whole story about what the judges actually base their assessments and considerations on, as judges' considerations are not always visible in the court reasoning.[94] However, I propose that written words mean and do something, and have an impact on those who formulate them as well as on those who read them, whether the reader is the asylum seeker who has to face the physical consequences of these words or the reader belongs to the legal community or other members of society. Besides having direct consequences for the asylum seeker, the wording of the migration court judgments inevitably constitutes part of what creates law and will impact on the legal community and the development of the law as well as on the societal legitimacy of the courts.[95]

My research interest in the study of the court cases is to obtain a systematic knowledge about if, and to what extent, the courts substantiate their argumentation with sources of information and what kind of sources of information the courts emphasise when assessing, the overall risk upon return on the one hand and, specifically the credibility of the asylum seeker's narrative on the other. Given its focus on "if", "how", and "to what extent" different kinds of knowledge are used, this study is carried out through a *quantitative content text analysis* of the court narrative.[96] A quantitative study is employed to uncover the patterns in courts' narratives, rather than to show precise statistical results.

The first two research questions are answered through information collected from a large number of rulings from the migration courts. As the Migration Court of Appeal only gives leave to appeal to precedent cases,[97] which means that the migration court, in reality, is the last instance in most cases, the everyday practice of the migration courts is the focus of the study.[98] The arguments and the different sources of

94 From my experiences as a clerk at the migration court, I found that considerations and arguments that occur during the procedure often do not become a part of the reasoning, although I believe they had an impact on the final outcome.
95 See supra note 42.
96 Esaiasson et al. 2012, p. 197 ff. and Begström and Boréus 2011, Chapter 2.
97 Chapter 16, section 12 of the Aliens Act (*Utlänningslag 2005:516)* (hereafter the Aliens Act)).
98 Stendahl 2003, p. 74 speaks about *de facto* legitimacy provided by the legal system through conflict resolution and conflict mediation which will not be found in the Supreme Courts where only the "hard cases" will be dealt with, but "in the more routine-based, production of judgments by county courts".

information are coded and grouped in categories[99] and the results will be presented as frequencies of, as well as potential correlations between, the categories.[100]

The study focuses on the part of the ruling labelled "the reasoning" (*domskälen*). Also, other parts of the ruling, as well as the decision from the Migration Agency, are included to collect background data that could have an impact on the assessment of credibility and risk, such as the asylum seeker's gender, age, and country of origin. The aim is to study the general pattern visible in the court judgments of the lower instance, the migration courts, and to consider why potential regional differences between the three migration courts are not attended to, specifically. As the concept "risk upon return" in this dissertation is coupled with the principle of *non-refoulement* and *status determination*, only arguments related to these grounds are studied, while arguments associated with humanitarian grounds are excluded.

I approach the text in in the rulings as texts that are meant to represent legal texts: as part of "the law" and as a communicator of legitimacy for the asylum adjudication. However, taking the rulings seriously as a representation of law does not necessarily mean that the reading of the rulings as legal texts aims at interpreting them in a strictly legal context, i.e. to interpret the content in relation to what a statement should or could mean if the legal sources are taken into account. I attend to what is actually written in the rulings without what I, as a legal scholar, may interpret as being the legal basis for a statement in the court narrative. As a legal scholar, I am not bound to legal contexts and frames or to take legal concepts and classifications for granted in the way that a practitioner is when solving a legal question.[101] In my encounter with the selected material, my professional legal "pre-understanding" will inevitably have an impact on how I design the study and how I will analyse the results.[102] However, the focus is to describe what the courts have chosen to express, as a basis for their assessments even if the arguments used by the courts need not

---

[99] See Bergström and Boréus 2011, p. 237 on the quantitative study of narrative through a "categorical-content" approach.

[100] Esiasson et al. 2012, pp. 66 and 351 and Bergström and Boréus 2011, p 82.

[101] See Svensson 2014, *De lege interpretata* – on the need for methodological reflection, which includes either sociological knowledge (i.e. what actually is done within jurisprudence) or theoretical knowledge or both.

[102] See the preamble above on "pre-understanding".

necessarily fit into a specific legal concept or classification. Thus, the results of the empirical study include a description of the arguments and sources of information the courts have chosen to write down in the rulings, disregarding their legal, normative, content. While the focus is on the questions "if", "how", and "to what extent" the arguments and sources of information occur, the study forms a basis from which further conclusions can be drawn.

In the second step of the dissertation, a critical analysis is undertaken of the pattern that appears in the court judgments regarding the scope for legal interpretation in asylum cases against the background of the asylum legal framework. Since Swedish asylum law is governed by EU law as well as international human rights conventions, the analysis is made in the light of a multi-layered legal framework. With the exception of Swedish legal sources (such as the Aliens Act, the Aliens regulation, procedural acts and regulations, preparatory works, case law, and legal doctrine), this also includes relevant EU directives, regulations, and case law as well as relevant international human rights conventions with a special focus on the Refugee Convention, the ECHR, and case law from the ECtHR. Additionally, different guidelines and notes from the monitoring body of the Convention Relating to the Status of Refugees[103] the United Nations High Commissioner for Refugees (UNHCR) general comments as well as decisions from monitoring bodies of international human rights conventions have become important sources of interpretation in asylum adjudication.[104] The so-called soft law texts – such as handbooks, notes, guidelines, and conclusions – have been discussed in doctrine as useful tools in interpreting the content of law, while also

---

[103] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S.137, entry into force 22 April 1954 (hereafter the Refugee Convention (or the Geneva Convention when quoting other authors)).
[104] International monitoring bodies of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter the CAT); the Committee Against Torture (hereafter the ComAT), the International Covenant on Civil and Political Rights (hereafter the ICCPR); the Human Rights Committee (hereafter the HRC) have published notes on *refoulement* and decided in cases concerning *non-refoulement*. Also, the monitoring bodies of the Convention on the Rights of the Child (hereafter the CRC) and Convention on the Elimination of all Forms of Discrimination against Women (hereafter the CEDAW) have decided on *non-refoulement* issues in a few cases (see, for instance, CEDAW, /C/55/D/35/2011 and CRC, /C/77/D/3/2016).

posing a risk of degrading hard law to something it is nt meant to be.[105] As my purpose is not to establish current legal standards or definitions but to explore how the legal framework impacts on the judges, these soft law instruments are important to include in the analysis. This also includes national guidelines, handbooks, and internal policy documents where these texts have been given significance in legal sources and in the migration courts' reasoning.

How the Swedish migration judges specifically handle the assessment of the asylum seeker's narrative is analysed from, on the one hand, what function it is given in the asylum adjudication, and, on the other, its content. While the *function* refers to the question of what purpose a credibility assessment of the asylum seeker's narrative serves in the asylum procedure, the *content* of such assessments refers to the evidentiary assessment of the narrative – i.e. the arguments for and against a credible narrative. To understand the specific difficulties entailed in assessing the asylum seeker's narrative in terms of credibility, aside from the legal framework, and legal doctrine in the field also research on the topic from other disciplines (such as psychology, sociology, and anthropology) is included.[106]

In the third step of the dissertation, the third question is answered through a theoretical analysis of the results of the studies made in the first and second steps. The choice of Hannah Arendt as a basis for the theoretical discussion of the material is based on her theories on the responsibility to judge and the faculty of judging in high-stakes situations. In light of the uncertainties linked to asylum adjudication and the grave, irreversible consequences in case of an incorrect rejection for asylum, Arendt's work provides a way of thinking about how to handle these situations. The texts drawn on for this discussion are primarily Arendt's work connected to her theories on the division between the faculties of thinking, the will and judging, and the responsibility to judge. However, other of her texts evolving around politics, freedom, and totalitarianism are included as her theory of the faculty of judging is closely linked to these themes.

[105] See Gameltoft-Hansen 2009, p. 35 f., Hathaway 2011, p. 31 f., and Noll 2000, p. 20.
[106] See Gräns 2006 and Heuman 2006.

1.4.2 Reflections on the time factor

The fact that this dissertation took a long time to finish, and that conditions may have changed since the study was made, requires some reflection. Despite a greater need for protection for people fleeing from their home countries, the political situation concerning migration has changed both in the European Union and in Sweden towards a more restrictive approach. In Sweden, the tension between its self-image as a nation with strong human rights ideals and the idea of regulated migration being closely related to the welfare state became accentuated in 2015. Until 2016, Sweden was one of the countries in the EU that had received the highest number of asylum seekers compared to the population.[107] However, since 2016 when Sweden introduced a number of laws that restricted the possibility for aliens to enter into the country and reduced the rights for those granted protection, the number of asylum seekers has diminished and it is now lower than in many years.[108] The new restrictive laws were a response to the increasing number of asylum seekers choosing Sweden when applying for asylum together with the fact that several Member States refused to share responsibility for taking care of the asylum seekers. The justification by the Swedish Government was that the sudden rise in the number of asylum seekers was a threat to important societal functions such as accommodation, health care, schooling, and social welfare, which together was perceived as "a serious threat to general order and security".[109] In the Government Bill as regards the temporary restricting law, there were no signs of any consideration being given to the consequences for future asylum seekers in terms of the possibility to seek asylum or other human rights such as family reunification and the right of the child.

Even if the migration laws in Sweden have changed, the State's obligations with regard to *non-refoulement* and the right to seek and

---

[107] Parusel and Schneider 2017, p. 73.

[108] See the the law on temporary limitations of the possibility to get residence permit in Sweden (*Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige*) and the decision made by the government to temporarily reintroduce border control at the internal border temporary at https://www.regeringen.se/artiklar/2015/11/regeringen-beslutar-att-tillfalligt-aterinfora-granskontroll-vid-inre-grans/. See for the number of asylum application in Sweden over the years: https://www.migrationsverket.se/Om-Migrationsverket/Statistik/Asyl.html.

[109] Prop. 2015/16:174, p. 21.

receive protection when the requirements are met remain the same. This part of asylum law must not be conditioned by the individual State's perception of the necessity to restrict immigration. Also, the asylum procedure and the rules and principles governing the procedure are the same. There is, of course, the possibility that the practice revealed in this dissertation has changed in the meantime, and that the present study does not reflect the practice as it is performed by Swedish migration courts today. However, the criticism of the argumentation and the grounds for this argumentation in decisions and judgments in asylum cases is ongoing in society. The criticism primarily addresses specific groups.[110] However, it is still the Migration Agency that is the main target of this criticism, while the judgments of the migration courts seem to garner less attention.[111] Considering that, in the main, the migration courts have the last word, I believe that it is important to continue the discussion on the role and practice of the migration courts. The results from this study can serve as a basis for discussions regarding the everyday practice of the Swedish migration courts. It will be for future research to identify and examine eventual changes in the patterns highlighted in this dissertation.

1.5 Disposition

The dissertation consists of three parts. The first part includes the present chapter that provides a problem-oriented introduction to the subject including a presentation of the aim, the research questions, and methods and material. Part II presents the empirical study and includes three chapters (2–4). Chapter 2 provides an account of how a judgment is produced in the Swedish asylum procedure and gives a detailed explanation of the study's method and design, as well as setting out how the study has been carried out. Chapter 3 provides background data to the empirical study while the results of the study are presented in Chapter 4. Part III includes three chapters (5–7) and analyses the

---

110 See, for instance, https://www.skr.org/vart-arbete/migration-och-integration/konvertiter and the report form RFSL (The Swedish Association for the Rights of Homosexuals, Bisexuals, Transgender, Queer and Intersex Persons, on LBTQI people whose application for asylum has been rejected: https://www.rfsl.se/wp-content/uploads/2020/12/Rapport-AVSLAGSMOTIVERINGAR-I-H-BTQI-ASYL%C3%84RENDEN-2020.11.09.pdf)

111 An exception is the above-mentioned report form RFSL.

results based on the legal framework governing the asylum adjudication. In Chapter 5, the relation between the principle of *non-refoulement* and status determination and the rules and principles governing the asylum procedure are analysed. Chapter 6 addresses how facts and circumstances are handled in asylum adjudication. In Chapter, 7, the focus is on the function and content of the assessment of credibility. Part IV includes two chapters. In Chapter 8, an analysis of the results of the research is made against the backdrop of Hannah Arendt's theories on "the faculty of judging". Chapter 9 offers summaries and key conclusions of all three parts of the dissertation.

Part II – A study of court cases from Swedish migration courts 2014–2015

This part includes three chapters (2–4). Chapter 2 provides a description of how the judgment is produced, the presentation of the methodological choices, and the design of the main study. Chapter 3 provides background data to the empirical study and in Chapter 4, the results of the study are presented and give answers to the two first research questions:

1. *How, and to what extent, if at all, do the Swedish migration judges substantiate their arguments regarding the assessment of the risk of sending the asylum seeker back to her or his country of origin?*
2. *How, and to what extent, if at all, do the Swedish migration judges substantiate their arguments regarding the assessment of the credibility of the narrative presented by the asylum seeker?*

2 A study of court cases from Swedish migration courts 2014–2015

This chapter includes an account of the design of the empirical study. It commences with a contextual section, describing basic principles for judging and motivating a judgment, the organisation of the Swedish migration courts, and how and by whom the judgments are produced. The description in section 2.1 is meant to serve the understanding of how interaction between the different groups working in the court add to the understanding of how knowledge is produced. In section 2.2 the choice of methods and material are presented while section 2.3 includes an account of the choice of the design in the main study. The design of two pre-studies and the results of these studies are presented in Appendix 1, Chapter 1.

2.1 The production of the judgment

The relation between the decision-making process and what is actually revealed in the reasoning has been expressed as the relation between the process of discovery and the process of justification.[112] This process is influenced by legal procedural principles and legal institutional culture, i.e. the interpretation and perception among judges of the scope of legal judgment. The Swedish procedural system is governed by the principle of free presentation, admissibility, and assessment of evidence. This means that there are no restrictions on what kind of evidence the parties can invoke to support the claim and the court is in principle free to assess the submitted evidence.[113] The principle of free presentation, admissibility, and assessment of evidence stems from Chapter 35, section 1, para. 1 in the Swedish Code of Judicial Procedure.[114] This is viewed as a general basic legal principle and,

---

[112] Gräns 2005. See also Bergholtz 2007, p. 84 f. who puts forward the significance of coherence and entirety, and Eckhoff and Sundby 1976, p. 218 who are sceptical about making a distinction between reaching a position and justifying it and instead talk about the significance of feedback.

[113] Diesen and Lagerqvist Veloz Roca 2003, p. 20 f.

[114] Chapter 35, section 1, para. 1 of the Swedish Code of Judicial Procedure stipulates that the court "…after a conscientious examination of everything that has occurred, shall decide what has been proved in the case". (The author's translation.) The provision

although not implemented in the Administrative Court Procedural Act (*Förvaltningsprocesslag 1971:291*), it is applicable in the administrative procedure.[115] Section 30 of the Administrative Court Procedural Act has a shorter wording stipulating that the judgment should be based on the content of the documents and what otherwise has occurred in the case.[116]

The obligation to motivate the judgment is codified in section 30, para. 2 of the Administrative Court Procedural Act and has the short wording: "The decision shall include the reasons that determined the outcome".[117] [118] The provision is not explicit about the scope of the motivation but should also include a motivation on how the evidence has been evaluated and on what grounds.[119] Additionally, section 31 of

---

is old and, at the time of its implementation, the wish was to abandon the old theory of proof where what should be considered as proof was codified (*legal bevisföring*). The free presentation, admissibility, and assessment of evidence were perceived as a safer way for arriving at a judgment that is correct in substance. The belief was that if the judge, as a rational and thinking human being, freely could assess the material put before the court, this was better suited to arrive at a judgment that is correct in substance than if the judge was limited by strict evidentiary rules. This had its basis in a shift of scientific thinking concerning the perception of the individual as in need of an authority to instead be able to for herself, intellectually, form a perception of reality. This expanded the room for the judges' discretionary assessment and, thus, increased their responsibility for arriving at a judgment that is correct in substance (Lindell 1987, p. 90 f., Prop. 1942:5 s. 218, NJA II 1943 s. 444 and SOU 2006:6, p. 198).

115 Wennergren 2005, p. 315 and SOU 2006:6, p. 198.

116 The author's translation..

117 The author's translation. Information that has to be included in a judgment or decision is codified in §13 of the Regulation on Cases in the Administrative Courts (*Förordning (2013:390) om mål i allmän förvaltningsdomstol*) and shall include details such as the name of the court, time and place for the annunciation of the judgment, the name of the parties and their representatives or counsels, the matter in brief, and the parties' claims and objections. Also, the judgment should, to the degree that it is necessary, include an account of the appealed decision or judgment.

118 In the old Roman and Canon law, reasoning was considered unnecessary and even harmful as the authority substituted reasoning and grounds and reasoning were perceived as in breach of the dignity of the judge. Furthermore, if the reasoning was wrong, the judgment could become invalid. In the early Sweden, the judgments were orally delivered which has been considered to mean that the parties could easily understand the judgment finally delivered. However, in the law from 1734 it became mandatory for the judges to state their reasons for the judgment in a written judgment (SOU 2001:103 p. 273 f. and p. 275).

119 von Essen 2017, p. 375 f. See also, Article 11.2 of the *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)* (hereafter, the Asylum Procedures Directive)

the Act states that dissenting opinions by one of the judges (including lay judges) must be included in the judgment. Before the implementation of codifying an obligation for the Migration Agency to motivate the decisions, the Government emphasised that the need of motivation is more important in asylum decisions than in many other categories of administrative decision.[120] This is the case even when protection is granted.[121]

The purpose of the motivation has been expressed as having a legitimising, controlling, and democratic function.[122] It is important that the parties as well as the Court of Appeal understand on what basis the judgment is made for the parties to be able to meet the arguments in an appeal and for the Court of Appeal to be able to give a judgment that contributes to the legislative development (*rättsutvecklingen*).[123] Also, the requirement of a motivated judgment is believed to enhance the quality of the decision-making process as such as it forces the author of the decision to make a thorough, factual, and objective judgment and create a distinct, clear, and straightforward motivation.[124] What has been proved should be accounted for in the ruling, even if this is not explicitly codified in the Administrative Court Procedural Act.[125] Empty wordings, such as "with regard to the circumstances in the case"

---

which stipulates that, where the claim is rejected, the Member States shall ensure that "…the reasons in fact and in law are stated in the decision".

120 Prop.1996/97:25, p. 203. The obligation for the Migration Agency to motivate the decision concerning a residence permit or expulsion or refusal of entry is stated in Chapter 13, section 10 of the Aliens Act and Article 11(2) of the Asylum Procedures Directive.

121 Prop.1996/97:25, p. 204.

122 See Stendahl 2003, p. 75 who holds that legitimacy is to be communicated by the members of the legal community by providing legal arguments (accepted as legal by the legal community) but also to make sure that these arguments are communicated to the members of the society in a dialogue reflecting justice. See also Peczenic 1995, p. 571 f. on the motivation of a judgment as having a democratic and controlling function, and von Essen 2017, p. 374.

123 Ibid. and von Essen 2017, p. 373 f.

124 Prop. 1996/97:25, p. 203 ff, SOU 2010:29, p. 104, SOU 2013/37, p. 78, and Bergholtz 2007.

125 Ibid. and von Essen 2017, p. 375 ff. Compare section 13 of the Regulation on Cases in the Administrative Courts (*Förordning (2013:390) om mål i allmän förvaltningsdomstol*), which does not include such a requirement, while Chapter 17, section 7 and Chapter 51, section 4 of the Code of Judicial Procedure (*Rättegångsbalken*).

or "on account of what has occurred in the case", should be avoided.[126] In addition, a mere account or paraphrase of the legal text without explaining why the text is applicable to the individual case should be avoided.[127] The process that led to the outcome should be clarified and if the court has had to make a discretionary assessment, it has to be explained how this has been done, as this is decisive for the parties to understand.[128] The language has to be comprehensible for the reader.[129] It has been emphasised that only information that is relevant for the reasons that have based the outcome of the case should be included.[130] In the Government official report from 2008, concerning increased confidence in the courts (*Förtroendeutredningen*), the investigators advocated for shortening the initial part of the judgment, which includes an account of the background, since the lengthy recitals were perceived as being given at the expense of a thorough formulation of the actual reasoning.[131] In a later Government official report the importance of efficiency is emphasised, by for instance using templates.[132]

---

[126] von Essen 2017, p. 376. See also the Handbook from the Swedish National Courts Administration (*Domstolsverket*), *Handläggare i migrationsdomstolen* 2017, section 12.3.3.

[127] von Essen 2017, p. 376.

[128] The Handbook from the Swedish National Courts Administration *(Domstolverket)* 2017, section 12.3.3.

[129] von Essen 2017, p. 375 and section 11 of the Language Act (*Språklag 2009:600*) which states that the language in public activities should be educated, simple, and comprehensible. (The author's translation) In SOU 2013:37 the use of a comprehensible language is emphasised as well as the significance of continuously evaluating the judgment writing. (p. 90 f).

[130] SOU 2013:37, p. 78 and Wennergren and von Essen 2013, p 341 f. See also Wennergren 2005, p. 311 f., who describes the legal adjudication process as including a complicated intellectual process comprising a number of factors that have to be weighed against each other, including logical conclusions as well as mere estimations and assessments of needs, usefulness, expediency, appropriateness, reason, safety, and risks. According to him, naturally, not all of these elements can be described in the motivation; it is enough that the key issues are accounted for. In a final conclusion he states that it is hardly appropriate to motivate "genuine values".

[131] SOU 2008:106, p. 200. Bladini has criticised the short recitals, since such cursory accounts of what has occurred during the procedure may hamper the possibility of understanding and questioning the judgments (2013, p. 347). Stendahl has highlighted the ambiguous approach to motivations in doctrine that, on the one hand, are described in negative terms as not including a demand for detailed accounts of all the different aspects of the case or for elaborated reasoning on the legal assessment made, and, on the other, warns against standardised motivations especially in the perspective of the complainant in cases where the application has been rejected (2003, p. 221).

[132] SOU 2013:37, p. 91.

The Swedish administrative court procedure is mainly based on written material, as is the asylum court procedure. The material to be assessed includes protocols of interviews carried out at the Migration Agency, the evidence which has been taken into account by the initial decision-maker, including any documents and statements submitted by the asylum seeker, the Migration Agency or the court (submitted of its own motion in accordance with their obligation to examine the case in line with section 8 of the Administrative Court Procedural Act) provided this material is communicated and thus known to the parties.[133]

The organisational structure of the asylum procedure is governed by codified rules on different levels but also by internal documents as well as by the way the work at the local courts is practically organised. There is a discretionary power for the administrative court to organise the work in the court to a certain extent which, for instance, includes to decide whether or not the judges and clerks should be specialised on migration law or handle other cases as well.[134] However, mandatory rules are also codified stipulating, for example, that the courts must have a written working order, which includes, inter alia, how the cases are divided between the judges.[135] The "chief judge" (*lagmannen*) is the administrative chief of the court. She or he is responsible for that the work is carried out effectively, in accordance with current law and the obligations that follow from Sweden's membership of the European

---

133 Section18 of the Administrative Court Procedural Act and von Essen 2017, p. 347.

134 See the facultative provision in section 16 of the Public Administrative Court Act (L*ag (1971:289) om allmänna förvaltningsdomstolar*) and the more specific provision in section 2 of the Regulation with Ordinance Containing Terms of Reference for the Administrative Courts (*Förordning (1996:382) med förvaltningsrättsinstruktion*). During my time as a clerk in the administrative court, the organisation changed from having sections specialising exclusively on migration cases to having sections with mixed cases.

135 Section 7 of the Regulation with Ordinance Containing Terms of Reference for the Administrative Courts (*Förordning (1996:382) med förvaltningsrättsinstruktion*). See, for an account concerning how the different administrative courts have organised their work, the Parliamentary Ombudsman (JO) 2013/14:JO1, (Dnr 5420-2011). See also, the Regulation on Cases in the Public Administrative Court (*Förordning (2013:390) om mål i allmän förvaltningsdomstol*) and the Regulation on Keeping Registers etc. at the Administrative Court when using Automated Processing (*Förordning (2001:640) om registerföring m.m. vid förvaltningsrätt med hjälp av automatiserad behandling*) concerning, for instance, how the court cases should be registered and what formal information must be presented in the judgments.

Union and that the State's means are economised.[136] Employees in the court should consist of judges on different levels: senior judges (*chefsrådmän*), ordinary judges, assistant judges (*assessorer, fiskaler*), educational clerks (*notarier*), clerks (*föredragande*), and court secretaries.[137]

As in most administrative cases, the migration court also includes lay judges. The court has the competence to rule with one jurist judge and three lay judges with a few exceptions.[138] The possibility to decide a case with only one jurist judge and no lay judges when the case concerns expulsion is limited as such cases are of great significance for the individual.[139] The purpose of including lay judges is to provide for the need of insight and impact of laymen in the court.[140] The lay judges in the migration courts are chosen from the lay judges in the administrative court, i.e. there are no lay judges who specialise in migration.[141] Each judge has one vote and the jurist judge has the casting vote.[142] The Government appoints the jurist judge and their independence is derived from the Constitutional Act.[143] The lay judges are nominated by the political parties. They are elected by the county council and the elections are proportional, meaning that the number of lay judges nominated by a political party will reflect the party's share of seats in the county council.[144] It is up to the parties to decide who is a

---

[136] Section 1, para. 1 of the Regulation with Ordinance Containing Terms of Reference for the Administrative Courts (*Förordning (1996:382) med förvaltningsrättsinstruktion*).

[137] Section 1, para. 2 of the Regulation with Ordinance Containing Terms of Reference for the Administrative Courts (*Förordning (1996:382) med förvaltningsrättsinstruktion*).

[138] Sections17 and 18 of the Public Administrative Court Act (*Lag (1971:289) om allmänna förvaltningsdomstolar*).

[139] See MIG 2007:58 where the court did not find that the case was of "simple character". See also MIG 2016:30 where the Court found that an assistant judge should not be the presiding judge in a complicated case concerning sexual orientation.

[140] Wikrén and Sandesjö 2017, p. 738.

[141] Chapter 1, section 2 of the Aliens Act and Wikrén and Sandesjö 2017, p. 738 f.

[142] Section 26 of the Public Administrative Court Act (*Lag (1971:289) om allmänna förvaltningsdomstolar*). It is not evident from the provision that the jurist judge should have the casting vote. The provision opens up for a voting system in accordance with the rules in the criminal procedure where, in case of an equal number of votes, the decision least intervening for the suspect will prevail. However, in MIG 2007:17 the Migration Court of Appeal ruled that migration cases, even those where expulsion is an issue, could not be compared to administrative cases including sanctions such as penalty payments (*vite*) or tax surcharge (*skattetillägg*) where criminal procedural rules were applicable.

[143] Chapter 11, sections 7–9 of the Constitutional Act.

[144] Section 19 para. 4 of the Public Administrative Court Act (*Lag (1971:289) om allmänna förvaltningsdomstolar*) and Prop. 2005/06:180, p. 20 f.

suitable candidate for their party.[145] Even though there is no requirement of party membership, most of the lay judges are politically active and most parties require their candidates to be members of the party.[146] Regional councils should aim for a diverse composition of lay judges in terms of gender, ethnicity, age, and occupation.[147] To be eligible as a lay judge, the person has to be a Swedish citizen, registered in the county, and at least 18 years old. The lay judges must undergo introduction training before the employment starts and again after six months.[148] The court can seclude a lay judge if she or he is suspected of or prosecuted for having committed a crime or shows a behaviour that would damage the public's confidence in the judicature.[149]

The clerk's[150] role in the procedure described below is to a minor degree regulated in laws or regulations; it has mainly developed as a practice and may partly be written down in internal documents.[151] The clerk has an important role in the procedure by being the one who

---

145 Prop. 2005/06:180, p. 25.

146 Ibid.

147 Section 19 of the Public Administrative Court Act (*Lag (1971:289) om allmänna förvaltningsdomstolar*). The problem with a biased composition that does not mirror the composition in the society as a whole has been subject to criticism for many years (see, for instance, SOU 2013:49, p. 28).

148 Section 5 of the Regulation with Ordinance Containing Terms of Reference for the Administrative Courts (*Förordning (1996:382) med förvaltningsrättsinstruktion*).

149 Section 22 of the Public Administrative Court Act (*Lag (1971:289) om allmänna förvaltningsdomstolar*).

150 There are two different kinds of court clerks: one who has an ordinary employment (*föredragande*) and one who has an educational employment limited to two years (*notarie*). They basically do the same kind of work but the clerk under education has a supervisor at the court and shall attend mandatory courses (sections 5 and 7 of the National Courts Administration's Statute Book (*Domstolsverkets författningssamling DVFS 2017:4).* The clerks may be given special competences (sections 20–23 of the Regulation with Ordinance Containing Terms of Reference for the Administrative Courts (*Förordning (1996:382) med förvaltningsrättsinstruktion*) and the Regulation on Extended Possibilities for Delegation in Administrative Courts (*Förordning (2012:34) om utökade möjligheter till delegering i förvaltningsrätt*)).

151 See section 19 of the Regulation with Ordinance Containing Terms of Reference for the Administrative Courts (*Förordning (1996:382) med förvaltningsrättsinstruktion*). My knowledge about the practice is based on my own experiences as a clerk under education (*notarie*) at the Migrations Court in Gothenburg. A couple of internal documents were available at the court in Gothenburg to support the clerks at the time for my employment as an educational clerk: on how to handle cases concerning their general role and tasks (*Föredragandens roll och arbetsuppgifter 2007-12-11*), and in asylum cases in particular (*Att arbeta med skyddsmål* PM 2014-12-03).

prepares the cases.[152] She or he makes sure that all the material submitted in the case by the parties or by the court is communicated to the parties and that the case has been properly investigated.[153] This includes going through and assessing all the written material both from the procedure at the Migration Agency and from the communication during the appeal procedure in the court. Through preparing and investigating the case, the clerk makes a legal analysis,[154] chooses which information is relevant (such as, for instance, information on the situation in the country of origin), and also how all the material in the case is to be summarised in the ruling.[155] The manual that specifically addresses asylum cases comprises instructions on how to deal with central issues in asylum adjudication including references to international, European, and Swedish legal sources.[156] The clerk chooses which material is sent out, along with the summary, to the lay judges and the jurist judge controls the material before it is sent out.[157] In practice, the material sent out to the lay judges is often limited to the decision from the Migration Agency.[158]

---

[152] A checklist is provided for in the two manuals mentioned above supra note 151.
[153] The duty to communicate all the submitted material in the case and to sufficiently investigate the case is codified in section 43 and section 9 respectively of the Administrative Court Procedural Act.
[154] According to the manual on "the clerks' role and work", the legal investigation should include: applicable provisions, relevant statements in preparatory works (Government Bills and Government Official Reports), relevant case law, and relevant doctrine (p. 3).
[155] The manual concerning "the role and work of the clerk" stipulates that the clerk should sift through information in the case (p. 1).
[156] The manual on asylum cases (*Att arbeta med skyddsmål* PM 2014-12-03) comprises how to deal with central issues in asylum adjudication with references to legal sources and provides a checklist of questions for asylum cases including: Is the case ready for making a judgment? Are the formal procedural prerequisites for a 'adjudication in substance' (*sakprövning*) fulfilled? What is the central legal question? Is there an issue as to the court's responsibility to investigate? And finally, an analysis should be made.
[157] The manual concerning the clerk's role and work (*Föredragandens roll och arbetsuppgifter 2007-12-11*), p. 3. According to my experience it differs between jurist judges as to how deep they go into the material in the case before the deliberation or the oral hearing.
[158] The manual concerning "the clerk's role and work" (*Föredragandens roll och arbetsuppgifter 2007-12-11*) states that the material that should be sent out to the lay judges before a deliberation should include a draft judgment and the appealed decision. If additional material is to be included, this should be decided in the individual case. This could be, for instance, the asylum investigation (i.e. the transcript of the interview at the Migration Agency) or country of origin information. The purpose is that the lay judges understand the problem (p. 3). If an oral hearing is going to be held, a draft judgment should not be sent out (p. 5).

Furthermore, the clerk suggests to the judge whether an oral hearing should be held. According to section 9 of the Administrative Court Procedural Act, an oral hearing shall be held at the individual's request if an oral hearing is not unnecessary and if there are no special reasons against it. However, even though the same wording is set out in Chapter 16, section 5 of the Aliens Act, according to Swedish case law, there is no similar presumption for an oral hearing in asylum cases, in case of a request from the applicant, as in other administrative cases.[159] This is due to the fact that the Migration Court of Appeal relies on its interpretation of a case from 2000, *Case Maaouia v. France*, ECtHR, stating that questions concerning migration do not fall under the heading of either civil rights or criminal charges, which is why the asylum procedure is interpreted as falling outside the scope of "a fair trial" as set out in Article 6 ECHR[160]. In a number of cases where an oral hearing has not been held, despite the fact that the credibility of the asylum seeker's narrative has been questioned, the Court has remanded the case to the lower instance.[161] This interpretation has made it possible for the Swedish migration courts to single out the assessment of credibility as a specific issue in rejecting claims for an oral hearing if the credibility of the applicant's narrative is not questioned.[162] In turn, this has led to the fact that the migration courts already in the initial stage of the appellate procedure make an assessment of whether or not credibility is an issue in the case.[163] If the assessment only concerns whether or not the reasons claimed by the

---

[159] MIG 2009:30, MIG 2012:11, and MIG 2014:1.

[160] MIG 2009:30 and MIG 2012:11. In *Case Maaouia v. France* the European Court of Human Rights (hereafter ECtHR) refers to the fact that the states have adopted protocol 7 in an effort to assure minimum rights to aliens who risk expulsion. From this fact, the ECtHR concludes that the states consider Article 6 not applicable in cases of expulsion (paras. 36 and 37). However, it is questionable whether this is still a reasonable stand after the binding force of the Charter of Fundamental Rights of the European Union (2000/C 364/01 (hereafter the EU Charter) (Baldinger 2013, p. 310, on Article 47(2) of the EU Charter and Strömblad 2014)

[161] See, among others, MIG 2009:30, MIG 2006:9, MIG 2017:9, and MIÖD UM 11222-12.

[162] See, among others, MIG 2009:30. This has led to an everyday language in the court where asylum cases are divided into "sufficiency cases" or "credibility cases").

[163] According to my experience of working as a clerk in the migration court, deciding whether an oral hearing would be needed on account of the distinction between "sufficiency" and "credibility" cases was one of the initial measures in investigating asylum cases.

asylum seeker are "sufficient" to meet the requisites for protection, a claim for an oral hearing is usually rejected. The decision to deny a request for an oral hearing cannot be appealed separately.[164] If no oral hearing is held, which is the most common scenario,[165] a draft for a ruling is also sent out to the lay judges.[166]

If an oral hearing is held, the clerk gives a short oral report on the case to the judge and the lay judges before the hearing and, thus, chooses which information she or he deems most relevant.[167] The jurist judge may give complementary information and the lay judges can ask questions about the case. At the deliberation after the oral hearing, the clerk gives a proposal for a judgment and after that it is for the judges to discuss and decide.[168] How independent the lay judges are in relation to the jurist judge and the clerk during the deliberation depends on the individual lay judge's knowledge and engagement. However, the lay judges are naturally in a disadvantaged position regarding both knowledge about law and knowledge about the facts in the case. During the oral hearing, the clerk takes notes, and after the hearing, mandatory facts are saved, in a protocol.[169] The rest of the notes are saved in the file as "memory notes" and are saved until the judgment has come into force.[170] Thus, the "memory notes" form part of the information in the procedure at the Migration Court of Appeal. After the hearing, the clerk writes the judgment and gives it to the judge for adjustments.[171]

---

164 Chapter 16, section 9 of the Aliens Act.

165 Appendix 1, Chapter 1.

166 This instruction is stated in the annual on "the clerk's role and work" (*Föredragandens roll och arbetsuppgifter 2007-12-11*), p. 3 and p. 5. See JO 2012-11-23, Dnr.4620-2011 on the risk of influencing the lay judges by giving them a draft of a judgment in advance.

167 The manual concerning "the clerk's role and work" (*Föredragandens roll och arbetsuppgifter 2007-12-1*) (p. 1) includes instructions on how the cases should be presented and, in brief, what information the presentation should include (p. 3 f.).

168 The manual concerning "the clerk's role and work" (*Föredragandens roll och arbetsuppgifter 2007-12-1*), p. 4.

169 According to section 17 of the Administrative Court Procedural Act, the mandatory information should include: claims, admissions, contestations, objections, in brief, the circumstances adduced by the parties and the responses to these circumstances as well as the investigation submitted at the hearing.

170 There is no mandatory provision stating that memory notes have to be made, but section 19 of the Regulation on Cases in Public Administrative Courts (*Förordning (2013:390) om mål i allmän förvaltningsdomstol*) states that such notes can be cut out when the case has come into force.

171 The manual concerning "the clerk's role and work" (*Föredragandens roll och arbetsuppgifter 2007-12-116*), p. 4.

The clerks are encouraged to take their starting point from "templates" when writing the judgments to be more effective. These templates comprise the structure of the judgment with pre-formulated headlines and initial formulations under each headline.[172]

2.2 Choice of methods and material

As described in section 1.4.1, the empirical study is carried out through a *quantitative content text analysis* of court judgments from the Swedish migration courts. The analysis focus on the assessments made by the judges of the risk for the asylum seeker to return to her or his country of origin with a special focus on the assessments of the credibility of the asylum seeker's narrative.

Two *pilot studies* were carried out in order to choose a unit of analysis and to design analytical tools relevant to the research questions.[173] The purpose of the pilot studies was to select a number of variables based on the data that could be obtained from the unit of analysis; variables that could form categories of arguments and sources of information used in the courts' argumentation proposing to say something about; if, how, and to what extent the courts substantiate their assessment of the *risk upon return* on the one hand, and their assessment of *credibility* on the other.[174] The division between risk and credibility assessments is based on the fact that, even if these assessments are interdependent, the basis for argumentation can differ. Variables related to the core of the research questions (*content variables*) as well as variables related to background data concerning the court procedure (such as outcome of the case) as well as personal data concerning the asylum seeker (*formal variables*) are included in the study.[175] A code scheme comprising coding principles and interpretation rules for all variables has been developed

---

[172] See Appendix 3 for an example of a template. The first page includes personal data, the outcome, the public counsel's fee and eventual classification issues. The following pages comprise the asylum seeker's claims and circumstances, background, and "the court reason" (*domskäl*) including "the applicable law" and the court's judgment. After that the right to appeal is addressed and, finally, the names of the participating judges and the clerk are presented.

[173] The *unit of analysis* is the part of the text where the occurrence of a phenomenon is notified, Bergström and Boréus 2011, p. 50.

[174] See further on the pilot studies, Appendix 1, Chapter 1.

[175] Esiasson et al. 2012, p. 203 f.

throughout the process.[176] A reliability test of the pilot study was carried out.[177] An application for an ethical review act was made and accepted by the Swedish Ethical Review Board on 19 March 2012. In accordance with the requirements of the Swedish Ethics Review Board, the numbers of the cases in the study are coded with the name of the court (S for the migration court in Stockholm, G for the migration court in Gothenburg, M for the migration court in Malmö, and L for the migration court in Luleå) followed by a number that corresponds to the chronological order in which they were decided. (S1-S100, G1-G100 and M1-M100).

The main study was carried out between May 2014 and May 2015. The cases were selected during a period of one year: 1 May 2013 to 30 April 2014 from three of the four migration courts.[178] As mentioned in section 2.1, the procedure in the Swedish migration courts includes deciding, at an initial stage, whether credibility is a conflicting issue. Hence, to be able to study the courts' assessment of risk with a focus on credibility assessments, a random selection of asylum cases from the migration courts, where an oral hearing has been held, was made. By this choice, a majority of the asylum cases were excluded, as in most of the cases an oral hearing is not held.[179] However, the choice is necessary in order to be able to study the court's reasoning on credibility. The cases were collected from the jural database, JP infonet.[180] Statistics from the Swedish National Courts Administration (*Domstolsverket*) from

---

[176] Bergström and Boréus 2011, p. 51.

[177] Esiasson et al. 2022, p. 207 f. The idea that another researcher should be able to carry out the same study with the same result is built on a perception of general scientific intersubjectivity and the cumulative nature of science, i.e. that every research result should be able to relate to other research results in the same field in order to accumulate knowledge in the field. An acceptable deviation between results from the same study has to do with the degree of precision that is necessary to answer the research questions, Bergström and Boréus 2011, p. 51. See for the results Appendix 1, Chapter 1.

[178] The migration court in Luleå was new at the time of the study. It was not possible to find more than 27 relevant cases from Luleå and only from the later part of the period, which is why the data from this court will not be part of the total analysis.

[179] See Appendix 1, Chapter 1.

[180] This database is a private company and comprises, practically, all rulings from the Migration Courts since 1 September 2010 and all rulings from the Migration Court of Appeal since the beginning of 2009. There is no guarantee, though, that JPinfonet can ensure that they do not miss cases.

the chosen period were retrieved to get a picture of the population from which the units of analysis were selected.[181]

A disproportional, stratified selection was made through selecting the cases in three rounds, one for each court.[182] From the chosen population, a random and systematic selection of 100 cases from each court was made in such a way that the selected cases were evenly distributed over the period.[183] The choice of time period and the total sum of 300 cases were based on the aim of acquiring the latest possible cases and a sufficiently large sample to provide a pattern and yet limited in such a way that would enable a more complex study with many variables.

The data is mainly collected from the part of the court ruling with the headline "the court's reasoning (*domskäl*)", as this contains the court's bases for the judgment. Also, data found in other parts of the ruling and in the Migration Agency's decisions is used as "background data" – data showing whether, for example, written evidence, country reports or statements from experts have been submitted. The Migration Agency decisions, classified parts of the decisions, and the rulings have been requested from the Migration Agency and the courts.

2.3 The categories

Two categories comprising *formal* variables and eight categories comprising *content* variables were developed out of the results of the pilot studies. The categories serve as analytical tools used to identify the different components of the courts' narrative concerning, on the one hand, the risk of returning the asylum seeker to her or his country of origin, and, on the other, the credibility of the asylum seeker's narrative. The categories are constructed to cover the arguments and

---

[181] See Appendix 2, Table 1. The statistics are based on information from the courts and compiled by the Swedish National Courts Administration (*Domstolsverket*). The statistics are obtained from Åsa Saltin, 2014-11-27, Controller at the Swedish National Courts Administration, and compiled by the author. There may be several reasons for the differences in granting rates. It may be a result of the fact that certain countries of origin are more frequent in one court than in the others as well as different interpretations of law and facts. The issue will not be further explored here.

[182] Key words template: "FörvR Stockholm" AND "flykting OR "alternativt skyddsbehövande" OR "skyddsbehövande i övrigt" AND "har hållit muntlig förhandling". (Stockholm was changed to Gothenburg, Malmö.)

[183] Esaiasson et al. 2012, p. 176 ff.

bases for the arguments found in the courts' reasoning and are meant to be descriptive. Each category comprises subcategories and a set of variables. While the main part of the content categories is the same whether studying the courts' bases for assessment of risk or assessments of credibility, the subcategories and the specific variables may differ in the two groups. A more detailed account of the categories, subcategories, and variables is presented in Appendix 1, Chapter 2. The chosen categories are:

Formal variables:

1. The court and the court procedure[184]
2. Personal data concerning the asylum seekers[185]

Content variables:

1. Legal sources[186]
2. External sources of information[187]
   A. *Country of origin information*
   B. *Written documents*
   C. *Witnesses*
   D. *Experts*
3. The quality of the asylum seeker's narrative. (The "quality" refers to when the court uses indicators for credibility to assess the narrative without basing them on any external sources.)[188]
4. The asylum seeker's behaviour, actions or activities[189]
   A. *during the procedure*
   B. *in the country of origin*
5. Co-applicants[190]
6. Individual facts and circumstances[191]

---

[184] Appendix 1, section 2.1.1.
[185] Appendix 1, section 2.1.2.
[186] Appendix 1, section 2.2.1.
[187] Appendix 1, section 2.2.2.
[188] Appendix 1, section 2.2.3.
[189] Appendix 1, section 2.2.4.
[190] Appendix 1, section 2.2.5.
[191] Appendix 1, section 2.2.6.

7. General risk considerations[192]
8. Procedural deficiencies[193]

The result is presented in frequencies.[194] This is done on two levels – first, the number of cases where a category of argument or source of information is found, and second, how many times this argument or a source of information occurs in the material. What the judges choose to emphasise in their rulings is illustrated by presenting the results in percentage of the number of cases (300) and the total number of arguments and sources of information found in the material. The frequencies are used to map the courts' argumentation and in this way make potential patterns visible. Also, the correlations between different variables are presented where this is possible and relevant.[195] While some categories can be easily identified and quantified, others are more difficult. Hence, certain choices and balances have been made that are explained in a code book presented in Appendix 1. The presentation of the results is further described below in section 4.1.

[192] Appendix 1, section 2.2.7.
[193] Appendix 1, section 2.2.8.
[194] See Esaiasson et al. 2012, p. 351 f.
[195] See Esaiasson et al. 2012, p. 66 f. and Begström and Boréus 2011, p. 52 f.

3 Formal data – Results

This chapter includes the results of collected formal data divided into two categories: data related to the court procedure (section 3.1); and personal data about the asylum seekers (section 3.2). In the final section (3.3), conclusions are drawn from the results in the two categories. The subcategories are presented under each section (see Appendix 1, Chapter 2 for an explanation of the categories).

3.1 Formal data: The courts

Outcome: *How often do the courts change the decision from the Migration Agency in favour of the asylum seeker?*

In 15% of the cases the Migration Agency decision is overruled and the asylum seeker is granted a residence permit.[196] Out of these cases, refugee status is granted in 40% of the cases while subsidiary status is granted in 43% of the cases.[197] In 17% of these cases a residence permit is granted on account of "particularly distressing circumstances", i.e. humanitarian grounds.[198] The results in the study slightly differ from the general result of the chosen period where the granting rate is 17%.[199] No other explanation for this can be found in this study than the random selection of cases. The relation between the outcome of the cases and the frequency of arguments or sources of information in the different categories is presented in section 4.10.

Dissenting opinions: *Are there any patterns linked to the fact that one or two judges hold a dissenting opinion?*

One or two dissenting judges are found in 21% of the cases.[200] The lay judges dissent more often (16%) than the jurist judge (5%).[201]

196 Appendix 2, Table 2.
197 Ibid.
198 Ibid. "Particularly distressing circumstances" falls outside the scope of international protection. In 2014 the provision "Especially distressing circumstances" are used when the assessment concerns children in order to make it easier for children to get a residence permit on this ground.
199 Appendix 2, Table 1. The difference as regards the court in Gothenburg stands out by showing a 20% granting rate in the statistics compared to 16% in my study (Appendix 2, Tables 1 and 2).
200 Appendix 2, Table 3.
201 Ibid.

The courts' identification of the potential risk upon return and on the parties' standpoints: *Are there any patterns linked to whether the courts give an account of the parties' standpoints or of the potential risk upon return?*

The parties' standpoints: *Do the courts identify the parties' standpoints?*

In more than half of the cases, the court does not explicitly state whether it agrees or disagrees with the Migration Agency's (57%).[202] In a few cases the court explicitly agrees (9%) or disagrees (3%) with the overall assessment made by the Migration Agency.[203] In approximately a third of the cases the court expresses that it agrees with the Migration Agency assessments on certain issues, such as identity, domicile or the security situation in the country of origin.[204]

The potential risk: *Do the courts identify the potential risk upon return?*

An explicit account of how the courts perceive the potential risk upon return was found in approximately half of the cases (54%).[205]

3.2 Formal data: The asylum seeker – personal data

The category gives a general background pattern of the asylum seeker's personal data and includes five subcategories.

Personal data: *What is the general pattern, among the asylum seekers in the study, as regards personal data?*

Age, gender, and family constellation: A majority of the cases include a single adult, cases whereof 61% include a single man and 14% a single woman.[206] One or more minors are found in 22% of the cases and 6% of the cases include unaccompanied minors.[207] Altogether, 18% of the cases include more than one applicant. Adults with children amount to 16% while couples and other constellations constitute 1% each.[208] The study contains a total of 433 *individuals* whereof 54% are men, 21% women, and 26% children of which 5% are unaccompanied.[209]

---

202 Appendix 2, Table 5.
203 Ibid.
204 Ibid.
205 Appendix 2, Table 6.
206 Appendix 2, Table 8.
207 Ibid.
208 Ibid.
209 Appendix 2, Table 10. For the age distribution of the asylum seekers, see Table 11.

Country of origin: Altogether, 48 different countries of origin were found in the study. The two biggest groups of asylum seekers in the study originate from Somalia (22%) and Afghanistan (21%).[210]

3.3 Formal data: Outcome correlated to formal data

One or two dissenting judges are found in 41% of the cases where the asylum seeker is granted protection, while this figure is 30% for cases where the appeal is rejected.[211] The jurist judges only dissent in cases where protection is granted (14 out of 19 of these cases and only against the majority, i.e. while all three lay judges vote in favour of the asylum seeker, the jurist judge votes against) whereas lay judges hold a dissenting opinion mainly in cases where the appeal is rejected and more seldom in cases where protection is granted.[212]

A higher granting rate is found in cases where the courts have made an explicit account of how they perceive the potential risk upon return.[213]

The result shows a relatively higher granting rate in cases in which co-applicants are included (24%).[214] Cases including an unaccompanied minor have a slightly higher granting rate than cases with a single adult (16%).[215] A slightly higher share of granted protection is found in cases including a single adult male compared to cases where the claimant is a single adult female (15% and 12% respectively).[216]

3.4 Formal data – Concluding remarks

The granting rate in the study is slightly lower than what the statistics from the Swedish National Courts' Administration show, which include all the cases in the chosen population from the same period (15% in the study while 17% in the whole population).[217] Since the

[210] Appendix 2, Table 12.
[211] Appendix 2, Table 4.
[212] Appendix 2, Table 4, the asterisk.
[213] Appendix 2, Table 7.
[214] Appendix 2, Table 9.
[215] Ibid.
[216] Ibid.
[217] Appendix 2, Tables 1 and 2.

number of cases where protection is granted is low, the comparisons made, above in section 3.3 as well as in Chapter 4.10, between the courts' considerations due to different outcomes are attended to as indications.

Approximately a fifth of the cases include one or more dissenting judges. Since the disagreements between the judges are mostly coupled to credibility issues, this highlights the difficulties and risks in these assessments. Even though the number of cases where the protection is granted is small in this study, the indication – that the jurist judges would be more inclined than the lay judges to reject an appeal – finds support from the studies undertaken by Ställvik, Martén, and Johannesson, and suggests that the jurist judges have a more restrictive approach.[218] Since the lay judges are appointed on political grounds, this may, of course, change due to the political situation at the time.[219]

The fact that in approximately half of the cases the courts neither explicitly agree nor disagree with the statements made by the Migration Agency, nor give an account of the courts' perceived potential risk upon return for the asylum seeker, makes it difficult for the reader to understand which arguments from the parties are considered and assessed by the courts.

The two biggest groups of asylum seekers in the study originate from Somalia and Afghanistan and they also stand for the biggest granting rate. This does not fully correspond to the countries of origin of the asylum seekers coming to Sweden where the two largest groups seeking asylum in Sweden during the studied period were originally from Syria and Eritrea.[220] However, asylum seekers from these two countries are mostly granted asylum already at the Migration Agency. This is because the Agency has established that there is an armed

[218] See above, section 1.1 on the studies made by Martén 2015, Johannesson 2017, Ställvik 2009.

[219] See section 2.1 on the appointment of lay judges.

[220] The statistics regarding the number and origin of asylum seekers referred to coming to Sweden are based on those from the Migration Agency: *Inkomna ansökningar om asyl, 2014,* downloaded from: http://www.migrationsverket.se/Om-Migrationsverket/Statistik/Oversikter-och-statistik-fran-tidigare-ar/2014.html.

conflict going on in Syria[221] and that the situation in Eritrea[222] is such that forced expulsion is not possible on account of the risk of Eritreans being subjected to treatment that falls under the prohibition of *refoulement*. Also, the number of other big groups of asylum seekers in Sweden from, for instance, Serbia and Kosovo are not found in the study, probably since applications from these countries are often assessed to be "manifestly unfounded" and are subjected to a faster procedure where an oral hearing in the court is perceived as unnecessary.[223] Taking the above-mentioned circumstances into account, the division between the countries of origin found in the study broadly mirrors the asylum seekers who appeal their decisions from the Agency and hence, end up in court.

The adult asylum seekers in the material are mainly young men. As I have chosen to randomly select cases from a population without taking gender or age into consideration, this result is not surprising as it mirrors the number of male, female, and minor asylum seekers arriving in Sweden.[224] The lack of legal ways to seek asylum, which exposes asylum seekers to smugglers and dangerous and expensive journeys, as well as the difficulties for women in patriarchal societies to leave their home and their country, are likely contributory factors in explaining the low rate of single women and families with children seeking asylum. The differences found in terms of granting rates connected to age, gender or family constellation cannot be explained by these background data, but a tentative explanation is that families including children and women are viewed as more vulnerable. This is further analysed in section 6.1.2.

---

[221] *Rättsligt ställningstagande angående säkerhetssituationen i Syrien* (Legal position paper on the security situation in Syria), RCI 14/2013.

[222] R*ättsligt ställningstagande angående prövningen av skyddsskäl mot Eritrea* (Legal position paper on the adjudication of the need for protection towards Eritrea), RCI 16/2013

[223] See on the selection of cases, above, section 2.2 and the right to oral hearing in section 2.1.

[224] In the statistics from the Migration Agency, as regards 2014, women constitute 33% (girls included) and children 42% of the asylum seekers, while 9% of the asylum seekers are unaccompanied minors. To a large extent, boys form the majority even among the unaccompanied minors (81%).

4 The bases for assessing the risk upon return with specific focus on the credibility of the asylum seeker's narrative as presented by the Swedish migration courts

This chapter presents the results of the different arguments and sources of information used by the Swedish migration courts to substantiate their assessment of the risk upon return for the asylum seeker. A separate focus is on if, how, and to what extent the courts substantiate their assessment of the credibility of the asylum seeker's narrative.[225] The first section (4.1) presents an overview of the courts' use of different arguments and bases for these arguments connected to the different categories chosen accounted for in section 2.3. The presentation provides a map of the choices made by the judges in terms of what to emphasise in their written judgments. A more detailed result in each category is presented in sections 4.2–4.9. In section 4.10 the results on the relation between the outcome in the cases and the occurrence of different arguments and sources of information are presented. Finally, in section 4.11 research questions 1 and 2 are answered through a compilation of the main findings.[226]

4.1 Arguments and sources of information in the courts' reasoning – the general pattern

Table 1 below shows what kind of arguments and sources of information the courts emphasise when assessing, on the one hand, the overall *risk upon return*, and, on the other, *the credibility of the asylum seeker's narrative*. The table is initially presented in its entirety and then broken down into parts to make it easier to follow the presentation of the results in each category. The first two vertical rows show to what extent the courts refer to the different categories of arguments and sources of information to substantiate their assessment of the overall risk for the asylum seeker upon return. The third and the fourth vertical rows show

---

[225] See section 2.2. on the choice to study the courts' assessment of the credibility of the asylum seeker's narrative separately.

[226] See section 1.2.

to what extent the same categories of arguments and sources of information are used to substantiate, specifically, the courts' assessment of the credibility of the asylum seeker's narrative.

The first and third rows show *the number and percentage of cases* where the specific argument or source of information occurs. The second and fourth rows show the *total number of references* found in each category and the percentage they constitute of all references found. The total number of references found connected to the assessment of risk upon return amount to 3 095 while the total number of references to substantiate the assessment of the credibility of the asylum seeker's narrative amount to 2 728. The number of references complements the number of cases and is intended to deepen the picture of what the courts emphasise in their reasoning.

The vertical reading of the table provides for an overall picture of, and a comparison between, the courts' references to arguments and sources of information in the different categories. In two of the categories, the most important subcategories are also made visible which makes it possible to compare the emphases made by the courts within the category. For instance, if looking at the category *external sources of information* we can see that the courts use written documents more often compared to sources in the other subcategories.

A horizontal reading of the table provides for two different kinds of comparisons. Firstly, if looking, for instance, at the category *external sources of information* we can see that this kind of sources occurs in 61% of the cases. However, if looking at the total number of references in this category, the next row shows that such references constitute 11% of the total number of references. Secondly, if comparing the occurrence of external sources of information used to substantiate the reasoning regarding the risk upon return with the use of such references when assessing the credibility of the asylum seeker's narrative, we can see that the court uses such references to a lower extent when assessing the credibility of the narrative.

The figures in categories 4 and 8 are the same regarding the assessment of risk and that of credibility as it turned out to be difficult to divide the arguments as being coupled to either risk or credibility.[227]

[227] See for an explanation and the choice made in Appendix 1, section 2.2.4 and section 2.2.8.

Table 1. The courts' basis for assessing the risk upon return and the credibility of the asylum seeker's narrative – *all categories.*

Number and percentage of all cases (300)/number and percentage of all references (3 095/2 728)

The risk upon return/ Credibility Categories	The risk upon return *Number of cases (300)*	The risk upon return *Number of references (3 095)*	Credibility *Number of cases (300)*	Credibility *Number of references (2 728)*
Legal sources (Category 1)	93 **31%**	248 **8%**	37 **12%**	46 **2%**
External sources of information (Category 2)	183[a] **61%**	342[a] **11%**	117 **39%**	166 **6%**
Country of origin information	63 **21%**	123 **4%**	25 **8%**	32 **1%**
Written documents	117[b] 39%	178[c] 6%	81 27%	88 3%
Witnesses	7[d] 2%	7 <1%	11 4%	13 <1%
Experts	30[e] 10%	34 1%	31 10%	33 1%
The quality of the asylum seeker's narrative (Category 3)	293 **98%**	1 650 **53%**	293 **98%**	1 650 **60%**
The asylum seeker's actions/activities/behaviour (Category 4)	221 **74%**	501 **16%**	221 **74%**	501 **18 %**
During the procedure	198 66%	348 11%	198 66%	348 13%
In the country of origin	118 39%	153 %	118 39%	153 6%
Co-applicants (Category 5)	19[f] **6%**	19 **<1%**	14 **5%**	34 **1%**
Individual facts and circumstances (Category 6)	31 **10%**	31 **1%**	27 **9%**	27 **1%**
General risk considerations (Category 7)	182 **61%**	292 **9%**	182 **61%**	292 **11%**
Substantiated by references to legal sources	15[g] 5%	29[g] 1%	15[g] 5%	29[g] 1%
Substantiated by references to country of origin information	54[h] 18%	96[h] 3%	54[h] 18%	96[h] 4%
Procedural deficiencies (Category 8)	12 **4%**	12 **<1%**	12 **4%**	12 **<1%**

[a)] 58 of these cases only include references to ID documents (19% of all cases) and 107 of the references are to ID documents, [b)] 82 of these cases only include references to ID documents, [c)] 107 are references to ID documents, [d)] The material includes 11 witnesses altogether, [e)] 20 of these are statements from language analyses, [f)] 35% of the cases where one or more co-applicants are included, [g)] These numbers are also included in the numbers under the category *legal sources,* [h)] These numbers are also included in the subcategory *country of origin information* under the category *external sources.*

The results show that the courts' emphasis lies on arguments related to the assessment of the *quality of the asylum seeker's narrative*. The "quality" of the narrative refers to when the court uses indicators for credibility to assess the narrative without basing them in any external sources. As shown in Table 1, arguments related to this category are found in almost all cases (98%). This is a consequence of the fact that the selected material only includes cases where the credibility of the asylum seeker's narrative is explicitly expressed as a conflicting issue.[228] References to *credibility indicators used to support the assessment of the internal quality of the asylum seeker's narrative* constitute 53% of the total number of arguments as regards the assessment of the risk upon return and 60% as regards the assessment of the asylum seeker's narrative.

Table 1, Category 3

The risk upon return/ Credibility **Categories**	**The risk upon return** *Number of cases (300)*	**The risk upon return** *Number of references (3 095)*	**Credibility** *Number of cases (300)*	**Credibility** *Number of references (2 728)*
The quality of the asylum seeker's narrative (category 3)	296 **99%**	1,650 **53%**	296 **99%**	1 650 **60%**

Arguments connected to the asylum seeker's *behaviour or actions/activities* are found in 74% of the cases. Arguments connected to the asylum seeker's behaviour, actions or activities *during the procedure* are more often used (66% of the cases) than arguments related to behaviour or actions/activities *before leaving the country of origin* (39% of the cases).

Table 1, Category 4

The risk upon return/ Credibility **Categories**	**The risk upon return** *Number of cases (300)*	**The risk upon return** *Number of references (3 095)*	**Credibility** *Number of cases (300)*	**Credibility** *Number of references (2 728)*
The asylum seeker's actions/activities/behaviour (Category 4)	221 **74%**	501 **16%**	221 **74%**	501 **18%**
During the procedure	198 66%	348 11%	198 66%	348 13%
In the country of origin	118 39%	153 5%	118 39%	153 6%

228 See above on the selection of cases, section 2.2.

The result shows that the courts use one or more *external sources of information* to substantiate the assessment of the risk upon return in 61% of the case and in 39% of the cases when substantiating the assessment of the credibility of the narrative. The number of references to external sources stands for 11% and 6% respectively of the total number of references. References to *written documents* are the most frequently used category of external sources (39%). In 27% of the cases the courts use written documents to substantiate the assessment of the narrative. Written documents stand for 6% and 3% respectively of the total number of references. References to specific sources concerning *the situation in the country of origin* are found in 21% of the cases and in 8% of the cases country of origin information is used to substantiate the assessment of the narrative. Specific sources of information concerning the situation in the country of origin stands for 4% and 1% respectively of all references. References to statements from *experts* are found in 10% of the cases and stand for 1% in both groups, while statements from witnesses are found in 2% and 4% respectively of the cases and make up less than 1% of all references in both groups. (The result in relation to the number of cases where experts occur is presented below, section 4.3.4.)

Table 1, Category 2

The risk upon return/ Credibility **Categories**	**The risk upon return** *Number of cases (300)*	**The risk upon return** *Number of references (3 095)*	**Credibility** *Number of cases (300)*	**Credibility** *Number of references (2 728)*
External sources of information (Category 2)	183[a] **61%**	342[a] **11%**	117 **39%**	166 **6%**
Country of origin information	63 **21%**	123 **4%**	25 **8%**	32 **1%**
Written documents	117[b] 39%	178[c] 6%	81 27%	88 3%
Witnesses	7[d] 2%	7 <1%	11 4%	13 <1%
Experts	30[e] 10%	34 1%	31 10%	33 1%

References to *legal sources* are found in 31% of the cases.[229] If looking specifically at the courts' assessment of the asylum seeker's narrative, the court refers to legal sources in 12% of the cases. The total number of references to legal sources make up 8% of all the courts' references when assessing the risk upon return and 2% of the references in relation to the assessment of the narrative.

Table 1, Category 1

The risk upon return/ Credibility — Categories	**The risk upon return** *Number of cases (300)*	**The risk upon return** *Number of references (3 095)*	**Credibility** *Number of cases (300)*	**Credibility** *Number of references (2 728)*
Legal sources (Category 1)	93 **31%**	248 **8%**	37 **12%**	46 **2%**

Arguments and sources related to *individual circumstances* are found in 10% and 9% respectively of the cases and make up 1% of the references in both groups.

Table 1, Category 6

The risk upon return/ Credibility — Categories	**The risk upon return** *Number of cases (300)*	**The risk upon return** *Number of references (3 095)*	**Credibility** *Number of cases (300)*	**Credibility** *Number of references (2 728)*
Individual facts and circumstances (Category 6)	31 **10%**	31 **1%**	27 **9%**	27 **1%**

Arguments related to *deficiencies that may occur during the procedure* are found in 4% of the cases and make up 1% of the total references.

Table 1, Category 8

The risk upon return/ Credibility — Categories	**The risk upon return** *Number of cases (300)*	**The risk upon return** *Number of references (3 095)*	**Credibility** *Number of cases (300)*	**Credibility** *Number of references (2 728)*
Procedural deficiencies (Category 8)	12 **4%**	14 **<1%**	12 **4%**	14 **<1%**

229 The copy-pasting of "applicable provisions" or references to the "applicable provisions" presented in the decision from the Migration Agency is excluded (see Appendix 1, section 2.2.1 for an explanation).

The risk upon return for *co-applicants* is separately assessed in 19% of the cases and constitutes 5% and 1% respectively of the references. (The result in relation to the number of cases in which co-applicants are included is presented below, section 4.6.)

Table 1, Category 5

The risk upon return/ Credibility / **Categories**	**The risk upon return** *Number of cases (300)*	**The risk upon return** *Number of references (3 095)*	**Credibility** *Number of cases (300)*	**Credibility** *Number of references (2 728)*
Co-applicants (Category 5)	19[f] **6%**	19 **<1%**	14 **5%**	34 **1%**

Arguments connected to *general risk considerations*, such as the general security situation and the possibility of getting protection from the public authorities in the country of origin, are found in 61% of the cases. This category of arguments stands for 9% of the total number of arguments (of which 1% are substantiated with legal sources and 3% by sources concerning the situation in the country of origin). Below are two examples of wordings found in the initial part of the reasoning on the situation in the country of origin not substantiated with legal references or references to country of origin information:

> The conditions in Iraq are not such that a general need for protection is at hand for people coming from there. (M 55).[230]

> The general situation in Russia is not so serious that it in itself renders a right to a residence permit. Therefore, the court must assess whether X and others have individual reasons that lead to them being granted residence permits based on a need for protection. (S 7).[231]

[230] The author's translation.
[231] The author's translation.

Table 1, Category 7

The risk upon return/ Credibility — Categories	The risk upon return *Number of cases (300)*	The risk upon return *Number of references (3 095)*	Credibility *Number of cases (300)*	Credibility *Number of references (2 728)*
General risk considerations (Category 7)	182 **61%**	292 **9%**	182 **61%**	292 **11%**
Substantiated by references to legal sources	15[g] 5%	29[g] 1%	15[g] 5%	29[g] 1%
Substantiated by references to country of origin information	54[h] 18%	96[h] 3%	54[h] 18%	96[h] 3%

The following sections provide a more detailed presentation of the horizontal results presented in Table 1.

4.2 Legal sources: *How, and to what extent, if at all, do the courts base their assessments on legal sources?* (Category 1)

This section is divided into three subcategories: legal sources connected to the principle of *non-refoulement*, to *status determination*, and to *assessment principles*. While the first two categories are connected only to the assessment of the risk upon return, the third is found both in relation to the risk assessment as a whole, as well as specifically in relation to the assessment of the narrative (see Appendix 1, section 2.2.1 for an explanation of the categories).

As shown above, in Table 1, references to specific legal sources are found in the courts' reasoning in 31% of the cases. Table 2 shows what kind of legal sources the courts choose to put forward. Swedish legal sources stand for 69% of the sources of which the Migration Court of Appeal is the most frequently used legal source (44%). Half of these references concern the same case (MIG 2007:12). Legal references to EU law, ECHR, and international legal sources stand for approximately 29% of the references whereof the main part are references to the UNHCR Handbook. Almost half of the references to the Handbook concern how to assess the credibility of the asylum seeker's narrative.

Table 2. References to legal sources – *types of sources.*[232]

Number and percentage of all references.

Swedish provisions	Swedish case law	Swedish preparatory works	ECHR	EU law	UNHCR Hand-book	Other inter-national law	Other	Total
31 **12%**	110* **44%**	31 **12%**	14 **6%**	18 **7%**	31** **12%**	10 **4%**	4 **2%**	249 100 %

* Half of these are references to the same case, MIG 2007:12. ** Almost half of these references concern credibility.

While the principle of *non-refoulement* is not mentioned in any of the rulings, the issue of *expulsion* has been addressed and substantiated with references to legal sources in 4% of all cases and makes up 6% of the number of references in this category.[233] The number of references to expulsion issues amounts to 15 whereof provisions in the Aliens Act constitutes the main part.[234] The absolute prohibition of *refoulement* is addressed in four cases as a question raised under Article 3 ECHR. One case concerns the question whether or not the asylum seeker would be at risk of being subjected to torture if returned to his country of origin[235] while the other three concern how to interpret Article 3 in relation to the requisite "armed conflict" based on a case from the ECtHR.[236] In seven of the cases where the issue of expulsion is specifically mentioned, the migration court rules that the Migration Agency's decision concerning expulsion should stand firm and in one case that the decision regarding expulsion should be repealed as a residence permit is granted.[237]

---

[232] Appendix 2, Table 17.

[233] Ibid.

[234] Appendix 2, Table 19.

[235] S 97. The court refers to two decisions from ComAT; *Tala v. Sweden*15, (1996) and CJEU: *X. Y. and Z. v. Sweden,* (1998), ECtHR: *Case R.C. v Sweden* (2010) and MIG 2012:2. The asylum seeker was granted refugee status and a residence permit since, according to the court, there was no doubt about the fact that he had been subjected to torture together with the fact that there was no reason to question his account.

[236] In all three cases the court concluded that there was no longer an internal armed conflict in Mogadishu (G 4, G 12, and G 15) based on *Case of Sufi and Elmi v. United Kingdom*, nr 8319/07 and nr 11449/07.

[237] The seven cases from the migration court in Gothenburg are ruled by the same judge and includes the following identical wording: "Since A stays in Sweden without the required permission the Migration Agency shall decide to expel her in accordance with Chapter 8, section 7 of the Aliens Act" (now Chapter 7, section 2 (2) of the Aliens Act) (G 44 and others. The author's translation).

References to legal sources in order to support an interpretation of a specific requisite in the *status determination* provisions (as, for instance, what constitutes "well-founded fear for persecution", risk of torture, the possibility of getting protection from the public authorities) are found in 17% of all cases and stand for 37% of the number of references in this category.[238] Below is an example of how the courts phrase that the claims for protection are not sufficient to fulfil the criteria for being a refugee without any further argumentation.

> The migration court finds that the protection claims are not based on such circumstances that may form the basis for refugeehood. Therefore, there are no grounds for a residence permit on account of refugeehood. (G1).[239]

Below is an example of the courts' argumentation on the difference between refugee status and subsidiary protection.

> Although the situation for women in Iran is difficult, it is not such as to constitute grounds to grant residence permits in general. An individual examination does not reveal that what she states that she has been subjected to because of her gender is to be regarded as persecution within the meaning of the Aliens Act. (G 98).[240]

These kind of statements without references to legal sources are not included.

More than one reference related to status determination is found in 7% of the cases[241] and altogether, the material includes 93 such references.[242] While references to Swedish sources stand for 65% of the references in this subcategory, European sources constitute 22%, international sources 11% and other sources 3%.[243]

The courts refer to one or more assessment principles, in 77% of the cases.[244] In 25% of the cases these references are supported by references to legal sources.[245] The total number of references amounts to 584 whereof 140 are substantiated with references to legal sources.[246]

---

[238] Appendix 2, Table 15 and 16.
[239] The author's translation.
[240] The author's translation.
[241] Appendix 2, Table 21.
[242] Appendix 2, Table 22.
[243] Ibid.
[244] Appendix 2, Table 23.
[245] Ibid.
[246] Appendix 2, Table 24.

Below is an example of what the courts initially put forward as the basis for the adjudication.

> When examining whether there is a need for protection, it is necessary to make a forward-looking assessment of the risk for the applicant of being subjected to treatment that forms the basis for a need of protection if he/she returns to his/her country of origin. It is the applicant who shall make her or his need for international protection probable. The starting point for this assessment is that the applicant's asylum narrative appears probable and credible (compare MIG 2007:12).[247]

The most frequently found statements referred to in this category are the wordings *the assessment should be individual* or, *the assessment should be forward-looking* (39% of all the references in this category).[248] Below is an example of how the courts express that the assessment should be individual.

> There are no grounds to generally grant applicants from X a residence permit due to a need for protection. An individual assessment of the stated circumstances must therefore be made. (G 95).[249]

Statements that are coupled to assessment principles addressing the *burden and standard of proof*, such as "it is for the applicant to make her or his need for protection probable" or "it is for the applicant to substantiate her or his claims" constitute 35% of the references while statements coupled to evidentiary alleviation principles or principles on who has the responsibility to investigate stand for approximately 6% of the statements in this subcategory.[250]

The courts use the word *probable* as a marker for the standard of proof to a higher degree than the words linked to the requisites in the protection provisions such as *risk*, *return*, *well-founded fear*, or *substantial ground for believing*.[251] While the world *probable* stands for 60% of all words/wordings found in this category, the words *risk* and *return* constitute together 33% while the requisite *well-founded fear and substantial ground for believing* amounts to 4% and 3% respectively of these words or wordings.[252]

---

[247] G12, G 27, G 58, G 99. (The author's translation). Compare, for instance, G 72, 73, 89, and 95 where this wording is present but without references to legal sources.
[248] Appendix 2, Table 25.
[249] The author's translation.
[250] Appendix 2, Tables 26 and 27.
[251] Appendix 2, Tables 28 and 29.
[252] Appendix 2, Table 29.

References to assessment principles related to specific issues such as the possibility of internal flight, language analyses, age determinations, and how to assess the narrative constitute 20% of all the references in this subcategory.[253] Below is an example of how the courts phrase how to assess the asylum seeker's narrative:

> To assess whether a story is reliable, various factors are important. The story should be coherent and in its main features unchanged over time, i.e. from the application to the Swedish Migration Agency and to the adjudication in the Migration Court. Of particular importance is the information that is initially submitted to the Swedish Migration Agency when the applicant for the first time is given the opportunity to explain in her or his own words the need for protection. If information is added later or changed, it should be possible to explain in a logical and reliable way why the new information was not provided earlier. (G 1).[254]

Below is an example with a similar content but with references to case law:

> When making a credibility assessment, it should be considered if the story is coherent and not marked by conflicting information. The circumstances relied on must also not conflict with generally known facts as, for instance, relevant and current country information. Significance in terms of credibility is also attached to the fact that the story, in its main features, remains unchanged during the asylum adjudication in various instances (compare MIG 2007:12).[255]

Out of the total number of references made to legal sources as regard assessment principles, Swedish sources constitute 74% whereof 63% are case law from the Migration Court of Appeal.[256] In turn, half of the references to Swedish case law are references to the same case (MIG 2007:12).[257] References to EU law and ECHR constitute 6% of the references while international sources constitute 21% of the references of which the UNHCR Handbook makes up the main share (19%).[258]

Arguments linked to assessment principles on how to assess the credibility of the narrative are found in 20% of the cases and in 12% of all cases these statements are substantiated with references to legal sources.[259] The cases where legal sources are found include altogether

---

253 Appendix 2, Table 30.
254 The author's translation.
255 The author's translation.
256 Appendix 2, Table 31.
257 Ibid.
258 Ibid.
259 Appendix 2, Table 32.

46 references of which Swedish case law stands for 63%.[260] All but two of these references concern the same case from the Migration Court of Appeal (MIG 2007:12).[261] References to the UNHCR Handbook stand for 35 % of the references.[262]

4.3 External sources: *How, and to what extent, if at all, do the courts base their assessments on external sources of information?* (Category 2)

This section presents the findings about the references made by the courts to sources of information other than the asylum seeker's narrative, behaviour, activities or actions. The category is divided into four subcategories: *A. The situation in the country of origin, B. Written documents, C. Witnesses, and D. Experts* (see further explanation of the subcategories in Appendix 1, section 2.2.2).

4.3.1 The situation in the country of origin: *How, and to what extent, if at all, do the courts base their assessments on sources of information as regards the situation in the country of origin?* (Category 2A)

The courts make a statement concerning the situation in the country of origin in 81% of the cases.[263] Thus, in 19% of the rulings the situation in the country of origin is not mentioned. The courts substantiate their assessments of the situation in the country of origin, with references to specific country of origin information in 21% of the cases.[264] In 6% of the cases more than one source is found.[265]

In cases where no country reports or other sources of information as regards the situation in the country of origin are mentioned in the ruling, such sources are referred to in the decision from the Migration Agency in 54% of all cases while in 15% of the cases no report is

[260] Appendix 2, Table 33.
[261] Ibid.
[262] Ibid.
[263] Appendix 2, Table 34.
[264] Ibid.
[265] Appendix 2, Table 35.

referred to or mentioned neither in the court's ruling nor in the Migration Agency decision.[266]

The courts refer to specific reports concerning the *general situation* in the country of origin, in 12% of the cases while 13% of the cases include specific country of origin information related to the asylum seeker's *individual claims*.[267] The total references to country of origin information, in the ruling, amount to 168 whereof 123 are used by the courts to substantiate their reasoning.[268]

The assessments made by the courts of *the credibility of the asylum seeker's narrative* are supported by references to country of origin information in 8% of the cases[269] Altogether, 153 references to the situation in the country of origin are found.[270] Of these, 32 are supported by references to country of origin information whereof 24 concern the asylum seeker's individual claims.[271] The courts refer to country of origin information more often to support the assessment that the narrative is credible (55%) than to support the assessment that it is not credible (45%).[272]

The majority of the country of information is submitted by the Migration Agency (55%) while a lower share of the reports is claimed by the asylum seeker (15%).[273] The courts submitted one of the total number of country reports.[274] Regarding 28% of the reports mentioned in the rulings it is not possible to identify who submitted them.[275] The publishing year of the reports varies from 2009–2014 whereof 66% were published half a year or more before the court judgments.[276]

Table 3 shows *the origin of the sources* used by the courts to support their assessment of the situation in the country of origin. The "legal position papers" and the "legal commentary" from the legal executive

---

266 Appendix 2, Table 36.
267 Appendix 2, Table 37.
268 Appendix 2, Table 38. More than half of these references are found in the cases from the court of Gothenburg.
269 Appendix 2, Table 41.
270 Appendix 2, Table 42.
271 Ibid.
272 Appendix 2, Table 43.
273 Appendix 2, Table 44.
274 Ibid.
275 Ibid
276 Appendix 2, Tables 45.

together with country reports compiled by the Migration Agency constitute 43% of the sources referred to while reports from the Swedish Foreign Department stand for 10%. The most frequently used international sources are country reports from public authorities in foreign countries (36%), while reports from NGOs and the UN account for 7% and 2% respectively.

Table 3. The origin of the sources as regards the situation in the country of origin referred to in the courts' reasoning.[277]

Number and percentage of all references.

The origin of the sources	Legal position paper MA*	Legal commentary MA*	MA*	SFD **	PAOS ***	NGO** **	UN*****	Other	**Total**
Total	34 **28%**	6 **5%**	13 **10%**	13 **10%**	44 **36%**	8 **7%**	2 **2%**	3 **2%**	123 **100%**

* The Migration Agency, ** The Swedish Foreign Department, *** Public Authorities in other countries, **** Non-Governmental Organisations, ***** United Nation organs

Looking at the origin of the sources in the cases where one source is referred to, the "legal position papers" stand for 52 % of the references.[278]

4.3.2 Written documents: *How, and to what extent, if at all, do the courts base their assessments on written documents?* (Category 2B)

Identity documents or other written documents have been submitted in 75% of the cases and a total sum of 442 written documents are found in the material.[279] Written documents other than identity documents are submitted in 58% of the cases, identity documents in 65% of the cases and both identity documents and other written documents in 22% of the cases.[280]

---

[277] Appendix 2, Table 47.

[278] Appendix 2, Table 48.

[279] Appendix 2, Tables 49 and 50. The results do not take into account who has submitted each written document. However, the main part of the documents is submitted by the asylum seekers.

[280] Appendix 2, Table 49. Examples of written documents are: *Identity documents* such as passports, other ID documents and birth certificates and *other written documents* such as summons from courts or the police, rulings from the country of origin, membership certificates, baptism certificates, documents originating from the Internet. Even sound recordings have been included.

Altogether, 60% of the written documents are assessed as being of "simple character" and therefore of no or low value, or not mentioned, while 40% of the total number of submitted documents are attached with "some value" or are "not questioned". A majority of the latter (107 out of 71) are identity documents. [281]

Below are two examples of the courts' phrasings:

> A has, as written evidence to show that the public authorities have an interest in her, submitted to the Swedish Migration Board copies of summonses to the district police in two different places in X and of an indictment brought before a court in X. The Migration Court makes the assessment that the documents are of too simple a nature so that A, through these, should be able to show that she has a need for protection towards X. The court must therefore decide whether A, with her oral information, has made it probable that she needs protection in Sweden. Her narrative must then be credible. (S 7)

> The documents are copies and are therefore of simple nature. (M 51)[282]

Written documents other than identity documents are connected to identity issues in nine cases, i.e. whether or not the asylum seeker has been able to make her or his identity probable has significance for whether or not the written documents could be attached with any evidentiary value.[283]

The courts base their assessment of *the asylum seeker's narrative* on written documents in 27% of the cases.[284] Out of the total number of documents (442), 20% are considered in relation to the courts' assessment of the narrative.[285] It is further found that even documents attached with "no" or "low value" or documents that are not explicitly evaluated by the court are used as a basis for assessing the credibility of the narrative.[286]

[281] Appendix 2, Table 54.
[282] The author's translation.
[283] Appendix 2, Table 52, the asterisk.
[284] Appendix 2, Table 55.
[285] Appendix 2, Table 55.
[286] This is the case, for instance, when a document is deemed to have been falsified or a fact in a document contradicts a statement from the asylum seeker (S 99 among others).

4.3.3 Witnesses: *How, and to what extent, if at all, do the courts base their assessments on witnesses?* (Category 2C)

As shown above in Table 1, the courts accept statements from witnesses in 2% of the cases.[287] Witnesses occur in 7% of the cases and, altogether, 24 witnesses are found in the material.[288] Evidentiary value is attached to seven of the witnesses ("not questioned" or "some value"), while 12 witnesses are attached with no or low value.[289] Five of the witnesses are not evaluated.[290]

The courts base their assessments of *the narrative* on statements from witnesses to a slightly higher degree (4% of the cases).[291] The higher share is caused by the fact that the courts use witnesses as a basis for assessing credibility even if the evaluation of the witness is set to "no" or "low value" or the witness is not evaluated. Altogether, 13 witnesses have been the basis for the courts' assessment of the narrative whereof seven are considered to support the credibility of the asylum seeker's narrative, while five of the witnesses were found not to support the narrative either because the statements from the witness contradicted statements from the asylum seeker, the witness's account was found to have credibility deficits due to the quality of the account, or the witness had a close relation to the asylum seeker.[292]

4.3.4 Experts: *How, and to what extent, if at all, do the courts base their assessments on experts?* (Category 2D)

No experts have been heard in the oral hearings in any of the cases in the study. Language analyses, medical age determinations or medical reports occur in 24% of the cases.[293] As shown in Table 1, these statements form the basis for the courts' reasoning in 10% of all cases (42% of the cases including expert statements).[294] Statements from

[287] See Appendix 2, Table 58 ("some value" taken together with "not questioned").

[288] Appendix 2, Tables 57 and 59.

[289] Appendix 2, Table 59.

[290] Ibid.

[291] Appendix 2, Table 60.

[292] Appendix 2, Table 61.

[293] Appendix 2, Table 62.

[294] Appendix 2, Table 63. The results do not take into account who has initiated or claimed statements from an expert. This is not always clear from the material in the study.

language analyses form the basis for the courts' assessment in 7% and medical age determination in 4% of the cases.[295] Medical reports as a basis for the assessment are found in one case.[296] The number of statements from experts used as a basis for the assessment are 34 out of 77 statements found.[297] The courts question the medical age determination in two cases and the language analysis in no cases.[298] One out of 30 medical reports is accepted by the court as a basis for the assessment on the risk upon return.[299] 63% of the medical reports are considered.[300] In four cases the court has referred to the medical reports when assessing the need for international protection but stated that they are not relevant to the assessment of risk, either because the medical report "does not indicate torture" or because the medical reports are "not sufficient to base a need for international protection".[301] In eight of the cases the considerations have been made only in relation to humanitarian grounds or have not been considered relevant to any international protection ground.[302]

The courts base the assessments of *the narrative* on statements from experts in 10% of the cases.[303] Altogether, 33 references are found (1% of all references) whereof the results from language analyses constitute the main part (61%), while references to the results from medical age determination and statements in medical reports stand for 21% and 18% respectively.[304]

---

[295] Appendix 2, Table 63.
[296] Ibid.
[297] Appendix 2, Tables 62 and 63, the asterisk.
[298] Appendix 2, Tables 64 and 65. In three of the cases including a language analysis, the court did not find it necessary to assess the content of the asylum seeker's narrative further, G 45, S 23, and G 74.
[299] Appendix 2, Table 67. More than half of the 30 medical reports (18) address mental health problems and approximately a third of the reports (8) include both mental and physical health issues related to alleged torture, while 4 of the reports support other alleged physical diseases, Appendix 2, Table 66.
[300] Appendix 2, Table 67.
[301] Ibid.
[302] Ibid.
[303] Appendix 2, Table 68.
[304] Appendix 2, Table 69.

4.4 The quality of the asylum seeker's narrative: *How, and to what extent, if at all, do the courts base their assessments on the quality of the asylum seeker's narrative?* (Category 3)[305]

As shown in Table 1 above, these kinds of arguments are found in 99% of the cases.[306] The total sum of arguments in this category amounts to 1 650[307] and more than one argument is found in 90% of the cases.[308]

In 70% of the cases the arguments in this category are used to support the assessment that the narrative is not credible, while arguments used to support the assessment that the narrative is credible are found in 6% of the cases.[309] Arguments to support that the narrative is partly credible and partly not credible are found in 22% of the cases.[310] Out of the total number of arguments 87% are used to support the assessment that the narrative is not credible.[311]

Tables 4 and 5 below show to what extent the courts use the different types of arguments in this category. While Table 4 shows in how many cases each argument is found, Table 5 shows the total number of arguments found. The most used arguments are the ones connected to the "coherence" of the asylum seeker's narrative (78% of all cases and 34% of all references) followed by "number of details" (69% of all cases and 29% of all references). Whether the asylum seeker's statements are regarded as "plausible" form the basis for the courts' credibility assessments in 59% of the cases and constitute 21% of the total number of quality arguments. Arguments related to how the asylum seeker presents her or his narrative are found in 31% of the cases and constitute 8% of the total number of credibility arguments, while the question of "the origin" of the asylum seeker's statements is found in 25% of the cases and constitutes 5% of the total number of arguments. The statement that the narrative or parts of the narrative

305 See Appendix 1, section 2.2.3 for an explanation of the category.
306 Appendix 2, Table 76. In the few cases where the quality of the asylum seeker's narrative is not discussed, the court simply states that the account is not questioned or that the alleged risk upon return is not sufficient as a basis for protection.
307 Appendix 2, Table 79.
308 Appendix 2, Table 77.
309 Appendix 2, Table 78.
310 Ibid.
311 Appendix 2, Table 79.

are "not questioned" is found in 10% of the cases and constitutes 3% of the number of credibility arguments.[312]

Below is an example of how the courts reason on credibility:[313]

> The court considers that A's narrative is not credible and that she, therefore, nor on these grounds, can be granted a residence permit as a person in need of protection. She has in fact provided *conflicting information* and the story has been *escalated* during the investigation. At times, it is also *vague* and *lacks details*. The court has, among other things, based the assessment on the following.
>
> A has previously, primarily, referred to the fact that her need for protection is because she is suspected of having provided assistance to terrorists and that she has, therefore, been deprived of her liberty on two occasions. During the oral hearing, she *added* that she herself is suspected of being a terrorist because of her own political activity. Apart from the fact that she must have been active from 2003 until she left X in 2004, *she has not described* in what way she has been active, what activities she has conducted or why the authorities would be interested in her […]. (S 7)[314]

Table 4. Types of quality arguments used as a basis for assessing the asylum seeker's narrative as (not) credible.[315]

Number and percentage of all cases (300).

Credible/ Not credible	How the account is presented	Number of details	Coherence	Origin of the statement	Plausibility	Not questioned
Not credible	61	185	179	74	158	0
Credible	27	6	43	1	14	30
Partly (not) credible	4	15	13	0	4	0
Total	92 **31%**	206 **69%**	235 **78%**	75 **25%**	176 **59%**	30 **10%**

312 Appendix 2, Table 78.
313 A closer analysis of how the courts assess credibility in four cases from the empirical material is presented in section 7.2.3.
314 The author's translation and the author's italics.
315 Appendix 2, Table 80.

Table 5. Types of credibility arguments used as a basis for assessing the asylum seeker's narrative as (not) credible.[316]

Number and percentage of all references in this category.

Credible/ Not credible	How the account is presented	Number of details	Coherence	Origin of the statement	Plausibility	Not questioned	**Total**
Not credible	86	453	489	82	318	0	1 428 **87%**
Credible	43	36	69	1	28	45	222 **13%**
Total	129 **8%**	489 **29%**	558 **34%**	83 **5%**	346 **21%**	45 **3%**	1 650 **100%**

4.5 The asylum seeker's behaviour, actions or activities: *How, and to what extent, if at all, do the courts base their assessments on the asylum seeker's behaviour, actions or activities?* (Category 4)[317]

This section is divided into two subcategories: *A) the asylum seeker's behaviour, actions or activities during the procedure*, and *B) the asylum seeker's behaviour, actions or activities before leaving the country of origin*.

As shown in Table 1, arguments coupled to the asylum seeker's behaviour, actions or activities constitute the second most common arguments found (74% of the cases and 501 references).[318] Table 6 below shows to what extent the courts use the different types of arguments coupled to the asylum seeker's behaviour, actions or activities *during the procedure*. Arguments connected to "redress" (i.e. the asylum seeker's ability to explain or rebut the decision-maker's or the court's assessments that the narrative is not credible) are the most commonly found arguments in this category (53% of all cases and 73% of all references in this subcategory). References to the asylum seeker's willingness or unwillingness to cooperate in the asylum procedure are found in 21% of the cases and constitute 21% of all references in this subcategory. The fact that the asylum seeker has or has not filed an application as soon as possible is used as an argument in 4% of the cases and constitutes 6% of all the references, while references to

---

316 Appendix 2, Table 81.

317 See Appendix 1, section 2.2.4 for an explanation of the category.

318 See above, Section 4.1, Table 1.

"body language" as a basis for assessing the credibility of the narrative are not found in any of the cases.

Table 6. The asylum seeker's behaviour or actions during the procedure – *types of arguments.*[319]
Number and percentage of all cases (300) / Number and percentage of all references in this subcategory (348).

Number of cases / Number of references — Arguments	Number and percentage of all cases (300)	Number and percentage of all references (348)
Redress	158 **53%**	253 **73%**
Cooperativeness	64 **21%**	74 **21%**
Has (not) filed an application as soon as possible	12 **4%**	21 **6%**
Body language	0 **0%**	0 **0%**

Table 7 below shows to what extent the courts use the different arguments coupled to the asylum seeker's *behaviour, actions or activities before leaving the country of origin*. The results show that arguments related to whether or not *the level of the asylum seeker's activities before leaving the country of origin* would constitute a risk upon return are the most frequently used kind of argument in this category. The second most frequently found argument is whether the asylum seeker has "*been or not been able to continue her or his activities" in the country of origin* (12% of the cases and 24% of all the references in this subcategory). Whether or not the asylum seeker "*has sought protection from the public authorities" in the country of origin* is an argument in 7% of the cases and constitutes 14% of all the references, while the question whether the asylum seeker *has or has not been able to leave her or his country of origin legally* is an argument in 4% of the cases and constitutes 8% of all references. Other arguments are found in 5% of the cases and constitute 10% of the references.

---

[319] Appendix 2, Tables 87– 88 taken together.

Table 7. The asylum seeker's behaviour or actions before leaving the country of origin – *types of arguments.*[320]

Number and percentage of all cases (300) / Number and percentage of all references in this subcategory (153).

Number of cases / Number of references — Arguments	Number and percentage of all cases (300)	Number and percentage of all references (153)
Has (not) sought protection from the public authorities	21 **7%**	21 **14%**
Has (not) been able to leave the country of origin legally	12 **4%**	12 **8%**
Has (not) been able to continue her or his activities	37 **12%**	37 **24%**
Level of activity	67 **22%**	67 **44%**
Other	16 **5%**	16 **10%**

4.6 Co-applicants: *How, and to what extent, if at all, do the courts include the co-applicants in their assessments?* (Category 5)[321]

As shown above in section 3.2, 18% of all the cases include one or more co-applicants. Explicit assessments on the risk upon return for co-applicants are found in 35% of these cases.[322]

One or more *adult* co-applicants are found in 9% of the cases.[323] In 36% of these cases the courts have assessed the risk upon return for the adult co-applicant/s separately or partly separately.[324] 16% of the cases include one or more *minor* co-applicants.[325] The risk upon return is assessed separately or partly separately in 15% of these cases.[326]

---

[320] Appendix 2, Tables 89–90.
[321] See Appendix 1, section 2.2.5 for an explanation of the category.
[322] Appendix 2, Table 91.
[323] Appendix 2, Table 92, the asterisk.
[324] Appendix 2, Table 92.
[325] Appendix 2, Table 93 the asterisk.
[326] Appendix 2, Table 93.

Statements from co-applicants form the basis for assessing the credibility of the narrative in 26% of the cases that include co-applicants and altogether 34 references to statements from adult co-applicants are used in the courts' assessment of the asylum seeker's narrative as credible or not credible.[327] No statements from the 92 minor co-applicants are assessed.[328]

4.7 Individual facts and circumstances: *How, and to what extent, if at all, do the courts base their assessments on individual facts and circumstances?* (Category 6) [329]

In 10% of the cases the courts consider one or more circumstances connected to the asylum seeker's individual facts and circumstances (other than being a minor) when assessing the risk of returning the asylum seeker to the country of origin.[330] Out of 101 claims found in the material, 31 are considered by the courts (31%).[331] The circumstance most frequently considered in this category is related to the fact that the asylum seeker is a *woman* (68% of references in this category).[332]

The courts formally refer to the principle "*the best interest of the child*" in 20% of the cases in which one or more minors are included, while the consequences for the child/children upon return are explicitly considered in 3% of these cases.[333] If including the cases where the consequences for the child/children are considered in relation only to humanitarian grounds, the share is 25%.[334]

Claims concerning individual facts and circumstances are identified in 27% of the cases as an explanation for difficulties for the asylum seeker to present a *credible narrative*.[335] Individual facts and circumstances

---

327 Appendix 2, Tables 94 and 95.

328 Appendix 2, Table 10 (the number of minor co-applicants) and Table 95.

329 See Appendix 1, section 2.2.6 for an explanation of the category.

330 Appendix 2, Table 96.

331 Ibid (the number of cases and the number of references are the same) and Table 97 (the number of identified claims).

332 Appendix 2, Table 97.

333 Appendix 2, Tables 98 and 99.

334 Appendix 2, Table 100.

335 Appendix 2, Table 102.

(such as age, gender, health, social, and cultural aspects) are considered in relation to the asylum seeker's ability to present a credible narrative in 9% of all the cases.[336] The most frequently claimed aspect relates to health problems which are identified in 14% of the cases and considered by the courts in 4% of the cases, while cultural aspects and illiteracy are identified in 6% and considered in 3% of the cases.[337] 16% of the cases include one or more minors and claims related to the fact that the complainant is a child are identified in 7% of the cases and considered in 2%.[338] In a majority of the cases (22 out of 27) where the courts have considered the asylum seeker's health, personal, social, or cultural circumstances, they are a basis for assessing the narrative as not credible.[339]

4.8 General risk considerations: *How, and to what extent, if at all, do the courts base their assessments on arguments connected to general risk considerations?* (Category 7)[340]

The presented results in this section include both to what extent these kinds of arguments are used and to what extent the arguments are substantiated by references to legal sources and/or sources of information concerning the situation in the country of origin.

As shown in Table 1, one or more arguments in this category are found in 61% of the cases. In 18% of all cases the general risk arguments are supported by references country of origin information and in 5% of the cases these arguments are supported by references to legal sources.[341] As shown below, in Table 8, the most frequently found argument in this category is whether or not there is an *on-going severe conflict* in the country of origin (22% of the cases). Arguments coupled to the *possibility or impossibility of getting protection from the public authorities* in the country of origin are found in 20% of the cases, while arguments coupled to the possibility of *internal flight* are found in 13% of the cases.

[336] Ibid.
[337] Ibid.
[338] Ibid and Appendix 2, Table 93, the asterisk.
[339] Appendix 2, Table 103.
[340] See Appendix 1, section 2.2.7 for an explanation of the category.
[341] Appendix 2, Table 105.

Other types of general risk arguments are found in 26% of the cases whereof the argument that "*the alleged event happened long ago*" constitutes the main share (17%).

Table 8. General risk arguments – with or without references to legal sources or country of origin information– subcategories. [342]

Number and percentage of all cases (300)/Number of references

Cases/References / ref. to legal sources/ ref. to COI Type of argument	Number and percentage of all cases (300) / Number of references*	Based on references to legal sources	Based on references to country reports
Subcategory A *Arguments linked to the security situation in the country of origin*			
Armed conflict	9 **3%**	0	3
No armed conflict	39 **13%**	1	19
Severe conflict	60 **20%**	3	24
No severe conflict	7 **2%**	0	4
The asylum seeker can get protection from the public authorities	34 **11%**	0	7
The asylum seeker cannot get protection from the public authorities	27 **9%**	0	14
Internal flight is possible	13 **4%**	7	2
Internal flight is not possible	27 **9%**	8	12
Subcategory B *Arguments connected to "sufficiency"*			
The claimed event happened long ago	50 **17%**	1	10
Other	26 **9%**	9	5

* The number of cases and number of references are the same as the courts only use each of these arguments once in the same ruling.

[342] Appendix 2, Table 106.

The total sum of arguments found in this category amounts to 292 whereof 33% are supported by references to specific country of origin information and 10% are supported by references to legal sources.[343]

4.9 Procedural deficiencies: *How, and to what extent, if at all, do the courts base their assessments on procedural deficiencies? (Category 8)*[344]

As shown in Table 1, altogether the courts accept claims regarding deficiencies in the procedure when assessing the asylum seeker's narrative in 4% of the cases.[345] The asylum seeker has claimed deficiencies connected to the proceedings at the Migration Agency as an explanation for the Agency's assessment of the asylum seeker's narrative as not credible in 36% of the cases.[346] In 22 % of the cases the court have considered one or more claims and in 4 % of the cases claims are accepted.[347] In sum, 121 claims related to the procedure are found whereof 10 % are accepted by the courts.[348]

4.10 Correlations between the results in the different categories and the outcome of the cases

Legal sources are found twice as often when an application for protection is granted (22%) compared to when the appeal is rejected (11%).[349] Also, references to *country of origin information* are more frequent in cases where protection is granted (48% and 16% respectively).[350] When looking separately at the courts' assessments of *the narrative*, the reference to country of origin information as a basis for assessing the credibility of the narrative is higher when protection is granted (22%) than when the appeal is rejected (6%).[351] *Written documents* attached with some value or not questioned by the court are more frequently found

343 Appendix 2, Table 107.
344 See Appendix 1, section 2.2.8 for an explanation of the category.
345 Appendix 2, Table 108.
346 Ibid.
347 Ibid.
348 Appendix 2, Table 109.
349 Appendix 2, Table 111.
350 Appendix 2, Table 112.
351 Appendix 2, Table 113.

in cases where protection is granted (52% and 37% respectively).[352] The courts refer to written documents, when assessing the *asylum seeker's narrative*, relatively more often when granting protection (46% and 24% respectively).[353]

Arguments related to *the quality of the asylum seeker's narrative* are found almost equally often in cases where protection is granted and where the appeal is rejected (96% and 97% respectively).[354] However, a higher number of quality arguments is found in the cases where the appeal is rejected.[355]

Arguments connected to the asylum seeker's behaviour, actions or activities *during the procedure* are more frequently used when the appeal is rejected (79%) than when protection is granted (50%), while there is a small difference in the other direction when looking at arguments connected to actions or activities *before leaving the country of origin* (41% and 39% respectively).[356]

The courts take *individual facts and circumstances* into account more often in the cases where the asylum seeker is granted protection (20% and 9% respectively).[357] A small difference in the opposite direction is shown when this category of arguments is used to substantiate the assessment of the narrative (7% and 9% respectively).[358]

General risk arguments are more frequently found when protection is granted (87% and 56% respectively).[359] This is regardless of whether these arguments are substantiated with references to legal sources or country of origin information.

The courts accept claims related to *procedural deficiencies* more frequently in the cases where protection is granted (15% and 2% respectively).[360]

---

352 Appendix 2, Table 114.
353 Appendix 2, Table 115.
354 Appendix 2, Table 119.
355 Appendix 2, Table 120.
356 Appendix 2, Tables 121–122.
357 Appendix 2, Table 125.
358 Appendix 2, Table 126.
359 Appendix 2, Table 127.
360 Appendix 2, Table 128.

4.11 Compilation of the main findings

In this section, research questions 1 and 2 are answered on the first level. The compilation of the results is divided into five categories which will form the basis for the analyses in the next part. The categories below more or less follow the design of the study as presented in Chapter 4. I have deviated from the categories above where this supports a more relevant analysis. The overarching finding in each category is presented first while other findings are identified as sub-findings. The sub-findings are meant to offer a more detailed and complex picture. The five categories are: I) *The selection and interpretation of legal sources*; II) *Consideration and evaluation of facts and circumstances*; III) *The consideration and assessment of the asylum seeker's behaviour, actions, and activities*; IV) *The assessment of the asylum seeker's narrative*; and V) *Correlation between the results in the different categories and the outcome of the cases*. The main findings in the five categories are presented below.

I) The selection and interpretation of legal sources

The findings in this category show if, how, and to what extent the courts refer to legal sources to substantiate their assessments. A detailed presentation of the results in this category is given above in section 4.2. The main finding shows that, with the exception of references to "applicable provisions",[361] *references to legal sources in the courts' reasoning are found in 31% of the cases and constitute 8% of all the references. A lower share is found when looking specifically at the arguments used to substantiate the assessment of the credibility of the asylum seeker's narrative (12% of the cases and 2% of all the references)* (section 4.1, Table 1). The sub-findings in this category show the following patterns:

- When the courts chose to substantiate their arguments with references to legal sources, this is more often done in relation to assessment principles than to the provisions regarding *non-refoulement*/expulsion or status determination (Appendix 2, Table 15).

[361] See Appendix 1, section 2.2.1 for an explanation of the term "applicable provisions".

- References to legal sources are more frequently found in relation to status determination than references to the principle of *non-refoulement* or expulsion (Appendix 2, Table 15).[362]
- The emphasis within the subcategory, *assessment principles*, is on an individual and forward-looking assessment (39%) and on the principles on burden and standard of proof (35%), while principles on evidentiary alleviation and the State's duty to investigate constitute the lowest share (6%) (Appendix 2, Tables 25–27). Assessment principles as regards specific issues stand for 20% whereof principles on how to assess credibility make up 11% of the references.

Overall, references to legal sources in the courts' reasoning are found in a minority of the cases and constitute a low share[363] of all the references found both in terms of the assessment of the risk upon return and of the credibility of the asylum seeker's narrative. When legal references are made, the emphasis is on assessment principles.

II) Consideration and evaluation of facts and circumstances

1) Individual facts and circumstances

The findings in this category show if, how, and to what extent the courts consider and evaluate individual facts and circumstances. A detailed presentation of the results in this category is given above in sections 4.6 and 4.7. The main finding shows that *references to the asylum seeker's individual facts and circumstances (age, gender, health, social situation or cultural background) in the courts' reasoning as factors impacting on either the risk upon return or the asylum seeker's ability to present a credible narrative are found in 10% and 9% respectively of the cases and constitute 1% of all the references in both groups* (section 4.1, Table 1).The sub-findings in this category show the following patterns:

- Out of the individual facts and circumstances claimed by the asylum seeker, 31% are considered by the court. The fact that

[362] The focus on status determination is strengthened by the fact that these provisions are the ones put forward by the courts in what is referred to as "applicable provisions" (see Appendix 1, section 2.2.1 for an explanation).

[363] The wordings "low" or "high" share of the references are descriptive and stand for 1–30% and 70–99% respectively of all the references found in the courts' reasoning.

the asylum seeker is a woman is the most frequently considered (68%) (Appendix 2, Table 97).

- The risk upon return for co-applicants is separately assessed in 35% of the cases that include more than one applicant. When children are co-applicants, separate assessments are found less frequently (15%) than as regards adult co-applicants (36%). No statements from minor co-applicants are considered in the courts' reasoning while assessments of statements from adult co-applicants are considered in 26% of the cases with co-applicants (Appendix 2, Tables 91–93).
- The consequences for the child/children are assessed in relation to the need for protection in 3% of the cases including minors. A higher share is found when the courts assess the consequences for the child/children in relation to humanitarian grounds ("particularly distressing circumstances") (25% of the cases including minors) (Appendix 2, Tables 99 and 100).

Overall, references in the courts' reasoning to individual facts and circumstances are found in a minority of the cases and constitute a low share of the references both as regards the risk upon return and the assessment of the credibility of the asylum seeker's narrative. Separate assessments of the risk upon return for co-applicants are found in a minority of the cases including co-applicants. Assessment of the consequences for children are found in a minority of the cases that include minors.

2) External sources of information

The findings in this category show if, how, and to what extent the courts consider and evaluate external sources of information to substantiate their assessments. A detailed presentation of the results in this category is given above in section 4.3. The main finding shows that *one or more external sources of information form a basis for the assessment of the risk upon return in 61% of the cases and constitute 11% of the references. A lower share is found when looking specifically at the arguments used to substantiate the assessment of the credibility of the asylum seeker's narrative (39% of the cases and 6% of the references)* (section 4.1). The sub-findings in this category show the following *patterns:*

A. Country of origin information

– The courts refer to country of origin information to support their assessment of the risk upon return in 21% of the cases and these references constitute 4% of all references (section 4.1, Table 1).
– The courts refer to country of origin information to support their assessment of the credibility of the asylum seeker's narrative in 8% of the cases and these references constitute 1% of all the references (section 4.1, Table 1).
– More than half of the references to country of origin information found originate from Swedish sources (53%) while 36% of the references originate from public authorities in other countries. Country of origin information from NGOs or the UN stand for 9% of the references. When only one reference to country of origin information is found, the "legal position papers" from the Migration Agency stand for 52% of the references (Appendix 2, Tables 47 and 48).

Overall, references in the courts' reasoning to country of origin information are found in a minority of the cases and constitute a low share of the total number of references. Among the references to country of origin information, the legal position papers from the Migration Agency have a prominent position.

B. Written documents

– The courts attach evidentiary value to 40% of the written documents (Appendix 2, Table 50).
– The courts consider written documents when assessing the risk upon return in 39% of the cases and references to written documents constitute 6% of all references found to support the assessment of the risk upon return (sections 4.1, Table 1).
– The courts consider written documents when assessing the credibility of the asylum seeker's narrative in 27% of the cases and these references constitute 3% of all references found in the courts' reasoning (section 4.1, Table 1).

Overall, references to written documents are found in a minority of the cases and constitute a low share of the total number of references both

as a basis for the assessment of the risk upon return and for the assessment of the credibility of the asylum seeker's narrative.

C. Statements from experts

- No expert witnesses have been present in the oral hearing in any of the cases.
- References to written statements from experts on age determination, language analysis or medical reports form the basis for the assessment of the risk upon return and of the credibility of the asylum seeker's narrative in 42% of the cases where such experts have been used (section 4.2.4 and Appendix 2, Tables 62–63).
- In all of the cases except for two where a language analysis or a medical age determination contradict the asylum seeker's statements, the court takes a stand in accordance with the experts. 63% of the medical reports are considered by the courts although they are deemed as having no relevance to the need of international protection in all but one case (Appendix 2, Tables 64–66). However, 18% of the medical reports form the basis for the assessment of the credibility of the asylum seeker's narrative (Appendix 2, Table 67).

Overall, the results show that the courts base their assessments of the risk upon return and of the credibility of the asylum seeker's narrative on age determination and language analyses in a majority of the cases when such experts have been used, while medical reports are considered and accepted as evidence to a lower extent.

III) The consideration and assessment of the asylum seeker's behaviour, actions or activities

The findings in this category show if, how, and to what extent the courts consider and assess the asylum seeker's behaviour, actions or activities. A detailed presentation of the results in this category is given above in section 4.5. The main finding shows that *the courts consider and evaluate the asylum seeker's behaviour, actions, and activities in 74% of the cases. References to these kinds of arguments constitute 16% of all references regarding the assessment of the risk upon return and 18% of the arguments supporting the*

assessment of the credibility of the asylum seeker's narrative (section 4.1, Table 1). The sub-findings in this category show the following patterns:

- The courts consider and evaluate the asylum seeker's behaviour, actions, and activities during the procedure to a larger extent (66% of the cases, and 11% and 13% respectively of the number of references) than the asylum seeker's behaviour, actions, and activities in the country of origin (39% of the cases, and 5% and 6% respectively of the number of references) (section 4.1, Table 1).
- 73% of the arguments in this category are connected to credibility indicators (i.e. whether the asylum seeker has been able to redress statements that are perceived as not credible) (Appendix 2, Table 88).

Overall, references in the courts' reasoning to the asylum seeker's behaviour, actions or activities are found in a majority of the cases but they constitute a low share of all the references. A high share of these references are connected to the assessment of the credibility of the asylum seeker's narrative.

IV) The assessment of the internal quality of the asylum seeker's narrative

The findings in this category show if, how, and to what extent the courts consider and evaluate the internal quality of the asylum seeker's narrative. A detailed presentation of the results in this category is given above in section 4.4. Two main findings show that *the assessment of the internal quality of the asylum seeker's narrative is found in 98% of the cases* and that *credibility indicators used to support the assessment of the internal quality of the asylum seeker's narrative constitute 53% of the references made by the courts in their reasoning to support the assessment of the risk upon return and 68% of the references made to assess the credibility of the asylum seeker's narrative* (section 4.1, Table 1). The sub-findings show the following pattern:

- The indicators for credibility found in the courts' reasoning are connected to *coherence*, *number of details*, *plausibility*, *how the narrative is presented*, and *the origin of the statements* (Appendix 2, Tables 80–81).
- The courts use the credibility indicators for stating that the narrative as a whole is either credible or not credible in 76% of

the cases while considerations for and against credibility are found in 22% of the cases (Appendix 2, Table 78).

Overall, references to indicators for credibility as a basis for the assessment of the quality of the asylum seeker's narrative are found in almost all the cases and make up a majority of the references found.

V) Correlations between the results in the different categories and the outcome of the cases

The findings in this category show whether there are any correlations between the outcome of the case and the types of arguments and sources of information used by the courts. A detailed presentation of the results in this category is given above in Chapter 3 and section 4.10. The main findings show that *the courts substantiate their reasoning with legal references as well as references to country of origin information and written documents more often when the asylum seeker is granted protection* (Appendix 2, Tables 111–115); and that *the jurist judges more often hold a dissenting opinion when the asylum seeker is granted protection* (Appendix 2, Table 4). The sub-findings show the following patterns:

- The courts make an initial, explicit account of the potential risk at stake based on the parties' standpoints more often in cases where protection is granted (Appendix 2, Table 7).
- References to legal sources, country of origin information, and written documents are more frequently found in cases where protection is granted (Appendix 2, Tables 111–115).
- The courts consider individual circumstances to a higher extent when assessing the risk upon return in cases where protection is granted (section 4.10, Appendix 2, Table 125).
- The number of references to credibility indicators is higher in cases where the appeal is rejected (section 4.10, Table 120).
- The number of references to the asylum seeker's behaviour, actions or activities during the procedure is higher when the appeal is rejected (section 4.10, Appendix 2, Table 121).

Overall, there is an indication that the courts are more inclined to substantiate their judgments with references to legal sources, country of origin information, written documents, and arguments on individual facts and circumstance when granting protection, while references to credibility indicators are more frequent when the appeal is rejected.

Also, there is an indication that the jurist judges have a more restrictive approach to granting protection than the lay judges.

The overall results show that the emphasis in the Swedish migration courts' argumentation lies on assessing the quality of the asylum seeker's narrative based on internal indicators for credibility. The fact that the credibility of the narrative is at the core of the courts' argumentation in nearly all the cases can be explained by the fact that the selection of the material only includes cases in which credibility has been judged to be a conflicting issue. However, this does not explain the results regarding if, how, and to what extent the courts choose to substantiate their assessment of the asylum seeker's narrative in relation to the assessment of the risk of sending her or him back to the country of origin. In the next part, the results are critically analysed in light of the legal framework.

Part III – Identifying the space for legal interpretation in asylum adjudication as presented by Swedish migration courts – critical reflections

This part includes step two of the research project where the answers to research questions 1 and 2, presented in Chapter 4, are analysed in the light of the asylum law framework. It is within the power and responsibility of the judge to identify and present the legal space for solving a legal question. The responsibility includes that of identifying and presenting the legal question as well as which facts should be considered and evaluated, and how. This identification and presentation of law include several choices in all stages of the adjudication where, inevitably, a degree of discretionary power for the judge is present throughout the legal procedure. The present part explores the possible space for interpretations and choices in the field of asylum law. Critical reflections are offered on how the Swedish migration courts present their choices and interpretations of this legal space. The main findings from the empirical study are analysed in the context of the asylum law framework, taking as a point of departure the categories of the findings presented in section 4.11. The part includes three chapters (5–7). In Chapter 5, the focus is on the legal requisites and assessment principles that the Swedish migration courts, in general, identify and present as points of law. Chapter 6 includes analyses and critical reflections on the identification, presentation, and consideration of facts and circumstances. Credibility assessment as a legal phenomenon in asylum adjudication is explored and critically reflected on in Chapter 7.

5 Critical legal reflections on the identification of points of law as presented by Swedish migration courts

The analysis in the present chapter is connected to the sub-question in section 4.2: *How, and to what extent, if at all, do the courts base their assessments on legal sources?* The chapter includes three sub-sections. In section 5.1 the relation between *status determination* and the principle of *non-refoulement* is explored, while section 5.2 provides an exploration of assessment principles. Finally, section 5.3 offers critical reflections.

5.1 The adjudication of the prohibition of refoulement in relation to status determination

The results from the empirical study of the Swedish court judgments in asylum cases show a pattern where the legal emphasis is on *status determination* rather than on *non-refoulement*.[364] In this section, these findings are analysed in light of the possibility and implications of making a distinction between the assessment of *non-refoulement* and the assessment of status determination. In section 5.1.1 the relations between the principle of *non-refoulement* and *status determination* in international law are traced, followed by an analysis of how the EU has implemented these notions in asylum law. Section 5.1.2 examines how these notions have been implemented, systemised, and applied in Swedish asylum law. In section 5.1.3 critical reflections are made.

5.1.1 The relation between *non-refoulement* and status determination in international and EU law

The asylum regime as expressed in law comprises mainly three elements: the principle of *non-refoulement*; the *status determination*; and the right to seek *asylum*.[365] While *non-refoulement* and *status determination* have their roots in the Refugee Convention where access to protection is based on two parameters – the definition of "refugee" and the principle

[364] See section 4.2.

[365] Goodwin-Gill and McAdam 2011, p. 357.

of *non-refoulement*[366] – the right to seek and enjoy asylum emanates from Article 14(1) of the Universal Declaration of Human Rights (UDHR). The assessment of risk in asylum adjudication is coupled to the legal consequences set out in the provisions as regards *non-refoulement* and *status determination*. The scope of status determination has extended through the inclusion of human rights law in EU law and includes not only determination of who is a refugee but also who has the right to complementary status determination, codified as subsidiary protection.[367]

The international community has as its core principle a non-returning policy expressed in the principle of *non-refoulement*, but it has retained the non-entrance policy expressed in, for instance, visa regimes and border controls.[368] However, this was not always the solution. In the first international document addressing refugees, dating back to 1919, rather than a prohibition on returning refugees, the so-called Nansen passport assisted in the movement of refugees.[369] The Nansen passport has been cited as the "beginning of international refugee law" but this idea was not agreed on among the States that signed the first Refugee Convention, and thus, it did not become a part of the Refugee Convention that applies today. A formal refugee definition was adopted in 1924 and was based on the refugee being outside the country of origin.[370] Hence, the principle of *non-refoulement* has become the outermost protection of refugees and asylum seekers and is an essential corollary to the right to seek asylum as enshrined in Article 14.1 of the UDHR.[371] The principle originates from Article 33.1 of the Refugee Convention. The Article states that:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

---

366 Chetail 2012.

367 Article 2(f) of the Qualification Directive.

368 Hathaway 2011, p. 229 ff.

369 Labman 2009.

370 The protection intended was the diplomatic protection incidental to citizenship as a consequence of various denationalisation measures adopted by the Soviet republic in the period 1921–24, rather than human rights protection such as is understood today as relevant to the requisite, well-founded fear (Goodwin-Gill 2007).

371 Zimmerman et al. 2011.

The wording, *non-refoulement*, was agreed upon after a discussion concerning the English translation of the French word "refouler" which implies a certain degree of force, i.e. it is the State that "returns" or "turns back" the asylum seeker.[372]

The importance of the principle is further supported by Article 42 in the Convention, which prohibits States any reservation to Article 33 and Article 31(1) which, under certain conditions, prohibits the imposition of penalties on account of the illegal entry of refugees. Hence, the principle of *non-refoulement* is the ultimate restriction on the State's sovereignty when it comes to deciding over a non-citizen's presence on the State's territory and represents a qualified limitation upon the absolute right of the Member State to admit a right to reside to those of the State's own choice.[373]

The principle as stated in the Refugee Convention is connected to the refugee definition as set out in Article 1A (2) in the Convention[374] stating that a refugee is someone who:

> … owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The close relationship between Article 1A and Article 33.1 is paramount for the determination of the individual scope of the principle of *non-refoulement* as every person encompassed by the refugee definition according to Article 1A is automatically protected by Article 33.1 provided none of the exclusion clauses of Article 1F applies.[375] The different wordings in the two articles are not explained in the *travaux préparatoirs*. However, the threat to "life and freedom" expressed

---

372 The drafting history reveals a discussion about whether the translation of the world "refouler" to English should be "turn back" or "return". The wording "turn back" was chosen in the first draft by an Ad Hoc Committee. However, to avoid the discussion about whether "return" could be seen as more restrictive, the French term was included even in the English version of the Refugee Convention (Gammeltoft-Hansen 2009, pp. 80 and 89).

373 Chetail 2012.

374 This Article should be read in conjunction with Article 1(2) in the Protocol Related to the Refugee Convention, as Article 1A(2) is limited to events before 1 January 1951.

375 Zimmerman et al. 2011, p. 1342.

in Article 33 should be interpreted as encompassing the requisite "a well-founded fear of being persecuted", stated in Article 1A (2).[376] Also, the same standard of proof should apply in both cases which reflects the "sufficiency of serious risk", rather than a more onerous standard of proof, such as "the clear probability of persecution".[377]

Since the Refugee Convention entered into force, the scope of the principle of *non-refoulement* has expanded and the requirement of being persecuted on account of the grounds recounted in Article 33(1) is not the only basis for activating the principle. The prohibition of *refoulement* has become a core element of protection also in the context of human rights law.[378] The scope of the principle has developed as a result of different regional and international human rights conventions and now also encompasses the prohibition of returning a person to a country where there are substantial grounds to believe that she or he would face a real risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment regardless of whether the person fulfils one of the grounds for persecution listed in Article 1A of the Refugee Convention.[379]

The prohibition on *refoulement* in the refugee context is not unconditional. It includes an exception clause to exclude from the protection anyone "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime,

---

[376] Lauterpacht and Behtlehem 2001, paras. 123–125. They base their conclusion on the commentaries to the Refugee Convention made by Paul Weis and Atle Grahl-Madsen.

[377] Goodwin-Gill and McAdam 2011, p. 234.

[378] Chetail 2012.

[379] The principle of *non-refoulement* is set out in Article 7 ICCPR, Article 3 CAT and Article 19 of the EU Charter. The prohibition against torture is set out in Article 5 of the Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) (hereafter the UDHR), Article 7 ICCPR, Article 37 CRC, Article 3 ECHR, Article 4 of the EU Charter, Article 5 of the African (Banjul) Charter on Human and Peoples' Rights (1986), Article 5.2 of the American Convention on Human Rights, "Pact of San José, Costa Rica" (1969), Common Article 3 of the Geneva Conventions, 1949. The definition of torture is set out in Article 1 CAT. For a definition of *non-refoulement* that includes the content of human rights conventions, see Lauterpacht and Bethlehem in Feller et al. 2003, pp. 125 and 163 f., UNHCR, Executive Committee Conclusion No. 82 on Safeguarding Asylum, 48th session. Contained in United Nations General Assembly Document No. 12A (A/52/12/Add.1) (1997), para. (d)(i), and Wouters 2009, p. 25.

constitutes a danger to the community of that country".[380] Unlike the possibility of exception from the principle set out in Article 33.2 of the Refugee Convention, the prohibition against subjecting any person to torture or other cruel, inhuman or degrading treatment or punishment is absolute and no derogation from this obligation shall be made.[381]

Through its case law on Article 3 ECHR, the ECtHR has been clear about the absolute nature of the principle of *non-refoulement*. The Court has established an absolute prohibition against States expelling, returning or extraditing any person to another State where there are substantial grounds for believing that she or he would be in danger of being subjected to torture or other inhuman or degrading treatment or punishment.[382] This applies regardless of whether a national security issue exists.[383] The prohibition also includes returning a person to a State where she or he would be at risk of being forwarded to such state.[384] Even other rights may contribute to a breach of *non-refoulement* if they reach a level where they amount to ill-treatment as set out in Article 3.[385]

---

[380] Article 33.2 of the Refugee Convention.

[381] No-derogation clauses are set out in Article 4.2 ICCPR, Article 15.2 ECHR. See also Article 19 in conjunction with Article 52.3 of the EU Charter. Dembour has questioned the use of the term "absolute", since applying a right will always be subject to cultural relativism. For instance, an act assessed as torture at a certain time in a certain context may be seen as an appropriate punishment or treatment at another time and in another context (Dembour 2006, pp. 85 ff., 163 ff., and 170 ff.).

[382] See, among others, *Case Soering v. the United Kingdom*, *Case Chahal v United Kingdom*, and *Case Saadi v. Italy*.

[383] See, for example, *Case Chacal v. United Kingdom*, paras. 80 and 151. The Court motivates its stand as follows: given the "irreversible nature of the harm that might occur if the risk of ill-treatment materialised … [t]his scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State" (para. 151).

[384] Ibid.

[385] See *Case Bader and Kanbor v. Sweden*. See also *Othman Abu Qatada v. The United Kingdom* where the Court found a breach of Article 6 as the expulsion of the applicant would constitute a flagrant denial of justice since evidence obtained by torture was admitted in the criminal proceeding (paras. 282–285). See also McAdam 2007, Chapter 4, sections C–D, for a discussion of the relation between the unqualified rights set out in Articles 2, 4(1), 7, 14, and 4 of Protocol, 7 ECHR and the qualified rights set out in Articles 8–11, ECHR and socio-economic issues and their relation to Article 3, ECHR. See also the discussion in Noll 2000, Chapter 11 who argues that nothing in the wording or in the structure of the ECHR suggests that its Article 3 has a monopoly on inherent *non-refoulement* obligations. According to him, in principle, all ECHR rights are capable of possessing *non-refoulement* capabilities (Noll 2000, pp. 453–474). See also den Heijer 2008.

The ECtHR has addressed the applicability of the principle of *non-refoulement* in relation to humanitarian law, i.e. in situations of indiscriminate violence due to armed conflict. In a number of cases, the Court has stated that a breach of Article 3 may occur due to indiscriminate violence if "the violence in a country of destination may be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention".[386] However, the Court sets a high threshold for establishing a breach of Article 3 in cases of indiscriminate violence by stating that: "…the Court would adopt such an approach only in the most extreme cases of general violence, where there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return".[387]

In the beginning, the ECtHR did not address the rights for persons, non-removable under Article 3 ECHR.[388] However, the Court has gradually taken into account rights beyond *non-refoulement* for these persons and has ruled that a mere tolerance of the person on the territory may infringe Article 3 as well as other rights. For instance, a mere tolerance may lead to the asylum seeker being denied the right to private life, Article 8 ECHR, or being denied a residence permit even though they have stayed in the country for a long time, thereby barring them from having access to work and social support.[389] Hence, as McAdam writes: "At a bare minimum, States must ensure that their treatment of non-removable persons does not itself amount to inhuman or degrading treatment".[390] This means that even socio-economic rights to a certain level must be afforded to non-removable persons whether they fall under the Refugee Convention or *non-refoulement* as expressed in the human rights treaties.

As a result of connecting the absolute prohibition on torture or other cruel, inhuman or degrading treatment or punishment to the principle of *non-refoulement*, the principle has become customary law,

[386] *Case S.A v. Sweden*, para. 45. See also *Case Sufi and Elmi v. United Kingdom*, para. 241.
[387] Ibid.
[388] See on ECtHR case law on this issue, McAdam 2007, p. 205.
[389] Ibid, p. 206.
[390] McAdam 2007, p. 236. See also Gil-Bazo 2006. See also Lambert 2013 who argues that the scope of Article 3 has widened through ECtHR's ruling in *Case M.M.S v. Belgium and Greece*. In this case the lack of the most basic human needs was said to amount to a breach in cases where the applicant is in a highly vulnerable situation, para. 263.

binding on all states.[391] In its Note on International Protection §16, the UNHCR has expressed the status and the scope of the principle as follows:

> The obligation of States not to expel, return or *refoule* refugees to territories where their life or freedom would be threatened is a cardinal protection principle enshrined in the Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights. *It has come to be considered a rule of customary international law binding on all States*. In addition, international human rights law has established *non-refoulement* as a fundamental component of *the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment*.[392]

The protection afforded by the Refugee Convention can be said to be both broader and narrower than the protection afforded by human rights law. It is broader in the sense that the concept of "a threat to life and freedom" on the grounds recounted in Article 33(1) encompasses a broader human rights approach – i.e. it includes breaches of several different fundamental human rights that may alone or taken together amount to persecution.[393] Yet, it is also narrower in the sense that the persecution must be connected to affiliation to a group recounted in the Article.

In the EU asylum regime, the obligations for the Member States under the Refugee Convention as well as under other human right treaties have, on the one hand, led to a welcome extension to include

---

[391] *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relation to the Status of Refugees, UN Doc HCR/MMSP/2001/09 (2002)*, para. 4 and *Sanremo Declaration on the Principle of Non-Refoulement*, 2001.

[392] (The author's italics.) See also UNHCR: *Agenda for Protection Addendum A/AC.96/965/Add.1 26 June 2002*, para. 4, ECtHR in *Case Hirsi Jamaa and others v. Italy*, p. 23, p. 34, and p. 135. With a few exceptions, authors in the field have supported the position of the principle of *non-refoulement* as customary law in the light of refugee law as well as human rights law (Zimmerman et al. 2011, p. 1345, Lauterpacht and Bethlehem 2003, p. 125 and p. 163 f. An opposite position is taken by Hathaway 2010 and 2011, p. 365 ff. who argues that "there is no customary international legal obligation" for states, not bound by relevant human rights conventions, to honour the duty of non-refoulement in relations to persons facing serious harm or granting them refugee-specific rights. See Goodwin-Gill and McAdam 2011, p. 351 ff. for counterarguments to Hathaway's view. See also Farmer 2008 and Allain 2001 who go further and advocate in favour of the view that *non-refoulement* has qualified as *jus cogens* as human rights conventions and the Refugee Convention are interrelated.

[393] See the interpretation of "persecution" in the UNHCR Handbook, for instance, para. 51 (generally), para. 54 (discrimination and restrictions), para. 57 (excessive punishment and application of law), and para. 71 (freedom of thought, conscience, and religion).

protection on human rights grounds that are not covered by the Refugee Convention. However, on the other hand, this extension has led to the development of a confusing and fragmented legal asylum system that does not always live up to the standards set out in the international and regional conventions.[394] The way of placing the refugee definition and the prohibition of *refoulement* in different sections, as is done in the Refugee Convention, taken together with the expansion of the scope of protection provided for through the human right treaties, has led to an ambiguous legislation in the EU. The Qualification Directive is the most important secondary act concerning the definition and content of the protection afforded in the EU asylum acquis.[395] The basis for the EU asylum law is found in Article 78 of the Treaty on the Functioning of the European Union (TFEU) and links the EU's "common asylum policy" to the Geneva Convention as well as to "other relevant treaties" without specifying which ones.[396] The preamble in the Qualification Directive does not refer to any specific international human rights treaties but pays special attention to the *Charter of Fundamental Rights of the European Union (2000/C 364/01).* (Hereafter the EU Charter.)[397]

---

[394] See for critical opinions: McAdam 2005 and 2007, chapter 2, Gill-Bazo 2006, Peers et al. 2015, chapter 4.

[395] *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).* (Hereafter, the Qualification Directive). Member States had to comply with the amended Directive by 21 December 2013, Article 40, Qualification Directive (recast). (The first version was adopted in April 2004 and was replaced by a recast adopted in December 2011.)

[396] Article 78.1 TFEU states that: "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties".

[397] Recital 16 of the Qualification Directive connects the asylum adjudication to human rights by emphasising a number of articles in the Charter. The *European Council on Refugees and Exiles* (hereafter ECRE) suggests a non-exhaustive list of relevant treaties that should be considered including: "… *the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities (CRPD), the Convention against Torture and*

The right to asylum and the content corresponding to the principle of *non-refoulement* has been implemented in Articles 18 and 19 of the EU Charter. No independent definition of the right of asylum is codified. However, Article 18 stipulates that the right to asylum shall be guaranteed with due respect to the Refugee Convention and to the Treaty on European Union (TEU) and TFEU. An individual right to obtain asylum (and not only to seek and enjoy asylum, as stipulated in Article 14 UDHR) has been established as the Charter addresses individuals.[398] Connecting the right to asylum to the Geneva Convention opens up for making the same exception from *non-refoulement* as in the Refugee Convention. Article 19.2 of the Charter, on the other hand, is based on relevant case law from the ECtHR on Article 3 of the ECHR and does not allow for such exceptions.[399] The separation between the concept of asylum in Article 18 and the prohibition of refoulement in Article 19.2 gives the impression that these are two separate things. However, authors in the field advocate for an integrated interpretation of "asylum".[400] According to Gil-Bazo, "asylum in the Charter is to be construed as the protection to which all individuals with an international protection need are entitled, provided that their protection grounds are established by international law, irrespective of whether they are found in the Refugee Convention or in any other international human rights instrument".[401] This would be in line with what can be derived from international obligations. Furthermore, *non-refoulement* as expressed in human rights law is likely to encompass persons eligible for refugee status.[402]

---

the Convention on the Rights of the Child (CRC) and *the European Convention on Human Rights (ECHR)*". (ECRE: *Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, p. 2.)

398 Gil-Bazo 2008, den Heijer in Peers et al. 2014, pp. 522 and 531, and Peers 2015, p. 60.

399 *Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) on Article 19 paragraph 2*. Article 19.2 states that: "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".

400 Gil-Bazo 2008 and 2006. See also den Heijer in Peers et al. 2014, p. 533.

401 Gil-Bazo 2008.

402 See Farmer 2008, Allain 2001. See also Guild in Peers et al. 2014, p. 547.

Instead of developing the content of protection from "serious harm", as expressed in the Refugee Convention and the human rights treaties, the EU has in its legislation chosen to distinguish between, on the one hand, *refugee status* and, on the other, complementary or, as expressed in the EU context, *subsidiary status*.[403] Also, in the Qualifications Directive, the prohibition of *refoulement* is separated from the two status definitions. While the definitions of the two different kinds of protection grounds and the different statuses linked to these definitions are placed in the initial articles in Chapter 1, the prohibition of *refoulement* is placed further down under section VII, "Content of international protection", and labelled "Protection from refoulement". In Article 21 the protection from refoulement is connected to the different statuses in different ways: while refugee status includes exceptions in relation to *non-refoulement*, subsidiary status does not. However, the "absolute" prohibition of refoulement is not explicitly stated in the article and paragraph (1) simply states that the Member States shall respect the principle of *non-refoulement* in accordance with their international obligations.[404] Article 21(2) includes exception

---

[403] Article 2(d) of the Directive includes the definition of refugee corresponding to the definition in Article 1(a) of the Refugee Convention (except for the limitation to third-country nationals):
"… 'refugee' means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;…".
Subsidiary protection is defined in Article 2(f) as follows:
"… 'person eligible for subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;…".
[404] Peers et al. 2015, p. 74. According to McAdam 2005, it is notable than none of the cross-referenced definitions concerning international protection refer to the principle of *non-refoulement*: "The Directive uses internal cross-references as much as possible rather than referring to international law on which provisions are based".

clauses similar to those in Article 33(2) of the Refugee Convention.[405] However, the exception clauses concerning national security set out in Article 33(2) of the Refugee Convention have instead been implemented as an exclusion from the benefit of subsidiary protection (Article 17(d)) and as a possibility for the Member State to revoke, end or refuse to renew a refugee status (Article 14(4)). This mixing of exclusions connected to receiving a status and exceptions from being refouled further contributes to the lack of coherence regarding the content of the principle of *non-refoulement* and opens the way for a blurring of Member States' international obligations.[406]

According to Gil-Bazo, the Council "seems to have ignored the evolution of international law regarding this norm over the past 50 years by introducing a clause similar to Article 33(2) of the Geneva Convention in a legally binding instrument of EC law".[407] Gil-Bazo further argues that the exceptions in Article 21(2) are in themselves contrary to those fundamental rights that EU law has committed itself to and therefore in breach of Community law.[408] Reading Article 21(2) of the Qualification Directive in the light of the absolute prohibition set out in Article 3 CAT, Article 7 ICCPR, Article 3 EHCR, and the case law of the ECtHR and also Article 19 of the EU Charter would "lead to an interpretation ad absurdum".[409] She means that even if it

---

405 Article 21(2) of the Qualification Directive states that: "Member States *may refoule* a refugee, whether formally recognised or not, where not prohibited by the international obligations mentioned in paragraph 1 when:
(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or
(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State".

406 UNHCR has stressed the importance of separating the exclusion clauses in Article 1F of the Refugee Convention with the exceptions from *non-refoulement* set out in Article 33(2) as: "… the exclusion clauses are not to be confused with Articles 32 and 33(2) of the Convention which deal respectively with the expulsion of, and the withdrawal of protection from refoulement from, recognised refugees who pose a danger to the host State (for example, because of serious crimes they have committed there). Article 33(2) concerns the future risk that a recognised refugee may pose to the host State" (*Guidelines on Protection: Clauses: Article1F of the 1951 Convention relating to the Status of Refugees (HCR/GIP/03/05,4Sept.2003)*, p. 4). See also McAdam 2007, p. 86 and Lambert 2006, who discusses the problematic relation between the lower standards compared to the Refugee Convention set out in the Qualification Directive.

407 Gil-Bazo 2006.

408 Ibid.

409 Ibid.

may not be at odds with the literal wording of the Refugee Convention, it does not reflect the broader international law obligations of Member States as "refoulement is in all cases contrary to international human rights law, given that this legal term refers precisely to the removal of individuals to prohibited areas".[410]

States shall grant refugee status to a third country national or stateless person who qualifies as a refugee or subsidiary protection status to a person eligible for subsidiary protection[411] if the exclusion clauses in Articles 12 and 17 are not applicable. Unlike international human rights treaties and the Refugee Convention, Article 24 of the Qualification Directive includes an obligation for the Member States to issue a residence permit.[412] However, the residence permit shall be issued on the condition that the person has received status as either refugee or subsidiary protection, while the Directive is silent as to persons excluded from receiving any status but non-removable under Article 21 of the Directive. As these persons cannot be deported, they have a right to stay in the country. What kind of permit to reside and the content of the permit is left to the Member States to decide. However, the Member States are still responsible for making sure that the living conditions for all persons within their jurisdiction do not constitute inhuman or degrading treatment under Article 3, ECHR.[413] Further, exception clauses are stated in Article 24 of the Qualification Directive and concern security issues, i.e. even if not excluded from being granted the status as either refugee or subsidiary protection, a residence permit may be denied on grounds of security issues. However, in practice it is difficult to see when this situation would occur as security issues may already exclude an asylum seeker from receiving a status. This in turn does not mean that the person may not

---

[410] Ibid. See also Farmer 2008 and Allain 2001.
[411] Article 13 and Article 18 of the Qualification Directive.
[412] Article 24 of the Qualification Directive.
[413] See ECtHR: *Case M.M.S v. Belgium and Greece* where the court concluded that the living conditions in Greece for asylum seekers amounted to inhumane and degrading treatment (para. 263). See also CJEU: the joined cases (C-411/10 and C-493/10) *N.S v. the United Kingdom* and *M. E. and Others v. Ireland.* See also Lambert 2013. Compare McAdam 2007, p. 6 who claims that persons protected by the extended principle of *non-refoulement* ought to receive a legal status equivalent to that accorded by the Refugee Convention.

receive a permit to stay in the host country in cases where she or he is non-removable due to the "non-derogable" parts of *non-refoulement*.

A number of rights follow from being granted one of the statuses. However, according to the Qualification Directive, the content of the protection differs whether the person is granted status as a refugee or subsidiary protection status. Even though the differences have diminished through the recasting of the Directive, and as the purpose of the Commission has been to eliminate the differences as to the content of the protection, the Member States have shown an unwillingness to equate the protection afforded under refugee status with the one under subsidiary status. Hence, some important differences remain. For instance, the length of a valid residence permit may be shorter for those eligible for subsidiary protection.[414] Also, in the Family Reunification Directive, the beneficiaries of subsidiary protection are excluded, hence, leaving persons with subsidiary protection without the explicit right to reunite with their families.[415] This is based on the false notion that beneficiaries of subsidiary protection need a shorter period of protection than refugees.[416] The differences as to the content of the protection being connected to the different grounds have been criticised. A general rule in human rights law is that the rights apply equally to citizens and aliens.[417] The protection needs of beneficiaries of subsidiary protection are equally compelling and generally as long in duration as those of refugees.[418] Furthermore, there is no legal justification for making distinctions between the two statuses based purely on the different sources of the obligation of *non-refoulement* as is done in the Qualification Directive. This, rather, seems to reflect a political motivation.[419]

The distinction between refugee and subsidiary protection has had the consequence that the minimum standard of rights set out in the

---

414 Article 24 of the Qualification Directive.

415 Article 3(2c) of the *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification*.

416 Peers 2012.

417 McAdam 2007, p. 220 f.

418 McAdam 2007, p. 96 and European Council of Refugees and Exiles (ECRE): *Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast*), p. 13.

419 McAdam 2007, p. 221f.

Qualification Directive may, on the one hand, exclude asylum seekers in need of *subsidiary* protection from the rights provided for in the Refugee Convention.[420] On the other hand, Article 21 provides subsidiary status with a stronger protection against *refoulement*.

Subsidiary status should be complementary to refugee status. It follows from Article 2(f) of the Directive where the subsidiary element is expressed as relating to a "person who does not qualify as a refugee". This requires that the refugee test must always precede the subsidiary protection test which is, further, clearly expressed in Article 10(2) of the Asylum Procedures Directive.[421] The CJEU has reinforced this in the cases *El Kott* and *H.N.*[422] Hence, subsidiary protection should never be considered before the competent authority has reached the conclusion that the applicant does not qualify for refugee status.[423]

However, reports from the UNHCR have shown that some Member States tend to use subsidiary protection not as complementary to the Refugee status, but as an independent status that leaves the asylum seeker with a lower level of rights.[424] This practice specifically affects women, children, young men who run the risk of being forcibly recruited into armed groups, and persons who are at risk because they

---

420 See Chapter VII of the Qualification Directive on distinctions between refugees and persons eligible for subsidiary protection as regards the content of the protection.

421 This has further been emphasised by the UNHCR specifically in relation to situations of generalised violence, i.e. a person may qualify for refugee status regardless of whether the context of the persecution is one of generalised violence (*Asylum in the European Union. A study of the implementation of the Qualification Directive November 2007*, p. 82).

422 (C-364/11) *Mostafa Abed El Karem El Kott and Others v. Hungary*, paras. 66–67. (C-604/12) and *H.N. v. Ireland,* para. 32.

423 *(C-604/12) H.N. v. Minister for Justice, Equality and Law Reform and Others* (Ireland), para. 35.

424 See UNHCR's reports: *Asylum in the European Union. A study of the implementation of the Qualification Directive November 2007*, p. 82 and *Safe at Last 2011*, p. 16 ff. about some Member States' restrictive interpretation of recognition of refugee status in cases of armed conflicts based on: "A narrow interpretation of the five 1951 Convention grounds for persecution; An expansive interpretation of 'actors of protection'; A high standard of proof placed on the applicant to demonstrate a nexus between the threat of persecution and the 1951 Convention reasons, and other onerous evidentiary requirements; Flawed credibility assessments" (p. 19). UNHCR has in 2015 reiterated the fact that many persons fleeing indiscriminate violence qualify for refugee status (*International Protection Considerations with regard to People Fleeing the Syrian Arab Republic, Update IV, United Nations High Commissioner for Refugees (UNHCR) November 2015 HCR/PC/SYR/01*, para. 36).

exercise a particular occupation.[425] The tendency to use subsidiary protection as the main ground has been prominent in Swedish asylum adjudication where the rate of granted refugee statuses has been low, which has been the target of criticism from the UNHCR.[426] The fact that the results from the empirical study show that the refugee requisites are rarely explicitly discussed or considered implies that such criticism has not impacted the Swedish migration courts.[427]

In addition to the requisites that qualify for either refugee status or subsidiary protection, the Qualification Directive includes provisions on the scope and interpretation of some of the key elements in Articles 2(f) and (d). These definitions are not found in the Refugee Convention or in other international human rights treaties from where the definition of subsidiary protection status and refugee status emanates. Hence, the Directive provides a guidance comprising independent definitions on how to interpret these general key elements which are not defined in international treaties. Instead of referring to the Refugee Convention or other human rights conventions and clarifying or complementing international law concepts, the attempt to harmonise EU asylum law has led to the use of cross-references to its own definitions. In this process, international refugee law is replaced with regional definitions at the risk of breaching international obligations.[428] However, recital 3, stating that the Common European Asylum System should be based on "the full and inclusive application" of the Refugee

---

425 UNHCR: *Asylum in the European Union. A study of the implementation of the Qualification Directive November 2007* (p. 19).

426 UNHCR: *Asylum in the European Union. A study of the implementation of the Qualification Directive November 2007*, p. 82 and UNHCR: *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the draft law proposal on restrictions of the possibility to obtain a residence permit in Sweden ("Begränsningar av möjligheten att få uppehållstillstånd i Sverige – utkast till lagrådsremiss") 2016*, para. 28. And UNHCR, *International Protection Considerations with regard to People Fleeing the Syrian Arab Republic, Update IV*, November 2015, p. 33. See also an earlier report from UNHCR and the Swedish Migration Agency 2011: *Kvalitet i svensk asylprövning*, Chapters 3–4. See also Noll and Popovic 2005 and Stern 2012 (*Hur bedöms ett skyddsbehov?*). See also Bonnevier 2017 (graduate essay), who carried out an empirical study comprising a random sample of the Swedish migration courts' judgments concerning status determination of asylum seekers from Syria. The study shows that the courts often fail to recognise refugee status for these asylum seekers.

427 See section 4.2.

428 Storey 2008 and McAdam 2005, p. 107 ff.

Convention implicates that the standard cannot be lower than the standard set out in the Convention.[429]

Common definitions for both refugee status and subsidiary status, not found in international law, are set out in Articles 6–8. Article 6 defines *the actors of persecution* or serious harm while Article 7 defines the *actors of protection*. Article 8 introduces a non-mandatory provision in an area not explicit in international law: to exclude the asylum seeker from being granted international protection owing to the possibility of *internal protection*, i.e. protection provided in another area of the country of origin. The UNHCR has expressed it in a more cautious and conditional manner, stating that "a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so".[430]

Actions constituting grounds for refugee status and subsidiary status, respectively, are set out in separate articles and worded differently. Neither the notion of "acts of persecution" connected to refugee status in Article 9 of the Qualification Directive nor the notion of "serious harm" connected to subsidiary status in Article 15 of the Directive are defined in international law. The definitions of what constitutes an "act of persecution" and "serious harm" differ. The definition in Article 9 includes the phrase "severe violation of basic human rights" followed by a non-exhaustive list of such acts. Article 15 refer to acts of "serious harm" followed by a shorter list of specific acts including the prohibition of the death penalty, torture or inhuman or degrading treatment or punishment or indiscriminate violence. However, even though Article 15 does not define the content of these acts, they must be seen as included in "severe violation of basic human rights". This is also the definition under Article 2, protocols 6 and 13, and Article 3 in the case law from ECtHR.[431] In its observation to the European

[429] Ibid.
[430] The UNHCR Handbook, para. 91.
[431] Neither the concept of "torture" nor that of "inhumane or degrading treatment or punishment" are defined in the ECHR. A definition of torture is set out in Article 1, CAT stating that:
"…the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third

Commission's Proposal for the Qualification Directive, the UNHCR concluded that "in most cases the types of threats that are enumerated in Article 15 may indeed indicate a strong presumption for Convention Refugee status, except perhaps for those fleeing the indiscriminate effects of violence and the accompanying disorder in a conflict situation, with no element of persecution or link to a specific Convention ground".[432]

Article 15(c), addressing *indiscriminate violence* in situations of international or internal conflicts, states that the threat must be both serious and individual. The latter seems to contradict the meaning of "indiscriminate" violence as the nature of indiscriminate violence is precisely that it is not foreseeable on individual grounds.[433] Even if indiscriminate violence during armed conflicts may be a threat to all individuals in a war zone, Article 15(c) is, according to the UNHCR, mostly coupled to Convention grounds as "experience shows that most civil wars or internal armed conflicts are rooted in ethnic, religious or political differences which specifically victimise those fleeing" as war

---

person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions". For an interpretation and definition of the concept by ECtHR see: Case Aksoy v. Turkey para. 64 and Case Selmouni v. France, para. 103, and for interpretations of "inhumane or degrading treatment" see: Case Ireland v. the United Kingdom, para. 167, Case Soering v. the United Kingdom, para. 111 and Case M.M.S v. Belgium, paras. 219–220 and 263. The ECtHR included assessments under Article 5 and Article 6 ECHR in these cases. See also Case Sufi and Elmi concerning how armed conflicts and indiscriminate violence may amount to a breach of Article 3, ECHR. For an overview of how the ECtHR distinguishes between the different ill-treatments, see Röhl 2005.

432 UNHCR: *Observations on the European Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection' 4109/01 ASILE 54 (16 November 2001)* [4], para. 42. See also McAdam 2007, p. 70.

433 McAdam 2007, p. 72. See on the degree of violence CJEU: *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, para. 35 and *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, para. 32 on the level of violence as the factor constituting the ground for protections. In the *Case Sufi and Elmi v. the United Kingdom*, para. 226, the ECtHR made a cautious comparison between Article 3 ECHR and Article 15(c) of the Qualification Directive.

and violence are themselves often used as "instruments of persecution".[434]

To sum up: while many legal scholars, already prior to the implementation of the Qualification Directive, expressed a positive view as to the attempt to recognise complementary human rights issues falling outside the scope of the Refugee Convention, the implementation of a separate "subsidiary protection status", comprising a lower protection standard, has been heavily criticised for being in breach of international human rights standards. Subsidiary protection has become a status outside the refugee concept including extended exclusion clauses and a lower level of protection. As shown above, the subsidiary protection has opened the way for misuse by Member States as a way of narrowing down the scope of refugee protection. However, at the same time, subsidiary protection has seemingly been afforded a stronger protection regarding the absolute nature of *non-refoulement*. Many authors in the field hold that the possibility to make exceptions to the principle of *non-refoulement* in the refugee context, today, is non-existent in practice, as any situation where the asylum seeker claims persecution will necessarily include treatment that corresponds to the definition in the human rights conventions concerning torture or other cruel, inhuman or degrading treatment or punishment.[435] As put forward by Goodwin-Gill and McAdam: "A person who fears 'persecution' necessarily also fears at least inhuman or degrading treatment or punishment, if not torture".[436] However, the exception clauses in relation to *non-refoulement* as set out in the Refugee Convention are reproduced in the Qualification Directive.

---

434 UNHCR: *Observations on the European Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection' 4109/01 ASILE 54 (16 November 2001) [4]*, para. 35, *International Protection Considerations with regard to People Fleeing the Syrian Arab Republic, Update IV, November 2015 HCR/PC/SYR/01*, para. 36 and *Guidelines on International Protection No. 12*, para. 9. See, further, the discussion above, section 5.1.1 on the differentiation between refugee status and subsidiary protection status.

435 Lauterpacht and Bethlehem in Feller et al., 2003, para. 169, Goodwin-Gill and McAdam 2011, p. 243, Allain 2001, and Farmer 2008.

436 Goodwin-Gill and McAdam 2011, p. 243. See Allain 2001 and Farmer 2008 for a similar view.

Hence, instead of viewing the Refugee Convention as a living instrument closely linked to human rights law, allowing for a broader interpretation of the refugee protection, encompassing new human rights issues, the EU chose to introduce a separate status for those falling outside the scope of the Convention. According to Goodwin-Gil and McAdam, the reason for this was a "pragmatic response to the political realities of the EU and the need for an instrument of compromise" and that subsidiary protection is "a regional manifestation of the broader international legal concept of 'complementary protection'".[437] McAdam further concludes that "its scope is far narrower than protection principles under international human rights law, humanitarian law, and international criminal law provide".[438]

According to McAdam, the Qualification Directive is based on a restrictive interpretation of existing practices and mirrors the political suspicion aimed at asylum seekers.[439] She questions the separate subsidiary protection status and argues that the Refugee Convention status should attach to all those to whom the principle of *non-refoulement* applies, since international human rights treaties are interconnected instruments which together constitute the international obligations to which States have agreed. Also, Gil-Bazo advocates a unifying status, arguing that:

> The Directive is a missed opportunity to combine in one status all protected categories of individuals under international law, this is, Geneva Convention refugees and the broader category of non-removable individuals under international human rights law. Therefore, rather than establishing two separate statuses, the Directive could have reflected the evolution of international law by joining in one instrument the various legal grounds on which individuals are protected under international law and creating one status of the "refugee" broadly considered under EC law.[440]

A preferable solution had been to base the legislation on a view of international law as a holistic and integrated system in which:

> …the extended scope of *non-refoulement* under international human rights and humanitarian law imposes a two-fold obligation on States: to refrain from removing persons to territories where they face substantial risk of particular kinds of ill-

437 Goodwin-Gill and McAdam 2011, p. 330. See Spijkerboer 2002, pp. 19–42 for a similar view.
438 McAdam 2007, p. 110.
439 McAdam 2005.
440 Gil-Bazo 2006.

treatments; and to provide such persons with a legal status equivalent to that of the Convention refugees.[441]

Hence, instead of arriving at a clarified, simplified, and coherent definition of the conditions for getting protection and of the content of the protection that would mirror the Refugee Convention in the light of the development of human rights law, the Member States have chosen to separate the protection that they are obliged to give according to the human rights treaties from the obligations that follow from the Refugee Convention.[442] This way of legislating has also been reproduced in the Swedish Aliens Act, as shown in the following sections.

5.1.2 The relation between *non-refoulement* and status determination in Swedish asylum law

The definition of refugee as set out in the Refugee Convention was implemented in the 1980 Aliens Act.[443] Before that, the protection addressed political refugees and a couple of other categories that remained in the new law, such as persons fleeing from war, persons who refused military service or if there were other valid reasons due to the political situation in the country of origin.[444] Provisions in relation to "impediments to enforce expulsion" existed but did not include an absolute prohibition. An absolute prohibition against expelling an asylum seeker was implemented in the 1989 Aliens Act to fulfil Sweden's obligations under the UN Convention Against Torture and the European Convention against Torture.[445]

The Aliens Act was amended in 1997. In the preparatory work to the amendment, the Government included the human rights treaties relevant to asylum law, falling under Sweden's international obligations.

---

[441] McAdam 2007, p. 252 f. See, for similar views, Chetail 2012, Goodwin-Gill 1983, pp. 38–46, Hathaway 1991, pp. 104–105, and McAdam 2005 for a discussion about the relationship between human rights law and refugee law and how they are interdependent. See also the UNHCR Handbook, para. 51.

[442] McAdam 2007, p. 59 and Gil-Bazo 2006.

[443] Section 3 of the Aliens Act (*Utlänningslag (1980:376)*).

[444] Section 2 of the Aliens Act (*Utlänningslag (1954:193)*), Prop. 1975/76:18 pp. 100–113 and Prop. 1983/84:144 pp. 35–40.

[445] Chapter 8, section 1 of the Aliens Act (*Utlänningslag (1989:529) and* Prop. 1988/89:86, p. 115.

The list included references to not only the ECHR and the Refugee Convention, but also other human rights conventions such as CAT, ICCPR, CRC, CEDAW, ECSR, and ILO.[446] It has been emphasised in subsequent preparatory work that the courts must maintain necessary competence in refugee law, human rights law, as well as international law.[447] The additional grounds for protection outside the scope of the Refugee Convention were replaced by the concept of "otherwise in need of protection" in order to correspond to the prohibition of expulsion implemented in 1989.[448] The provision included similar grounds as today drawing its requisites from ECHR Article 3 but also from the concept of armed conflict as most persons in need of protection falling outside the scope of the Refugee Convention were in need of protection due to war.[449] Additionally, the provision granted protection for those who were unable to return to their country of origin on account of an environmental catastrophe. Finally, persons who were persecuted for reasons of sexual orientation or gender were placed under the same provision.[450]

In the 1989 Aliens Act, the definition of the concept of asylum was set out as encompassing both the refugee definition and the additional grounds for protection.[451] The right to asylum encompassed a right to a residence permit, which was placed in the same chapter as the grounds for protection. However, in the amendment made in 1997, the concept of asylum was limited only to refugees, although a residence permit was granted to both groups.[452] The reason was, according to the Government, that asylum in international law usually only addresses residence permits granted to refugees.[453] Hence, already before the implementation of the Qualification Directive, Sweden distinguished between refugee protection and other protection grounds, and

---

446 Prop. 1996/97:25, p. 48 ff. Furthermore, the Government Bill includes a discussion on the relation between international conventions and the application of Swedish national law (p. 68).
447 Prop. 2004/05:170, p. 135. See Stern 2010 on the fact that Swedish migration courts only to a low degree consider human rights conventions.
448 Prop. 1996/97:25, p. 99 ff.
449 Ibid., p. 96 and p. 290.
450 Ibid., p. 98 and p. 101.
451 Prop. 1988/89:86, p. 76 ff. Chapter 3, section 4 of the Aliens Act (*Utlänningslag (1989:529)*).
452 Chapter 3, section 1 of the Aliens Act (*Utlänningslag (1989:529)*).
453 Prop. 1996/97:25, p. 288.

separated *non-refoulement* from the protection grounds, viewing expulsion as an administrative measure.

In the 2005 Aliens Act, the Qualification Directive was implemented and the division between *non-refoulement* and protection status was partly revised and partly remained as before.[454] The Government found it important to stress the different grounds for protection and specifically emphasised the difference between protection grounds and humanitarian grounds.[455] Asylum is defined in Chapter 1, section 3 Aliens Act as: a residence permit granted to an alien because he or she is a refugee or in need of subsidiary protection (*alternativt skyddsbehövande*).[456] Hence, persons excluded from status as either a refugee or as in need of subsidiary protection but non-removable according to *non-refoulement*, are excluded from asylum under this definition. The content of the protection afforded under asylum is set out partly in the Aliens Act and partly in Acts concerning the specific areas.[457]

The word *non-refoulement* is not mentioned anywhere in the Swedish Aliens Act. However, the principle is referred to in the preparatory works. Notably in the Aliens Act the wording in Article 21 of the Qualification Directive, "protection against refoulement", is exchanged for "protection against refusal to entry" (*skydd mot avvisning*). The core

---

454 Chapter 4 of the Aliens Act and Prop. 2004/05:170, p. 176ff.

455 Prop. 2004/05:170, p. 176 ff.

456 The author's translation.

457 Aside from the right to a residence permit and an impediment to enforce refusal-of-entry or expulsion (*verkställighetshinder*), the content of the protection afforded concerning access to work, the possibility to family reunion, and to get travel documents or an alien's passport is dealt with in the Aliens Act and the Aliens Regulation (*Utlänningsförordning (2006:97)*)(see Chapter 2, section 8 and Chapter 6, section 35 of the Aliens Act (permission to work), Chapter 5, sections 3–3(g) of the Aliens Act (the right to or possibility of family reunion), and Chapter 2, section 1(a) of the Aliens Regulation, and Chapter 2, section 1(a) of the Aliens Act (the right to an alien's passport and travel documents). However, rights as regards social benefits, health care, access to education, unaccompanied minors, and other vulnerable groups and integration programmes, corresponding to Chapter VII in the Qualification are set out in legal acts concerning the specific area such as the School Act, the Health and Medical Care Act, the Social Welfare Act, and the Social Security Act. Most of these acts do not vary between different statuses or whether or not the person is a citizen, but are based on population register (*folkbokföring*). The possibility to apply for naturalisation (not mentioned in the Qualification Directive but in Article 34 of the Refugee Convention) differs between refugees and "other aliens" according to the Swedish Citizen Act (*Lag om svenskt medborgarskap*), sections 11–12.

provisions corresponding to the content in the principle are set out in Chapter 12, sections 1–3 of the Aliens Act as "impediment to enforce" refusal-of-entry or expulsion (*verkställighetshinder*),[458] whereas the right to a certain protection status is set out in Chapter 4, sections 1–2a and the right to a residence permit in Chapter 5, section 1. The three provisions in Chapter 12 correspond to Article 21 of the Qualification Directive, the provisions in Chapter 4, sections 1–2 to Articles 2(d) and 2(f) and Article 15, and Chapter 5, section 1 to Article 24 of the Qualification Directive.[459]

The provision in Chapter 12, section 1 corresponds to the absolute prohibition of *refouler* connected to the prohibition against torture and other ill-treatment as set out in human rights law. The provision was instituted owing to the ratification of the UN Convention against Torture and the European Convention against Torture and corresponds to Article 3 ECHR.[460] Unlike Article 21 of the Qualification Directive, the content of the absolute prohibition is stipulated in the provision and also includes an absolute prohibition when the risk concerns death penalty or corporal punishment.[461] A person who is excluded from receiving status as a refugee or subsidiary protection may be non-removable according to this provision and thus be eligible for a temporary residence permit or, if the impediment to enforce an expulsion will remain for such a long period that the person may acquire a special connection to Sweden, for a permanent residence permit.[462] The provision states that:

---

458 According to the Swedish Aliens Act, there are two different ways of sending an alien back to their country of origin after an asylum application has been rejected. In addition to expulsion it is possible to refuse entry (*avvisa*). A decision regarding refusal-of-entry has to be done within three months from the date of application (Chapter 8, section 5 of the Aliens Act). If the decision is made after three months it becomes a question of expulsion (Chapter 6, section 7 of the Aliens Act). An impediment to enforce a refusal-of-entry or an expulsion may also occur for practical reasons, for instance, if the country of origin does not want to accept the rejected asylum seeker or due to severe health problems (Chapter 12, section 18 of the Aliens Act). These reasons are outside the scope of *non-refoulement* and, therefore, outside the scope of this dissertation.

459 Prop. 2009/10:31, p. 259 f. and pp. 90, 99 and 116 f.

460 SOU 2006:6, p. 164 and Prop. 2009/10:31, p. 151.

461 According to the Government, death penalty also includes execution (Prop. 2009/10:31, p. 118).

462 Chapter 5, section 11 of the Aliens Act and Chapter 5, section 6 of the Aliens Act.

> Refusal-of-entry and expulsion of an alien may never be enforced to a country where there are reasonable grounds to assume that the alien would be in danger of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, or where the alien would not be protected in the country from being sent on to a country where the alien would be in such danger.[463]

Chapter 12, section 2 emanates from the prohibition of *refouler* set out in Article 33 of the Refugee Convention, and is meant to correspond to Article 21 of the Qualification Directive.[464] The definition of "persecution" corresponds to the provision concerning refugee status determination set out in Chapter 4, section 1 of the Aliens Act and should be interpreted in the same way.[465] However, instead of the concept of "owing to a well-founded fear", the wording "a risk of being subjected to" is inserted. The provision states that:

> Refusal-of-entry and expulsion of an alien may not be enforced to a country if the alien is at risk of being subjected to persecution in that country, or if the alien is not protected in that country from being forwarded to a country in which the alien is would be at such risk.
>
> An alien may, however, be sent to such a country, if it is not possible to enforce the refusal-of-entry or expulsion to any other country and the alien has shown by committing a particular gross offence that public order and security would be seriously endangered by allowing him or her to remain in Sweden. This is, however, not applicable if the persecution threatening the alien in the other country entails danger for the life of the alien or is otherwise of a particularly severe nature.
>
> An alien may also be sent to such a country if the alien has conducted activities that have endangered national security and there is reason to assume that the alien would continue to conduct these activities in the country and it is not possible to send the alien to any other country.[466]

Chapter 12, section 3 addresses situations of armed conflict connected to humanitarian law[467] and provides a weaker protection from being returned. The provision states that a decision regarding refusal-of-entry or expulsion of an alien in cases of armed conflict must not be enforced to the country of origin or to a country where he or she is at risk of

---

[463] The author's translation.
[464] Prop. 2009/10:31, p. 150.
[465] Ibid., p. 151.
[466] The author's translation.
[467] *The Geneva Conventions of 1949 and their Additional Protocols)* (hereafter the Geneva Conventions), Common Article 2 and 3.

being sent on to the country of origin if there are extraordinary reasons against it.

The Aliens Act, Chapter 4 comprises the provisions that regulate the different statuses of protection. There are three different statuses that render a right to protection and thus a right to a residence permit. The two first statuses are implemented in accordance with the Qualification Directive,[468] while the third status goes beyond the Directive.[469] These sets of provisions are based on similar grounds as the provisions in the Chapter 12 mentioned above but do not include an explicit prohibition against enforcing refusal-of-entry or expulsion. Protection based on *refugee status* is set out in Chapter 4, section 1 and defines a refugee as:

> …a person who is outside the country of the alien's nationality, because she or he feels a well-founded fear of persecution on grounds of race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group and is unable, or because of his or her fear is unwilling, to avail himself or herself of the protection of that country.[470]

The *subsidiary status protection* is set out in Chapter 4, section 2 and is granted to an alien who:

> …in cases other than those referred to in section 1 is outside the country of the alien's nationality because there are substantial grounds for believing that the alien, upon return to the country of origin, would run a risk of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, or as a civilian would run a serious and personal risk of being harmed by reason of indiscriminate violence resulting from an external or internal armed conflict and the alien is unable or, because of a risk referred to above, unwilling to avail himself or herself of the protection of the country of origin.[471]

---

[468] Article 2(d) (*refugee*) and 2(f) (*subsidiary protection*) of the Qualification Directive.

[469] See Feijen 2014 on the use of complementary protection outside the scope of the EU asylum acquis in the Nordic Countries. Her conclusion is that complementary protection is used where refugee or subsidiary protection could have been used and that the threshold for its application is higher, or its application is for a more limited group of beneficiaries, than was originally intended. She questions "whether these complementary forms of protection adhere to the criteria of the Treaty establishing the European Community of being more favourable and ensuring the coherence of Community action".

[470] The author's translation.

[471] The author's translation.
Compare Article 15 of the Qualification Directive. The Swedish provision does not include "execution" but explicitly includes "corporal" punishment.

Finally, the status that refers to *a need of protection otherwise* is set out in Chapter 4, section 2(a) and is granted to a person who is:

> …outside her or his country of origin and needs protection in situations of international or internal armed conflict or other severe conflicts because he or she feels a well-founded fear of being subjected to severe abuse. This provision is also applicable if a person is unable to return to her or his country of origin due to an environmental disaster.[472]

All three definitions shall apply regardless of whether the alien is at risk of being subjected to treatment listed in Chapter 4, sections 1, 2, and 2(a) on account of the public authorities or if the public authorities cannot be assumed to offer protection against this treatment carried out by private individuals.[473] The phrase "is at risk" was added when the Qualification Directive was implemented. In the preparatory work, the Government highlighted that the assessment should be prospective.[474] All three definitions shall also be applied to stateless persons in relation to the country where the person previously had her or his habitual residence.[475]

The protection provisions were amended in 2015 to be in accordance with Article 7(1) of the Qualification Directive. The protection can only be afforded by "the State or by parties or organisations that control all or a substantial part of the State's territory".[476] The protection afforded has to be effective and not of a temporary nature.[477] However, the content of the protection afforded as set out in Article 7(2) has not been incorporated or further discussed in the preparatory works.[478] Also, the definitions and assessment rules

---

472 The author's translation. This status stems from the grounds for protection that existed in the Swedish Aliens Act before the implementation of the Qualification Directive but that fell out of the scope of the Directive's definition. The status was removed temporarily in 2016 and permanently in 2021.

473 Chapter 4, sections 1–2(a), paras. 2 and 3. The provision corresponds to Article 6 of the Qualification Directive (Prop. 2009/10:31, p. 133).

474 Prop. 2009/10:31, p. 101.

475 Chapter 4, sections 1–2(a), paras. 2 and 3.

476 Chapter 4, sections 1–2(a), para. 2. The author's translation. The amendment entered into force on 1 January 2015 as a result of the recast of the Qualification Directive. According to the Government, the reason for the amendment was that the list of actors of protection in Article 7.1 was now exhaustive (Prop. 2013/14:248, p. 27).

477 Prop. 2013/14:248, p. 28.

478 See Prop. 2009/10:31, p. 133. The Government did not consider it necessary as it was already part of the current law (*gällande rätt*). See for instance MIG 2011:6.

set out in Article 8 on "internal protection" as well as the definitions of "acts of" and "reasons for persecution" set out in Articles 9 and 10 of the Qualification Directive were, according to the Government, already provided for in Swedish law.[479]

If the asylum seeker fulfils one of the protection grounds, she or he shall be declared a refugee, eligible for subsidiary protection or otherwise in need of protection and be granted a residence permit.[480] The residence permit shall be permanent or valid for at least three years, or if there are no imperative grounds of public security or public order, a shorter period is permitted but it cannot be shorter than one year.[481] Exclusion or exception clauses on account of criminal or security reasons and provisions concerning cessation or revocation of statuses are found in different stages of the procedure.[482]

As mentioned above, the subsidiary protection status has been favoured in Swedish case law, while refugee status has been granted to

---

479 The issue was discussed in the preparatory works at the time of implementing the first Qualification Directive as well as when implementing the recast of the Directive. The Government considered that the Swedish refugee definition as well as the other protection definitions should be as close as possible to the definitions in the Refugee Convention (Prop. 2009/10:31, p. 102, 104f.). According to the Government, there was no reason to establish other principles for interpretation, as regards the reasons for "acts of" and "reasons for persecution" set out in Articles 9 and 10 of the Directive, outside what was already established by international law, as excessively far-reaching definitions would lock the legislative development, (Prop. 2009/10:31, p. 102 and p. 105). According to the Government, the assessment of internal protection would best be made through Swedish case law with guidance from preparatory work, the UNHCR Handbook, and case law from the CJEU. Also, the obligation set out in Article 8(2) to obtain "precise and up-to-date" country of origin information "from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office", was, according to the Government, already provided for in Swedish law. However, many "bodies considering proposed legislation" (*remissinstanser*), such as the Migration Agency, one of the migration courts, as well as UNHCR and the Red Cross, argued that the current legal situation did not suffice to fulfil the obligations in Article 8 (Prop. 2013/14:248, p. 31f.).

480 Chapter 5, section 1 of the Aliens Act.

481 This was the case during the time when the empirical study was carried out. However, through the Act on temporary limitations of the possibility to get a residence permit from 2016, the main rule is that a residence permit is temporary (Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige, §5).

482 Chapter 4, sections 2(b), 2(c), 3, 3(a), 5, and 5(a–c), Chapter 5, section 1, para. 2 and Chapter 12, section 2, paras. 2 and 3 of the Aliens Act. See Prop. 2009/10:31, p. 105f. for a discussion by the Government of the considerations regarding exclusion when implementing the Qualification Directive.

a lesser extent.[483] One explanation for this might be that the Migration Court of Appeal established a rather high threshold in its early case law when interpreting what could constitute persecution.[484] The differences between the two statuses as to the protection afforded have been minimised over the years and there has been little focus on whether the asylum seeker has been declared a refugee or was found eligible for one of the other two statuses. However, this equality between the statuses has changed with the adoption of the new "Law on temporary limitations of the possibility to obtain a residence permit in Sweden" adopted in June 2016[485] where the minimum rules as to the length for a residence permit and the right to family reunification have been amended in accordance with the minimum rules set out in the Qualification Directive. In this way, the fact that Swedish decision-makers and judges, to a large extent, have favoured the subsidiary status protection before refugee status protection has been used by the Government to limit the number of asylum seekers coming to Sweden. This "temporary" law has recently been prolonged and has now become permanent in essential parts.[486]

The origin to the systematising in the Swedish Aliens Act can be traced to both the Refugee Convention and the Convention against Torture as well as to the Qualification Directive where the definitions

---

[483] Supra notes 426 and 469.

[484] MIG 2008:21. The Court's interpretation was based on the UNHCR Handbook, Article 9 of the Qualification Directive in combination with the situation in the country of origin for the minority Maktoumeen in Syria. The Court agreed with the interpretation of what constitutes persecution, made by the migration court; that living as a Maktoum in Syria meant that they could not apply for a work permit and were not allowed to own houses, vehicles or businesses. Furthermore, they had access only to subsidised emergency health care, they could not legally register their children (which had the consequence that their children were deprived of their right to education), and they could not register matrimony (which was the reason they could not register their children). However, in practice the State gave the children a possibility to access basic education. Finally, they had no right to get an identity card and, hence, could not leave the country legally. Despite this information and taking into account the cumulative effects of the discriminatory facts, the Court concluded that the sole fact that the woman belonged to this minority group was not enough to constitute persecution. (The Court based its last conclusion on two older cases from the Aliens Board (UN 03/19271 and UN 04/9463) and a case concerning a Kurd in Syria from the Asylum and Immigration Tribunals CG [2006] UKAIT 00048, para. 88.)

[485] Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige.

[486] Chapter 5, sections 1(a), 3 and 3(a–g) of the Aliens Act.

of refugee and torture respectively are stated in the initial Articles while the prohibition against *refoulement* is found in separate Articles. In the Swedish Aliens Act, the provisions in the different Chapters are connected in two ways. Firstly, Chapter 8, section 7 states that the provisions regarding “impediment to enforce” in Chapter 12 are to be taken into account whenever a question about refusal-of-entry or expulsion as regards an alien who lacks permission to stay in the country is to be examined. [487] According to the preparatory work, the question of “impediment to enforce” should be tried by the public authority or the court whenever a decision concerning a residence permit is made.[488] However, it has also been stated by the Government that the protection against “impediment to enforce” may be of significance, primarily when the issue arises after a judgment has become final.[489] In the Government Bill prior to the implementation of the Qualification Directive, the Government came to the conclusion that no legislative changes were necessary to fulfil the obligation of *non-refoulement* as set out in Article 21 of the Directive as this was already provided for in Chapter 12, sections 1–2 in conjunction with Chapter 8, section 17 (now Chapter 8 section 7).[490] Additionally, the absolute prohibition of refoulement that follows from Article 3 ECHR is directly applicable as it is incorporated into Swedish law. Notably, the situation of armed conflict in relation to *non-refoulement* is not discussed in the Government Bill.[491] However, in the Government Official Report prior to the Government Bill it is stated that protection based on internal or external armed conflict was meant to have the same absolute protection as torture and other ill-treatment.[492] Yet this was

[487] The provision was first adopted in the 1989 Aliens Act as a codification of an applied practice.

[488] SOU 2006:6, p. 133 and 152 and Prop. 2009/10:31, p. 75 and p. 108 and p. 151. The Government had previously established that the application regarding residence permit should always include an adjudication regarding impediments to enforce a refusal-of-entry or an expulsion. The Government explained the change of standard of proof to a lower standard in the provision concerning impediment to expel by emphasising that ”the standard of proof should not be set too high as regards allegations concerning risk of death penalty or inhumane or degrading treatment or punishment as complete evidence that clearly proves such a risk can seldom be presented” (Prop. 1996/97:25, p. 294 and Prop. 2004/05:170, p. 296. The author’s translation).

[489] Prop. 2004/05:170, p. 296 and 2009/10:31, p. 108 and p. 151.

[490] Prop. 2009/10:31, p. 149 ff.

[491] Prop. 2009/10:31, p. 120 and p. 138.

[492] SOU 2006:6, p. 164.

not discussed by the Government and did not render any changes in legislation.

As shown in the results of the empirical study, the Swedish migration courts choose to refer to the provisions regarding status determination in Chapter 4 (sections 1–2(a)) rather than to the provisions in Chapter 12 (sections 1–3) corresponding to the principle of *non-refoulement*.[493] In case law, the latter provisions are mainly applied when an asylum case is reopened after the initial asylum application has been rejected and become final.[494] A reopening of the case may be done according to Chapter 12, sections 18 and 19 of the Aliens Act and implies that the "impediments to enforce" set out in Chapter 12, sections 1–3 have to be considered in order to decide whether or not to reopen the case. However, the Migration Court of Appeal has brought up the principle of *non-refoulement* in the first asylum procedure in a number of situations. This is the case, for instance, when the applicant falls within the scope of one of the exclusion clauses and is therefore excluded from receiving protection status but is non-removable on account of the risk of *refoulement*.[495] The second situation may occur when the issue is to determine the Member State responsible for examining an application for international protection according to the Dublin regulation.[496] This issue has been subject for assessment by

---

[493] See above, section 4.2.

[494] This is called "new adjudication" and implies that the applicant's case may be reopened after the first asylum application has been rejected and become final under certain circumstances set out in Chapter 12, sections 18 and 19 of the Aliens Act. See MIG 2008:32 and MIG 2015:9. In a recent case 2019:5 the Migration Court of Appeal established that a valid excuse for not having raised an issue in the first asylum procedure could not be required as stated in section 19 if a real risk of ill-treatment upon return had been established.

[495] See, for instance, MIG 2011:24 where the asylum seeker held a high position in the secret service under Saddam Hussein's regime in Iraq and participated in torture. This excluded him from being granted protection status as he, through these acts, had committed crimes against humanity (Chapter 4, sections 2(b) and 2(c) of the Aliens Act). However, as there was a real risk that he would be subjected to torture, ill-treatment or the death penalty if returned, it would be in breach of Chapter 12, section of the Aliens Act 1, and the principle of *non-refoulement* to expel him. Therefore, he was granted a time-limited residence permit for one year. See also MIG 2014:20 and MIG 2014:24.

[496] Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the quality arguments and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). (Hereafter, the Dublin Regulation.)

the Migration Court of Appeal in a number of cases and concerns whether it would be a breach of the principle of *non-refoulement* on the basis of Chapter 12, section 2 of the Aliens Act, Article 21 of the Qualification Directive and/or Article 3 ECHR to transfer the asylum seeker to another Member State.[497] A third situation has arisen when the Migration Court of Appeal has chosen to apply case law from ECtHR and decisions from ComAT concerning the absolute prohibition of deporting a person to torture or other inhuman or degrading treatment or punishment.[498]

5.1.3 A shift of emphasis from *non-refoulement* to status determination

Asylum law is based, on the one hand, on the idea of State sovereignty, the need for regulated immigration and control of aliens, and, on the other, on fundamental human rights. Although there is an underlying tension between these values in legislation, the application of the asylum law does not allow for considering the value of regulated immigration when assessing the asylum seeker's need for protection. However, the implementation of the Refugee Convention and human right treaties, to EU asylum law and finally to Swedish asylum law seems to have opened the way for and has led to an ambiguous systematisation and interpretation of asylum law. I agree that no human right can be said to be absolute in the sense of existing independent of historical or cultural contexts.[499] However, this does not mean that the absolute prohibition of refoulement is meaningless. As Dembour concludes, human rights only exist if we talk about them.[500] Talking

---

[497] MIG 2008:42, MIG 2010:20, MIG 2012:21, 2013:8, MIG 2013:23, 2015:17, and MIG 2016:17. (Compare MIG 2013:15 where the Court ruled that a refugee determination by UNHCR is not binding for Sweden.) In a later case, MIG 2017:27, the principle of *non-refoulement* was the focus for the Migration Court of Appeal's argumentation. The Court ruled that Sweden could return an asylum seeker to Somalia after having made an assessment of the risk of *refoulement*, even though the person had obtained subsidiary status protection in another Member State. However, the Court did not make its own assessment of the situation in Somalia.

[498] See, for instance, MIG 2012:2 and 2014:21 concerning the duty to investigate a medical report, MIÖD: UM 10483-10 and UM 10509-10 concerning the situation for women in the Democratic of the Congo (DRC), and MIG 2017:6 concerning the general security situation in the country of origin.

[499] See supra note 381.

[500] Dembour 2006, p. 235.

about a right as absolute does not necessarily mean that it is or can ever be absolute, but still indicates a specific severe nature of certain ill-treatments.

The distinctions that have developed in asylum law between status determination and the issue of expulsion, and between refugee protection and supplementary protection, seem to have allowed for a shift of emphasis from an assessment of the *risk upon return* to a question of a benefit of obtaining a status determination and a residence permit. Or, as McAdam puts it, the principle of *non-refoulement* has been decontextualised and has therefore created a protection gap.[501] Furthermore, the distinction between refugee protection and subsidiary protection and the illusionary differences as regards the possibilities of exclusions from protection of *refoulement*, as accounted for above, adds to the decontextualisation of the principle.

The Swedish migration courts' avoidance of the issue of expulsion can be viewed against the backdrop of this decontextualisation of *non-refoulement*. However, when reading the legal sources closely, it is clear from both the Refugee Convention and other international conventions, as well as the Swedish Aliens Act, that the principle of *non-refoulement*, although placed in a more or less secluded corner in many legal sources, must always be considered. This is to give meaning to the protection from the ill-treatments safeguarded by law.

To criticise the shift of emphasis from *non-refoulement* to status determination may seem irrelevant as the different provisions have pretty much the same content, i.e. the same types of risks have to be assessed. However, it highlights the question of who carries the responsibility for the consequences of a rejected application. By narrowing down the adjudication to a question of a benefit of status, the responsibility of the migration courts for the consequence of a rejected appeal – the risk at stake – the expulsion, is concealed.[502] The choice of status also has, as we have seen above, consequences for the content of the protection provided, which should make it even more important to justify the arguments as to why the judgment concerns subsidiary protection and not refugee protection. The choice made by

[501] McAdam 2007, p. 201.

[502] See section 1.3 on the judgment that is correct in substance as connected to real consequences and section 8.1 for the discussion on Arendt's theory on the faculty of judging including a responsibility to judge in high-stakes situations.

the migration courts not to substantiate their reasoning with legal arguments or at least not be transparent with their legal choices and interpretations indicates a narrow perception of responsibility.

In the next section, the focus is on the choice of the migration courts to emphasise the principles regarding the limits for the adjudication.

5.2 Assessment principles in relation to the assessment of the risk upon return

The pattern that emerges in the study of the judgments from the Swedish migration courts shows that references to assessment principles are more often found in the courts' reasoning than references to how requisites in the protection provisions should be interpreted.[503] This section commences with critical reflections on the legal content of the courts' frequent use of the phrase "the adjudication must be individual and forward-looking" (5.2.1). In section 5.2.2 the interrelation between the burden and standard of proof and the State's duty and responsibility to investigate in light of the principle of *non-refoulement* is explored. In the final section (5.2.3) critical reflections are made. Assessment principles on specific issues (such as, for instance, how to assess language analyses, medical age determinations or the possibility of internal flight) are analysed in Chapter 6, while principles connected to the assessment of the credibility of the asylum seeker's narrative are analysed in Chapter 7.

5.2.1 "Forward-looking" and "individual" as a point of departure for the assessment of the risk upon return

As was shown in the empirical study, the Swedish migration courts choose to emphasise that the adjudication must be *forward-looking* and *individual*.[504] Unlike principles on burden and standard of proof and evidentiary assessment principles, these two criteria are inherent in the requisites in the protection provisions. The forward-looking risk assessment follows explicitly as a part of the requisite regarding

---

[503] See, above, section 4.2. For an explanation of the content of the category "assessment principles", see Appendix 1, section 2.2.1.
[504] See, section 4.2 and Appendix 2, Table 25.

subsidiary protection stated in Chapter 4, section 2 of the Aliens Act: "…upon return would run a risk…",[505] while this lies implicit in the wording in the refugee provision and in the provision as regards "otherwise in need of protection". From these requisites it is evident that the asylum adjudication concerns the risk upon return which inevitably must be an assessment of what will happen to the individual if she or he returns to the country of origin. This has also been emphasised in Swedish preparatory works and case law by establishing that the asylum adjudication is a "forward-looking risk assessment" which is derived from the sentence in the UNHCR Handbook para. 42: "…or would for the same reasons be intolerable *if he returned* there".[506]

Like the criminal procedure, the assessments include the act to consider and evaluate facts about events or a situation that has already happened. However, unlike the criminal procedure, where the aim is to establish a course of events and the criminal liability for these events, the asylum procedure includes the complicated task of drawing conclusions from past events and situations to the current situation and judging what could happen upon return. In that sense the asylum procedure has more similarities with cases on compulsory care, of children and drug addicts, where the future well-being of the child or the risk for an addict is at stake.[507] The forward-looking assessment is the focus if it has been established that the asylum seeker has been subjected to ill-treatment prohibited by law in the country of origin and, hence, the assessment concerns whether this would happen again upon return. Hence, the courts could also have chosen, as a general point of departure, to put forward the principle of the presumption of a future real risk if it had been established that the asylum seeker has been subject to ill-treatment as codified in Article 4.4 of the

---

505 Compare Article 2(f) of the Qualification Directive: "…if returned to his or her country of origin, …".

506 Prop. 2009/10:31, p. 130, MIG 2007:37, MIG 2009:27, and MIG 2013:15. Compare the standard established by the ComAT expressed as "substantial grounds" which involve a "foreseeable, real and personal risk" of torture (McAdam 2007, p. 63, note 60).

507 See the Act with specific provisions on the care of young people (*Lag (1990:52) med särskilda bestämmelser om vård av unga (LVU)*) and the Act on the care of addicts in some cases (*Lag(1988:870) om vård av missbrukare i vissa fall*). See Kaldal 2010, on the specific elements necessary in a prognostic assessment (p. 196 ff.) and the significance of making a consequence analysis (p. 199 f.).

Qualification Directive and established by the ECtHR.[508] For instance, in addition, definitions of what acts constitute persecution or torture would be as relevant as general points of departure in order to identify which risk is at stake for the individual.

The phrase "individual assessment" is, in the courts' reasoning, often linked to the argument that the situation in the country of origin is not such as to render protection status to everyone from this country.[509] The same phrasing is to be found in the case law of the Migration Court of Appeal.[510] This narrow way of presenting the scope of an individual assessment blurs the fact that this assessment is embedded in the different protection requisites and may go both ways depending on the personal circumstances in relation to the situation in the country of origin.[511] An "individual assessment" includes an important and complex investigation of facts and circumstances. While the refugee provisions codify part of the individual assessment by stating that the person must belong to a specific group listed in the refugee provision, the provision addressing alternative statuses does not include such a list. Yet, this does not mean that these individual facts are irrelevant when adjudicating subsidiary protection. As concluded from the empirical study, Swedish migration courts generally lack any discussion of whether or not refugee status is relevant and why.[512] Therefore, it has been difficult to distinguish between whether individual facts and circumstances presented in the ruling are directly connected to the refugee requisites or if they are facts and circumstances that would generally make the asylum seeker more vulnerable and, hence, enhance their risk upon return.[513] By detaching the notion of "forward-looking" and "individual" assessment from, for

---

[508] See Case *J.K v. Sweden*, para. 99 and Case *R.C. v Sweden*, para. 53. See also UNHCR 1998: *Note on Burden and Standard of Proof in Refugee Claims*, para. 19.

[509] See for an example of the phrasing in section 4.2.

[510] See, for instance, MIG 2007:12, MIG 2007:37, and MIG 2011:8 where the Court initially couples the individual assessment to a general assessment of the situation in the country of origin by stating that not every asylum seeker from the country of origin at hand can get a residence permit on account of a need for protection and, hence, an individual adjudication of the claimed circumstances must be made.

[511] See SOU 2006:6, p. 228 on the implementation of the Qualification Directive concerning Article 4.3 of the Directive.

[512] See above, section 4.7.

[513] See Appendix 1, section 2.2.6 for a definition of the category "individual facts and circumstances".

instance, the content of the acts that render protection, they seem to be transformed into a diffuse kind of assessment principles rather than emanating from the requisites in the protection provisions.

The content of the notion of "individual assessment" is further explored below, in section 6.1. For now, it suffices to note that the content of an individual assessment is embedded in the different protection requisites and may limit or extend the adjudication dependent on the individual facts and circumstances in relation to the situation in the country of origin.[514]

5.2.2 The relation between the burden and standard of proof, evidentiary alleviation, and the State's duty to investigate

The pattern that emerges in the study of the judgments from the Swedish migration courts shows that the principles on burden and standard of proof are emphasised in the reasoning whereas the notions of "risk" or "well-founded fear" are more rarely found.[515] It was also shown that the evidentiary alleviation principles for the asylum seeker and the duty for the authorities to investigate are put forward to a lower extent than the principles on burden and standard of proof. In light of these findings, this section offers an analysis of the relation between the burden and standard of proof, the evidentiary alleviation principles, and the duty to investigate in asylum law.

The questions as to who has the burden of proof, and what standard of proof is required, are related to the handling of risk including handling knowledge gaps.[516] The concept of "burden of proof" raises the question of who bears the risk and for what, while the standard of proof is linked to the quantity and quality of evidence. Hence, closely connected to the question of burden and standard of proof is that of who bears the responsibility for investigating the asylum

---

[514] See Article 4.3 of the Qualification Directive, 10(3)a of the Asylum Procedures Directive, SOU 2006:6, p. 228 on the implementation of Article 4.3 of the Qualification Directive, and MIG 2009:27. See also Baldinger 2013, p. 379 f. and the UNHCR Handbook, paras. 44 and 45.

[515] See, above, section 4.2.

[516] See the theory on risk assessments in decision-making under great uncertainty developed by the philosopher Johannes Persson 2007 who advocates for understanding risk assessment as a matter of *handling* risk, a perspective that, according to him, entails considering the relationship between risk and decision or action taking into account knowledge risks (p. 98).

seeker's claims, i.e. who runs or takes the risks for lack of quality/quantity of evidence in the cases and hence for what is unknown or uncertain.[517] The relation between the question of, on the one hand, who has the burden of submitting evidence and seeing to it that there is enough material to make a decision, and, on the other, bearing the risk in case of lack of evidence, is crucial but ambiguous in the asylum procedure. Asylum cases differ from criminal cases in terms of who has the burden of proof. In criminal cases this burden explicitly rests on the state. In line with the strong value that prevails in criminal law not to convict an innocent person, the prosecutor bears the entire burden to prove "beyond reasonable doubt" that the named suspect is guilty.[518] Also, in compulsory cases, in line with the value of the State not interfering with individual private life and freedom if not absolutely necessary, the burden and duty to investigate lies with the public authority.[519] As argued in section 5.1.1, in asylum cases the absolute prohibition of *refoulement* is the utmost value. This absolute prohibition has not necessarily led to a clear burden for the state, as is shown in the following analysis.

5.2.2.1 International and EU law

As a consequence of the absolute prohibition of *refoulement*, the principle of *ex nunc* is established in European as well as international asylum law.[520] Since the recast of the Asylum Procedures Directive, EU asylum law stipulates that the asylum procedure should include an effective remedy that provides for a full examination at the time of the

---

[517] See Kaldal 2010 on the assessment of the level of risk as an epistemological adjudication (p. 182 ff.). See also Persson 2007 who includes not only the traditional outcome risks, but also the knowledge risks in his theory (p. 134). Both outcome risks and knowledge risks can, according to Persson, be both *taken*, i.e. when you are aware of what you do not know, and *run*, i.e. when you are unaware of what you do not know. He advocates for taking knowledge risks into account when making risk assessments (p. 139 and p. 149).

[518] See case law from the Swedish Supreme Court; NJA 1980 s. 725 and NJA 1996 s. 176.

[519] Kaldal 2010, p. 314 f. Diesen and Lagerqvist Veloz Roca 2003, p. 76 f. and p. 86.

[520] See Baldinger 2013 for a thorough examination of the application of *ex nunc* as applied by HRC (p. 108), CAT (p. 181), ECtHR (p. 285), and CJEU (p. 321). See also ECtHR: *Case F.G. v. Sweden*, para. 158 where the Court ruled that the Swedish authorities had failed to investigate the implications of expelling the applicant to Iran in the light of his conversion sur-place.

review of both facts and points of law.[521] The provision is derived from Article 13 ECHR, case law from the ECtHR, and Article 47 of the EU Charter and means that the appeal (both first and second instances) must include not only judicial review for potential errors of law, but also a reconsideration of the facts.[522] This is also established by the Swedish Migration Court of Appeal.[523] A *full review* implies that the national courts are able to make an independent determination of the disputed facts as well as of the credibility of a claimant.[524] National asylum courts would actively and independently make a fresh factual determination, including an assessment of credibility, in cases of "insufficient national proceedings, new facts, circumstances and developments, including evidence thereof, and an incorrect application of evidentiary standards (for example, the standard or proof)".[525] In line with the absolute prohibition against *refoulement*, the ECtHR stipulates that the Court may have to obtain material on conditions in the country of origin, by its own motion (*proprio motu*) as the situation and circumstances can change quickly.[526] The *full examination at the time of the review* includes both facts and points of law. The examination of points of law rests on the court and must be understood as including all points of law relevant to the assessment of the risk upon return. Establishing which facts are disputed is also important, in order to decide what are the relevant points of law as well as the scope of the adjudication. As shown in section 3.1, the parties' different standpoints are often unclear in the Swedish migration courts' rulings.

The focus on *non-refoulement* as a core value in asylum law has not led to a clear burden for the State in asylum cases, even though the CJEU has ruled that the aspects on burden and standard of proof and the duty to investigate must be analysed in the light of the risk upon

---

521 Article 46(3) of the Asylum Procedures Directive and Article 4(3)(a) of the Qualification Directive, CJEU: C-69/10 *Samba Diouf v. Luxemburg*, paras. 56 and 61. See also International Association of Refugee Law Judges 2013, part VI, para. 91.

522 Peers et al. 2015, p. 288, ECtHR: *Case Saadi v. Italy*, paras. 128–133*, Case Salah Sheek v. the Netherlands*, para. 136 and *Case N.A. v. the United Kingdom*, para. 136.

523 MIG 2013:15 and MIG 2013:21.

524 Baldinger 2013, p. 380, Macklin 1998, and Kagan 2003.

525 Baldinger 2013, p. 381.

526 *Case Saadi v. Italy*, para. 131, *Case Ismoilov and Others v. Russia*, para. 120, and *Case N.A. v. the United Kingdom*, para. 119. A number of cases concern Sweden: *Case R.C. v. Sweden*, *Case F.G. v. Sweden*, *Case I. v. Sweden*, and *Case J.K. v. Sweden*. See also Baldinger 2013, p. 273 and the International Association of Refugee Law Judges 2013, p. 77 f., para. 5.

return and the prohibition of *refoulement* with a basis in human integrity and individual freedom.[527] A full examination is connected to who has the responsibility to present facts and see to it that the quantity and quality of the evidence is sufficient at the time of the review to enable a decision. The relation between the burden of proof and the duty to investigate is stated in Article 196 in the Handbook:

> It is a general legal principle that the burden of proof lies with the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. *Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.*[528]

The notion of "shared burden" is also addressed in the EU law. Rules regarding what facts and circumstances should be assessed and investigated are set out in Articles 4 and 5 of the Qualification Directive. Article 4(1) and (2) includes a shared burden on the duty of submitting and investigating facts.[529] While the first sentence in Article 4(1) of the Qualification Directive places the initial burden of information on the applicant, the second sentence is mandatory and states that the subsequent duty to investigate and to assess the relevant elements is shared between the applicant and the Member State.[530]

In the report *Beyond Proof*, the UNHCR has given further explanations on how to interpret the guidelines in the Handbook and advocates that the use of the "burden of proof" should be avoided in favour of a *duty, in principle, to substantiate the application.*[531] The latter corresponds to the wording used in Article 4 of the Qualification Directive.[532] In his analysis of Article 4 of the Qualification Directive,

---

527 *(C-175-179/08), Salahadin and others*, para. 90, *(C-71/11 and C-99/11) Y and Z v. Germany*, para. 77.
528 The author's italics. See also Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, para. 6.
529 See Noll 2005 for an analysis of Article 4 of the Qualification Directive and Peers et al. 2015, p. 89.
530 Baldinger 2013, p. 257, p. 378, and p. 378f., and Noll 2005.
531 UNHCR 2013, Beyond Proof, p. 88 and p. 134.
532 Article 4(1) of the Qualification Directive states that: "Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to

Noll has interpreted the article as meaning that the applicant is enjoined with *a burden of assertion* and *a burden of information* rather than a burden of proof.[533] This duty applies to the applicant as well as the determining authority and, hence, constitutes a "shared duty".[534] Additionally, the UNHCR states that while the applicant's duty is to substantiate her or his claims as far as could possibly be expected[535] (written evidence is not a requirement), the determining authorities have a duty to, substantiate the facts stated by the applicant, inform the applicant about what is important, take into consideration individual and contextual circumstances (such as the applicant's background, ability to take in information), give the applicant a chance to comment on potentially adverse credibility findings and, take into consideration relevant country information.[536]

The EU Qualification Directive is more explicit about what should be considered and assessed. Article 4(2) provides a list of elements that should be considered and assessed.[537] The list is not meant to be exhaustive.[538] Article 4(3) of the Qualification Directive also stipulates that the individual assessment encompasses considering a wide range of elements listed in paragraphs a–e.[539]

Moreover, the *International Association of Refugee Law Judges* advocates for using the notion of *shared burden* between the applicant and the determining authority.[540] According to them, the courts can and should consider not only evidence, which should, under the *shared burden*, have been considered in the original decision, but also later evidence relevant

---

substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application".

533 Noll 2005.

534 The UNHCR Handbook, para. 205, UNHCR, *Note on Burden and Standard of Proof*, para. 6, UNHCR 2013, Beyond Proof, p. 87 and Article 4.5(b).

535 The UNHCR Handbook, para. 205.

b).

536 UNHCR Handbook, para. 205 and UNHCR 2013, Beyond Proof, p. 134 and p. 143.

537 According to Peers et al. 2015, Article 4 focuses on avoiding abuse and deterring deceptive conduct rather than assessing access to status determination, p. 91 f.

538 Baldinger 2013, p. 339.

539 The first two paragraphs (a–b) addressing country of origin information and statements and documents submitted by the asylum seeker are analysed further below, in sections 6.2.1 and 6.2.3.

540 International Association of Refugee Law Judges 2013, p. 82, para. 7, and p. 99, para 95.

to issues of current risk on *refoulement*. If the court is not confined to the evidence brought before it by the asylum seeker and the state, there is no reason why the court should not introduce evidence of its own provided that this is made freely available to the parties pursuant to its duty of undertaking the utmost scrutiny of the claim before it.[541] Even in the human rights context, where the issue is *non-refoulement* and not determination of a protection status, the notion of "shared burden" or a "shift of burden" when the applicant has fulfilled her or his initial "burden of assertation" or has presented "an arguable claim" is emphasised.[542]

Different wordings are used to determine the standard of proof. A general standard of proof is not explicitly expressed in the EU asylum directives as this could not be agreed on.[543] However, different standards are codified in the protection provisions. While refugee status requires *well-founded* fear, subsidiary status requires that "*substantial grounds have been shown for believing…*" *that the person concerned* […] *would face a real risk* […]".[544] No specific standard is set out in Article 21 of the Qualification Directive concerning *non-refoulement*.

According to the *International Association of Refugee Law Judges*, there is a legal consensus that the risk assessment should be measured at the standard of "real risk" and advocates that there should be no distinction between the test for recognition of refugee and subsidiary protection status.[545] The Hungarian Helsinki Committee instead uses the notion of "the level of conviction" and only in relation to the

---

541 International Association of Refugee Law Judges 2013, p. 77 f., para. 5.
542 See Baldinger 2013 for an account on the burden of proof as applied by the Human Rights Committee, the ComAT, and the ECtHR, pp. 89, 137, and 23. The arguable claim test is, according to Baldinger, a threshold below the test on the standard of proof in the ECtHR context. See also ECtHR in cases specifically concerning Sweden: *Case F.G. v. Sweden*, para. 120, *Case R.C v. Sweden*, para. 50, and *Case J.K. v. Sweden*, para. 91. See also Wouters 2009, p. 275 f. Compare Spijkerboer 2009 who warns against emphasising evidentiary principles. He initially analyses the burden and standard of proof in relation to Article 3, ECHR, and concludes that the burden of proof is shifted as soon as the applicant has shown an arguable case and that it is then for the State to dispel any doubts about the claimed risk. However, he also highlights the limits and risk of procedural rules as a tool to assess an Article 3 claim, as the essence of procedural rules is that they can be applied without having regard to the substance of the case.
543 Baldinger 2013, p. 335.
544 Article 2(d) and (f) of the Qualification Directive.
545 International Association of Refugee Law Judges 2013, p. 22, p. 91, paras. 50–55.

overall risk assessment.[546] According to the Hungarian Helsinki Committee, the level should be lower in asylum cases than in criminal and most civil matters.[547]

In the human rights context, where *non-refoulement* is the issue, the standard of proof is expressed through notions such as "substantial grounds for believing" and "real risk" or "would be in danger".[548] These notions are connected to the rather unspecified duty for the State to investigate in "good faith" (HRC), to "make sufficient efforts" (ComAt), or to "ascertain all relevant facts" (ECtHR).[549]

"Well-founded" is not a standard in itself but is further linked to a standard expressed in the Handbook as: "the applicant's fear should be considered well-founded if he can establish, 'to a reasonable degree', that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same

---

[546] Hungarian Helsinki Committee 2013, p. 16.

[547] The Hungarian Helsinki Committee states that: "It should not be above the balance of probabilities and it should certainly not reach the high threshold of certainty beyond a reasonable doubt. Nor should it represent only a highly unlikely possibility" (p. 19).

[548] HRC, General Comment 31, para. 12. According to the case law of HRC, "real risk" means that it is a necessary and foreseeable consequence of the expulsion that Article 7 will be violated which, according to Baldinger 2013, p. 87, clearly indicates a high threshold which is not easily met. Article 3 CAT, General Comment No. 1, para. 6 uses the wording "substantial grounds for believing that the claimant would be in danger of being subjected to torture". Substantial grounds involve a "foreseeable, real and personal risk" of torture. "Danger" means that there must be more than a mere possibility of torture, more than mere theory or suspicion, but that torture does not need to be highly likely or highly probable to occur (Baldinger 2013, p. 135). In ECtHR case law, the standard is expressed in wordings such as "substantial grounds have to be shown for believing that upon expulsion there is a real risk of treatment contrary to Article 3", *Case Chahal v. the United Kingdom*, para. 86. According to Baldinger, the threshold put forward by the HRC "seems to be higher than under Article 3 ECHR, where the level of risk required is a real (not fictional), personal, and foreseeable risk exceeding the mere possibility of being subjected to proscribed ill-treatment, but where the risk does not need to be certain (necessary) or highly probable" (Baldinger 2013, p. 87 f.). See also Röhl 2005 who argues that *non-refoulement* under Article 3 has in practice been limited by the heavy burden of proof imposed on an asylum seeker to demonstrate the "real risk" and draws the conclusion that "from the case-law examined, it seems that state sovereignty continues to play a somewhat disproportionate role in the expulsion decisions of the Court".

[549] See Baldinger 2013, p. 89 and p. 137, and *Case R.C. v. Sweden*, where a medical report indicating that the applicant had been subjected to torture was enough to shift the burden to investigate the issue to the State (para. 53).

reasons be intolerable if he returned there".[550] The relation between standard of proof and the duty to investigate is formulated by the UNHCR as follows:

> The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.[551]

This balance between lack of evidence and recognising the difficulties of presenting proof has led to the development of the alleviation principle that has become internationally recognised in asylum adjudication. Due to the difficulties for the applicant to prove every part of his case and also for the examiner to produce the necessary evidence, according to the Handbook, it frequently becomes necessary to give the applicant the "benefit of the doubt".[552] The need for the principle is reinforced by the prohibition of *refoulement* and the absolute nature of Article 3 ECHR and the "benefit of the doubt" should be understood and applied as a safety valve in relation to *non-refoulement* as a way of recognising the difficulties and uncertainties inherited in asylum adjudication.[553] This means that it allows the adjudicator to accept pieces of evidence about which there is uncertainty.[554] "Benefit of the doubt" as expressed in the Handbook is connected to the assessment of the applicant's general credibility and shall:

---

550 The UNHCR Handbook, para. 42 (the author's emphasis). In the *Note on Burden and Standard of Proof in Refugee Claims*, para. 16, the wording *reasonably possible* [is also suggested. See also the subsequent *Guidelines on International Protection No. 12*, para. 21 where the UNHCR emphasises "reasonable degree" and dissuades from applying a probability calculus.

551 The UNHCR Handbook, Article 197.

552 This is further developed in UNHCR: *Note on Burden and Standard of Proof in Refugee Claims*, para. 6.

553 UNHCR Handbook, para. 196, UNHCR 2013, Beyond Proof, p. 246, Kagan 2003, Goodwin-Gill and McAdam 2011, p. 59, and Noll 2005. Compare Popovic 2005 who advocates for comparing the principle "benefit of the doubt" in asylum cases with the standard "beyond reasonable doubt" in criminal cases with regard to the obligation of *non-refoulement*.

554 UNHCR 2013, Beyond Proof 2013, p. 246 and Kagan 2003.

> …only be given when all available evidence has been obtained and examined and when the investigator is satisfied as to the applicant's general credibility.[555]

This condition for getting "benefit of the doubt" is problematic but will be further analysed in Chapter 7.

The principle of the "benefit of the doubt" is not explicitly stated in the Qualification Directive but Article 4(5) of the Directive includes an evidentiary alleviation rule corresponding to the principle, which is linked to the facultative rule in 4(1).[556] However, while some sentences in Article 4(5) include the same or nearly the same wordings as in the Handbook, the wordings have been modified and structured into more strict conditions in the Qualification Directive.[557] The Directive places an additional condition on the applicant by stating that the applicant must have "applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so". This leads to a heavy burden on the applicant and has been criticised for not being compatible with the principle of *non-refoulement*.[558] The rule was not implemented in the Swedish Aliens Act as, according to the Government, the fact that an application had not been submitted at the earliest possible time was not such an exception that would render a refusal of a residence permit.[559] Whether this should be interpreted as saying that this fact should not be considered at all was not mentioned. However, the Migration Court of Appeal has in fact used this as an argument when assessing credibility.[560]

---

555 The UNHCR Handbook, para. 204.

556 Noll 2005 and Peers et al. 2015, p. 90.

557 Article 4(5)(d) of the Qualification Directive and the UNHCR Handbook, paras. 203 and 204.

558 Noll 2005 and UNHCR, *Comments on the European Commission's Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted (COM (2009)551, 21 October 2009)*, 29 July 2010, section 11(c). See also the UNHCR 2013, Beyond Proof, p. 249 where the UNHCR "encourages Member States to interpret Article 4 (5) of the Qualification Directive as a whole, and provisions (d) and (e) in particular, in accordance with the principles of the UNHCR Handbook".

559 Prop. 2009/10:31, p. 181.

560 MIG 2013:25. See further on the issue in relation to credibility, below, Chapter 7.

5.2.2.2 Swedish law

In the Swedish asylum context, the question of burden and standard of proof as well as the duty to investigate have been interpreted on the basis of, on the one hand, general administrative procedural principles, and, on the other, international and EU standards concerning asylum law. Generally, in Swedish administrative cases, the burden of proof regarding benefits lies with the individual, whereas the burden for obligations of the State lies with the public authorities.[561] Asylum cases include both elements: the benefit of a residence permit and an obligation to protect.[562] This is expressed in the Swedish preparatory work in that asylum cases are a special kind of administrative case where the applicant not only applies for a "benefit" but this also includes an "aspect of protection".[563] This view has impacted on the extent to which the authorities and courts perceive an obligation to investigate asylum cases.[564]

Generally in Swedish administrative cases, the question of burden and standard of proof has been diffuse, which has been subject to critical reflections in doctrine.[565] Unlike in many other administrative cases, the standard of proof has been more explicit in asylum cases where the notion of "probable" has been established.[566] The standard "probable" is seen as a fairly low one and is chosen to realise the protection interest in the light of the uncertainty and risk involved in

[561] Diesen and Lagerqvist Veloz Roca 2003, p. 73.
[562] Diesen in Andersson et al. 2018, p. 222.
[563] Prop. 2004/05:170, p. 155 and Prop. 2009/10:31, p. 127. Compare Staffans on burden and standard of proof in EU asylum law (2012, p. 72 f.).
[564] Prop. 2004/05:170, p. 155.
[565] von Essen 2017, p. 376 ff., Ragnemalm 2014, p. 112, and Stendahl 2009 and 2013. See for an analysis of different notions of standard of proof in administrative cases, Diesen and Lagerqvist Veloz Roca 2003, p. 99 ff., and Diesen in Andersson et al. 2018, p. 245 ff.
[566] MIG 2006:1, MIG 2007:12, among others. See also Diesen in Andersson et al. 2018, p. 251 f. where he put forward a few principles that should be considered in order to decide whether the standard of proof "probable" has been reached: previous persecution, real risk of persecution upon return, general grounds (such as belonging to a certain well-known persecuted group), a plausible and credible narrative that is corroborated by documentation submitted by the applicant or by the investigating authorities and, finally, in the case of a lack of documentary or other corroborative evidence, the applicant's statements should be taken at face value if there is at least a *balance of probability* that the applicant will be subjected to prosecution or other actions that would justify asylum.

making future assessments.[567] As shown in the empirical study, this notion is frequently used by the Swedish migration courts in their reasoning. The notion "probable" is used not only in the final assessment of the risk but in the different stages on specific types of evidence such as the narrative as a whole or the written evidence presented in the case.[568] This way of assessing evidence has been criticised by Diesen who points out that it is not possible to impose a standard of proof on "evidentiary facts" (*bevisfakta*), i.e. it is not possible to claim that, for instance, belonging to a certain group has to reach the standard of proof by itself.[569] Every piece of evidence has to be assessed in relation to other facts, which means that the assessment of one piece of evidence is not sufficient to decide whether the standard of proof has been achieved.[570] Also, the narrative is a piece of evidence and there is no separate standard for the assessment of the narrative.[571]

In addition to the general standard of proof, "probable", the various protection provisions in the Swedish Aliens Act contain different notions on standard of proof corresponding to Article 2(d) and (f) of the Qualification Directive.[572] How the standard "probable" should be applied in relation to, for instance, the standard set out in Chapter 4, section 2 of the Aliens Act, "substantial grounds for believing" (*grundad anledning att anta*) is not clear. However, by choosing to emphasise the standard "probable", the Swedish migration courts shift the emphasis from the requisite in the provision to a standard of

---

567 Kaldal 2010, p. 203.
568 See, above, section 4.2.
569 Diesen in Andersson et al. 2018, p. 264. See also for a similar view regarding other types of cases, Lindell 1987, p. 32, Kaldal 2010, p. 177, and von Essen 2017, p. 339.
570 Diesen in Andersson et al. 2018, p. 251. See also Cegrell Karlander 2021, p. 213, who advocates for a holistic method and Lindell 1987, p. 392. Compare the method advocated by UNHCR 2013, Beyond Proof, p. 50 and International Association of Refugee Law Judges 2013, p. 11 and 28 f. where the adjudicators are supposed to first decide which material facts in the asylum seeker's story are deemed to be credible and thereafter decide which statements or other pieces of evidence should be "accepted" or not, before making the risk assessment. This will be further discussed in Chapter 7.
571 Diesen in Andersson et al. 2018, p. 256.
572 According to the Government the standard set out in the Qualification Directive – *substantial grounds have been shown for believing* that the person concerned, […], *would face a real risk* – could be perceived as more advantageous for the asylum seeker than *well-founded fear* which is why the Government deemed it important to exchange the standard *well-founded* set out in the subsidiary protection (Prop. 2009/10: 31, s. 119 and UNHCR 2011, *Kvalitet i svensk asylprövning*, p. 164).

proof outside the provision which has no support in international human rights law.[573]

Additionally, the different location in the Aliens Act of the provisions regarding protection statuses and the provisions regarding "impediment to enforce" (*verkställighetshinder*) makes the risk assessment rather inconsistent as the latter provisions comprise other wordings that indicate a different standard. When assessing the risk connected to status determination, the wording suggests a higher standard of proof ("well-founded fear"/"substantial grounds for believing" (*grundad anledning att anta*)) than when assessing the question of refusal-of-entry or expulsion ("is at risk"/"fair reason to assume" (*skälig anledning att anta*)). This seems rather confusing especially considering that the provisions regarding enforcement are to be taken into account whenever a question about refusal-of-entry or expulsion is to be examined.[574] The fact that there seems to be no correlation between the assessment on status and the assessment on "refusal-of-entry" and expulsion implies that there is a tension between these two issues which relates to the fact that an asylum application is an application for a benefit and at the same time implies a restriction on the state.[575] The relation between the different standards set out in, on the one hand, the status determination provisions, and, on the other, the provisions corresponding to the prohibition of *refoulement* has, however, not been explicitly dealt with in Swedish case law.[576]

573 See above, section 5.2.2.1. See also Kaldal 2010 on the difficulty of distinguishing between the fulfilling of, on the one hand, the standard of proof, and, on the other, a requisite. She holds that even though the level of risk is expressed as a requisite and the answer should be sought in the legal sources, the assessment of the degree of certainty in relation to a future harm requires an open adjudication and is, therefore, an epistemological question (p. 186).

574 See above, section 5.1.2 on Chapter 8, section 17 of the Aliens Act, and Cegrell Karlander 2021, p. 227 f.

575 See Diesen in Andersson et al. 2018, p. 290 who has recognised this ambiguity and initially argues that the determining authorities have the burden of proof as regards "impediment to enforce", which could imply a requirement to prove that a deportation can be executed without risk. However, he continues by stating that this is not how established law (*gällande rätt*) is constructed.

576 The content of the notion "fair reasons to assume" has been discussed in MIG 2010:11 concerning "new adjudication" (*ny prövning*). In this case the Court makes a comparison to other legal fields and states that "assume" means that there are objective grounds substantiating the assumption which in turn means that there is a small balance

In its early case law, the Migration Court of Appeal, by quoting the Governmental Bill, establishes that the Handbook, together with other conclusions regarding the procedure, which is supported by the UNHCR, may be considered an important source of law regarding the procedure in cases concerning refugees.[577] The Court continues by specifically pointing out that the paragraphs concerning the "Procedures for determination of Refugee Status" (paras. 195–205) in the UNHCR Handbook constitute important methods and principles in order to establish facts.[578] Notably, the Handbook's practical guidance on how to interpret the substantial protection requisites is, however, not emphasised in the same manner. This is despite the fact that the main part of the Handbook concerns the interpretation of the requisites set out in the Refugee Convention, as the Convention has been the main tool for their mandate to monitor the protection of refugees.[579] The part concerning the principles and methods for establishing facts in refugee adjudication (paras. 196–205) is only one part of the Handbook. These selective references to the Handbook are also what the results of the empirical study show in the migration courts' reasoning, where such references are made.[580] As mentioned above, these paragraphs and the subsequent guidelines advocate for a shared burden and also include principles on evidentiary alleviation for the asylum seeker.[581] The fact that the Swedish migration courts selectively refer to this part in the Handbook adds to the picture that the focus in the court judgments is shifted from an assessment of the potential future risk upon return to emphasising assessment principles. Also, as shown in the empirical study, the Swedish migration courts selectively choose to emphasise the asylum seeker's burden and the

---

of probability. However, in an earlier case, MIG 2007:37, the Court uses almost the same interpretation of what constitutes *well-founded fear*. Hence, the difference in case law is not clear.

577 Prop. 2004/05:170 p. 94, MIG 2006:1, and MIG 2007:12.

578 MIG 2006:1 and MIG 2007:12.

579 On its website the UNHCR states that its mandate is "to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate locally or to resettle in a third country. It also has a mandate to help stateless people". http://www.unhcr.org/pages/49c3646c2.html.

580 See above, section 4.2.

581 See above, section 5.2.2.1.

standard of proof "probable" by, for instance, initially stating that "it is for the applicant to make her or his need for protection probable".[582]

In its first case, the Migration Court of appeal stated that it is an established principle that a person applying for a benefit has the burden of proof and that applying for a residence permit is applying for a benefit.[583] Hence, according to the Court of Appeal, it is the person applying for a residence permit who has the initial burden of proof regarding the factual circumstances.[584] Additionally, in this first case, the Court of Appeal establishes that in spite of it being a two-party procedure and that the applicant is often assisted by legal counsel, an obligation for the court to investigate may arise.[585]

A general duty to investigate is expressed in section 8 of the Swedish Administrative Court Procedural Act:

> The court shall ensure that the case is investigated to the degree that its nature requires. Through questions and remarks the court shall work for the parties to remedy any ambiguities and incompleteness in their claims. The court shall ensure that no unnecessary investigation is brought into the case. Superfluous investigation may be rejected.[586]

The provision addresses the responsibility of the court for the fullness of the investigation, for the management of the proceedings (*processledning*), and for necessary investigations falling outside the scope of the parties' claims.[587] The latter is referred to as the principle of

[582] See above, section 4.2.
[583] MIG 2006:1.
[584] In the subsequent case, MIG 2007:31, from the Court of Appeal it was established that the "matter" (*saken*) in all migration cases is the application for a residence permit. This applies regardless of whether the basis for the application concerns asylum, family reunion or has other grounds, which means that all parts of an application resulting in a residence permit can be tried at the same time. For instance, when an asylum application is complemented with an application for family ties that has arisen during the asylum procedure, this should be dealt with as one case and not as two separate cases. This implies a focus on the benefit of a residence permit rather on the obligation for the State to protect. Two judges held dissenting opinions and put forward the specific characteristic of Aliens law in general and differences as regards characteristics between adjudication of family ties and asylum specifically as they differ in prerequisites as well as in legal consequences. See also Cegrell Karlander 2021, p. 326 f.
[585] The right to a public counsel in asylum cases is stipulated in the Aliens Act Chapter 18, section 1 of the Aliens Act, See on the scope of this right Wejedal 2017, p. 490 ff.
[586] The author's translation.
[587] SOU 2006:6, p. 210.

"official examination" (*officialprövningsprincipen*).[588] The meaning of "official examination" is that the court shall ensure that the case is sufficiently investigated to enable a judgment.[589] The court has the uttermost responsibility for the investigation of the case.[590] The types of cases with a high level of significance for the individual as well as cases where the individual has to bear the deficiencies of the investigation require the courts to ensure a more robust investigation.[591]

The limitation for the court to investigate *ex officio* is limited by section 29 of the Administrative Court Procedural Act, which stipulates that: "The court's judgment may not go beyond what is claimed in the case. If there are special reasons, however, the court may, even without a request, decide for the better for the individual, when this can be done without harm to the opposing individual interest". The aim in asylum cases of arriving at a judgment that is correct in substance should lead to the investigative responsibility extending beyond the circumstances stated in support of the application.[592] However, a basic principle is that the court may go beyond what is claimed in the case only so long as it is not to the detriment of the individual.[593]

The scope of investigating *ex officio* and the administrative courts' role in the two-party process in asylum cases is ambiguous in the Swedish asylum law context.[594] As mentioned above, at the time of establishing the migration courts, the Government stated that asylum cases are a special kind of cases which include an "aspect of protection" which in turn impacts on the extent to which the authorities and courts are obliged to investigate the cases.[595] However, the Government also stated that a higher responsibility for being active in the procedure is placed on the asylum seeker and her or his counsel as a result of the two-party process in the court, even though the duty for the Migration

---

588 Ibid.

589 Prop. 2012/13:45 p. 113 ff.

590 Ibid, Wennergren 2005, p. 148, Diesen in Andersson et al. 2018, p. 229, and Cegrell Karlander 2021, p. 189 and p. 324. See also von Essen 2017, p. 128 ff. for a discussion on how the responsibility for the administrative courts to ensure that the case is sufficiently investigated, depends on the nature of the case.

591 Prop. 1971:30 part 2, p. 529, Prop. 2012/13:45 s. 113 ff., and von Essen, 2017, p. 129.

592 Diesen in Andersson et al. 2018, p. 226.

593 Wennergren 2005, p. 279 and von Essen 2017, p 321.

594 Cegrell Karlander 2021, p. 324 ff.

595 Prop. 2004/05:170, p. 155 and Prop. 2009/10:31, p. 127.

Agency to investigate remains.[596] The fact that the court procedure is a two-party process was put forward as a basis for legal certainty and an efficient procedure which, according to the Government, means that the court should base its judgment on what emerges under the proceedings in the court and the responsibility for the examination should be in line with what applies in other types of cases.[597] The court's responsibility to see to it that the case is sufficiently examined before it can be decided is given less attention. It was emphasised that the court should have a general and qualified knowledge about the conditions in different countries as a background and that it must be possible to presume that this knowledge is known to the parties.[598] The significance of the principle of "court hierarchy" (*instansordningsprincipen*) was put forward and connected to legal certainty:

> An adjudication marked by legal certainty within reasonable time at the court is conditioned by the fact that the emphasis of the adjudication lies in the first instance. The courts' adjudication facilitates if all the circumstances have already been examined. Then, the court can focus on what is disputed in the case.[599]

This focus on "what is disputed in the case" seems to have allowed for a narrowing down of the adjudication in the migration courts to a question of credibility when this is disputed. This is a problematic stand in the light of the *ex nunc* principle which has also led to Sweden being found to violate Article 3 ECHR for failing to carry out a full assessment.[600] The fact that allegations of procedural deficiencies are mostly ignored or rejected as an explanation for lack of credibility may also be a result of the courts' assumption that the Migration Agency has investigated the case sufficiently.[601]

However, in subsequent case law, the Migration Court of Appeal has stated that in cases where there may be a need for protection, there is a greater responsibility for investigating than in other cases and that

[596] Prop. 2004/05:170, p. 151.
[597] Prop. 2004/05:170, p. 135.
[598] Prop. 2004/05:170, p.137 f. See also Cegrell Karlander 2021, p. 320 on how the Swedish Migration Court of Appeal has submitted country of origin information without commentating the measure.
[599] Prop. 2004/05:170, p. 154 and SOU 2004:74, p. 321 f.
[600] *Case F.G. v. Sweden*, para. 115. See also the dissent opinion in the lower chamber in *Case J.K. v. Sweden* by Judge Zupançiç.
[601] See above, section 4.9 on to what extent the Swedish migration courts consider claims connected to procedural deficiencies.

the court may fulfil its responsibility by, for instance, giving the parties instructions on the necessary investigation.[602] The Migration Court of Appeal has further stated that the Migration Agency, even after the implementation of the two-party procedure, has the overall responsibility to see to it that the applicant's reasons and grounds are sufficiently examined.[603] The responsibility of the migration courts to ensure that the cases are sufficiently investigated has led to the Court of Appeal remitting a number of cases to the migration courts based on, for instance, a lack of information about the country of origin and deficiencies in the investigation regarding written documents.[604] Also, the extended duty for the migration courts to investigate in cases where torture is an issue has been emphasised in the Migration Court of Appeal.[605] Furthermore, the fact that there has been no oral hearing in the court has been regarded as an investigative deficiency, as has the question of investigating internal flight possibilities.[606] Insufficient investigation of the asylum seeker's age and insufficient language analyses have also been the basis for referring cases back to the migration courts.[607] In the preparatory work, the emphasis is on the principle of "court hierarchy" and the two-party procedure as a basis for an efficient process based on legal certainty, whereas the Migration Court of Appeal seems to stress an initial burden on the asylum seeker but also the investigative responsibility for the courts.

Among legal scholars, arguments supporting the view that the burden should rest with the asylum seeker are motivated by the fact that difficulties inherited in the asylum procedure in general regarding

---

602 MIG 2006:1, MIG 2012:18, MIG 2014:21, MIG 2014:22.
603 MIG 2006:7. See Lagerqvist Veloz Roca in Andersson et al. 2018, p. 192 ff. for an analysis of the case.
604 MIG 2006:1, MIG 2006:7, and MIÖD, UM 2089-09.
605 See MIG 2012:2, MIG 2014:21 where the Court refers to ECtHR's final judgment in *Case R.C. v. Sweden*. The ECtHR found that Sweden had violated Article 3 in the Convention when neglecting to further investigate a torture claim supported by a medical report. See also MIÖD UM 9002-12 where the Court concludes that the migration court has been guilty of a severe procedural error by not letting the asylum seeker submit a medical report concerning torture.
606 See, as regards oral hearing, MIG 2009:30, MIÖD UM 8363-09, MIÖD UM 2926-10, and as regards the possibility of internal flight, MIG 2009:4.
607 MIG 2014:1, UM 694-14, and MIG 2011:15.

the production of evidence affect the parties equally.[608] The opposite view is based on exactly this imbalance between the parties, meaning that this probably requires national courts to take an active role when it comes to fact finding and evidence gathering in the light of case law from the CJEU in other areas.[609] Furthermore, in line with the absolute prohibition of *refoulement* in human rights law, the national judges are obliged "…to reconstruct as meticulously as possible what happened and to use his or her investigative powers to that end".[610] Also, the standard of proof is intertwined with the alleviation principles that should be applied, provided that the parties have fulfilled their obligations. The uncertainties that remain should not be assessed to the disadvantage of the asylum seeker.[611] Due to the unequal relation between the asylum seeker and the Migration Agency, the court should have more reason to provide assistance to the individual than to the public authority, even though access to a legal counsel may have an impact on the court's responsibility.[612]

5.2.3 A shift of emphasis from the State's duty to investigate and evidentiary alleviation to the burden of proof for the asylum seeker

In section 5.1.1, I argued that the principle of *non-refoulement* is the core of the asylum adjudication. By making the question of expulsion invisible in the rulings, the Swedish migration courts shift the emphasis of the purpose of asylum adjudication from an assessment of the risk for *refoulement* to a question of status determination and the benefit of a residence permit. In this section, I have argued that the Swedish migration courts further shift the emphasis of the asylum adjudication from a question of interpreting the content of the requisites in the

---

[608] See Staffans 2012, p. 73 who, on the one hand, recognises the discriminatory inequality in the asylum procedure relating to the procedural strength and cultural differences, but, on the other, holds that this issue is effectively dealt with outside the burden of proof through procedural safeguards such as legal advisers and interpreters.
[609] Baldinger 2013, p. 328. Compare Johannesson 2017, p. 111 who argues that the adversarial procedure masks rather than adjusts the inequality in resources that inevitably exists between the State party and the asylum seeker.
[610] Baldinger 2013, p. 381. See also Spijkerboer 2009 and later cases from ECtHR: *Case F.G. v. Sweden* para. 120, *Case R.C. v. Sweden*, para. 50, and *Case J.K. v. Sweden*, para. 91.
[611] Diesen in Andersson et al. 2018, p. 228.
[612] SOU 2006:6, p. 211, Ragnemalm 2014, p. 112, and Cegrell Karlander 2021, p. 324.

protection provisions (such as torture, persecution) to a question of assessment principles. Firstly, this is done by formulating the point of departure for the assessment as "individual" and "forward-looking" in a way that blurs the connection between these notions and the requisites in the protection provisions. Secondly, this is done by emphasising the notions of standard and burden of proof. Furthermore, by highlighting the asylum seeker's burden to attain the standard of proof, while downplaying the evidentiary alleviation principles as well as the duty for the State to investigate, the State's responsibility for expulsion is blurred. This jeopardises an outcome that is correct in substance, which Spijkerboer rightly warns against.[613]

The legal analysis in this section provides for a more open and complex interpretation of the limits for the asylum adjudication than what can be discerned in the rulings by the Swedish migration courts. It was concluded above in section 5.2.2 that the shared burden between the State and the asylum seeker is emphasised both in EU law and in the UNHCR's guidelines. Many scholars in the field view the burden on the asylum seeker as a burden of information or a burden of assertation rather than a burden of proof.[614] The "burden" is expressed as a shared burden of investigating the circumstances and facts presented by the asylum seeker as well as other relevant facts. It is further established that an assessment in the EU context concerning the need for international protection requires a full, *ex nunc* examination in the court and that, in line with this requirement, the court must make a rigorous examination of facts and circumstances and make a fresh assessment of facts as well as of the credibility of the asylum seeker's narrative. Furthermore, according to the ECtHR, the absolute prohibition against *refoulement* requires that the court may have to obtain material on conditions in the country of origin, by its own motion (*proprio motu*), since the situation and circumstances can change rapidly. The notion of shared burden, i.e. the duty for the asylum seeker to substantiate her or his claim and the duty for the court to investigate facts *ex nunc* and *ex officio* must be interpreted as both the parties and the court having a responsibility to reach the required standard of

613 See supra note 542.

614 Noll 2005, Baldinger 2013, p. 378 f., Spijkerboer 2009, Diesen in Andersson et al. 2018, p. 227.

proof. Foremost, these principles should always be applied in the light of the risk of *refoulement*.

The notion of "shared burden" is less explicit in the Swedish asylum context. It seems that there has been a shift, by the legislators, from the duty to investigate in order to arrive at an outcome that is correct in substance, to emphasise efficiency and legal certainty and the parties' responsibility due to the implementation of a two-party process. Also, in case law there is an emphasis on the burden of proof on the asylum seeker, even though the responsibility for the Migration Agency and even the responsibility for the courts to investigate is recognised. The aspects of protection and the absolute prohibition of *refoulement* require a more active role from the courts than that of merely placing the burden of proof on the party who makes a claim. Considering the risk of *refoulement* it should rather be the object and the significance for the individual that should be the focus. The assessment of the risk upon returning an individual who seeks asylum is an assessment of potential future consequences in case of a return in relation to what must not happen.

5.3 A shift of emphasis from an assessment of the risk of *refoulement* to a question of burden and standard of proof – Concluding reflections

In this chapter I have critically reflected on the possible interpretations and choices within the frame of the asylum procedure. I have shown how the Swedish migration courts' choices of legal presentation lead to a shift of emphasis from a question of *non-refoulement* to a question of burden and standard of proof.

This shift of emphasis in the adjudication is done at different levels. Firstly, by referring to provisions on status and the benefit of a residence permit and not mentioning expulsion, the principle of *non-refoulement* is made invisible. Secondly, by emphasising the asylum seeker's burden of proof and the standard of proof that she or he must reach and at the same time disregarding the evidentiary principles and the State's duty to investigate, the absolute prohibition of *refoulement* shifts to a question of burden and standard of proof where the whole burden is heavily placed on the asylum seeker.

In line with the purpose of the asylum adjudication – that no one should be forced back to a place where she or he is at risk of being subjected to treatments prohibited by law – I argue that the principle of *non-refoulement* must be the central basis of the asylum adjudication. I further argue that this should have an impact on how adjudication and assessment principles, such as the burden and standard of proof and the duty for the State to investigate, are applied. The assessments on the balance between the "shared burden" and the duty for the State to investigate in relation to the risk upon return should be visible in the rulings.[615] In the next section, the handling of facts and circumstances within the asylum procedure is critically reflected on.

[615] See Arendt, section 8.2, on the faculty of judging which involves taking a stand in public.

6 Critical legal reflections on the Swedish migration courts' identification, presentation, consideration, and evaluation of facts and circumstances

The analyses and reflections in the present chapter are coupled to the three sub-questions in Chapter 4: *How, and to what extent, if at all, do the courts base their assessments on external sources of information?* (section 4.3); *How, and to what extent, if at all, do the courts base their assessments on individual facts and circumstances?* (section 4.7); and *How, and to what extent, if at all, do the courts include co-applicants in their assessments?* (section 4.6). In light of the findings presented in these sections the room for considering facts and circumstances within the asylum law framework is explored. The first section (6.1) addresses the significance and content of considering individual facts and circumstances when assessing the risk upon return. In section 6.2 the room for using country of origin information, experts, and written documents as evidence in the asylum procedure is explored and analysed. In section 6.3 the pattern shown in the study on the correlation between the outcome of the cases and how, and to what extent, the judges motivate their judgments, is analysed.[616] Finally, in section 6.4, concluding reflections are made.

6.1 The consideration and evaluation of individual and personal facts and circumstances in relation to the assessment of the risk upon return

The results from the empirical study of the Swedish migration court judgments in asylum cases show a pattern where individual facts and circumstances constitute a minor share of the arguments in the judges' reasoning (1%).[617] Furthermore, it was shown that co-applicants' need of protection and their statements are considered and assessed separately in a minority of the cases that include applicants.[618] As discussed in section 5.2.1, the wording "individual assessment" in the

[616] See above, section 4.10.
[617] See sections 4.1 and 4.7.
[618] See section 4.6.

rulings is used in a narrow sense, mostly in order to initially establish that the security situation in the country of origin is not such as to render a need of protection for anybody from that country.[619] In this section the significance and assessment of individual facts and circumstances are analysed from a broader perspective where all such facts and circumstances that can be relevant for the risk upon return are included.[620] The present section includes three sub-sections. In section 6.1.1 the content of an individual assessment is explored, while section 6.1.2 focuses specifically on women and children as co-applicants. In section 6.1.3, critical reflections are provided. The significance of individual and personal factors impacting on the asylum seeker's ability to present a credible narrative is examined in Chapter 7.

6.1.1 The content of an individual assessment

The individual assessment includes such factors as the level of discrimination of certain groups as well as the personal circumstances that may impact the possibility for the individual asylum seeker to live in the country of origin.[621] In the refugee definition these factors are connected to the enumerated grounds for persecution and to the requisite "well-founded fear". The UNHCR defines "well-founded fear" as including two elements: one subjective and one objective. The subjective element includes taking into account individual circumstances as well as the asylum seeker's personality in order to assess the credibility of the statements.[622] The division between subjective and objective elements has been criticised in doctrine. Critics mainly hold that it is not the asylum seeker's state of mind or feelings that should be assessed as this could lead to a focus on the decision-

619 See section 4.2.

620 See Appendix 1, section 2.2.6 for an explanation of the category "individual facts and circumstances".

621 UNHCR Handbook, paras. 44 and 45, and MIG 2009:27. See Baldinger 2013, p. 379 f. for an account on the different levels of individual assessment in relation to the situation in the country of origin. See Goodwin-Gill 2013 who argues that the proper focus should be on the modification of behaviour as the possibly relevant harm amounting to persecution, rather than on the nature and level of risk attaching to membership of particular groups.

622 The Handbook, paras. 40 and 41, and *Note on Burden and Standard of Proof in Refugee Claims 16 December 1998*, para. 13.

maker's subjective perception of the asylum seeker's fear.[623] Rather, the focus should be on the objective elements, i.e. assessing whether the statements have been sufficiently substantiated.[624] However, in its subsequent guidelines, the UNHCR has developed the relation between the subjective and the objective elements and more emphasis has been put on the fact that the two elements should be evaluated together.[625] An individual contextual approach regarding "well-founded fear" has been developed in different guidelines concerning special groups[626] where, for instance, the asylum seeker's perceived fear should be assessed in connection to how national laws affect the individual.[627]

In Swedish case law, the individual assessment has mainly been prominent in relation to the refugee requisite in Chapter 4, section 1 of the Aliens Act: "…well-founded fear of persecution" (*…välgrundad*

---

623 See, for instance, Hathaway 1991, p. 66, Wikrén and Sandesjö 2017, p. 175 f., Grahl-Madsen 1966, p. 173 ff., Kagan 2003, Wouters 2009, p. 84, and Zimmerman 2011, p. 190 f. See for a slightly different view, Diesen in Andersson et al. 2018, p. 269, who focuses on whether the asylum seeker's narrative is plausible and stems from genuinely experienced circumstances. See for an opposing view Zahle 2005 who holds that the subjective part should have a more prominent role as the court can know nothing about the asylum seeker.

624 Ibid.

625 UNHCR, *Note on Burden and Standard of Proof*, para. 13.

626 See, for instance: *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees HCR/GIP/04/06 28 April 2004, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009 and Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012).*

627 See *Guidelines on International Protection No. 9, Claims to Refugee Status based on Sexual Orientation and/or Gender Identity*, para. 28 where UNHCR advocates that in cases where homosexual relations are criminalised: "Assessing the 'well-founded fear of being persecuted' in such cases needs to be fact-based, focusing on both the individual and the contextual circumstances of the case. The legal system in the country concerned, including any relevant legislation, its interpretation; application and actual impact on the applicant needs to be examined". "The 'fear' element refers not only to persons to whom such laws have already been applied, but also to individuals who wish to avoid the risk of the application of such laws to them. Where the country of origin information does not establish whether or not, or the extent, that the laws are actually enforced, a pervading and generalized climate of homophobia in the country of origin could be evidence indicative that LGBTI persons are nevertheless being persecuted".

fruktan för förföljelse).[628] The subjective and objective elements included in "well-founded fear" have not been subject to a detailed interpretation but are expressed in Swedish preparatory works as encompassing: "…on the one hand, the feeling of fear for persecution that the Alien her/himself feels, and, on the other hand, an objective element which includes a requirement that this fear is warranted".[629] The Government further has pointed out that the personal conditions as well as the conditions in the country of origin are elements that should be considered when assessing whether the fear is well-founded.[630] In the case law from the Migration Court of Appeal, the objective elements have been emphasised, while the subjective elements related to individual and personal facts and circumstances have been downplayed and seem to have been replaced by the issue of credibility.[631] An example is MIG 2011:29 where the asylum seeker's fear of returning to Afghanistan after his having converted to Christianity was an issue. The central issue in the case was whether the risk upon return had arisen during the asylum seeker's time in Sweden (*sur-place*). The court did not refer to any "objective" elements of "well-founded fear", such as country of origin information or the fact that he was illiterate and that he had learned about Christianity from a Christian friend; rather, the court made its assessment based on questioning the asylum seeker's subjective fear without explicitly expressing the term "subjective". The assessment of the asylum seeker's fear was based on a credibility indicator connected to contradictions. The applicant first claimed that he was not afraid of what would happen if it became known that he was interested in Christianity and that the Afghans that he knew in Sweden had not questioned his conversion, while at a later

[628] See, for instance, MIG 2008:39, MIG 2011:8, MIG 2012:12 (gender), MIG 2008:21 (minority group and women, MIG 2011:21(political activity sur-place), MIG 2011:29 (conversion), 2014:25 (sexual orientation), and 2014:20 (ascribed political affiliation).
[629] Prop. 2005/06:6, p. 9. (The author's translation.)
[630] Prop. 2005/06:6, p. 9 and p. 27.
[631] See, for instance, MIG 2008:39, MIG 2011:8, MIG 2011:29, and MIG 2012:12. Compare the criticism from the UNHCR in its report from 2011 on Swedish asylum decisions at the Migration Agency, *Kvalitet i svensk asylprövning*, where UNHCR meant that the demands on the applicant to fulfil the refugee requisite is set too high (p. 135 ff.) and that the subjective element is hardly ever considered (p. 161). See also, for instance, MIG 2011:6 where the Court does not make its own assessment as to *well-founded* fear of persecution but upholds the migration court's argumentation simply stating that neither A nor B has claimed such reason that may be attributed to refugee grounds.

stage of the procedure, after the oral hearing at the Court, he claimed that he had been bullied due to his conversion.[632] Contrary to MIG 2011:29, in MIG 2013:25 the education of the applicant was raised by the Court to the detriment of the asylum seeker: the Court did not find it credible that the applicant did not know that homosexuality had been criminalised for a long time as he had completed a university education conducted in English.

Individual and personal circumstances are not only relevant in refugee determination but also in assessing the need for subsidiary protection. The UNHCR stresses the significance of taking individual and contextual circumstances into account in adjudication of the need of "international protection".[633] The term "individual and contextual circumstances" has been developed into a broader concept, reflecting the requirement under EU law and including the need to take into account the applicant's *background*.[634] According to the UNHCR, this broader concept encompasses:

> …both the personal background of the applicant, his or her age, nationality, ethnic origin, gender, sexual orientation and/or gender identity, education, social status, religion, beliefs, values, and urban/rural cultural background, and state of mental and physical health; his or her past and present experiences of ill-treatment, torture, persecution, harm, or other serious human rights violations, and experiences in any transit country and the Member State; as well as the wider legal, institutional, political, social, religious, cultural context of his or her country of origin, or place of habitual residence, the human rights situation, the level of violence, and available state protection.[635]

The notion that the assessment should be individual is stated in Article 4(3) of the Qualification Directive and Article 10(3)(a) of the Asylum

---

632 The information that the asylum seeker was illiterate is to be found in the full judgment, MIÖD UM 7850-10 but is not to be found in the MIG version. See Thorburn Stern and Wikström 2016, p. 147 ff. for a critical analysis of the case and assessments of genuineness of religious beliefs and sexual orientation in other Swedish migration court rulings.

633 UNHCR Handbook, paras. 42 and 43 and 52, Note on Burden and Standard of Proof in Refugee Claims 16 December 1998, para. 19 and UNHCR 2013, *Beyond Proof*, p. 22.

634 UNHCR 2013, *Beyond Proof*, p. 22.

635 UNHCR 2013, *Beyond Proof*, p. 22. In its subsequent *Guidelines on International Protection No.12, paras. 13–14*, from 2016, the UNHCR has stressed the importance of considering these factors even in a situation of armed conflict in order to determine whether the asylum seeker should be declared as being a refugee (see above, section 5.1.1, on the different protection grounds).

Procedures Directive. Article 4(3) of the Qualification Directive stipulates that the individual assessment encompasses to take into account a wide range of elements listed in paragraphs a–e. The third paragraph (c) is relevant to this section and stipulates that the "…individual position and personal circumstances of the applicant, including factors such as background, gender and age, …" should be taken into account.[636] Neither Article 4(3) of the Qualification Directive nor Article 10(3)(a) of the Asylum Procedures Directive are codified in the Swedish Aliens Act as, according to the Government, an individual adjudication is already provided for in Swedish asylum adjudication and is usually based on the enumerated elements in Article 4(3).[637] Furthermore, the Government did not perceive the list as exhaustive.[638]

Some personal circumstances have garnered special attention in the Qualification Directive. The fact that the asylum seeker already in her or his country of origin has been subjected to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's "well-founded fear of persecution" or "real risk of suffering serious harm", unless there are good reasons to consider that such persecution or serious harm will not be repeated.[639] The ECtHR has been clear that if such evidence is adduced, it is for

---

636 Article 4(3)(c) has been interpreted by the CJEU, *(C-71/11) and Z (C-99/11) Y and Z v. Germany,* paras. 65, 68, and 76, concerning conversion, as including an assessment "not on the basis of the particular aspect of religious freedom that is being interfered with but on the basis of the nature of the repression inflicted *on the individual and its consequences…*", which means taking into account, "all the acts to which the applicant has been, or risks being, exposed, in order to determine whether, in the light of the applicant's personal circumstances, those acts may be regarded as constituting persecution within the meaning of Article 9(1) of the Directive". The author's italics. See also *(C-199-201/12) X, Y, and Z v. the Netherlands*, para. 72. The CJEU concluded in the former case that assessing an application for refugee status on an individual basis, the applicant cannot be expected to abstain from the religious practices that she or he is expected to exercise upon return and that would constitute persecution, para. 81(2). See *(C-199-201/12) X, Y and Z v. the Netherlands*, paras. 70–71 for a similar conclusion as regards sexual orientation and *(C-148-50/13) A, B and C v. the Netherlands*, para. 72, about the limits of the individual assessment, precluding the competent national authorities from using tests or questions based only on stereotyped notions concerning homosexuals and from carrying out detailed questioning as to the sexual practices of an applicant for asylum.

637 Prop. 2009/10:31, p. 180 f. and p. 129. The Migration Court of Appeal has emphasised the importance of making an individual assessment in a number of cases. See, for instance, MIG 2007:12, MIG 2007:37, 2015:18.

638 Prop. 2009/10:31, p. 129.

639 Article 4(4) of the Qualification Directive.

the Government to dispel any doubts about it.[640] At the time of the implementation of the Qualification Directive, the Stockholm department of the UNHCR advocated an implementation of Article 4.4 into the Swedish Aliens Act. However, in line with what was stated in the other parts of Article 4, the Government held that this principle was already provided for through earlier preparatory work and case law which included that the fact that persecution or ill-treatment of close relatives, friends or colleagues had occurred had been taken into account in accordance with the UNHCR Handbook, para. 43.[641] Also, events, which had taken place since the applicant left the country of origin, or activities, which the applicant had engaged in since he or she left the country of origin (*sur-place*), should be considered as these may constitute an individual basis for a well-founded fear.[642]

An individual assessment is also relevant when assessing whether there exists an internal flight alternative.[643] The internal flight alternative must be reasonable and the decision-maker has to take into account the individual's personal circumstances such as age, gender, health, and the risk of social exclusion as well as the possibility to live together with her or his family in the suggested area.[644] However, the use of the internal flight concept has been criticised in a General Comment by ComAT in connection to the risk of torture, with the Committee considering "that the so called 'internal flight alternative', i.e. the deportation of a person or a victim of torture to an area of a State where he/she would not be exposed to torture unlike in other areas of the same State, is not reliable or effective".[645]

The UNHCR, as well as the ECtHR, has emphasised the significance of the fact that a number of individual factors taken together may give rise to a real risk when taken cumulatively, as, for

---

[640] See, for instance, *Case F.G. v. Sweden*, para, 120, *Case R.C. v. Sweden*, paras. 50, 51, and 53, *Case I. v. Sweden*, para. 62, and *Case J.K. v. Sweden*, paras. 99, 102, and 115.

[641] Prop. 2005/06:6 p. 9 and prop. 2009/10:31, p. 129 f., and MIG 2007:16 and MIG 2009:27.

[642] Article 5.1 and 5.2 of the Qualification Directive, the UNHCR Handbook, paras. 94–96, Prop. 2009/10:31, p. 132, MIG 2007:20, MIG 2011:21, and MIG 2011:29.

[643] Article 8 of the Qualification Directive, the UNHCR Handbook, para. 91, Prop. 2005/06:6 p. 28, MIG 2007:33 II, MIG 2008:20, MIG 2009:4, and MIG 2010:10.

[644] Article 8(2) of the Qualification Directive, prop. 2005/06:6 p. 28, MIG 2007:33 II, MIG 2008:20, MIG 2009:4, and MIG 2010:10.

[645] CAT, General Comment No. 4 (2017) on the implementation of Article 3 of the Convention in the context of Article 22, para. 47.

instance, individual factors taken together with general violence and heightened security risks.[646] The ECtHR has ruled in a number of cases that Sweden has violated Article 3 due to not taking cumulative risks into account. In J.K. v. Sweden, the ECtHR gives an example of such risk factors: "…previous criminal record and/or arrest warrant, the age, gender and origin of a returnee, a previous record as a suspected or actual member of a persecuted group, and a previous asylum claim submitted abroad…".[647] In this case the Court assessed the cumulative effect of the applicant's personal circumstances, the applicant's former individual position and relations, and the threats he had been subject to. This taken together with the Iraqi authorities' diminished ability to protect the family must, therefore, according to the Court, be considered to create a real risk of ill-treatment in the event of their return to Iraq.[648] In I. v. Sweden, the ECtHR held that scars on the applicant's body, which may indicate former torture on account of political activities in a situation of possible interrogation and detention upon return, would constitute a real risk of similar ill-treatment if returned to the country of origin.[649] A similar scenario was put forward in R.C. v. Sweden where presumptive former torture taken together with the deteriorated respect for human rights in Iran and the enhanced risk for asylum seekers who return and cannot prove that they left the country legally, were assessed as a cumulative risk.[650] Furthermore, the ECtHR has ruled that the competent national authorities have an obligation to assess individual and personal facts or circumstances brought to their attention, of their own motion, before taking a decision.[651] According to the Court, in F.G. v. Sweden, the Swedish determining authorities should have taken into account the fact that the applicant had converted to Christianity in spite of the fact that he had not wanted to include this fact in his claim in front of the Swedish authorities as he perceived this as a personal matter.[652] The ECtHR's

---

646 UNHCR Handbook, paras. 53, 55, and 201. Case *N.A. v. the United Kingdom*, para. 130, *Case J.K. v. Sweden*, para. 95, *Case I. v. Sweden*, para. 66, and *Case R.C. v. Sweden*, para. 56.
647 *Case J.K. v. Sweden*, para. 95.
648 *Case J.K. v. Sweden*, para. 121.
649 *Case I. v. Sweden*, para. 68.
650 *Case R.C. v. Sweden*, para. 56.
651 See above, section 5.2.2.1.
652 *Case F.G. v. Sweden*, para. 156.

argumentation on the relation between credibility and facts in these cases will be further discussed below under section 7.1.3.

The Swedish asylum procedure was addressed in a decision from the ComAT. Although this decision came in 2021, long after my empirical study was done it illustrates the problematic findings in the study as regards individual assessments. The Committee found that Sweden failed in its duty to undertake an individualised assessment of the personal and real risk that the complainant would face in Afghanistan after having converted to Christianity.[653] The Court had not considered either the applicant's cultural or educational background or the medical evidence showing that he suffered from mental health problems on account of traumatic experiences.[654] The complainant's statements should have triggered an individual psychiatric assessment to ascertain whether he had suffered trauma or had any mental health challenge which would affect his ability to give clear evidence.[655] Neither had the State party considered the actual or likely impact of the complainant's prolific social media activity, i.e. posting clearly Christian content on social media, on the risk he faced in Afghanistan.[656] Furthermore, he was denied the chance to develop the reasons for his conversion in the Court.[657]

6.1.2 Specifically, about women and children as co-applicants

An individual assessment must also include an assessment of the risk for the dependent applicants which means that they should be given the opportunity of a separate personal interview.[658] This also applies to dependent minors.[659] It is important to account for women's and

[653] *Tala v. Sweden,* CAT/C/72/D/918/2019, 26 November 2021, Advance unedited version, para. 8.
[654] Ibid., paras. 7.15 and 7.16.
[655] Ibid., para. 7.12.
[656] Ibid., para. 7.16.
[657] Ibid., para. 7.12.
[658] Article 14(1), para. 3 of the Asylum Procedures Directive. Also, see UNHCR 2010, *Improving Asylum Procedures Comparative Analysis and Recommendations for law and practice*, p. 71 ff.
[659] Article 14(1) of the Asylum Procedures Directive, para. 4. Also, see UNHCR 2009, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* HCR/GIP/09/08, para. 70.

children's need for protection, since these can emanate from social norms that will affect them differently from men, such as domestic violence and honour-related issues.[660] Even at a young age, a child may still be considered the principal asylum applicant, for instance, in cases involving genital mutilation.[661] Article 11(3) of the Asylum Procedures Directive stipulates that separate judgments and motivations may be warranted in such sensitive cases.

Even though the UNHCR Handbook primarily regards asylum seekers as vulnerable in general, it is emphasised that special considerations and extra efforts should be made during the procedure when assessing the need for protection as regards persons with mental health problems and unaccompanied children.[662] Additionally, in subsequent guidelines and reports, other groups and aspects have been highlighted as calling for special attention.[663] In the EU Asylum Directives, a wider range of groups are listed as "vulnerable" in relation to reception issues, and to the "content of the protection", i.e. rights for the asylum seeker when international need for protection has been established.[664] They are not explicitly linked to the protection requisites. However, Article 9(2)(f) of the Qualification Directive stipulates that acts of persecution of a child- or gender-specific nature, such as recruitment of child soldiers, genital mutilation, rape, and child

---

[660] See the report made by Bexelius 2008 on the specific problems connected to female asylum seekers in the Swedish asylum procedure and on the same issue in the UK Asylum Aid 2011 *Unsustainable: The Quality of Initial Decision-making in Women's Asylum Claims*.

[661] UNHCR 2009, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* HCR/GIP/09/08, paras. 8 and 9.

[662] UNHCR Handbook, para. 190 and paras. 206–212 (mentally disturbed persons) and paras. 213–219 (unaccompanied minors).

[663] See supra note 626.

[664] Chapter VII, Article 20(5) of the Qualification Directive and Article 21 of the *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).* (Hereafter, the Reception Conditions Directive.) The Reception Conditions Directive stipulates that special consideration should be made as regards vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders, and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

marriage, should be specifically considered.[665] Hence, in the EU Asylum Directives, several aspects of vulnerability that might impact on the risk upon return have been detached from the adjudication of the need for international protection and relocated to a reception issue.

The result from the empirical study shows that the fact that the asylum seeker is a woman is explicitly taken into account more often by the courts than other personal circumstances, while child-specific circumstances are more often invisible.[666] The results further show that in 85% of the cases including minor co-applicants, there are no reflections in the court's reasoning on the specific need of protection for these children.[667] What can be found is a copy of the exact wording of Chapter 1, section 10 of the Aliens Act (Gothenburg) or a general reference to the decision from the Migration Agency regarding applicable provisions (Stockholm and Malmö).[668] Below is one example of the few times when the court has commented on the stand of a minor co-applicant:

> The children have not claimed any grounds for protection of their own. (M2)[669]

In one exceptional case, the specific need of protection for both the women and the children in the family was specifically considered:

> The question in the current case is partly whether the blood revenge also includes the women and children in the family, and partly whether in that case there is an opportunity for them to receive protection from the public authorities in the country of origin. (G89)[670]

Gender and sexual orientation are codified as specific groups in the Swedish refugee provision.[671] However, it is not clear from the reasoning in the Swedish migration courts' judgments whether the argument, to be a woman, falls under the refugee requisite in the

---

665 See also the Preamble, para. 28 in the Qualification Directive. In the Swedish context see on children-specific acts, prop. 2009/10:31, p. 104, MIG 2017:6, and MIG 2018:6, and on gender-specific acts, prop 2005/06:6, p. 22 f., MIG 2008:39, MIG 2011:8, and MIG 2012:2.

666 See above, section 4.7.

667 Ibid.

668 See above, section 4.7 and Appendix 1, section 2.2.1.

669 The author's translation.

670 The author's translation.

671 Chapter 4, section 1 of the Aliens Act.

Swedish Aliens Act ("…owing to a well-founded fear of persecution […] for reasons of gender"), or is used as a social or cultural fact that may enhance the risk in general. Specific acts of persecution based on gender and sexual orientation were specifically addressed in a Government Bill at the implementation of gender and sexual orientation as grounds for being a refugee. The Government put forward the significance of being aware that persecution on account of political opinion and on account of gender or sexual orientation often overlap as the latter may be perceived, by the country of origin, as opposing the laws and norms of the society and, therefore, as a political statement.[672] However, these kinds of overlapping discussions are hard to find in the case law of the Migration Court of Appeal.[673] An example of the failure to take this overlap into account is MIG 2011:6 where the two minor asylum seekers were not granted protection as refugees but were still recognised as living in a cultural environment where girls were specifically exposed to honour culture. The two young asylum seekers had broken the norms in their society through having an extra-marital relationship. They were not allowed to get married as the girl had to marry a cousin; when she refused to do so, both of the applicants were threatened by the girl's family. In the country of origin, honour crimes still occurred. The Court did not discuss the refugee grounds but merely, and briefly, without any further explanation, stated that the applicants had not raised any grounds that they may be considered as refugees. They were granted subsidiary protection on the grounds of being minors and given that the situation for girls was a point of focus in relation to honour-related crimes, and they had the possibility to seek protection from the public authorities.

Unlike gender, to be a child is not included in the Swedish Aliens Act as an instance of being a member of a specific "group" that is

---

672 Prop 2005/06:6, p. 24. See also UNHCR, Guidelines on international protection no. 9*: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, para. 50. Compare Wettergren and Wikström 2013, who highlight the fact that Somali asylum seekers have a high acceptance rate in Sweden but as a rule they are granted subsidiary protection in collective routine assessments. "Even if the applicant receives a residence permit, he/she is symbolically rejected, first as 'political' and secondly as having legitimate individual motives for seeking protection".

673 Prop. 2005/06:6, p. 22 f., MIG 2008:39, MIG 2012:12, and 2011:8 (gender), MIG 2013:25 (sexual orientation).

protected in the refugee provision.[674] However, special attention is provided for as regards minors through the principle of *"the best interest of the child"* derived from the CRC. Each child has the right to make an independent refugee claim, regardless of whether she or he is unaccompanied or accompanied.[675] In the UNHCR Handbook and subsequent guidelines, the difficulty of establishing a "well-founded fear" for unaccompanied minors is highlighted. According to the Handbook, the mental development and maturity of the child is the point of departure when assessing whether it is possible to establish a well-founded fear and therefore experts conversant with child development should be enrolled in the procedure.[676] If an unaccompanied minor finds himself in the company of a group of refugees, this may, depending on the circumstances, indicate that the minor is also a refugee.[677] The UNHCR has developed its recommendations which include how the assessment of the risk upon return for a child should be applied as well as the need for special procedural safeguards in accordance with the CRC. Taking into account children's rights in accordance with the CRC entails an analysis of how these rights are affected by the conceivable ill-treatment upon return and, most important, to take into account that ill-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a child. The procedural safeguards include, among other measures, that the child has a right to express her or his views and that appropriate communication methods should be provided for.[678] The significance of taking into account a child's way of expressing fear and factors impacting the child's way of narrating is highlighted:

---

[674] Compare Article 10(1)d of the Qualification Directive which does not exclude children as members of a particular social group but explicitly only points out gender and sexual orientation as potential social groups. Also, see MIG 2017:6, where the Migration Court of Appeal ruled that an unaccompanied minor from Afghanistan could not be seen as a member of "a particular social group" merely based on being a child.
[675] CRC, *General Comment no. 6*, paras. 7–8 and *UNHCR, Guidelines on International Protection no. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/09/08*, para. 6.
[676] UNHCR Handbook, para. 214.
[677] Ibid., para. 217.
[678] UNHCR, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/09/08*, paras. 65 and 70–71 which is based on Article 12 CRC.

> Children cannot be expected to provide adult-like accounts of their experiences. They may have difficulty articulating their fear for a range of reasons, including trauma, parental instructions, lack of education, fear of State authorities or persons in positions of power, use of ready-made testimony by smugglers, or fear of reprisals. They may be too young or immature to be able to evaluate what information is important or to interpret what they have witnessed or experienced in a manner that is easily understandable to an adult. Some children may omit or distort vital information or be unable to differentiate the imagined from reality. They also may experience difficulty relating to abstract notions, such as time or distance. Thus, what might constitute a lie in the case of an adult might not necessarily be a lie in the case of a child. It is, therefore, essential that examiners have the necessary training and skills to be able to evaluate accurately the reliability and significance of the child's account. This may require involving experts in interviewing children outside a formal setting or observing children and communicating with them in an environment where they feel safe, for example, in a reception centre.[679]

According to the UNHCR, these factors should also lead to a greater burden of proof for the examiner in children's claims.[680]

As was shown in the empirical study, the child-specific considerations when assessing the narrative were only undertaken in a small share of the cases including minors (2%). In a few examples the courts recognised that a lower demand should be placed on a minor. In the example below, the credibility assessment of the minor's narrative commences with a detailed account of why the court finds that A has not provided a credible account. With the exception of an initial general reference to the situation in the country of origin, the assessment is based on internal credibility indicators:

> The Migration Court considers that A has not provided a credible account. It is true that A did not provide any conclusively contradictory information during the oral procedure. His story also does not contradict what is generally known about the conditions in Afghanistan. A's description of the events in his home country has, however, been strikingly undetailed throughout the Swedish Migration Board's handling of the case. Although A has had the opportunity to provide further information during the oral hearing and re-describe the events, he has not enriched the story to any decisive extent with further details. What he said during the hearing about the events surrounding his deprivation of liberty has been chronological and remarkably similar in word choice and details to the information he provided during the asylum investigation. Even after repeated questions, he has not been able to provide further information about how and where he was taken during the detention, which he, in the event that his story was self-perceived, should reasonably have been able to provide. His description of what happened does not give the impression of being self-experienced. The story in this part seems to come across as being learned.

679 Ibid., para. 72.
680 Ibid., para 73.

> The story also contains a number of strange circumstances such as the fact that A's father described his time of birth for him in Western times and that the Taliban, the day before they were to use A in a suicide bombing, took such a large quantity of drugs that he could escape unhindered. It also seems unlikely that A and his family would allow him to accompany human traffickers from Kandahar without knowing where they took him and without deciding how to keep in touch in the future. A has not been able to provide any clarifying information in these parts. (S2)[681]

After this account the court recognises that lower demands should be placed on a minor but still concludes that A has not made probable his need for protection:

> A is a minor, which is why it is not possible to place as high demands on, for example, the richness of detail in the story as on an adult's story. Despite this, in the light of the aforementioned shortcomings, the court considers that A's story is not credible and that he has therefore not made it probable that he has individual grounds for protection. (S2).[682]

It is difficult to see that, in spite of this statement, the court has applied a lower standard as to the detail, coherence, and plausibility than it does for adults. Much can be said about the assumptions made by the court about the plausibility of how his family and the Taliban acted. However, the content and the context of credibility assessments will be further analysed in section 7.2.

While the UNHCR clearly couples the rights of the child to the requisites in the protection provisions as well as to the procedural principles, the formulations in the EU asylum law address the issue in more general terms. The EU Asylum Directives as well as the EU Charter take as their point of departure the general principle of "the best interest of the child", emanating from Article 3(1) of the CRC. Para. 18 of the preamble to the Qualification Directive and para. 33 of the Asylum Procedures Directive state that the consideration of "the best interest of the child" should be a primary consideration of the Member States when implementing the Directives and that it should be implemented in line with the CRC.[683] These general paragraphs include particular facts that should be taken into account when assessing the best interest of the child such as the principle of family unity, the minor's well-being and social development, safety and

[681] The author's translation.
[682] The author's translation.
[683] The best interest of the child is also stipulated in Article 24 of the EU Charter and para. 22 in the Preamble and Article 23 of the Reception Conditions Directive.

security considerations, and the views of the minor in accordance with his or her age and maturity.[684] Also, due consideration should be given to the minor's background.[685] They are not explicitly linked to the protection requisites. However, as mentioned above, a list of child-specific acts is stipulated in Article 9(2)(f) of the Qualification Directive. Additionally, without specifically mentioning minors, Article 4(3)(c) stipulates that age is an individual factor to take into account when assessing the need for protection.

In the Swedish Aliens Act, the principle of the best interest of the child is implemented in Chapter 1, section 10. The provision contains a general statement that in cases concerning a child, special attention should be paid to the child's health, development, and to what else is required in the best interest of the child.[686] In addition, in line with Article 12 of the CRC, the right for a child to be heard, if it is not inappropriate in relation to what is motivated given the child's age and maturity, is implemented in Chapter 1, section 11 of the Swedish Aliens Act. The provisions are intended to indicate that the child's individual reasons for a residence permit must be assessed separately and not only as a part of the parents' case and that this must be apparent in the decision.[687] At the implementation of the Qualification Directive and the Asylum Procedures Directive, the content of what a child-specific adjudication includes was not closely elaborated in the preparatory works. A number of organisations (such as the Red Cross and the Children's Ombudsman (*Barnombudsmannen*), and UNICEF) argued that a thorough examination and analysis of what constitutes child-specific persecution was required and that a Governmental official investigation should be carried out. However, the Government did not find that this was necessary as the right for the child to be heard and her or his need for protection adjudicated as an independent individual already constituted the point of departure in the Swedish asylum adjudication. The Government further argued that the Migration Agency had developed a method for analysing the consequences for children and that the Agency had examiners specialised in examining children's

684 The Preamble, para. 18 of the Qualification Directive.
685 The Preamble, para. 33 of the Asylum Procedures Directive.
686 Prop. 2009/10:31, p. 104, MIG 2017:6, and MIG 2018:6.
687 Prop. 1988/89:86 s. 80 f., Prop. 1996/97:25 s. 244 f., Prop 2004/05:170, p. 195, and Prop 2009/10:31 p. 103.

asylum cases. Furthermore, the Government pointed out that the Agency, through a "letter of regulation" (*regleringsbrev*), had been commissioned to report on how the analyses of these consequences for children proceeded.[688]

It was shown in the empirical study that when the Swedish migration courts consider children's situations, this is more often done in relation to humanitarian grounds, expressed as "particularly distressing circumstances"[689] in Chapter 5, section 6 of the Aliens Act, than in relation to the protection grounds stated in Chapter 4, section 1-2(a) of the Aliens Act.[690] An example is case G 25 where one of the minors claims that he was afraid of his father and that the father prevented him from getting the care he needed. This was not assessed in relation to a need for protection. However, his situation as a child suffering from a severe muscular disease was considered in relation to humanitarian grounds. At the time of replacing the provision concerning humanitarian grounds with that concerning "particularly distressing circumstances", the Government highlighted the importance of separating humanitarian grounds from protection grounds.[691] The Government expressed concern that there had been a sliding towards granting residence permits on humanitarian grounds instead of on protection grounds.[692] The significance of thoroughly adjudicating other grounds for getting a residence permit before an adjudication of whether there are grounds for a residence permit on account of "particularly distressing circumstances" was strongly emphasised.[693] However, looking at the case law from the Migration Court of Appeal, even after the implementation of the EU Asylum Directives, references to "the best interest of the child" or special considerations as regards children in asylum cases are more often found in cases relating to family reunification and " particularly distressing

[688] Prop. 2009/10:31, p. 103.

[689] In 2014 the provision changed so that children can obtain a residence permit on account of "especially distressing circumstances" to emphasise that the threshold for children is lower.

[690] See above, section 4.7 and Appendix 2, Table 99, the asterisk.

[691] Prop. 2004/05:170, p. 176 ff.

[692] Prop. 2004/05:170, p. 192 and p.194. Compare MIG 2007:33 and MIG 2008:39 where the court refers to the best interest of the child only in relation the question of "particularly distressing circumstances".

[693] Ibid.

circumstances".[694] In differentiating between protection and humanitarian grounds, it seems as if the individual element of the adjudication concerning children has shifted to other grounds for getting a residence permit.

By shifting emphasis from assessing a need for protection to assessing "particularly distressing circumstances", the lawmakers have also made it possible to trade the best interest of the child with the economic consequences for the state.[695] The fact that the children's grounds for asylum are often neglected in the asylum procedure, and that their individual claims are assessed in relation to humanitarian grounds rather than a need for asylum, has been highlighted several times in different reports.[696] The migration courts' handling of the best interest of the child has also been scrutinised by Anna Lundberg and Jakob Lind who have studied the motivations in the decisions from the Migration Agency on children's grounds for protection. They conclude that "the best interest of the child" is used mainly in order to legitimate rejected asylum applications and that the Agency motivates their decision through a circle of negations resulting in sovereignty and regulated immigration taking precedence over children's rights.[697]

In a few cases, "child-specific protection grounds" have been a focus in Swedish case law and are often coupled to gender issues. In MIG 2011:6 the Migration Court of Appeal referred to the principles of "the best interest of the child" stated in Chapter 1, section 10 of the Aliens Act. The fact that the asylum seekers were minors at the time of the alleged threats was an important issue when assessing their possibility to seek protection from honour-related crimes. In MIG

---

[694] If searching for case law from the Migration Court of Appeal and using the key word "the best interest of the child" on the website https://rattsinfosok.domstol.se/lagrummet/ mainly family reunification cases are shown. See as regards family reunification, among others, MIG 2010:16, MIG 2011:23, MIG 2012:1, MIG 2012:3, and MIG 2014:7. See on "especially/particularly distressing circumstances", MIG 2010:6, MIG 2015:14, and MIG 2013:6. Also, see MIG 2016:16 as regards transferring a family in accordance with the Dublin Regulation.

[695] Prop. 2004/05: p. 190 and p. 281 and Lundberg 2011.

[696] See the reports from the organisation Save the Children (*Rädda Barnen*) 2008 *Nytt system gamla brister? Barns egna asylskäl efter ett år med den nya instans-och processordningen*, p. 74, and 2016 *Barns egna asylskäl – Rätten att bli sedd som individ*, p. 8 f., 11, 13, 17. See also Jacobson and Olsson 2009, Lundberg, 2009, p. 82 ff., and 2011, and Lundberg and Lind 2017.

[697] Lundeberg 2011 and Lundberg and Lind 2017.

2012:12 the Court ruled that two girls owed a well-founded fear for being subjected to genital mutilation upon return to Somalia as their parents did not have the ability to protect them. In a recent case, MIG 2017:6, child-specific protection grounds were at stake. The Court considered the cumulative effect of the fact that the applicant had no family that could protect and help him, and no other network. Taken together with the fact that he had no local knowledge of Afghanistan and the exceptionally difficult situation for children in Afghanistan, considering that children are subject to violence and other severe abuses, this situation would, at a forward-looking assessment, put him at an individual and specific risk of being subjected to the ill-treatment referred to in the Aliens Act.

6.1.3 The lack of consideration and evaluation of individual and personal facts and circumstances

The consideration and assessment of individual facts and circumstances is central to the assessment of the risk for the asylum seeker to return to her or his country of origin. This entails not only taking into account the facts that the asylum seeker belongs to a certain group, enumerated in the refugee provision, and the acts the person has carried out or the treatment she or he has been subjected to. Other individual circumstances such as health, social and culture circumstances could and should be considered *ex officio* by the court in order to assess the risk upon return.

The practice in Swedish migration courts, as evident from the empirical study, paints a similar picture as the case law from the Migration Court of Appeal and the criticism it has received from the ECtHR concerning the lack of account given to individual and contextual circumstances. It was mentioned in section 5.2.2.2 that the Migration Court of Appeal in its early case law stated that the UNHCR Handbook, in the part which concerns the procedure, constitutes an important source of methods and principles in order to establish facts. However, assessing individual circumstances in a kind of pick-and-choose manner is contrary to the content of an individual assessment considering the recommendations from the UNHCR as well as the case law of the ECtHR. Instead of integrating the subjective and objective aspects of "well-founded fear", the subjective parts have been

separated and transformed into an assessment of credibility. This way of separating out different parts of the adjudication, fragmenting the assessment, and disregarding a more complex cumulative risk situation appears as a judgment made out of context and divorced from reality.[698]

The fact that the results of the empirical study of the migration court judgments show that individual circumstances are considered to a low extent may be explained in part by the fact that such circumstances are not explicitly claimed or not visible in the material. However, as shown, even relative to the number of claims or to the identified available information, these circumstances seem to be neglected to a high extent.[699] The considerations of individual facts and circumstances are important in determining refugee status both in relation to the assessment of well-founded fear and of belonging to a certain group. The lack of such consideration in the courts' reasoning may indicate that Swedish migration courts still have a restrictive approach to refugee status and are more inclined to focus the assessment on subsidiary status determination.[700] By disregarding or dismissing individual and personal facts and circumstances, the adjudication becomes more focused on subsidiary protection than on refugee protection. However, individual and personal facts and circumstances are an important ground for assessing subsidiary protection needs. As shown above, in EU law, individual and personal facts and circumstances are legally more apparent and highlighted in relation to reception conditions and rights for persons who are granted international protection. This allows the emphasis of the assessment of individual facts and circumstances to be shifted from a legal issue connected to the need for protection to a question of individual vulnerability connected to procedural and post-procedural aspects.

An example of this process can be seen in the fact that an asylum seeker being a woman is explicitly considered by the Swedish migration courts more often than other personal circumstances, without clearly

---

698 See section 8.2 on Arendt's understanding of the faculty of judgment as being based on a contextual assessment that includes plurality, and section 8.3 on the relation between reality and judgment. The way of separating out different parts of the adjudication will be further explored in relation to the assessment of the credibility of the asylum seeker's narrative in section 7.1.
699 Appendix 2, Table 97.
700 See supra notes 426 and 469.

assessing this fact in relation to the refugee ground.[701] Taken together with the fact that women who are co-applicants are mostly invisible in the judgments, this indicates that women may be perceived as vulnerable but not as individuals whose individual facts and circumstances constitute grounds for refugee protection. Also, the fact that the consequences for children were considered in relation to the need for international protection in only two cases but more often when adjudicating the humanitarian ground, "particularly distressing circumstances", gives an indication that the courts are still less inclined to perceive children as "real asylum seekers". This is concerning since the consequences of this oversight for women and children are an important risk issue. Even if it is the actions and activities carried out by the male asylum seeker that constitute the basis for the risk upon return, and the risk for women and children is a consequence of his actions and activities, the consequences for women and children may be different in character and even enhanced. As co-applicants are primarily women and children, this means that women and children's narratives are often invisible in the courts' narratives, as is their potential and individual need for international protection.

Overall, by not examining relevant individual and personal facts and circumstances, the courts fail to make a "cumulative" assessment of the risks. Furthermore, the courts become more exposed to an assessment of the asylum seeker's narrative without the contextual help of individual and personal factors.

6.2 Consideration and evaluation of external sources of information

The analysis in the present chapter is coupled to the sub-question: *How, and to what extent, if at all, do the courts base their assessments on external sources of information?* (section 4.3). In the present section the content of the obligation to consider and evaluate external sources of information in asylum cases is analysed. The sub-sections follow the categories in the empirical study: country of origin information (6.2.1), statements from experts (6.2.2), and other written documents (6.2.3). In section 6.2.4 critical reflections are offered.

[701] Compare the study made by Wettergren and Wikström 2013 (see supra note 672).

6.2.1 Country of origin information

The analysis in this section is coupled to the sub-questions: *How, and to what extent, if at all, do the courts base their assessments on sources of information as regards the situation in the country of origin?* And: *How, and to what extent, if at all, do the courts base their assessments on arguments coupled to general risk considerations?*

One of the central sources of background knowledge to be able to assess the risk for the individual to return to her or his country of origin is knowledge about the situation in the country of origin. The pattern that appears from the empirical study shows that it is not self-evident for the courts to support their arguments with references to specific country of origin information.[702] Furthermore, when the courts do refer to the situation in the country of origin, they mostly do so in general terms without supporting this with references to specific country reports or other sources of information.[703] This is the case both concerning the general situation in the country of origin and as well as in relation to the individual protection claims.[704] Generally, when the country of origin information is referred to in the reasoning, it is not explicitly evaluated but rather selected and presented as facts.[705] Additionally, the country of origin information referred to is primarily derived from reports and legal position papers from the Migration Agency.[706]

The obligation of a good background knowledge about the current situation in the country of origin is explicit in the UNHCR Handbook as well as codified in EU secondary law and established in EU case law.[707] The obligation to obtain and base the decisions on international protection on relevant, precise, and up-to-date country of origin

---

702 See above, sections 4.1 and 4.3.1.

703 See above, section 4.3.1.

704 See above, sections 4.3.1 and 4.8.

705 See above, section 4.3.1.

706 Ibid.

707 The UNHCR Handbook, para. 42, Article 4(3)a, 4(5)c, and Article 8(2) of the Qualification Directive, Article 10(3)b of the Asylum Procedures Directive, CJEU: *Salahadin Abdulla and others v. Bundesrepublik Deutschland* (C 175-179/08), para. 164, *X, Y and Z v. Minister voor Immigratie en Asiel*
(C-199-201/12), paras. 58–59.

information is codified as mandatory in EU law.[708] Article 4(3)(a) of the Qualification Directive and Article 10(3)b of the Asylum Procedures Directive address the general assessment of the need for international protection. Article 4(3)(a) stipulates that an application for international protection should be assessed on an individual basis, including facts concerning the country of origin at the time of the decision, including laws and regulations of the country of origin and the manner in which they are applied.[709] Also, the evidentiary alleviation rules in Article 4(5)c are linked to knowledge about the situation in the country of origin and stipulate that the asylum seeker should be given evidentiary alleviation when her or his "…statements are found to be coherent and plausible and *do not run counter to available specific and general information relevant to the applicant's case…*".[710]

How this information should be obtained and evaluated has been outlined in a number of international and EU guidelines.[711] The information used in asylum adjudication concerning the situation in the country from which a person seeks asylum has developed into the concept of "Country of Origin Information" (COI). It is described as: information about the situation in refugees' home countries that is used in procedures for determining international protection needs.[712] More specifically, COI aims at supporting legal advisors and persons making decisions on international protection in their evaluation of the human rights and security situation, the political situation and the legal framework, cultural aspects and societal attitudes, the humanitarian and economic situation, events and incidents, as well as the geography in

---

708 Article 4(3)(a) and Article 8(2) of the Qualification Directive and Article 10(3)b of the Asylum Procedures Directive.

709 See CJEU: *Salahadin Abdulla and others v. Bundesrepublik Deutschland* (C 175-179/08), para. 164 and *X, Y and Z v. Minister voor Immigratie en Asiel* (C-199-201/12), paras. 58–59.

710 The author's italics.

711 UNHCR 2004, *Country of Origin Information: Towards Enhanced International Cooperation*, para. 9, ACCORD 2013*: Researching Country of Origin Information. The Training Manual*, Hungarian Helsinki Committee 2011: Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU, EU 2008: Common EU Guidelines for processing Country of Origin Information (COI) 2008 replaced in 2019 by EASO 2019: Country of Origin Information (COI). Report Methodology.

712 ACCORD 2013*: Researching Country of Origin Information. The Training Manual*, p. 12, and EASO Country of Origin Information (COI) Report Methodology 2019, p. 5.

the claimant's country of origin (or, in the case of stateless people, countries of former habitual residence) or countries of transit.[713]

The task for decision-makers and judges, that is, to assess the information in COI reports, is by no means an easy one and has to be done with caution and in the light of quality standards as well as the relevance in relation to the individual claims.[714] This means not only that the content of the report has to be considered, but also that facts such as the origin and source of the information and the time of the collected information in the report have to be taken into account too.[715] As the information in the reports is by no means "the truth" but has to be evaluated, it is important that the different reports from different sources are used.[716] While the ECtHR put forward UNHCR and NGOs as primary sources, as they are independent of any specific state, the EU Asylum Directives specifically point to reports from UNHCR and EASO as important sources.[717] As an example of the significance of evaluating the reports, UNHCR has observed that country reports may be gender and child biased.[718] The principles for using COI are neutrality, impartiality, and equality of arms as regards access to

[713] ACCORD 2013: *Researching Country of Origin Information. The Training Manual*, p. 12 and Hungarian Helsinki Committee 2011: *Standards: Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU*, p. 7 ff.

[714] Article 4(3)b and Article 8(2) of the Qualification Directive, Hungarian Helsinki Committee 2011: *Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU*, p. 33 f. See also UNHCR *Guidelines on International Protection No. 12*, para. 92, on situations of armed conflicts and violence.

[715] UNHCR 2004, *Country of Origin Information: Towards Enhanced International Cooperation*, para. 26. *International Association of Refugee Law Judges* 2006: *Judicial Criteria for Assessing Country of Origin Information (COI*: *A Checklist*, p. 5 f. (Compare the manual, "To work with protection cases" (*Att arbet med skyddsmål*) used in the migration court of Gothenburg (see above, section 2.1), which includes a specific check list on how to handle country of origin information stipulating that the clerk should check whether there are more recent reports published since the Migrations Agency decision as well as evaluate the country information in order to decide whether additional information is necessary.)

[716] ECtHR: *Salah Sheek v. the Netherlands*, para. 136, *Na v. the United Kingdom*, paras. 118–122 and paras. 123–137, and Hungarian Helsinki Committee 2011: *Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU*, p. 8.

[717] ECtHR: *Salah Sheek v. the Netherlands*, para. 136, *NA v. the United Kingdom*, paras. 118–122 and paras. 123–137, and Article 8(2) of the Qualification Directive and Article 10(3)b of they Asylum Procedures Directive.

[718] UNHCR, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, para. 74.

information.[719] Reports with a focus on the risk to the particular applicant should be given greater evidentiary weight than more general reports on the socio-economic and humanitarian situation.[720] It is necessary to assess the laws as well as the application of these laws in the country of origin to determine if there are laws that, if applied, would amount to persecution or other ill-treatment as well as if there are laws that are applied that can protect from these treatments.[721]

To qualify as "country of origin information" it is essential that the source of the information has no vested interest in the outcome of the individual claim for international protection.[722] Furthermore, to qualify as "country of origin information" in the EU context, a number of quality standards have been put forward including:

- Legal relevance, meaning that the information shall correspond to the content of the requisites in the protection provisions;
- Reliability and balance, which include using information from various sources and taking into account the origin of the sources of the information as well as the methodology and aim of the reports;
- Accuracy and currency, which includes up-to-date information from various sources;
- Transparency and retrievability, meaning that the information must be available to all parties involved in the asylum procedure, principally through the use of a transparent method of referencing.[723]

---

719 ACCORD: *Country of Origin Information, Training Manual* 2013, *International Association of Refugee Law Judges* 2006 (Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist).

720 ECtHR: *Salah Sheek v. the Netherlands*, para. 139, *Na v. the United Kingdom*, paras. 122–137, and Baldinger 2013, p. 385.

721 UNHCR Handbook, paras. 59 and 60, and Article 4(3)(a) of the Qualification Directive.

722 Ibid. and ECtHR: *NA v. the United Kingdom*, para. 120.

723 ACCORD *2013: Researching Country of Origin Information. The Training Manual*, p. 31ff, EASO 2019: *Country of Origin Information (COI) Report Methodology* 2019, p. 7 ff., Hungarian Helsinki Committee 2011*: Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU*, p. 7 ff., UNHCR 2004: *Country of Origin Information: Towards Enhanced International Cooperation*, section B, and *International Association of Refugee Law Judges* 2006: *(Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist*.

Country of origin information can be obtained from a range of sources. The Swedish migration courts have access to a number of public databases that provide country of origin information from various sources such as NGOs, UN bodies, State departments, and national migration agencies. The database run by the Swedish Migration Agency, LIFOS, comprises reports and guidelines from the Agency itself as well as from various international and national sources. Also, the international databases "Refworld", conducted by UNHCR, and the European databases conducted by the NGO, European Counsel of Refugees and Exiles (ECRE), include reports from various sources as well as guidelines.[724] In addition, recently the EU body European Asylum Support Office (hereafter EASO) provides country reports compiled and produced by EASO[725] or other Member States.[726] Although aiming at harmonising the Member States' use of country of origin information, the analyses from EASO shall not purport to give instructions to Member States about the granting or refusal of applications for international protection.[727]

Principles or rules concerning how to assess country of origin information are not codified in the Swedish Aliens Act or in other Swedish regulations as, according to the Government, they are already provided for in the Swedish administrative procedural law and practice.[728] However, knowledge about the conditions in the countries

---

[724] ECRE is an alliance of 105 organisations of NGOs in 40 countries with its Secretariat in Brussels. The alliance works to promote the rights of refugees, asylum seekers, and other forcibly displaced persons in Europe and in European external policies.

[725] EASO is an agency of the European Union set up through the *Regulation (EU) 439/2010 of the European Parliament and of the Council.* Article 4 in the Regulation gives EASO the mandate to "organise, promote and coordinate activities relating to information on countries of origin". This includes the gathering of relevant, reliable, accurate, and up-to-date information on countries of origin, drafting of reports on countries of origin, development of a common format, and a common methodology for presenting, verifying, and using information on countries of origin and analyse information in a transparent manner. (At the time of the empirical study in this dissertation, EASO's COI was less developed than it has since become).

[726] See an account of EASO's method for gathering and compiling information in Country of Origin Information (COI) Report Methodology 2019. EASO produces reports but also outsources the research to external COI service providers.

[727] The Preamble, paras. 1 and 3 of the *Regulation (EU) No 439/2010 of the European Parliament and the Council of 19 May 2010 establishing a European Asylum Support Office*. See also before the implementing of EASO, Common EU Guidelines for processing Country of Origin Information (COI), 2008, p. 2.

[728] Prop. 2009/10:31, p. 129 and p. 181.

of origin was put forward in preparatory works before the implementation of the Qualification Directive to the Aliens Act, as being of the utmost importance when adjudicating alien cases.[729] In the Governmental Bills on the implementation of the Swedish migration courts, one of the issues was how the country of origin information should be dealt with and who should have the responsibility for this information. In both the Government Official Report and the Government Bill, it was emphasised that, even though the court has a responsibility to see to that the case is sufficiently examined in line with section 8 of the Administrative Court Procedural Act, the examination of asylum cases should be focused on the procedure at the Migration Agency.[730] This would also be in line with the values of "legal certainty" and efficiency.[731] However, the preparatory works reiterated that even the courts must have a good, general, and specific knowledge about the situation in the country of origin in order to assess the general and individual potential risk for ill-treatment as well as to assess the credibility of the asylum seeker's narrative.[732] According to the Government, it is primarily the Migration Agency that should provide for information concerning the situation in the country of origin.[733] The Government claimed that the courts cannot obtain information as regards the situation in the country of origin in the same way that the Aliens Board did, since section 30 of the Administrative Court Procedural Act does not allow this.[734] The Government's response to the need for the court to be informed about the situation in the country of origin is that these facts can be seen as given for all parties in the procedure, which may enhance the efficiency of the procedure at the same time as the court, like in all cases, "…has to be cautious in its assessment about these facts".[735] Also, the possibility for the court to bring in an expert on the situation in the country of origin is put forward as a possibility and included as part of the court's obligation to examine.[736] The final conclusion by the Government is a diluted general

---

729 Prop. 1996/97:25, p. 220 and prop 2004/05: 170, p. 135 ff.
730 Prop. 2004/05:170, p. 135 and p. 154.
731 Ibid.
732 SOU 2004:74, p. 322 and Prop. 2004/05:170, p. 135.
733 Prop. 2004/05:170, p. 138.
734 Ibid.
735 Ibid.
736 Ibid., p. 139.

statement that the responsibility for the examination and the evidence should be in line with what applies in other administrative cases and that the courts should base their judgments on what emerges from the procedure.[737] This was reiterated in the Government Bill from 2009 concerning the implementation of the Qualification Directive and the Asylum Procedures Directive.[738]

The Migration Court of Appeal has not been explicit about who is responsible for submitting country of origin information or how it should be selected and evaluated. Although reiterating the standpoint in the preparatory works,[739] the Migration Court of Appeal has obtained country of origin information on its own motion[740] and has remanded cases on account of the fact that the country of origin information has been old or insufficient or has not been sufficiently assessed in relation to the asylum seeker's statements.[741] In the cases where the Court has made an independent assessment of the submitted country of origin information, it is not always clear who submitted the information.[742] In later cases (after the timeframe of my empirical study) the Court has been more explicit about the fact that the responsibility is shared between the parties and the migration court to see to it that necessary material is submitted.[743]

The analysis above demonstrates that there is an obligation for the migration courts to ensure that the country of origin information is

---

737 Ibid., p. 135.

738 Prop. 2009/10:31, p. 181.

739 See, for instance, MIG 2009:7 and MIG 2012:18.

740 See, for instance, MIG 2011:4, MIÖD, UM 10509-10, MIÖD, UM 10483-10, and MIG 2014:20.

741 See, for instance, MIG 2006:7 (see Diesen et al. 2007 for an analysis of the case, p. 164 ff.), MIG 2009:4, MIG 2009:7, and MIG 2017:12. Compare MIG 2010:23 and MIG 2014:22 concerning the possibility to get medical treatment in the country of origin and the right to a permanent residence permit due to "particularly distressing circumstances", Chapter 5, section 6 of the Aliens Act.

742 MIG 2008:12, MIG 2009:7, MIG 2011:6. In MIG 2011:4 the Court held that the situation in Somalia amounted to internal armed conflict contrary to the Migration Agency's assessment and in MIG 2017:12 the Court maintained that the Agency had made a wrongful assessment of the country of origin information concerning persons who refuse military service. Later cases: MIG 2018:7, MIG 2018:8, and MIG 2019:14

743 MIG 2018:8. In the case the Court refers to ECtHR, *Case J.K. v. Sweden* and concludes that when the national authorities that handle the application on international protection assess the situation in a specific country, they have full access to information and therefore the situation in a country should be established *ex officio* by the national migration authorities.

balanced, up-to-date, and relevant for the individual case, and that this information should be evaluated in the context of the individual circumstances by the court. Furthermore, in spite of the two-party process and the fact that the examination of the case should be focused on the procedure of the Migration Agency, there is space for the courts to make a fresh independent assessment of the situation in the country of origin and that this may require submitting country of origin information by its own motion.[744]

The meagre references to country of origin information in the Swedish migration courts' rulings were shown already in a Swedish Government Official Report from 2009. The tentative explanation offered by the investigators at the time was that the migration judges hold that the relevant country of origin reports had been accounted for in the appealed decision and that is why there is no reason for the court to add information except for when there has been any updated version of a report that has already been claimed.[745] This explanation and the results in the empirical study indicate that the courts see the Migration Agency as an expert on country of origin information and do not perceive that they have to make their own assessment of the situation in the country of origin unless it has changed since the time of the Migration Agency's decision. However, certain questions may be raised against this standpoint, as will be discussed below.

As the results of the empirical study show, the courts mostly mention the situation in the country of origin in general terms without support of references to country reports. Furthermore, the sources of the reports referred to are one-sided both in the Migration Agency's decisions and in the courts' rulings. While reports from NGOs are almost non-existent, the Migration Agency's reports and "position papers" are the main sources.[746] The low number of references to reports from NGOs and the fact that it is more often the asylum seeker who submits such reports indicate that these reports are less valued by the court and/or by the Migration Agency. The origin of the sources of information is not surprising given that the Migration Agency submits the majority of the country information. However, the fact that the sources used by the courts mainly emanate from the Migration

---

[744] See above, section 5.2.2.1.
[745] SOU 2009:56, p. 83.
[746] See above, section 4.3.1.

Agency raises concerns as to whether the information that the courts base their assessments on as regards the situation in the country of origin is as complete, balanced, and impartial as could be required.

Moreover, the fact that the Migration Agency is a party in a two-party court process makes it questionable to use their compilation of the situation in the country of origin as the only or main source of information. The significant role of the "legal position papers" as the main or only source of information on the situation in the country of origin gives rise to specific concerns. Since 2009 the Swedish Migration Agency has published governing and supporting guidelines and legal position papers (*rättsliga ställningstaganden*) regarding different issues.[747] These "legal position papers" may include applicable provisions, case law, and examples of decisions and suggestions about how to deal with a special issue. The "legal position papers" are signed by the Migration Agency's director of legal affairs (*rättschef*). According to the Migration Agency, the "legal position papers" address the decision-makers in the Migration Agency and aim to provide "foreseeable and coherent decision-making with a high legal quality".[748] Unlike the Migration Agency's regulations (*Migrationsverkets föreskrifter*) they are not binding and their legal status could be described as similar to that of "general recommendations" published by other Swedish administrative authorities that are supposed to be general recommendations on how provisions may or should be applied by the authority.[749] According to Stern, the introduction and number of legal position papers, published since 2009 covering a wide range of issues, "…suggests that the Migration Agency is trying to remedy the lack of authoritative guidance from the Migration Court of Appeal by introducing their own system of advice and direction".[750]

---

747 http://www.migrationsverket.se/info/481.html. The position papers are published in the Migration Agency online country and legal information system Lifos and are accessible to the public.

748 The author's translation. See the Migration Agency's Annual Accounts 2013 (*Förutsebart och enhetligt beslutsfattande med hög rättslig kvalitet*, Årsredovisning Migrationsverket 2013). See Stern 2013, for a further discussion on the legal position papers.

749 Compare, for instance, the Swedish Social Insurance Agency's general recommendations (*Försäkringskassans allmänna råd*).

750 Stern 2013.

From a normative point of view, one could question what role these "legal position papers" from an administrative authority should have in establishing facts in the court procedure. The role of the courts is to make their own legal assessments as well as an assessment of facts. However, from a descriptive point of view one may argue that the fact that the courts do use them makes it important to analyse their role in the court's adjudication.[751] In the court judgments they are used to support arguments about the situation in the country of origin. However, the "legal position papers" do not provide references to the sources for the statements made as regards the situation in the country of origin. They are not actually country reports but include interpretations of the relevant law in relation to the Agency's own evaluation of the situation in the country of origin. Hence, it is difficult to understand if the courts use the "legal position papers" as "legal sources", i.e. as a basis for how to interpret the law or as sources regarding how to assess facts, in this case how to interpret the situation in the country of origin. The courts' use of the legal position papers as facts concerning the country of origin information makes these facts appear as legal facts rather than as evidentiary facts. However, the situation in the country of origin can never be established case law, but must always be facts that have to be examined and assessed *ex nunc*.

The way the Swedish migration courts use "country of origin information" can hardly be said to be compatible with the requirements from the guidelines, presented above, neither as regards the number and origin of the sources nor as to their relevance for an individualised assessment. Furthermore, general risk considerations, such as the assessments of the general security situation in the country of origin, are often only phrased in a simple sentence and not substantiated by any references to specific sources of information concerning the situation in the country of origin. The reason why the courts seldom base their arguments concerning the risk upon return on sources of information as regards the situation in the country of origin and why they choose the "legal position papers" as their main source may have several answers that cannot be adequately addressed here, but which prompt some reflections. One reflection is that the courts perceive that it is obvious that they have this knowledge and that they do not have

[751] Compare Stendahl 2003, p. 98 and Strömholm 1996, p. 330 on the distinction between descriptive and normative approaches to legal sources.

to write it down clearly in the ruling. A phrasing that is commonly used by the courts is to briefly declare that "the situation in the country is not such as…" or "nothing in the country information indicates that…", which indicates that the judge "knows" but that she or he does not find it necessary to write it down or specify. Another reflection is that the answer may be found in the court's perception of its role in the two-party procedure in relation to the principles as to the duty to examine versus the burden of proof, i.e. the point of departure is seen to be that it is for the parties to claim specific country information and if such information is not submitted then the risk is on the asylum seeker. To scrutinise country information does not seem to be perceived as a task for the court and furthermore the country information compiled by the Migration Agency is perceived as a sufficient basis for the assessment of the situation in the country of origin. One conclusion is that the courts mostly rely on the Migration Agency's assessments of the situation in the country of origin and do not make their own assessment.[752] This in turn would mean that the courts leave a large part of an important risk issue to the Agency. Also, the courts seem to disregard the information about the country of origin as a tool for assessing the credibility of the asylum seeker's statements. However, the results indicate an exception when a protection is granted. It seems that the courts find it more important to support their arguments concerning the situation in the country of origin by referring to specific sources when granting an appeal.

Good knowledge about the situation in the country or area from which the asylum seeker is claiming international protection is one of the most fundamental bases for the assessment of the risk upon return for the asylum seeker. The low number of references to such sources of information and the one-sided origins of these sources raise concerns as to the content of the risk assessment.

---

[752] Compare the results presented above, in section 3.1, showing that in approximately a third of the cases the court expresses that it agrees with the Migration Agency's assessments in certain issues mostly as regards identity, domicile or the security situation in the country of origin.

6.2.2 Experts

The analysis in this section is coupled to the question: *How, and to what extent, if at all, do the courts base their assessments on experts?*[753] While the empirical study shows that experts are not summoned or engaged *ex officio* by the courts, language analyses, medical age determinations and medical reports constitute pieces of evidence in a number of cases. The pattern that emerges shows that when statements from experts have been submitted in the case, the courts consider and evaluate statements from different kinds of experts differently. While age determinations and language analyses are always considered, medical reports are often not considered.[754] Additionally, in most of the cases where a language analysis or a medical age determination contradict the asylum seeker's statements, the courts take a stand in accordance with the experts, while medical reports, when considered, are mostly deemed as having no relevance for the need for international protection.[755]

The possibility for the Swedish migration courts to seek advice from experts with knowledge concerning a specific matter (*särskild sakkunskap*) is provided for in section 24 of the Administrative Court Procedural Act. Also, Article 10(3)d of the Asylum Procedures Directive stipulates a possibility to seek advice "whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues". The advice from experts must be communicated with the applicant or her or his legal adviser or other counsellors.[756]

Language analyses and age determination are means to establish the identity of the asylum seeker which is an important part of the initial risk assessment. The fact that an asylum seeker will often not have any identity documents and therefore cannot fully prove her or his identity is recognised in asylum adjudication.[757] To carry out a language analysis

---

[753] See above, section 4.3.4.
[754] See above, section 4.3.4.
[755] Ibid.
[756] Article 12(1)(d) of the Asylum Procedures Directive.
[757] UNHCR1998: *Note on Burden and Standard of Proof in Refugee Claims*, para. 10, Article 4(5) of the Asylum Procedures Directive, Prop. 1996/97:25, p. 188 and Chapter 2, section 1 of the Aliens Regulation. According to Swedish case law, the concept "identity" comprises mainly the asylum seeker's name, age, and citizenship (MIG 2014:1 and MIG 2011:11). On several occasions, the Swedish Migration Court of Appeal has

or an age determination is directly coupled to the assessment of credibility, i.e. initiating such measures means that the Migration Agency has doubts about the asylum seeker's statements concerning identity. Knowing from which country the asylum seeker claims a need for protection is essential to assessing the risk upon return. Also, in case of a rejected claim for protection, it is essential to know to which country the asylum seeker can be returned.[758] Furthermore, identity data forms the basis for future identity documents and a possible future application for citizenship.[759] Age determination has a legal significance both as regards the substantial assessment of the risk upon return but also in respect of specific procedural rules.[760]

Medical reports are coupled to the mental and physical state of the asylum seeker which can constitute evidence of past torture or other ill-treatment and as such it is directly connected to the prospective risk assessment.[761] Also, the mental and physical state of the asylum seeker may be decisive in assessing what can be expected as to the asylum seeker's ability to present a coherent, detailed, and plausible narrative.[762]

Investigation measures to determine age have been codified and Article 25(5) of the Asylum Procedures Directive provides the possibility to use medical examination to determine the age of an unaccompanied minor when the Member State has doubts concerning the applicant's age. The provision also includes an alleviation rule stating that if "…thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a

---

made an assessment of the asylum seeker's need for protection after having stated that the asylum seeker's identity has not been proved or made probable (MIG 2007:9, MIG 2007:12, MIG 2007:37, and MIG 2014:1). The Swedish Aliens law stipulates that a temporary residence permit can only be issued if the identity is clear. An exception was made in relation to the temporary law concerning limitation of the possibility to get a residence permit implemented in 2016 on account of the increased number of asylum seekers who crossed the Swedish border in 2015. (See Chapter 2, section 1(a) of the Aliens Regulation.)

758 Prop. 1996/97:25, p. 187. There has been deportations from Sweden to the wrong country of origin with severe consequences; see, for instance, JO's (*Justiteombudsmannen*) criticism of the Police, JO, 2011-12-09, Dnr. 6051-2010.

759 Prop. 1996/97:25, p. 188. This part of the Government Bill concerns the implementation of taking fingerprints of the asylum seeker in order also to prevent abuse of the asylum system by using a false identity or by changing identity.

760 See above, section 6.1.2.

761 Peers in Peers et al. 2015, p. 238 and Baldinger 2013, p. 384.

762 UNHCR Handbook, para. 208 and UNHCR 2013, Beyond Proof, Chapter 2.

minor".[763] This is also what is recommended by EASO.[764] At the time of the empirical study, there were no specific provisions in the Swedish Aliens Act regarding age determination. However, in Chapter 8, section 10(h), of the Aliens Regulation, it is stated that the Migration Agency must inform the child about the possibility that the Agency may offer the asylum seeker the chance to undergo a medical age examination and the consequences of being deemed over 18 years of age if such an examination is rejected. In 2017, two provisions on age determination were introduced in the Aliens Act.[765] Initially, the obligation for the Migration Agency is limited to make an assessment of the written documentation together with the asylum seeker's statements.[766] If the result of such an assessment is that the person is deemed to be older than 18, the asylum seeker should be provided with a medical age assessment.[767] The offer to undergo a medical age determination is meant to give the asylum seeker access to an additional piece of evidence in order to fulfil her or his burden of proof.[768] However, the alleviation rule in the Directive was not implemented.

An example of Swedish case law on age determination is MIG 2014:1 where the Migration Court of Appeal initially reiterates that the burden for the asylum seeker to make her or his claim probable also includes making her or his identity probable.[769] The Court continues by

763 See also UNHCR 2009: *Guidelines on International Protection: Child Asylum Claims under Articles 1(A) 2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/09/08*, para. 75.
764 EASO emphasises that 'benefit of the doubt' should apply if there are doubts at any stage of the age assessment by any of the experts involved (*Age assessment practice in Europe,* 2013, p. 16). EASO also recommends, based on recommendations from the UN Committee on the Rights of the Child, that an age assessment, should not only take into account the physical appearance of the individual, but also his or her psychological maturity (2013, p. 8.) (A later version is available since 2018, (*Practical guide on age assessment, Second edition)* with similar statements however this was the version available at the time for the study.)
765 Chapter 13, sections 17 and 18 of the Aliens Act.
766 Ibid. and Prop. 2016/17:121, p. 21.
767 Furthermore, a regulation stating that the National Agency of Forensic Medicine (*Rättsmedicinalverket*) should carry out the examination was added (Chapter 4, section 21(d) of the Aliens Regulation).
768 Prop. 2016/17:121, p. 21.
769 See previous case law concerning identity and standard and burden of proof, MIG 2007:9 and MIG 2007:12. However, in a later case, MIG 2019:1, the Court ruled that the fact that the asylum seeker has not made her or his identity probable must not prevent

stating general principles on medical age assessments and rules that the asylum seeker should be offered a medical age assessment in order to facilitate the burden of proving her or his age. The Court also emphasises that the medical age determination should be seen only as one of many possibilities for the asylum seeker to make her or his age probable. The identity documents submitted by the asylum seeker in this case, a "taskira",[770] were not attached with any evidentiary value as, according to the Court, it was impossible to examine the authenticity of the document. The Court does not make an independent assessment of the asylum seeker's statements as to the protection grounds but relies on the assessment made by the migration court in the first instance. The Court adds a short sentence stating that the narrative concerning his family being threatened by smugglers is too vague. The conclusion drawn from this judgment must be that the Court, despite its initial phrasing on medical age determination as one of many possible ways to prove identity, allows the medical age determinations to play a decisive role in the assessment of the risk upon return.

Medical age determinations in Swedish asylum procedure have been, and are still, subject to heavy critiques from legal, medical, and statistical scholars.[771] The medical and statistical conclusion is that all the methods used are marked by uncertainty, especially if the asylum seeker is close to being 18 years old.[772] The legal critique has been put forward by Noll who argues that the fact that a medical age determination is not seen as one of the Migration Agency's investigation measures but as an offer to the asylum seeker – a choice and a benefit for the asylum seeker – is paradoxical as it is actually not

---

the determining authorities from assessing the risk upon return in line with the principle of *non-refoulement*.

770 An identity document common in Afghanistan.

771 Noll 2015. See articles on medical age examinations from the Swedish Pediatricians Society; (*Barnläkarföreningen*) www.barnlakarforeningen.se "*Till migrationsminister Heléne Fritzon och regeringen angående medicinska åldersbedömningar av asylsökande ungdomar*" published 17 July 2017 and *Medicinsk åldersbedömning av barn i övre tonåren – instruktioner för barnläkarundersökning*, published 16 January 2014, and *Mostad* (Mathematical Science) and *Tamsen* (Forensic Medicine) 2018. At present the criticism of methods used for determining age are frequent even among the physicians carrying out the assessments and some have resigned in protest against the uncertain radiological methods used, https://www.svd.se/a/vmQAKl/professorer-rattslakarnas-integritet-ar-hotad, 2017. See, also, EASO, *Age assessment practice in Europe,* 2013, p. 24.

772 Ibid.

a question of them having a practical choice.[773] If she or he says no to the offer, there is often no other way of making her or his age probable that would be accepted by the Migration Agency or the migration courts.[774] Noll proposes that an age determination based on radiologic examination, as carried out in Sweden, will necessarily result in a persisting doubt on the age of an applicant and therefore, in accordance with the "*in dubio pro reo rule* of article 25 (5) of the Asylum Procedures Directive, a radiological examination will automatically entail that the applicant has to be treated as a child".[775]

Unlike age determination, the possibility to use *language analysis* to determine the asylum seeker's country or area of origin falls under the general obligation to examine the case. Language analyses are not codified either in the EU Asylum Directives or in the Swedish Aliens Act. Such analyses have been used in Swedish asylum procedure since the 1990s and other countries have followed suit.[776] The importance of having a possibility of using such analyses, not only in order to determine the identity of the asylum seeker but also when executing a deportation, has been established in Swedish preparatory work and case law.[777] However, it was also emphasised that a language analysis must never be the only basis for determining the country or area of origin.[778]

Language analyses as conducted in the Swedish asylum procedure include two parts: one where the language is analysed, and another where the asylum seeker's knowledge about the claimed country or area of origin is tested.[779] The analyses are carried out by private companies[780] and have been a target of criticism as there is no certain method to determine the country of origin based on language analyses.[781] The manner in which Swedish language analyses are carried out and used were subjected to scrutiny initiated by the Migration

[773] Noll 2015.
[774] Ibid.
[775] Ibid.
[776] Heckscher 2015, p. 14.
[777] SOU 2003:25, p. 147 and MIG 2007 not. 11 and MIG 2011:15.
[778] Ibid.
[779] Hecksher 2015, p. 67 f.
[780] Sprakab and Verified AB (Hecksher 2015, p. 17).
[781] See statements from experts in SOU 2003:25, p. 146 and Hecksher 2015, p. 79 ff.

Agency after a critical news report was shown on Swedish television.[782] The investigator criticised the quality of the language analyses and how they are used, and came to the conclusion that language analyses should only be used when the obligation to examine the narrative and the documents has been exhausted.[783] This also includes scrutinising country of origin reports as an important source of knowledge with regard to language issues.[784] The knowledge test was suggested to be excluded and instead form part of the Migration Agency's examination.[785] Language analyses were suggested to be used on condition that they hold a sufficient level of quality and that their use is marked by legal certainty. This includes requirements for sufficiently qualified analysts and transparency as to their qualification as well as to linguistic research in the area.[786] The function of a language analysis was suggested to differentiate between the stage of determining the need of protection and the stage of deportation. Like the evidentiary value of age determination discussed above, the investigator argued that due to the inevitable uncertainty in these analyses, in the first stage, the determination of international protection, a language analysis can only be used to support the asylum seeker's statement and not as evidence for the contrary.[787]

In a few cases the Migration Court of Appeal has addressed language analyses. In MIG 2007 not.11 the Court rejects the language analysis based on the fact that the interview had been carried out via telephone and that it had not been possible to identify the analyst. However, it is hard to see that the Court actually did not base its judgment on the language analysis as its judgment was grounded on deficiencies as regards the asylum seeker's knowledge about the area of

---

782 Hecksher 2015. The language analyses as carried out in the Swedish asylum procedure were scrutinised and criticised by media in the Swedish television programme "Uppdrag granskning", *Kodnamn EA20* (a programme examining different societal problems), 12 November 2014. The difficulties, according to linguistics, in making such analysis in general and finding persons with enough knowledge to make them as well as the lack of transparency as to how they are carried out and by whom in the Swedish asylum procedure were highlighted.

783 Hecksher 2015, p. 87.

784 Ibid., p. 87.

785 Ibid., p. 94.

786 Ibid., p. 91. Sprakab's analysis lacked references to literature as regards the specific language in the area, ibid., p. 82.

787 Ibid., p. 74 and p. 85.

origin without even meeting the reasonable explanations from the public counsel for these deficiencies.[788] In a later case, MIG 2011:15, the Court reiterates that language analyses may have a significant evidentiary value if they are carried out in a way that fulfils the requirement of legal certainty and that the public authorities must have the possibility to use language analysis.[789] The case concerned an asylum seeker from an area in Somalia where an ongoing armed conflict had been established. Hence, to be granted protection status, it would be enough for the asylum seeker to make probable that he came from this area.[790] However, what had to be fulfilled was not further established in the case.[791] Instead, the issue brought up by the court is the duty for the migration courts, as well as for the Migration Agency, to examine the case. The Court states that the migration court, instead of only rejecting the submitted analysis, ought to have commissioned another analysis

[788] See Noll 2010 who holds that the judgment was "a performative self-contradiction and that "it actually substituted the shadowy language of experts with its own shadowy and inarticulate finding".

[789] The Court refers to the Government Official Report that preceded the changes in the Aliens Act. In the investigation the Government states that it is important to establish the asylum seeker's identity, not only in order to be able to enforce an expulsion, but also to prevent the asylum system from being misused by asylum seekers who commit crimes, SOU 2003:25, p. 137.

[790] MIG 2011:4.

[791] Compare [2014] UKSC (Supreme Court of the United Kingdom) 30 *Judgment Secretary of State for Home Department (Appellant) v. MNand KY (Respondent) (Scotland) 24 May 2014* where the issue was whether it was possible to use reports from the Swedish company Sprakab carrying out language analyses, used even by British courts. The Supreme Court ruled that it is possible to use a report from Sprakab as evidence in order to determine the origin of the asylum seeker, both as regards the origin of the applicant's language and the applicant's knowledge about the area of origin. However, these reports should be used under the following conditions:

– Anonymity of the experts involved may be relevant and in accordance with the law, but it should be possible to control the reliability of the expert by identification number in order to make it possible to check other cases where this specific expert has been consulted.

– The expression "certainty" or "near-certainty" used by Sprakab should not be taken for granted by the adjudicators in the legal procedure. The legal adjudicators must make their own assessment considering all the evidence in the case.

– The basis for language analysis as well as the basis for the knowledge test may be questioned and a right for the applicant to obtain a copy of the recorded interview on which the language and knowledge assessment is based in order to give another expert.

– The authors of the reports should not make their own opinions on the applicant's credibility and these kinds of statements should never be taken into consideration in the legal procedure (example in the case at hand: KY's knowledge "sounds rehearsed for the occasion").

or remanded the case to the Migration Agency for further investigation, as the rejection of the language analysis was the prerequisite for the migration court's assessment. Also, the Court stated that the Migration Agency should have acknowledged that the asylum seeker had questioned the analysis on several points. The Court did not rule on the actual protection issue but remanded the case to the Migration Agency for further examination.

It is hard to see to what extent the Migration Court of Appeal has considered the criticism of the medical age determination and language analyses. The results of the empirical study show that language analyses and age determinations are not evaluated or assessed but rather taken for granted as facts and furthermore used to the disadvantage of the asylum seeker which is not in accordance with the initial statements of the Migration Court of Appeal. However, the actual assessments made by the Court are vague and narrow. Due to the uncertainty of both age and language analyses and their function as a means for the asylum seeker, they can by no means be seen as established facts but should be analysed and assessed as other evidence.[792] If the language analyses and medical age determinations are means that only can be used as a benefit for the asylum seeker then the outcome of such evidence that runs counter to the statements of the asylum seeker must be disregarded and the Court, then, has to make a fresh assessment of other evidence in the case in order to assess age and country of origin.

As shown in the empirical study the *medical reports* are considered by the court mainly in relation to humanitarian grounds and not primarily as a piece of evidence of past ill-treatment or as a basis for assessing the credibility of the asylum seeker's narrative.[793] The obligation for the determining authority to not only consider and assess, but also obtain medical advice in case of signs of indications of past ill-treatment is established in asylum law.[794] Article 18(1) of the Asylum Procedures Directive stipulates that the Member State shall provide for a medical examination made by qualified medical professionals, at the State's

---

[792] See above, supra note 25, about the significance and problems of using expert witnesses (*sakkunniga*) in court.

[793] See the UNHCR report *Beyond Proof* 2013, p. 163 f. in relation to similar findings in other EU Member States.

[794] The UNHCR Handbook, para. 208 and Article 18 of the Asylum Procedures Directive.

expense, either arranged by the State or by the asylum seeker, where the determining authority deems it relevant for the assessment of international protection. The asylum seeker's consent is needed. When no such medical examination has been carried out, the asylum seekers shall be informed that they can, on their own initiative and at their own cost, arrange for such an examination.[795] A medical examination shall be assessed by the determining authority whether arranged on the initiative of the determining authority or the asylum seeker.[796] The content of the wording – "…relevant for the assessment of international protection…" – is not further explained but ought to include the assessment of past ill-treatment in addition to the assessment of the asylum seeker's ability to present a credible narrative.[797]

The ECtHR attaches great significance to medical reports that indicate torture. The Court found in R.C. v. Sweden that the Swedish determining authorities not only should have based their decisions on a credibility assessment but also were obliged to carry out further examinations in respect of past torture on the basis of a medical report submitted by the applicant.[798] However, the ECtHR has been reluctant to use medical reports as an explanation for inconsistencies in the asylum seeker's narrative.[799] R.C. v. Sweden has had direct significance for the Swedish case law and in MIG 2012:2 and MIG 2014:21 the requirement for further investigation concerning torture, when a medical report indicates such treatment, was reiterated by the Migration Court of Appeal, based on the statements in R.C. v. Sweden. However, from what emerges from the cases in the empirical study none of the

[795] Article 18(2) of the Asylum Procedures Directive.

[796] Article 18(3) of the Asylum Procedures Directive.

[797] See the UNHCR Handbook, para. 208 concerning mental illness as a factor to be regarded when assessing "the applicant's ability to fulfil the requirements normally expected of an applicant in presenting his case […] The conclusions of the medical report will determine the examiner's further approach".

[798] R.C. v, Sweden, paras 52-53. Compare Baldinger 2013, p. 170 who argues that in the decisions from the ComAT, medical reports seem to have been degrading from decisive to supportive evidence.

[799] Baldinger 2013, p. 265.

eight medical reports indicating torture has been basis for further investigation.[800]

6.2.3 Written documents

The analysis in this section is coupled to the sub-question: *How, and to what extent, if at all, do the courts base their assessments on written documents?* It was shown in the empirical study that the courts attach evidentiary value to less than half of the written documents (40%).[801] If excluding the identity documents, the share of written documents attached with low or no value or not considered is even bigger.[802] A reason as to why the courts come to this conclusion is mostly not explicit in the rulings. An explicit motivation in a few cases is that the document is easy to falsify. Additionally, the fact that the courts are seldom explicit as to whether they do base their assessment on a specific document, beyond attaching some value to it, makes it difficult to understand in what way a specific document has an impact on the assessments. Although the courts have attached written documents with no or low value, they may form part of the basis for the courts' assessment of the credibility of the asylum seeker's narrative, where contradictions are found when comparing the content of the narrative with the content of a written document.[803]

It is a recognised fact that external sources of information may be difficult to obtain in a situation of flight and also after arrival in the putative country of asylum.[804] The asylum seeker must make an effort to obtain evidence to support her or his statements, but they are not obliged to, if it is not reasonably obtainable.[805] However, when the asylum seeker does present such material, the determining authorities

---

[800] Appendix 2, Tables 66 and 67. The only medical report mentioned in the court's reasoning as support for the asylum seeker's statements has not led to any further medical investigation (G4).
[801] See above, section 4.3.2.
[802] See above, section 4.3.2.
[803] See above, section 4.3.2.
[804] UNHCR Handbook, paras. 196–197, 203, and 205, UNHCR, *Note on Burden and Standard of Proof in Refugee Claims 1998*, para. 10, Article 4.5 of the Qualification Directive, Prop. 2004/05:70, p. 90, and 2009/10:31, p. 131, and MIG 2006:1, MIG 2007:12.
[805] See about the principle "benefit of the doubt", ibid., above, section 5.2.2.1, and below, section 7.1.3.

are obliged to take relevant documentation into consideration.[806] The Migration Court of Appeal has remanded cases to the Migration Agency on account of insufficient examination of written documents.[807]

Even though the determining authorities have an obligation to examine the submitted documents, the difficulties and risks involved in carrying out authenticity tests have been highlighted. Carrying out these kind of investigations through embassies and consular services may not always be marked by legal certainty as the asylum seeker may have difficulties rebutting a finding based on classified material.[808] Furthermore, it can subject the asylum seeker to danger.[809] The ECtHR has partly solved this problem by applying the alleviation principle, the "benefit of the doubt", "… when it comes to assessing the credibility of […] documents…" submitted in support of the asylum seeker's statements. A large number of these cases concern Sweden.[810] Additionally, the ECtHR puts forward that the documents must be assessed in context alongside other evidence. If there is doubt about the authenticity of submitted documents, much depends on whether other evidence can support the questioned document.[811] However, this has not prevented the ECtHR from dismissing external sources of information on the basis that they are too vague or unspecific.[812]

The pattern that emerges from the empirical study reveals that the Swedish migration courts handle the uncertainty in assessing documents by initially evaluating the documents without connecting them to the law, statements in the narrative or other external sources of information and circumstances. There is no indication that the

---

806 Article 4(3)b of the Qualification Directive. Translation of documents are mandatory and follows from Article 10(5) of the Asylum Procedures Directive and the right to interpreter stipulated in section 50 of the Administrative Court Procedural Act (von Essen 2017, p. 582).
807 See, for instance, MIG 2006:1 where the authenticity of a death sentence was not further investigated and MIG 2014:22 where a document from the health ministry in the country of origin in relation to the country of origin information, concerning the possibility to get medical care, had not been considered.
808 Baldinger 2013, p. 158 and JO (*Justitieombudsmannen*) 2012-03-26, Dnr.258-2011.
809 Ibid.
810 See, for instance, *Case F.H. v. Sweden*, para. 95, *Case R.C. v. Sweden*, para. 50 and *Case J.K. v. Sweden* para. 93. See, further, on earlier cases, Baldinger 2013, p. 258, note 346.
811 Baldinger 2013, p. 258 f.
812 Ibid., p. 260.

documents have been further examined neither concerning their authenticity nor in relation to other evidence or circumstance. The evaluation of documents lacks any examination of the documents in context. Furthermore, the documents never become a part of evidentiary alleviation ("benefit of the doubt") as they have already been dismissed in an initial stage of the assessment. In this way the question of the relevance of a document in relation to law and facts does not become an explicit issue in the reasoning of the Swedish migration courts.

6.2.4 The lack of consideration and evaluation of external sources of information

The primary basis for the assessment of the risk upon return is the asylum seeker's narrative. However, to assess the risk for the individual, the asylum seeker's narrative cannot be assessed in the abstract but must be viewed in the context of relevant facts and circumstances. From what appears from the judgments studied in this dissertation, it is not self-evident for the judges to present, consider or evaluate external facts and circumstances in relation to the statements in the asylum seeker's narrative and in relation to the potential risk upon return for the asylum seeker. The results of the empirical study raise concerns as to how the migration judges perceive the scope of their obligation to examine external sources of information. There is no support in the legal framework for disregarding external facts and circumstances or, when such information is used, the one-sided and non-critical use of country of origin information. Furthermore, there is nothing in the legal framework that supports, on the one hand, the non-critical approach to language analyses and medical age determinations by regarding them as facts, and, on the other, the critical approach to medical reports by dismissing them as irrelevant or disregarding them. The possibility, as a way of handling uncertainty, of calling for, or initiating by its own motion, further expertise if needed is not utilised.

The decontextualised way in which Swedish migration courts assess or disregard external sources of information excludes this information as part of the assessment of the potential risk upon return. Hence, the external sources of information are excluded from the evidentiary alleviation principle, "benefit of the doubt", which is an established way

of handling uncertainty in the asylum procedure. Also, dismissing or disregarding the external sources of information submitted by the asylum seeker (such as written documents and medical reports), while taking for granted the evidence from the Agency as facts (such as country of origin information, language analyses, and age determinations), shows a pattern of choosing to handle external sources of information to the detriment of the asylum seeker. Hence, the omission or selective use of external sources of information add to the shift of emphasis from the duty for the court to see to it that the case is sufficiently investigated, to a question of the burden of proof being placed on the asylum seeker.

Finally, there is a risk that the lack of facts and circumstances as a basis for the judgments disconnect the outcome from the reality – from an outcome that is correct in substance.[813] Although external sources of information in asylum adjudication are difficult to evaluate due to a high degree of uncertainty, this does not relieve the courts of their responsibility to examine and assess this evidence in context. This is part of the difficult task of judging.[814]

6.3 Differences coupled to the outcome of the case and dissenting jurist judges

The analysis in this section is connected to the results presented in section 4.9 on whether there is any *correlation between the results in the different categories and the outcome of the case*. The results of the empirical study show that the reasoning, to a greater extent, is substantiated with legal references as well as with external facts and circumstances when the asylum seeker is granted protection. There is no basis to be found in law saying that the motivation of the judgment could be less based on law and facts when rejecting an application for protection. On the contrary, Article 11(2) of the Asylum Procedures Directive stipulates a mandatory obligation for Member States to ensure that "…where an application is rejected with regard to refugee status and/or subsidiary protection status, the reasons in fact and in law are stated in the decision". Generally, it is emphasised that a motivation is more

---

[813] See above section 1.3 on the definition of an outcome that is "correct in substance".
[814] See below, section 8.3, for the discussion on knowledge and judgment in the light of Arendt's theory on the faculty of judgment and the responsibility to judge.

important in asylum decisions than in many other categories of administrative decision.[815] Hence, it is difficult to understand why, for instance, specific country of origin information or legal sources should be less referred to in the cases where the application for protection is rejected. In section 2.1 the legal basis for the obligation to motivate the judgment and what it should include was addressed. The judgment as having a legitimising, controlling, and democratic function was put forward as well as the well-motivated judgment as a way of enhancing the quality of the decision-making process as it forces the author of the decision to make a thorough, factual, and objective judgment and create a distinct, clear, and straightforward motivation. This should apply regardless of the outcome of the case, especially when considering the great significance that it has for the individual.

The fact that the jurist judges are more often dissenting when the lay judges want to grant protection indicates a bias among the jurist judges towards a restrictive approach to granting protection, but also a bias towards the Migration Agency as generally being the more reliable part.[816] The study does not suggest an answer as to why this is so, but one tentative explanation is that the jurist judges either do not perceive the procedure as a two-party process where the court is equally neutral to the two parties but rather that the court's role is to check that the Migration Agency has not done anything (completely) wrong, i.e. the court takes up more of a monitoring role rather than the role of carrying out a "full examination of law and facts" that is neutral to the two parties. The emphasis made in the preparatory work – that the focus of the investigation should be on the procedure at the Migration Agency – could open the way to this interpretation. However, this does not relieve the courts of their responsibility to scrutinise and assess the material and the stands chosen by the Agency. A general restrictive approach towards granting protection may be the result of political leakage, i.e. not only the impact that the political affiliation of the lay judges has, but also the political winds in general.[817] It might also be a result of a more or less unreflective reproduction of how things are

815 Prop.1996/97:25, p. 203.
816 A more restrictive approach in granting protection is in line with the interviews conducted with judges, presented in section 1.1.
817 Compare the study of Martén mentioned above in section1.1.

usually done according to the institutional court culture.[818] However, there is no basis in law for the judge to be neither restrictive nor extensive in her or his assessments or to treat the Migration Agency as the more reliable part.

6.4 A shift of emphasis from an assessment of facts and circumstances to an assessment of credibility – Concluding reflections

In this chapter the space for the Swedish migration courts to consider facts and circumstances and the content of an individual assessment has been critically analysed in relation to the results of the empirical study. The critique revolves around the fact that the central part of the asylum adjudication – namely to choose, analyse, and assess facts and circumstances (either they are substantiated by external sources of information or not) – are largely absent in the court rulings. Without clearly expressing it, the migration courts seem to rely on a tacit understanding of the scope of the adjudication as chiefly a question of credibility once it has been decided that this is an issue in the case. The requirement of an *ex nunc* "full review" of the case is transformed into a tacit understanding of credibility being the main issue. By this way of narrowing down the scope of the adjudication, the asylum adjudication shifts from an assessment of the risk upon return for the individual asylum seeker to an assessment of the credibility of the asylum seeker's narrative. Against the backdrop of this conclusion, the following chapter elaborates on credibility assessments as a legal phenomenon and its place in the asylum adjudications.

[818] See supra note 82 as regards research on legal court culture and section 8.2 on the faculty of thinking as a necessary basis for the faculty of judging and the faculty of judging as something else than behaviour.

7 Assessment of the asylum seeker's narrative – Critical reflection on credibility as a legal phenomenon in the asylum procedure

The present chapter provides an analysis of the answers to the second research question presented in Chapter 4: *How, and to what extent, if at all, do the Swedish migration judges substantiate their arguments regarding the assessment of the credibility of the narrative presented by the asylum seeker?* The focus is, on the one hand, the *function* (7.1) and, on the other hand, the *content* (7.2) of credibility assessments. The analysis is made in the light of a critical examination of the different positions that have been put forward in guidelines, case law, and doctrine on how credibility assessments should be made. "Function" is used, in this context, to analyse what purpose the credibility assessment is supposed to serve in the asylum adjudication. This, in turn, is closely connected to a temporal aspect, i.e. where in the asylum procedure is a credibility assessment relevant. "Content" refers to what the assessments of credibility are filled with, i.e. what the arguments are based on. Section 7.2 also includes a close analysis of the credibility assessments made by the courts in four of the cases in the study. In the last section the analyses are summarised, and concluding critical reflections are offered (7.3).

The pattern that emerges from the study of the judgments in the Swedish migration courts show that the emphasis lies on assessing the credibility of the asylum seeker's narrative once the decision has been made that credibility is an issue in the case.[819] Also, it was shown that references to external sources of information, individual facts and circumstances as well as procedural issues being used as a basis for assessing the credibility of the asylum seeker's narrative make up a low share of all references compared to arguments based on indicators for credibility.[820] This is the case regardless of whether the facts and circumstances are claimed by the asylum seeker or can be obtained *ex*

[819] See above, section 4.1.

[820] See above, section 4.1 and 4.4.

officio.[821] The arguments made by the Swedish migration courts on the asylum seeker's behaviour, actions or activities during the procedure are mainly connected to credibility.[822] Therefore, this category is included in the analysis below.

The two aspects of credibility assessment – "function" and "content" – are interdependent. However, while the content, that is, what constitutes a credible narrative or a credible statement, has been subject to interdisciplinary research to quite a large extent, the legal function of a credibility assessment has been less thoroughly explored. Since how the function of credibility assessment is perceived in the asylum adjudication is fundamental, it is given more space in the analysis below, while the analysis on the content, in no way less important, is primarily based on a summary of interdisciplinary research and legal guidelines.

7.1 The function of credibility assessment in asylum adjudication

This section includes six sub-sections. In section 7.1.1 the significance that credibility assessments have gained in asylum adjudication is explored. Section 7.1.2 analyses the function of credibility assessments in the asylum procedure. In section 7.1.3 the relation between credibility assessments and the alleviation principle, "benefit of the doubt", is analysed. Section 7.1.4 addresses credibility assessments in Swedish asylum law, and in section 7.1.5 the doctrinal handling of the subjective element in credibility assessments is analysed. Finally, in section 7.1.6 the analyses are summarized.

7.1.1 The significance of credibility assessments

The purpose of the asylum adjudication is to assess the asylum seeker's need for protection against persecution and other serious harm in the country against which she or he seeks protection. This means that all parts of the procedure have to serve this purpose. The assessment of the risk of returning an asylum seeker to her or his country of origin necessarily takes its point of departure in what the asylum seeker

[821] See above, sections 4.3 and 4.7.
[822] See above, section 4.5.

recounts about her or his situation. One exception would be a case where an unaccompanied asylum seeker is unable to present any kind of verbal narrative on account of, for instance, age or severe mental or physical disabilities and where a verbal narrative may have a minor role in the assessment. Even in cases where the narrative may play a minor role in order to arrive at a non-expulsion decision as, for instance, when an ongoing armed conflict causing indiscriminate violence has been established in the country of origin, the asylum seeker's statement on her or his circumstances is an important part of the assessment in order to establish the country of origin as well as the protection status.[823] Hence, the asylum seeker's narrative constitutes, in most cases, the foremost piece of evidence. The assessment of risk in the individual case is a complex activity which includes investigating and assessing the parts of the narrative concerning the asylum seeker's claims on past events and circumstances as well as the ability to foresee the risks of ill-treatments upon return.[824] Sweeney, who criticises the UNHCR's use of the expression "to establish facts", argues that it may be misleading in indicating a process of an objective search of what is already there or has already happened.[825] According to Sweeney, the challenge of establishing past facts is not "quite so different to proving a future risk, since both are processes of actively constructing, rather than passively discovering knowledge".[826] Hence, establishing facts is always a consequence of choices, interpretations, and assessments.

It is not an easy task to outline the kind of legal phenomenon "credibility" has become in the asylum procedure and it is certainly easy to get confused and go astray when trying to analyse the legal sources in the area. My intention is not to establish what kind of legal phenomena credibility "is" but rather to analyse and problematise the

[823] Kagan 2003 brings up the examples of Jews fleeing Germany in the early 1940s or a Tutsi fleeing Rwanda in 1994. Later situations in which everybody from a certain country or region gets protection include Somalia, Iraq, and Syria.
[824] See Article 4(4) of the Qualification Directive concerning the presumption of persecution or serious harm upon return when the asylum seeker has been subject to such treatment in the past. See Diesen in Andersson et al. 2018, p. 230 f. on the difference between background facts and prognosis facts.
[825] Sweeney 2009. Compare the UNHCR Handbook, paras. 195–205.
[826] Sweeney 2009. See also Macklin 1998 who formulates the assessment on the narrative as choices of facts and circumstances and advocates a reflective and transparent judgment where the judge's choices are made visible.

role it seems to have gained and what this does to the assessment of the need for protection, i.e. the assessment of the "risk upon return".

The notion of "credibility" is not an actual part of either the refugee definition or the definition of subsidiary protection, i.e. a person does not have to be credible or present a credible narrative to be a refugee or in need of subsidiary protection.[827] The origin of credibility as a concept in asylum law is found in the UNHCR Handbook. As mentioned in section 5.2.2.2, Swedish preparatory works and the Swedish Migration Court of Appeal have emphasised that the UNHCR Handbook and other conclusions concerning the proceeding that the UNHCR's executive committee stands behind, should be regarded as "legal sources".[828] It was further concluded that this has led to a selective use of the Handbook by only including the procedural part.[829] The credibility assessment as a concept presented by the UNHCR has been reproduced in the EU Qualification Directive,[830] in the case law of the ECtHR, in decisions from HCR and CAT, as well as in national guidelines and case law.

The Handbook was published in 1979 and was reissued in 1992, 2011, and 2019.[831] The reissued versions include Guidelines on International Protection developed by the UNHCR through the years. The role of the UNHCR Handbook is to provide a practical guide and should not be viewed as a treatise or as refugee law.[832] However, the limitations of its use as a guideline are also highlighted as the process encompasses varied conditions and personal circumstances in the individual case and "… is by no means a mechanical and routine

---

827 Kagan 2003, Thomas 2011, p. 134, Sweeney 2009, Staffans 2011, p. 7, and Diesen in Andersson et al. 2018, p. 250. See also MIG 2007:12: "In spite of the fact that it is now established that A has submitted inaccurate statements, nevertheless, an overall assessment of A's narrative must be made, as false statements and false documents are not in themselves sufficient to refuse a residence permit (compare the Handbook, paras. 199 and 205b)". (The author's translation.) Also, according to the UNHCR study on the implementation of the Asylum Procedures Directive, negative decisions in some EU States were often made on credibility grounds and failed to apply the criteria of the Qualification Directive as to accepted facts (*Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice* 2010, p. 26).

828 Prop. 1996/97:25, p. 97, Prop. 2004/2005:170, p. 173 and MIG 2006:1 and 2007:12.

829 See above, section 5.2.2.2.

830 Article 4(5)(e) of the Qualification Directive.

831 HCR/IP/4/Eng/REV.1-4.

832 The UNHCR Handbook, the foreword, para. V.

process”.[833] The explanations in the Handbook are based on knowledge from the High Commission Officers’ 25 years of practising the Refugee Convention as well as the practice by the Contracting States and the “…exchanges of views…” between them.[834] Furthermore, while the literature “…devoted to the subject…” has been taken into account in the Handbook, there are deliberately no references to this literature due to the Handbook’s role as a guide rather than a treatise.[835] However, in later handbooks, guidelines, and reports on specific areas published by the UNHCR, both legal references as well as references to research in other disciplines are made.[836] In accordance with the increasingly apparent inter-relationship and complementarity between, on the one hand, international refugee law and, on the other, human rights, humanitarian, criminal, and other bodies of law, the UNHCR Handbook has also become a tool in assessing other grounds for protection based on international Conventions such as, for instance, CAT and the Geneva Conventions regarding armed conflicts[837]. In recent years the UNHCR has published a number of reports on asylum adjudication in EU where recommendations are based on the Handbook and its subsequent notes and guidelines.[838]

---

[833] Ibid, paras. 221–222.

[834] Ibid, the foreword, para. V. UNHCR has been criticised for using case law selectively in its guidelines. Baillet 2015 argues that the references made are biased towards case law from common law jurisdictions and from Western countries. She highlights that it is particularly problematic that the “background papers” concerning things such as protection on religion or beliefs is limited to case law from Anglo-Saxon Western countries and that there “is a complete absence of references to cases from developing countries and they thus lack the universal characteristic they are intended to have, and this requires rectification in order to preserve legitimacy of international law-making”. See also Goodwin-Gill 2013 who advocates for the need of a transparent, scholarly, and consultative approach.

[835] The UNHCR Handbook, the foreword, para. V.

[836] See, for instance, UNHCR, 2008, *Handbook for the Protection of Women and Girls*, UNHCR 2010 Guidelines on international protection No. 9: *Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, 2013, *Improved Credibility Assessment in EU Asylum Procedures*.

[837] UNHCR 2007: *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR*.

[838] See, for instance, *Asylum Systems Quality Assurance and Evaluation Mechanism Project in the Central and Eastern Europe subregion, ASAQAEM Final Regional*, 2010, *Kvalitet i svensk asylprövning, En studie av Migrationsverkets utredning av beslut om internationellt skydd 2011*, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice* 2010, and *Beyond Proof, Credibility Assessment in EU Asylum Systems* 2013.

Even though credibility is not a legal requisite that has to be fulfilled, the international and EU asylum legal discourse concerning the asylum seeker's narrative has directed great attention to the concept of credibility in recent years. One of the purposes has been to harmonise the application of asylum adjudication both between individual decision-makers and judges as well as, in the EU, among the Member States. Several authors in the field have tried to outline the function of credibility assessments in the asylum procedure as well as methods for how such assessments should be made.[839]

In 2011, the Hungarian Helsinki Committee, in partnership with UNHCR, the International Association of Refugee Law Judges, and Asylum Aid (UK), initiated a project entitled Towards Improved Asylum Decision-Making in the EU, the CREDO project. The project was initiated because UNHCR had noted a common trend across EU Member States whereby negative decisions on applications for international protection often seem to be made on credibility grounds without the application of the criteria of the Qualification Directive as regards the facts of the application. UNHCR further noted that, notwithstanding the different legal traditions in the EU, a common understanding and approach to credibility assessments was still lacking among its Member States. The overall goal of the CREDO project is to contribute to a better-structured, objective, high-quality, and protection-oriented credibility assessment practice in asylum procedures conducted by EU Member States. The CREDO project aims at delivering three different outputs. In addition to the report from UNHCR, a training manual on credibility assessment for practitioners has been prepared by the Hungarian Helsinki Committee, and judicial guidance for the assessment of credibility in judicial review has been developed by the International Association of Refugee Law Judges.

The initiative has resulted in three reports/documents concerning methods for credibility assessments in asylum cases published during 2013. In March 2013, the International Association of Refugee Law Judges published a "working paper" on *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive. Judicial*

[839] Kagan 2003, Sweeney 2009, Thomas 2006, Diesen in Andersson et al. 2018, p. 267 ff., Andersson in Andersson et al. 2018, Chapter V, and Thorburn Stern and Wikström 2016, Part II.

criteria and standards. Shortly afterwards, in May, UNHCR published its report: UNHCR project *Beyond Proof, Credibility assessment in EU Asylum Systems*. In October, the Hungarian Helsinki Committee published *Credibility Assessment in Asylum Procedures – a multidisciplinary Training Manual*. The latter is based on the former two.

In its report Beyond Proof, UNHCR puts forward the significance of credibility assessments as "… a core element of the adjudication of asylum applications…" and emphasises that "… credibility findings often lead to the determination of the material facts considered for the determination of an application, and are as such the first step in the decision-making process".[840] UNHCR has further, "…repeatedly identified the assessment of credibility as an area of concern and observed that this aspect of decision-making poses a particular challenge to decision-makers".[841] Also, in doctrine, authors have highlighted the significance of credibility assessments in the asylum adjudication. Thomas describes the credibility assessment as "the most fundamental aspect of asylum adjudication", while Kagan claims that it is "… often the single most important step in determining…" the need for protection. Sweeney requests that a more outlined legal status of the credibility statements has to be considered.[842] Critiques have been put forward on the way credibility assessments are applied. Critics are chiefly concerned about how decision-makers and judges focus on credibility in a narrow sense, namely as general credibility, and that they apply a high but unstated standard for the threshold of statements.[843] For instance, like what is shown in the empirical study, Sweeney has observed that, in the UK, a "broad" interpretation of credibility is often used as a shorthand for expressing the strength of the case: "…to describe a claim as 'credible' is to say that the applicant's statements are true and that he or she warrants international protection".[844] Both he

840 UNHCR 2013, Beyond Proof, p. 28.

841 UNHCR 2013, Beyond Proof, p. 29. See also the UNHCR report from 2011: Quality in the Swedish Asylum Procedure (*Kvalitet i svensk asylprövning*). This study was undertaken through cooperation between UNHCR and the Swedish Migration Board in 2009–2011 and involved the analysis of 200 decisions taken between July and December 2009. It was found that 38 per cent of the cases analysed were rejected on credibility grounds.

842 Thomas 2011, p. 165, Sweeney 2009, and Kagan 2003.

843 Sweeney 2009, Diesen in Andersson et al. 2018, p. 267, UNHCR 2013, *Beyond Proof*, p. 147.

844 Sweeney 2009. See also Kagan 2003.

and Kagan advocate for a narrow view of credibility assessment where it is "… less about the outcome of the case, or even the conclusive proof of material facts, and more about a pre-requisite evidential step…", while, in Diesen's view, credibility should serve as an "auxiliary" fact throughout the whole process.[845] In the following section, these standpoints are further explored.

7.1.2 Credibility assessment as admissibility or acceptance of evidence in a pre-requisite evidential step

Credibility assessment as a pre-requisite evidential step is based on the view that credibility is a possibility for the asylum seeker to get evidentiary alleviation as a consequence of the difficulties for the asylum seeker to substantiate her or his statements with external sources of information. It should be enough that facts that are relevant for a need for protection are substantiated with "credible" statements or statements "capable of being believed" that in turn will afford the asylum seeker with the "benefit of the doubt" in the parts where it is not possible to substantiate relevant statements in any other way.[846] Sweeney has expressed it as a process of "admissibility" which he defines as follows: "If a piece of evidence is relevant to a material fact then the decision maker must decide if there is any reason why it should not be admitted as evidence".[847] In this process he defines credibility as an "…alleviating evidential rule…" rather than an "…exclusionary evidential rule…", and that it should be set to very low threshold.[848] To conclude that an unsupported statement is credible should be merely to conclude that it is admissible as evidence.[849] The pre-requisite evidential step is also put forward in the frame of the CREDO project. The point of departure for the protection determination is, according to the project, humanitarian. This has some consequences. The core legal context is, according to the International Association of Refugee Law Judges, that refugee as well as subsidiary protection decisions are

---

[845] Sweeney 2009, Kagan 2003, and Diesen in Andersson et al. 2018, p. 301 f.
[846] UNHCR Handbook, paras. 196 and 203–204. See above, section 5.2.2.2 on the principle "benefit of the doubt".
[847] Sweeney 2009.
[848] Sweeney 2009.
[849] Sweeney 2009 and Kagan 2003. See also on the notions "burden of assertation" or "burden of information" mentioned above, in section 5.2.2.1.

made in the field of "rights-based" law derived from the international treaty obligation, and not from the domestic "privilege-based" immigration law of Member States.[850] According to UNHCR, the humanitarian approach implies that the determination does not purport to identify those in need of international protection as a matter of certainty.[851] The UNHCR defines credibility assessment as a process "… of gathering relevant information from the applicant, examining it in light of all the information available to the decision maker and determining whether the statements of the applicants relating to the material elements of the claim, *can be accepted,* for the purpose of determination of qualification for refugee and/or subsidiary protection status…" and thereby constitutes the asylum seeker's accepted "…individual and contextual circumstances".[852]

To apply the credibility assessment as a pre-requisite evidential step where the aim is to decide upon admissibility or acceptance means that, at this initial stage, the credibility assessment aims at deciding which of the asylum seeker's facts are found "capable of being believed" and thus will be accepted and may be taken into account in the analysis of well-founded fear of persecution and real risk of serious harm. This implies that most authors advocate a process where credibility assessment is, in a way, separated from the final risk assessment.[853] This is explicit in the UNHCR method where credibility assessment is put forward as the first stage in the process separated from the second stage, with the latter including the analysis of well-founded fear and

[850] International Association of Refugee Law Judges 2013, p. 9, para. 9.

[851] UNHCR 2013, *Beyond Proof*, p. 28.

[852] UNHCR 2013, *Beyond Proof*, pp. 13 and 27 (the author's italics). The International Association of Refugee Law Judges chooses to use the term the asylum seeker's "accepted profile" ("accepted past and present facts found by the judge or by the asylum seeker") (2013, p. 29), while the Hungarian Helsinki Committee, by contrast, does not talk about credibility assessment as accepting or not but defines "credibility determination" as "a step towards deciding how to weigh an applicant's statements and other evidence when making an asylum decision" (2013, p. 21). UNHCR was reluctant to the wording "accepted profile" as they had noted that this expression "is often wrongly taken to imply a pre-defined category of persons actually possessing, or perceived, or attributed to possess some common characteristics, against which individual applicants are then measured. The term 'individual and contextual circumstances' refers to a broader concept and reflects the requirement under EU law that an application be assessed on an individual basis taking into account the *background* of the applicant" (*Beyond Proof*, p. 22).

[853] Kagan 2003.

serious harm.[854] However, this does not mean that the UNHCR advocates that credibility assessment of the asylum seeker's narrative should be made in a vacuum. By including into the definition of the process of credibility assessment the investigation, i.e. the "…gathering and examination of relevant information in light of all the information available…", UNHCR emphasises the significance of assessing credibility in a context of facts and circumstances. This has been developed in the frame of the CREDO project where it is outlined what a credibility assessment should include before reaching a decision on which facts should be accepted:

> Having carefully assessed the credibility of the material facts with regard to all the relevant evidence obtained through the lens of the credibility indicators, as appropriate in light of the applicant's individual and contextual circumstances, and duly taking into account the reasonableness of any explanations provided by the applicant with regard to potentially adverse credibility findings, the decision-maker must determine whether to accept a material fact as credible or not.[855]

The position that credibility assessment is about deciding, in a pre-requisite evidentiary step, which statements should form the basis for the adjudication – which Sweeney describes as "admissibility" and the UNHCR calls "accepted past and present facts" – leads to an early focus on credibility as such. This opens the way for a kind of "pre-process" where the protection requisites are not the focus, which therefore encourages the separation between the credibility assessment and the risk assessment. By this separation the credibility assessment does not clearly serve the risk assessment but instead tends to become an assessment on its own merits, i.e. not only a pre-requisite but a requisite. Even though, as emphatically stated by Sweeney, credibility should be set to a low standard[856] and, as proposed in the CREDO project, the assessment of the statements in the narrative, even at this early stage, must be subject to a thorough, contextual, and multidisciplinary investigation of all facts and circumstances in the case, the threshold for admissibility or acceptance of statements in the

---

[854] UNHCR 2013, *Beyond Proof*, p. 261 f.

[855] UNHCR 2013, *Beyond Proof*, p. 50.

[856] Sweeney holds that the threshold of credibility does not amount to whether a statement has been proven or which weight it is given but merely whether the statement should be admissible for the final risk assessment. Compare the burden of presenting information or the burden of assertion as put forward by Noll and Diesen (see above, section 5.2.2.1).

narrative becomes "credibility". This approach risks equating credibility with the standard of proof and ultimately applying it as the yardstick for the risk assessment as a whole. On the one hand, the thorough examination of facts and circumstances advocated in the CREDO project and by other authors is welcome; yet, on the other hand, by determining via credibility assessment as a pre-procedural stage where all the evidence should be evaluated together, the separation becomes confusing and it seems hard to separate this stage from what is or should be included in the overall risk assessment. Furthermore, there is an ambiguity in the idea that credibility is said to be an alleviation rule only related to statements that cannot be substantiated by other facts and yet at the same time it advocates for having all facts and circumstances included in this assessment. This seems like an unrealistic distinction as a statement may be in parts substantiated by other facts. A statement about a certain circumstance may be supported by available country reports. For instance, it may be clear from the available country reports that homosexuality is forbidden by law and that homosexuals face life-threatening acts. This does not in itself prove that the individual asylum seeker is homosexual. However, these facts may explain certain actions, such as the asylum seeker's vagueness or difficulties speaking clearly about it, or that they have not been open about their sexual orientation and therefore have been married. Credibility assessment as a pre-requisite evidentiary step where an admissibility test of statements is made can too easily be used to dismiss the asylum seeker's narrative as a whole on credibility grounds at an early stage of the process and, hence, disqualify the statements in the narrative as a basis for the assessment of the risk upon return.

7.1.3 Credibility assessment in relation to the principle of the "benefit of the doubt"

The credibility assessment's prominent place in the asylum adjudication is strengthened by the way it is connected to the alleviation principle of the "benefit of the doubt". The principle is analysed above in section 5.2.2.1 in relation to the burden and standard of proof and in section 6.2.4 in relation to external facts and circumstances. In this section the principle, benefit of the doubt, will be further scrutinised in relation to credibility assessments. The principle emanates from the UNHCR's

Handbook and is to be applied when credibility has been established: "… *if the applicant's account appears credible*, he should, unless there are good reasons to the contrary, be given the benefit of the doubt".[857] The alleviation emerges when the asylum seeker renders "…a truthful account of facts relevant to the claim".[858] In that case the asylum seeker's burden of proof is discharged.[859] For "general" credibility to be established, the Handbook puts forward three criteria that have to be fulfilled: "The applicant's statements must be *coherent* and *plausible*, and *must not run counter to generally known facts*".[860] It is further stated that the benefit of the doubt should "…only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's 'general' credibility".[861] As mentioned above, the need to apply "benefit of the doubt" is reinforced by the prohibition of *refoulement* and the absolute nature of Article 3 ECHR and should be understood and applied as a safety valve in relation to *non-refoulement*.[862] According to UNHCR, the consideration of "benefit of the doubt" constitutes a distinct step in the establishment of facts that occurs at the end of the credibility assessment when all the available evidence has been obtained and evaluated, and the credibility of the applicant's statements has been assessed.[863] This means that an investigation and examination of facts should be made before the application of "benefit of the doubt" and that it allows the adjudicator to reach a clear conclusion to accept an asserted material fact as credible, although there may be no other evidence to support the fact.[864]

The relation between "benefit of the doubt" and the credibility indicators is put forward in UNHCR subsequent guidelines and reports[865] and reproduced in Article 4(5) of the Qualification Directive

---

[857] The UNHCR Handbook, para. 196 (the author's italics).
[858] UNHCR: Note on burden and standard of proof in Refugee Claims 1998, para. 6.
[859] Ibid.
[860] The UNHCR Handbook, para. 204.
[861] Ibid.
[862] See above, section 5.2.2.1.
[863] UNHCR 2013, *Beyond Proof*, p. 247.
[864] The UNHCR Handbook, para. 196, UNHCR 2013, *Beyond Proof*, p. 246f. See also Kagan 2003.
[865] UNHCR: Note on burden and standard of proof in Refugee Claims 1998, paras. 6 and 11.

as well as in the Swedish preparatory work and case law.[866] While not using the phrase "benefit of the doubt", Article 4(5) specifically addresses issues corresponding to the alleviation principles and to the phrase "general" credibility. The implementation of the alleviation principle in the Qualification Directive has given the notion of "general credibility" a separate line in Article 4(5)(e) which gives the impression that "general credibility" is an independent criterion and not connected to or a result of a thorough investigation or coupled to a coherent and plausible narrative that does not run counter to known facts.[867] The Swedish Government did not find it necessary to explicitly implement the content of Article 4(5) as, according to the Government, the principle "benefit of the doubt" had been applied in Swedish case law for many years.[868] The Government interpreted "general credibility" as a condition for "benefit of the doubt" to be applicable and stated that:

> The principle benefit of the doubt should only be applied when all available evidence has been submitted and examined and when the investigator has been convinced as to the applicant's general credibility. [869]

If the narrative is found to be generally credible, then there should be no need for further evidence:

> Concerning allegations as regards persecution, there is no need for further evidence if the applicant's narrative is coherent and credible. Complete evidence that clearly corroborates that such a risk exists can rarely be submitted and the applicant's narrative should, therefore, be accepted if it appears to be credible and probable. [870]

Para. 11 states: "In assessing the overall credibility of the applicant's claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support of his/her statements, consistency with common knowledge or generally known facts, and the known situation in the country of origin. Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed".

[866] Prop. 1995/96, p. 98 and MIG 2007:12.

[867] Compare section 4.3.7.5 of the judicial analyses from EASO 2018, *Evidence and credibility assessment in the context of the Common European Asylum System*, where the general credibility alludes to the overall credibility of the account and, in particular, the statements and documentary or other evidence produced in support of an application.

[868] Prop. 2009/10:31 p. 130 f.

[869] Prop. 2009/10:31 p. 131. (The author's translation.))

[870] Ibid. (The author's translation.)

In international and European asylum case law, "general" credibility has been interpreted as the "general" credibility of the asylum seeker's account, i.e. the focus in the adjudication should be on the core of the flight narrative, and the basic narrative, rather than getting caught up in details or more peripheral parts that might seem inconsistent or unreasonable, such as travel routes, dates of events, etc.[871] As Noll concludes in his analysis of Article 4 of the Qualification Directive, the applicant's credibility "at large" is not relevant to the overarching question of whether there is a risk of harm on return: only the credibility of the applicant's statements about those risks is relevant.[872]

While the asylum seeker's *behaviour or actions taken during the procedure* have no clear link to "benefit of the doubt" in the UNHCR Handbook, the Qualification Directive sets out certain behaviour and actions as conditions in order to get evidentiary alleviation. According to Article 4.5 (a, b, and d), the applicant must make a genuine effort to substantiate his application: submit all relevant elements at the applicant's disposal, and give a satisfactory explanation regarding any lack of other relevant elements; and apply for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so.[873] Also, Article 13(2)(b) of the Asylum Procedures Directive stipulates that applicants must hand over documents in their possession relevant to the examination of the application, such as their passports.

Other interpretations of the principle are made where "benefit of the doubt" should be applicable even in the process of assessing credibility. For instance, the Hungarian Helsinki Committee emphasises in its manual that the decision-maker should also bear in mind the "benefit of the doubt" principle when determining credibility as "…the benefit of the doubt rule reminds decision-makers that they need not have complete certainty in order to accept an applicant's statement as credible".[874] This means that uncertainties along the way must remain till the last part of the assessment, i.e. benefit of the doubt

---

[871] Kagan 2003, Reneman 2014, p. 217, note 179, Baldinger 2013, pp. 132, 170, 251, and 381, Noll 2005, and ECtHR: *Case R.C. v. Sweden*, *Case F.N. and others v. Sweden* 2013, *Case Bello v. Sweden* (Decision), and *Case N. v. Finland*, paras. 155–157.
[872] Noll 2005.
[873] Baldinger 2013, p. 349.
[874] Hungarian Helsinki Committee 2013, p. 24.

is applied in relation to the final assessment of the risk upon return. This is also the view of Diesen who claims that the notion of "general credibility" is a subjective evidentiary norm and cannot be the basis for such a central principle as "benefit of the doubt".[875] He interprets credibility assessment as an "auxiliary" fact that may be used in all stages of the adjudication and that "benefit of the doubt" should not be conditioned by credibility but shall be applied whenever there are remaining uncertainties, i.e. deficits as to the investigation.[876] In addition, the ECtHR does not seem to place the assessment of credibility in a certain part of the procedure but has taken an explicit stand by ruling that "benefit of the doubt" should also be considered when assessing the credibility of the narrative. In a number of cases, the Court has established that:

> … owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give the asylum seekers the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof.[877]

The Court lays a burden of explanation on the asylum seeker when the presented information "…gives strong reason to question the veracity of the asylum seeker's submission…".[878] However, the Court stresses that all statements that have been submitted or that have in any way emerged in the case should be assessed in relation to their relevance to the risk of ill-treatment contrary to Article 3 ECHR, and that the rules concerning the burden of proof should not render ineffective the applicants' rights protected under Article 3 of the Convention.[879] Many of the cases referred to above concern Sweden where the ECtHR finds a breach of Article 3 concerning *non-refoulement*.[880] In a number of these

---

[875] Diesen in Andersson et al. 2018, p. 265 ff. and p. 296.

[876] Diesen in Andersson et al. 2018, p. 300 and p. 302.

[876] Diesen in Andersson et al. 2018, p. 296.

[877] *Case Collins and Akaziebie v. Sweden* (Decision), *Case F.G. v. Sweden*, para. 113, *Case J.K. v. Sweden*, para. 93, *Case I. v. Sweden*, para. 60, *Case R.C. v. Sweden*, para. 50, and *Case N. v. Sweden*, para. 53.

[878] Ibid.

[879] *Case F.G. v. Sweden*, paras. 115 and 127, *Case J.K. v. Sweden*, paras. 87 and 97.

[880] Some of these are published after the cases included in the empirical study and were not available as case law for the Swedish migration courts at the time of their judgments. However, the cases were decided by the Swedish migration courts before the study and are therefore of interest for this analysis as the purpose is not mainly to confirm what

cases, the ECtHR comes to the conclusion that the narrative is credible enough in essential parts in the light of, for instance, medical reports and/or country of origin information.[881] The Court holds that Sweden has failed to take into account the cumulative risks by not investigating and/or evaluating new facts and circumstances and by not sufficiently considering the established past ill-treatment in light of available country of origin information and instead relying on credibility assessment as the final standard measure.[882]

The risk of focusing on credibility at the expense of a thorough investigation of the facts in the narrative has been highlighted in Case J.K. v. Sweden. In this case the ECtHR, Grand Chamber makes a different evaluation of the present risk of ill-treatment upon return in relation to established past ill-treatment. The Court claims that Sweden focused on the inconsistencies and vagueness of the narrative and has not sufficiently considered and investigated the facts in the narrative.[883] The Court bases its judgment on a concrete assessment of the facts in the narrative, concerning the former threats and actions taken against the applicants on account of one of the applicant's former employment in the American military service together with relevant country of origin information. The Court concludes that: "The cumulative effect of the applicants' personal circumstances and the Iraqi authorities' diminished ability to protect them must therefore be considered to create a real risk of ill-treatment in the event of their return to Iraq".[884]

Another, similar example is R.C. v. Sweden, where the ECtHR ruled that Sweden had violated Article 3 ECHR as Swedish authorities had not investigated indications of torture. The Swedish Government

---

was established law at the time but to highlight problems in Swedish asylum adjudication.

[881] *Case R.C. v. Sweden*, para. 52, *Case J.K. v. Sweden*, para. 114, and *Case I. v. Sweden*, para. 68.

[882] *Case I. v. Sweden* 2014, paras. 63 and 67, *Case F.G. v. Sweden*, paras. 56–57, *Case R.C. v. Sweden*, para 56, and *Case J.K. v. Sweden*, para. 121.

[883] See, for instance, *Case J.K.*, para. 115. In the lower chamber in *Case J.K. v. Sweden,* Sweden was found not to have violated Article 3. However, an interesting reading is the partly dissenting opinion, by Judge Zupančič, criticising Sweden for its generally exaggerated focus and narrow interpretation of credibility assessment: "As in so many other Swedish cases one is here confronted with the outlandish approach to the appraisal of evidence before the Swedish Migration authorities, as if the lack of credibility of the applicants on some issues would in itself nullify the evidentiary value of other well-attested facts".

[884] *Case J.K. v. Sweden*, para. 121.

gave its own alternative explanation for the scars on the asylum seeker's body as stated in the medical reports, and argued that they could have been caused by playing football, instead of as a consequence of torture.[885] Even though the ECtHR states that the applicant also has a burden to proof to establish that past ill-treatment will happen again in the future and that in this the ECtHR agrees with the Swedish authorities in many of its negative credibility findings, this does not exclude the State from investigating facts where relevant statements are sufficiently credible. The burden of proof, according to the ECtHR, in these cases, shifts to the State to dispel any doubt about past indication as an indication of risk.[886] A third example is Case F.G. v. Sweden where the Swedish authorities, according to the ECtHR, had failed to investigate the asylum seeker's conversion *ex officio*.[887]

7.1.4 Credibility assessment in Swedish asylum law

The alleviation principle of the "benefit of the doubt" was established in early preparatory work, long before the implementation of the migration courts, and it was connected to "plausibility": "When the asylum seeker's allegations regarding persecution seem plausible but the factual conditions cannot be clarified, as yet, the asylum seeker's statements should be the basis for the assessment. He or she should enjoy 'the benefit of the doubt'".[888] In the preparatory work that concerned changes in the Aliens Act 1997, the Government expressed that the duty to investigate occurs in situations where the credibility of the asylum seeker's narrative is questioned as this is not enough to be sure that the alleged risk of persecution can be neglected.[889] The balance between the assessment of risk upon return and credibility when the circumstances are impossible to clarify was developed in subsequent preparatory work before the EU common asylum system was in force in the following terms:

> The absence of completely satisfactory grounds for a decision must sometimes lead to an applicant getting a residence permit even if he or she in reality lacks the grounds

[885] *Case R.C. v. Sweden*, para. 45.
[886] *Case R.C. v. Sweden*, paras. 50 and 55, *Case I. v. Sweden*, para. 62, *Case J.K. v. Sweden*, paras. 102 and 114–115.
[887] *Case F.G. v Sweden*, paras. 113 and 157.
[888] Prop. 1979/80:96, p. 88. (The author's translation.)
[889] Prop.1996/97:25, p. 221.

stated in the legislation. For instance, there may be reason to question the credibility of the submitted statements but not with a degree of certainty that, at the time of the decision, it is possible to neglect a statement concerning risk for persecution. However, this, from a security point of view, unavoidable circumstance should not lead to failures to investigate ambiguities as far as possible and instead grant residence permits. The consequence of this would be that immigration regulations are circumvented, and that migration policy will lack clarity and consistency.[890]

However, the Swedish Migration Court of Appeal has since developed the assessment of the narrative to include a more conditional view that is more focused on the burden for the asylum seeker to present a credibility narrative. As shown in the empirical study, the legal source most frequently referred to in the Swedish migration courts' reasoning is a case from the Migration Court of Appeal's second year of operation: MIG 2007:12.[891] This indicates that MIG 2007:12 has impacted on the migration courts' perception of how to carry out asylum adjudications. In its first case, MIG 2006:1 the Court interprets the "benefit of the doubt" principle in relation to the burden of proof, the duty to investigate, and credibility.[892] With references to the Handbook, in this first case the Court establishes a method for how to place the burden of proof which includes a condition that in order to be granted the benefit of the doubt, the asylum seeker has to present a credible narrative:

The method for placing the burden of proof, that has been established in the Handbook, saying that an asylum seeker who has given a credible narrative should be granted "benefit of the doubt", should be applied in cases where the alleged reasons, otherwise, are sufficient for a residence permit.[893]

However, the Court also emphasises that credibility deficiencies are not necessarily essential for a negative outcome and that this does not release the public authorities and the courts from the duty to investigate facts in the case despite perceived credibility deficiencies. The Court, in principle, agrees with the findings of the lower instances, that the narrative includes several contradictious and improbable statements and that this means that the asylum seeker: "… not already on account

[890] Prop. 1996/97:25, p. 221. (The author's translation.).
[891] See above, section 4.2.
[892] Unlike the number of references to MIG 2007:12, references to this first case are only found in one of the studied cases (S46).
[893] The author's translation.

of the shape of the narrative can benefit from raised doubt".[894] However, in light of the fact that the asylum seeker's statements had some support through a submitted judgment from the country of origin and this judgment had not been investigated further by the lower instances, taken together with what is known about the extensive breaches of human rights in the country of origin and the fact that no oral hearing had been held in the migration court, the Court concludes that the migration court had failed to fulfil its duty to investigate the case in accordance with section 8 of the Administrative Court Procedural Act. The Court remands the case to the lower instance for further investigation. Furthermore, the importance of taking investigatory measures when the allegations concern torture is emphasised in the case. Notably, in this first case the Court, on the one hand, makes an assessment of the prospective risk, irrespective of contradictions and inconsistencies in the asylum seeker's narrative, which is in line with the core purpose of the asylum adjudication. Yet, on the other hand, it is hard to understand whether the death sentence together with the asylum seeker's statements make the "benefit of the doubt" applicable despite the contradiction and inconsistencies or if it only brings the duty to investigate to the fore. In this way, the Migration Court of Appeal establishes an interpretation of credibility as a condition to get the "benefit of the doubt" and as constituting a first step of the adjudication separated from the risk assessment; yet, at the same time, it makes clear that this does not relieve the court from investigating external facts. In subsequent case law, the Migration Court of Appeal has remanded a number of cases on account of a lack of investigation measures as regards alleged torture. In MIG 2012:2 and 2014:21 the Migration Court of Appeal ruled that a medical report indicating torture, taken together with the asylum seeker's narrative that was perceived to be credible in essential parts, should be enough to place a further burden of investigation on the Migration Agency and/or the migration court.[895]

---

[894] The author's translation.

[895] The Court based its argumentation mainly on *Case R.C. v. Sweden*, ECtHR, which had similar prerequisites. See also MIÖD, UM 9002-12 (decision) where the Court stated that it constituted a severe procedural error to deny the asylum seeker the chance to submit a medical report concerning torture. Compare Baldinger 2013, p. 384, who holds that the national courts should apply the approach of the ComAT which offers a higher

In the case that seems to have had the biggest impact on the adjudication of the Swedish migration courts, MIG 2007:12, the Migration Court of Appeal develops a method where it distinguishes the credibility assessment from assessing the risk upon return and introduces a *step-by-step method* where the credibility of the asylum seeker's narrative is assessed in a final stage of the adjudication after other evidence has been assessed. The basis for the method, according to the Court, is to be found in "…the administrative principles governing the procedure, which in the area of aliens' law includes the procedure for establishing facts contained in paras. 195–205 of the Handbook […]".[896] From this follows a first step in which an assessment is made of "…whether the asylum seeker has made her or his identity and alleged citizenship or homeland probable".[897] The advocated method continues with an assessment of the asylum seeker's need for protection, which in turn is divided into two steps. Firstly, the assessment of whether "… the applicant's narrative is sufficient, in itself, to meet the criteria for protection…"[898] should be made. Secondly, an assessment should be made as to whether "…the applicant has made his or her asylum narrative probable either through adduced evidence or because he or she is judged to be credible and therefore has been granted the benefit of the doubt …".[899] As an example of when a credibility assessment is unnecessary, the Court put forward two situations. The first situation is when all individuals or a certain group of individuals from a certain country or region must be granted a right to stay on protection grounds, there is mostly no need to make a credibility assessment. The second situation occurs when the applicant only claims circumstances that are not covered by international protection, such as, for instance, social or economic reasons. The Court distinguishes between assessing other pieces of evidence before making an assessment of the applicant's "general"

degree of protection than that of ECtHR and HRC as it attaches more consequences to medico-legal reports in assessing the claimant's credibility.

[896] The author's translation.

[897] The author's translation. As mentioned above, this step has been revised in MIG 2019:1 where the Court ruled that even though the identity had not been mad probable, an assessment of well-founded fear of persecution or risk of other ill-treatment must be made.

[898] The author's translation.

[899] The author's translation.

credibility and continues by stating that it is important to make a distinction between pieces of evidence and the applicant's narrative.

The Court's assessment of the asylum seeker's need of protection in this particular case begins with establishing that the asylum seeker has not made his identity "probable" but that, as the parties agree on this issue, the country of origin is established. The Court, then, moves on to the two-step method and states that there is no general need for protection in relation to the country of origin in this case which means that an individual assessment must be made. The Court continues by evaluating the external sources of information and attaches the written documents with low value as they are proved to be false and therefore, according to the Court, can be disregarded. One document is simply found to be "not worth mentioning" as the identity of the asylum seeker is unclear and therefore no value can be attached to the document. The Court then evaluates the statements of the witnesses and finds that, though supporting the statement of the asylum seeker, they are of low value which is based on "credibility indicators" (vague, unable to explain) taken together with the fact that the witnesses are related to the applicant and, as such, their statements should be evaluated with care. The Court concludes that the asylum seeker has not been able to make his need of protection probable through "the evidence".

At this stage all the evidence, with an exception of the asylum seeker's narrative, has been dismissed and now, according to the method, only the asylum seeker's narrative is left to assess. Firstly, the Court evaluates "the asylum seeker's credibility" by initially considering that the asylum seeker's behaviour – the fact that he submitted inaccurate statements concerning his identity and submitted false documents – has a negative impact on his credibility. The conclusion is that this lowers the credibility of the asylum seeker's statements but that his narrative, as a whole, must be assessed, as false statements and documents "… are not enough to reject an application for a residence permit". What is left to assess is the narrative, as a whole. The Court assesses the narrative based solely on an interpretation of the credibility indicators set out in the Handbook paras. 199–205. Descriptors – such as *vagueness*, *number of details*, and *failure to explain contradictions and gaps* in the narrative – are used. The Court concludes, contrary to the lower instance, that the asylum seeker has not made his narrative credible and

therefore should not be given "benefit of the doubt". Finally, the Court concludes that the asylum seeker has not made it probable that he has a well-founded fear of persecution based on his political opinion that has been ascribed to him by the authorities or that he is otherwise in need of protection.

In a few early subsequent cases, the Court refers to the step-by-step method,[900] whereas in later cases the method is not explicitly referred to.[901] However, the method is visible in many cases where the Court first makes a statement that the general situation in the country of origin or the general situation for a certain group is not enough and then concludes that an individual assessment has to be made.[902] In a number of subsequent cases, references to MIG 2007:12 are made to support arguments on principles on burden and standard of proof, and on the application of credibility assessments.[903] In MIG 2007:33 the Court explicitly requires that the asylum seeker speak the truth and help the investigator so that all the facts in the case can be established. The relation between making a risk assessment and benefit of the doubt is explicitly expressed in MIG 2007:37, where the Court states that "…if the assessment of the benefit of the doubt has been to the benefit of the applicant, a risk assessment must be made, and what he or she risks on return must be examined". Here, the Court links "benefit of the doubt" to the assessment of risk in a strange way as the asylum adjudication always includes an obligation for the courts to make a risk assessment irrespective of whether the asylum seeker is given "benefit of the doubt".

The method applied by the Migration Court of Appeal has a number of problems which, I argue, leads to a narrow scope for evidentiary assessment. *Firstly*, by choosing to generally put forward only the procedural part of the UNHCR Handbook and disregarding the rest, the Swedish Migration Court of Appeal is detaching the

900 MIG 2007:33 and MIG 2007:37.

901 However, in recent case law, the Court has explicitly referred to the method, MIG 2018:14 and 2019:1.

902 MIG 2008:21, MIG 2008:39, MIG 2010:24, and MIG 2011:8. Compare section 3 in the manual, "To work with protection cases" (*Att arbet med skyddsmål*), above, section 2.1) used in the migration court of Gothenburg which includes instructions on how to separate the assessment of sufficiency and credibility in a step-by-step manner.

903 MIG 2009:39, MIG 2009:4, MIÖD UM 105–10, MIG 2011:5, MIG 2011:6, MIG 2011:8, MIG 2011:29, and MIG 2012:14.

procedure from the content of the requisites which opens the way for a narrowing down of the adjudication to a focus on procedure. The assessment of the risk upon return for the asylum seeker becomes a question of procedural rules rather than on what is at stake – the judgment on life and freedom for the asylum seeker.[904] *Secondly*, the distinction between the narrative and "pieces of evidence" is an odd one as the applicant's narrative, naturally, is a piece of evidence.[905] Moreover, by dismissing the narrative as a whole and not scrutinising the relevant statements, the focus on the internal quality of the narrative is strengthened. *Thirdly*, by distinguishing between the assessment of, on the one hand, sufficiency issues, and, on the other, credibility issues, the credibility assessment has been singled out as a specific part of the assessment detached from the risk assessment.[906] This is reinforced by the fact that if credibility is not an issue in the case, i.e. the assessment only concerns whether or not the claimed statements are sufficient to render protection, according to case law, it is not necessary to hold an oral hearing.[907] The distinction between credibility assessment, on the one hand, and sufficiency assessment, on the other, opens up the possibility of both avoiding investigating facts as well as concealing that the assessment of the narrative also includes credibility issues. *Fourthly*, the kind of logic chain that the Court uses is to first evaluate and, in this case, dismiss all the evidence one by one, and finally also the narrative.[908] As, *finally*, the narrative is found not credible on account of deficiencies based on internal credibility indicators, the asylum seeker cannot get the benefit of the doubt, and

---

904 See below, section 8.1, for Arendt on the responsibility to judge and the significance of the faculty of judging in high-stakes situations as contrary to taking decisions in daily life based on repeated behaviour.

905 This has been criticised both by Diesen in Andersson et al. 2018, p. 299 and by the Migration Agency in a legal position paper concerning a method for adjudication of reliability and credibility (*Rättsligt ställningstagande angående metod för prövning av tillförlitlighet och trovärdighet. RCI 09/2013*), p. 6.

906 The distinction has been criticised by Diesen in Andersson et al. 2018 who argues that credibility should be used as an "auxiliary-fact" (*hjälp-fakta*) in all parts of the assessment and that the emphasis should be on an overall evidentiary assessment, pp. 250 and 302.

907 See, among others, MIG 2009:30, MIG 2012:11, MIG 2014:1, and above, section 2.1, on oral hearing in asylum cases.

908 Compare the case study below, section 7.2.3, on how a language that forms closed logic chains excludes relevant facts and circumstances, as well as Arendt on logic as divorced from reality and the construction of a totalitarian language, in section 8.3.

the case is solved. This tends to become a kind of a fragmented pre-assessment where all the evidence is evaluated and dismissed separately and the different pieces of evidence are never related to each other. Furthermore, the Courts' interpretation and application of the principle, "benefit of the doubt" indicates that when "benefit of the doubt" is not given to the asylum seeker, all the uncertainties and risk are placed entirely on her or him. The Court is no longer obliged to investigate and make a risk assessment based on the facts in the case.[909] For instance, in this case, the situation for political dissidents and the risk of sending them back are not mentioned in the Court's reasoning. Furthermore, the Court focuses on the quality of the narrative, as a whole, instead of scrutinising the different statements.[910] The narrative is assessed as an entity, not as containing different statements that could be investigated and found to be more or less credible in relation to other facts and circumstances.[911] In this way the credibility indicators become coupled directly to the strength of the case and to the outcome. The credibility assessment, which is meant to be an evidentiary alleviation principle, has in fact become a requisite, in itself, that has to be proven by the asylum seeker to the threshold of probability.[912]

Even if the migration courts, in the empirical study, do not always explicitly refer to this case, the traces of the method can be discerned. In section 6.2.4 it was shown that written documents (if mentioned)

---

[909] See below, section 8.2, on the faculty of thinking – the conscious discussion between me and myself – as the basis for the faculty of judging and as a means of ensuring that uncertainties and doubts are thought through and assessed.

[910] Compare the UNHCR Handbook, paras. 196 and 203 and Article 4(5)(c) of the Qualification Directive.

[911] Compare UNHCR that emphasises the importance of not examining each material fact in isolation, the Handbook, para. 201 and *Beyond Proof*, p. 45.

[912] See Diesen in Andersson et al. 2018, p. 300 for an analysis of the case and where he holds that investigators and decision-makers make a distorted interpretation of para. 195 in the UNHCR Handbook and read too much into the significance of credibility. Also, Andersson in Diesen et al. 2018, p. 311 holds that the Court's interpretation of "benefit of the doubt" is problematic as the criteria that are applied to assess the evidentiary value of the narrative are also used to assess whether the narrative amounts to the requirement for giving "benefit of the doubt". The Court does not distinguish between the assessment of the credibility of the narrative and the strength of the total evidence. See also Cegrell Karlander 2021, p. 209 who criticises the two-step method applied by the Swedish Court of Appeal. She argues that by requiring the asylum seeker to first prove relevant facts and then having to show that the risk is of a certain dignity, the asylum seeker is put in a worse situation than if applying a holistic assessment where the standard of proof and the risk are assessed together in a single context.

are often initially evaluated separately and are mostly attached with "low value" mainly on the grounds that they are easy to falsify and that they cannot alone form the basis for protection. As the documents, thereafter, are rarely mentioned, this leads to the conclusion that the courts make some kind of "admissibility or acceptance" evaluation, i.e. that they do not consider them as evidence that should be taken into consideration in the final aggregated assessment. The Swedish Migration Court of Appeal does not describe credibility assessment as "admissibility". As the Swedish procedural system is governed by the principle of the free presentation, admissibility, and assessment of evidence, i.e. there is no formal restrictions on what kind of evidence the parties can invoke to support the claim and the court is in principle free in terms of how it assesses the submitted evidence, the question of "admissibility" in a formal legal sense is not an issue.[913] However, this does not prevent the courts from attaching pieces of evidence with a certain value or no value or choosing that they are irrelevant to the legal issue. If using Sweeney's definition of the admissibility process as a pre-requisite evidential step, the difference may be illusionary as the assessment that the narrative has no value on account of credibility deficiencies has the same consequence in practice.[914] However, a decision on "admissibility" or "acceptance" has a sharper edge and allows the assessment of the evidence to be more clearly dismissed at an early stage of the adjudication and thus be detached from the assessment of risk upon return. From the results of the empirical study, it appears that the Swedish migration courts do treat credibility assessment of the narrative as a pre-requisite evidential step where the narrative, as a whole, may be dismissed as evidence. However, deciding on credibility in order to accept or dismiss evidence would run counter to the Swedish evidentiary principles about free admission of evidence where a piece of evidence should not be dismissed, but evaluated. The Swedish migration courts, in practice, seem to have embraced the pre-requisite evidential step but under the principle of free assessment of evidence.

In a few cases the Migration Court of Appeal has been explicit about this: since the narrative has been found credible, the court will

---

913 See above, section 2.1 on "free admission of evidence" in the Swedish court procedure.

914 See on the "pre-requisite evidential step" above, section 7.1.2.

base its judgment on the narrative.[915] However, this pre-requisite evidential assessment is only explicit when the narrative is found to be credible and not, as in the examples below from the migration courts, when the narrative has been found to be "not credible". Below are some examples in which the judges in the migration courts explicitly declare that the narrative cannot form the basis for the assessment on account of credibility deficiencies.

> Against this background, the Migration Court considers that A's story contains such deficiencies as regards credibility that her information cannot be used to assess her alleged needs for protection. Thus, she cannot be considered to have made probable such a personal threat to her in Iraq that she is in need of international protection for that reason. (Case M 52)[916]

By making a direct link from credibility deficiencies to the burden and standard of proof concerning the whole case, the judges, in this example, equate "credibility" to the standard of proof, probable, as well as to the risk upon return.

In a case from the migration court in Luleå[917] the asylum seeker claimed that an investigation as regards torture should be made, but the court rejected the claim on grounds of credibility deficiencies:

> In the present case, the Migration Court does not question that the complainant has injuries on the body that may have resulted from violence or torture. However, as stated above, A did not make it probable that the injuries occurred as a result of him being arrested, detained and tortured by the X state because he organised and participated in peaceful demonstrations. *There are such credibility deficiencies in the complainant's story that his oral information regarding the occurrence of the injuries cannot be used as a basis for a forward-looking risk assessment.* In this situation, there is neither an increased duty to investigate for torture injuries nor a reverse burden of proof as to a future risk of protection-based treatment. The claim to order a torture investigation should therefore be rejected. (Case L 23)[918]

The credibility deficiencies in this case lead to the court releasing itself from the obligation of further investigating injuries that might emanate from torture.

---

[915] MIG 2008:21, MIG 2008:39, MIG 2009:36, MIG 2011:6, MIG 2011:8, and MIG 2019:9.

[916] The author's translation. Similar expressions were found in case S 98 and case M 84.

[917] The migration court in Luleå is not included in the quantitative part of the study as there were too few settled cases at the time of the study. However, a number of cases from the Luleå court were studied before deciding to exclude the court from the empirical study, which is why I chose to use this case as an example.

[918] The author's translation and italics.

The Migration Court of Appeal has developed the issue of credibility assessment in two cases from 2011: MIG 2011:6 and MIG 2011:8. The Court refers to MIG 2007:12 but does not explicitly reiterate the "step-by-step" method. MIG 2007:12 is referred to as a basis for how to apply "benefit of the doubt". Still, in both cases the credibility assessment is separated in a first step from the overall risk assessment to assess whether the asylum seeker should be given "benefit of the doubt". The threshold for accepting the narrative as a whole is not only that it is perceived as credible but also that it is probable, i.e. the same standard is used for accepting the narrative as a basis for the adjudication as for the standard of proof concerning the overall risk assessment as the Court expresses it: "…A has, thereby, made her narrative *credible* and *probable* and therefore, the Migration Court of Appeal will base the assessment of whether she is in need of protection on her narrative".[919] Also, the Court's statement that "…the applicant has not made his need of protection probable through written documents…" indicates that the same standard of proof is set on the pieces of evidence as on the risk assessment as a whole. What differs, though, concerning the credibility assessment from MIG 2007:12 is that the Court now focuses its assessment of the credibility on the essential parts of the narrative. Even if some parts of the narrative are not perceived as credible, this should not stop the statements that are directly relevant for the need of protection and that are perceived as credible forming the basis for the assessment on risk upon return.[920]

In the empirical study, it was shown that the migration courts mostly come to the conclusion that the narrative as a whole is either found credible or not credible and seldom that parts of the statements are viewed as credible while others are not. By only referring to MIG 2007:12 and disregarding relevant later cases, the migration courts seem to have neglected the legal development that advocates a focus on central relevant parts of the narrative rather than on the narrative as a whole.

---

[919] MIG 2011:8. This threshold is set according to the preparatory work from 1996/97:25T to the Aliens Act, which stipulates that the asylum seeker's narrative should be accepted if it is *credible and probable*, prop. 1996/97:25, pp. 98, 102, and 294. In later preparatory work this is modified to: *coherent and credible*, prop. 2009/10:31, p. 131.
[920] MIG 2011:6.

7.1.5 Attempts to steer away from subjectivity and the Swedish discussion on credibility and reliability

This section analyses the attempts made to balance the subjective character of credibility assessment. The focus is on the Swedish attempts to introduce a distinction between reliability and credibility when assessing the asylum seeker's narrative.[921]

The word *credible* – or, in the Swedish context, *trustworthy* (trovärdig)[922] – inevitably leads one to think of the question of whether "to believe or not to believe", that is, whether to believe an assessment with subjective and moral connotations.[923] Different attempts have been made to steer away from the subjectivity inherent in a credibility assessment to focus more on objective elements. As mentioned above, the judicial review includes full jurisdiction, *ex nunc*, i.e. the judgments of the national migration courts must include an assessment of all the facts and law including a full assessment of the asylum seeker's narrative at the time of the judgment.[924] It follows from Article 10(3)(a) and Article 11(2) of the Asylum Procedures Directive that the adjudication must be objective and that this requires that the reasons in fact and in law are stated in the decision.[925] This includes that an

---

[921] The distinction is also applied in criminal cases where word stands against word and no other evidence is available.

[922] Both the words "credible" and "believable" are suggested as a translation of the Swedish word *trovärdig* but "worthy to be believed in" is a more literal translation. According to the lexical definition, the Swedish *trustworthy* seems to have slightly different meanings. In the Swedish explanation the words "truth" and "reality" are used as an explanation for trustworthiness, while in the English lexical explanations of credibility, believability is emphasised. Furthermore, in the Swedish definition of "worthy of being believed", capability is not mentioned. (http://sv.wiktionary.org/wiki/trovärdig, http://sv.wiktionary.org/wiki/trovärdig, www.synonymer.se.).

[923] The word "credible" derives from the Latin word *creed*, which means "to believe". In the Christian tradition the word "credo" stands for the "confession of fate"; a declaration that "I believe". (http://sv.wikipedia.org.) (See Beard and Noll 2009 for an analysis of how the Christian application of the word "credo" impacts on credibility assessments in asylum adjudication. According to Noll and Beard 2009, there is a requirement for the applicant to tell the truth in the refugee determining procedure that stems from the Catholic confession.)

[924] See more on the content of *ex nunc*, above, section 5.2.2.1.

[925] See also Kagan 2003 and UNHCR 2013, *Beyond Proof*, p. 42. The obligation to state reasons for a decision that are sufficiently specific and concrete to allow the applicant to understand why his or her application has been rejected has been framed as a corollary

assessment of the narrative has to be explained and supported by the evidence.[926] The fact that a perceived lack of credibility must have its foundation in the evidence has been put forward as an important component that, to a certain extent, serves as a counterweight to the subjectivity inherent in the assessment of credibility.[927] This means that the asylum seeker must be given the opportunity to rebut or explain negative credibility findings throughout the procedure.[928] In turn, this would require not only the opportunity to rebut or explain negative credibility findings during the interviews at the Migration Agency, but also that the court procedure must provide such opportunities.

In trying to handle the uncertainties in assessing another person's life story, Kagan suggests a shift be made from the naked subjective focus – whether the assessor believes or not – to a focus on whether it is "a reasonable basis" for the applicant "to be believed".[929] Even though the word "reasonable" contains subjective connotations, the wording at least implicates a need to base the assessment of credibility on something other than a subjective gut feeling. Macklin, by contrast, sees subjective credibility issues as inevitable and, therefore, suggests that they should not be concealed.[930] From her practical experience as a refugee judge, she has identified common techniques applied by adjudicators to avoid responsibility for their credibility assessments, which, she contends, conceal the actual basis for the decision and are, therefore, dishonest. The first technique she identifies is that of relying completely on country of origin information, which she illustrates with the example of two almost identical cases but with different outcomes where, in fact, credibility was the actual hidden basis for the outcome. The second technique is to hide behind the principle of burden of proof; for instance, relying on documents that have been shown to be

---

of the fundamental EU law principle of the right to defence in(C-277/11) *M.M. v. Ireland*, para. 88. In the Swedish context, the requirement of motivating the judgment follows from sections 30–31 of the Administrative Court Procedural Act (see above, section 2.1). This is also emphasised in a legal position paper from the Swedish Migration Agency concerning the method for adjudicating reliability and credibility RCI 09/2013 *Rättsligt ställningstagande angående metod för prövning av tillförlitlighet och trovärdighet.*

926 Ibid.

927 Kagan 2003, UNHCR 2013, *Beyond Proof*, p. 42.

928 UNHCR 2013, *Beyond Proof*, p. 46 and Reneman 2014, p. 225 and (C-277/11) *M.M. v. Ireland*, para. 88.

929 Kagan 2003.

930 Macklin 1998.

false or have low evidentiary value instead of articulating a cogent reason. The third technique is to focus on the casual link between persecution and the grounds for persecution as set out in the Refugee Convention. She concludes that:

> We should neither run away from credibility issues, nor pretend to be capable of knowing more than we can. We are all familiar with the barriers standing between us and "what really happened". We were not there. The only witness is usually the asylum seeker with whatever fragments of her life she puts before us.[931]

The only safeguard, according to Macklin, is to provide a reflective and transparent judgment where the judge's choices are made visible.[932]

In the Swedish context, attempts are made to separate between the *credibility (trovärdighet)* and *reliability (tillförlitlighet)*.[933] The notion of "reliability" originates from the discipline of forensic and witness psychology and has been adopted in the Swedish legal context, foremost in criminal cases.[934] In order to arrive at a less subjective assessment of statements from parties and witnesses, the importance of making a difference between the assessment of credibility and the assessment of reliability when analysing and evaluating statements has been emphasised in case law and doctrine.[935] According to the structured method, a reliability test also includes an assessment of the original conditions for the narrative.[936] The notion of reliability has also

[931] Macklin 1998.
[932] Macklin 1998.
[933] According to the lexical definition in Swedish, the words "credibility" and "reliability" (*trovärdighet* och *tillförlitlighet*) seems to be used as synonyms. The English lexical definition of *reliability* seems to refer to "trust" and "predictability". It is expressed as the "ability of being relied on or depended on as for accuracy, honesty or achievement" or "the quality of being reliable, dependable or trustworthy". http://sv.wiktionary.org/wiki/tillf%C3%B6rlitlig and http://dictionary.reference.com/browse/reliability. In science the word "reliability" is used to show that it is possible to repeat a study and achieve the same result, http://www.merriam-webster.com/dictionary/reliability.
[934] The discussion and debate have been especially prominent as regards rape cases where word stands against word and no witnesses exist (NJA 2010 s. 671 s. 13, NJA 2015 s. 702, and NJA 2017 s. 316. See also Gregow 1996 for a discussion on when and how to rely on witness psychology, and Sutorius 2014, p. 324 who puts forward the problems with relying on witness psychology as the method used is too focused on falsifying statements and the narrative disregarding other facts.
[935] Ibid., and supra note 91. See further on the method as advocated by Diesen and Andersson, below, in section 7.2.
[936] Diesen in Andersson et al. 2018, p. 40.

found its way into the asylum adjudication.[937] The distinction made by the different authors between credibility and reliability is not easily understood and diverges slightly between them. The differences may be briefly described as follows: "reliability" is related to how correct a statement is in relation to "real facts" (*verkliga sakförhållanden*) and the internal coherence of the narrative, while "credibility" refers to how the judge perceives the person and the narrative.[938] This means that the internal coherence is included as a part of the reliability test, while credibility refers to a subjective perception of the person's behaviour during the narration and of "believing or not believing" the narrative where assessment of behaviour and emotions may play a role. The Migration Agency uses the distinction between credibility and reliability in two policy documents concerning the application of credibility/reliability assessments.[939] The main message in these documents, directed towards the decision-makers, is to focus primarily on assessing the reliability of the narrative and to place credibility in the background.[940]

The word "reliability" is found in the empirical study in a few cases (7). The use of the word in these cases indicates that the word credible has simply been replaced by the word reliability:[941]

> To assess whether a story is *reliable,* various factors are important. The story should be coherent and in its main features unchanged over time, i.e. from the application to the Swedish Migration Agency to the adjudication in the Migration Court. Of particular importance is the information that is initially submitted to the Swedish Migration Agency when the applicant is given the opportunity for the first time to explain in their own words their need for protection. If information is later added or

---

937 Diesen and Andersson in Andersson et al. 2018, p. 267 ff., Sutorius 2014, p. 329, and Granhag et al. 2005, Migrationsverket, *Rättsligt ställningstagande avseende metod för prövning av tillförlitlighet och trovärdighet* 2013-06-10 RCI. 09/2013 and *Beslutsstöd för migrationsverket*, *Värdering av muntliga utsagor, Ett vetenskapligt baserat beslutsstöd för migrationsärenden* (section V).

938 Ibid. See also Sutorius 2014, p. 329.

939 Migrationsverket, *Rättsligt ställningstagande avseende metod för prövning av tillförlitlighet och trovärdighet* 2013-06-10 RCI. 09/2013 and Granhag et al. 2017, *Beslutsstöd för migrationsverket*, *Värdering av muntliga utsagor, Ett vetenskapligt baserat beslutsstöd för migrationsärenden.*

940 Ibid. Compare Bergius 2017 who advocates for replacing the distinction between credibility and reliability with a three-dimensional approach to credibility including perception, memory, and reproduction. The dimensions are all linked to the person who experienced or observed the event and who is the subject of the court process. Hence, the factors that impact the assessor are not included.

941 Compare Andersson 2004, p. 202.

> changed, it should be possible to explain in a logical and *reliable* way why the new information was not provided earlier. (Case G 1)[942]

Alternatively, both words are used but they appear to be used as synonyms:

> A basic precondition for further assessing the intensity and adequacy of this stated threat is that A's information that he has two daughters is deemed *reliable*.
>
> Taken together based on the above background, the Migration Court makes the assessment that A's information that he has two daughters is entrenched with such serious lack of *credibility* that they cannot be used as a basis for the assessment. (Case M 84)[943]

While the word "reliable" is not used in relation to credibility assessments in the international and EU asylum context, the discussions on how to assess the narrative include much the same elements. I am doubtful as to whether implementing additional or replacement words or concepts is helpful here in order to change the focus of what the assessment of the narrative entails if we do not scrutinise how its function and content are understood. That said, I do not deny that a discussion on word choice could add to the discussion on the function and content of credibility assessments in asylum adjudication. However, in the following analysis, I have chosen not to focus on the difference between credibility and reliability, and instead comment on the content in the Swedish definitions as expressed in policy documents and by Swedish legal scholars when it is relevant for the account in section 7.2.

7.1.6 Separating the assessment of the credibility of the asylum seeker's narrative from the assessment of the risk upon return – a risk factor

Above, the credibility assessment as a phenomenon expressed in the asylum legal context was analysed and problematised. When trying to summarise the perception of how the assessment of the credibility of the asylum seeker's narrative should be interpreted and applied in the field of asylum law, a somewhat ambiguous picture emerges. It can be concluded, though, that credibility assessments are perceived as playing

[942] The author's translation and italics.
[943] The author's translation and italics.

an important role in asylum adjudication, regardless of which position is taken on how they should be applied. In order to support decision-makers and judges in their difficult task of assessing the asylum seeker's statements and also in order to contribute to a coherent adjudication, credibility assessments, as was shown above, have been highlighted in handbooks, manuals, and doctrine. From the analysis above it can be concluded that there is a strong idea, especially from the UNHCR and Sweeney, of applying credibility assessment as part of an admissibility/acceptability process. This idea seems to have been partly embraced by the Swedish Migration Court of Appeal, while other voices (ECtHR, Diesen, Hungarian Helsinki Committee) put forward the credibility assessment as an element that is present throughout the process.

The aim to avoid the inevitable subjectivity in the credibility assessment by structuring and methodising this part of the asylum procedure may have been done with the good intention to enhance the quality and consistency of the asylum adjudication. However, the method of making the credibility assessment into an "admissibility/acceptance" principle in a pre-requisite process, as advocated by Sweeney and in the CREDO project, or the "step-by-step" method distinguishing between "credibility" and "sufficiency" as practised in the Swedish migration courts, opens the way for a fragmentary and decontextualised assessment. Evidence that is being evaluated separately may, at an early stage of the procedure, be dismissed. This places a high burden on the asylum seeker for every separate piece of evidence she or he submits and for the lack of supportive evidence. The way the Swedish migration court procedure is fragmented leads to external sources of information and evidence being dismissed at an early stage or disregarded. This, in turn, means that the assessment of the narrative cannot be made in the context of these facts and circumstances as they are already dismissed. The application of credibility assessment in the Swedish migration courts, where the narrative is mainly assessed without taking into account external facts and circumstances, turns credibility, more or less, into a requisite. The method of assessing the credibility of the asylum seeker's narrative based on a duty to investigate including gathering and analysing facts in the light of the asylum seeker's statements, as advocated in the CREDO project, should lead to a more contextual

understanding of the assessment of the asylum seeker's narrative. However, it is easy to go astray when the alleviation principles are conditioned (as in the UNHCR Handbook and the EU Qualification Directive) by the determination of whether the narrative is perceived as credible. The handling of the uncertainties inherent in the asylum adjudication seems to become a question of burden and standard of proof. The function of the credibility assessment, as an opportunity to be given evidentiary alleviation due to the difficulties in presenting supporting evidence, is easily lost if credibility becomes a standard for precisely obtaining this alleviation. Although it is clearly expressed that credibility is neither a requisite that has to be fulfilled to get protection nor a standard of proof, the focus on credibility assessment and the function it is given seems to lead to an understanding of credibility assessment as being a requisite. The enhanced focus on credibility assessments, although with good intentions, has, it seems, allowed credibility to become the main issue in the adjudication as a whole.[944] The focus on the assessment of the credibility of the asylum seeker's narrative has resulted in a broad understanding of the notion that seems to absorb everything and nothing at once. By the separation between credibility and sufficiency cases, the Swedish migration courts have strengthened this view and turned the question of disputing facts into one of credibility. However, as credibility cannot serve either as the main legal disputing point, as it is not a requisite that has to be fulfilled, or as a dispute on facts in itself,[945] this may, as mentioned in section 5.1.2.2, jeopardise the required full examination of the case. I believe that the fact that the asylum adjudication shifts emphasis from an assessment of a potential risk to an assessment of credibility involves a risk of sliding away from reality and, hence, moving away from an outcome that is correct in substance.

The attempt to separate credibility assessment from reliability assessment as made in the Swedish context may have contributed to reflecting on the content of credibility/reliability and to shifting focus from assessing the asylum seeker as a person to assessing the

[944] Sweeney 2009, Kagan 2003, and Diesen in Andersson et al. 2018, p. 300.

[945] Compare the discussion above, section 5.2.2.2, concerning the Government's statement in the preparatory work on the significance that the investigation is mainly made during the procedure at the Migration Agency so that the court procedure can focus on what is disputed in the case.

statements in the asylum seeker's narrative. However, the distinctions between the two notions, as put forward in the discussions accounted for above, also contribute to confusion which can be seen in the Swedish migration courts' application of the two notions. The distinction between credibility and reliability and the way this distinction is applied do not make up for the fact that relevant facts and circumstances are invisible in the courts' reasoning as a basis for the outcome of the case.

It was concluded in section 5.2.2 that the empirical study indicates that there is a shift of emphasis from the question of a need for protection to a question of burden and standard of proof. As concluded above, shifting the emphasis in the adjudication from the content of protection requisites to procedural principles such as burden and standard of proof constitutes a risk that the asylum adjudication becomes an assessment of "probability" disconnected from the possible risk upon return.[946] In this chapter it is argued that the further shift of emphasis to an assessment of credibility tends to give credibility the function of being the main requisite that has to be fulfilled in order to be granted protection[947] and, hence, the highest yardstick against which everything is measured. Additionally, as the courts' assessments of credibility are mainly based on what I call internal quality criteria – i.e. the narrative is assessed based on a quality check that is mainly focused on internal coherence, completeness, and plausibility – these criteria in themselves become equated with "establishing the facts". What has to be proven is the internal quality of the asylum seeker's narrative rather than the facts. It is not foremost the well-founded fear of persecution or the risk of ill-treatment upon return that is assessed, but the internal quality of the narrative. To be transparent with the choices made of which statements to believe (Macklin) and supporting these findings with reasonable bases (Kagan) are important grounds for asylum adjudication. However, if being transparent with the bases for the assessments of credibility helps to minimise the risk of making a wrongful decision, this will depend on the content of the bases for

[946] Diesen in Andersson et al. 2018, p. 300.
[947] See Diesen in Andersson et al. 2018, p. 300 who criticised the Swedish Migration Court of Appeal at an early stage for wrongly treating credibility as an "evidentiary theme" that must in itself amount to the standard of "probable" which leads to an unreasonable focus on how the adjudicator perceives the applicant's credibility.

these findings and how they relate to the risk of returning an asylum seeker to her or his country of origin. In the following section, this content is scrutinised.

7.2 The content of credibility assessments

Above, I have elaborated on how the assessment of the narrative in terms of credible or not credible is applied and can be understood as regards its function in asylum adjudication. In this section I will move on to scrutinise the content of credibility assessments as applied in the Swedish migration courts' reasoning in light of the asylum law discourse. In the migration court procedure, the asylum seeker's narrative is mediated through different pieces of narratives from the Migration Agency and from the legal counsel in the form of transcripts from interviews at the Agency,[948] the decision from the Agency, and submissions from the legal counsel. This narrative, in turn, is mediated through an interpreter. All these mediated narratives can be subject to interpretation, evaluation, and comparison with each other and/or with the statements given by the asylum seeker and witnesses in an oral hearing. The narrative comprises a lot of different facts that can be more or less relevant for assessing the risk upon return and, thus, for the outcome of the case. The results of the empirical study show that the credibility indicators that make up what I call "the internal quality of the narrative" constitute the main basis for the Swedish courts' reasoning and hence, as must be concluded, for the outcome of the cases.

---

[948] The right to be heard at the Migration Agency is stated in Chapter 13, section 1 of the Aliens Act (compare Article 14 of the Asylum Procedures Directive). The duty to ensure that there is either a thorough and factual report containing all substantive elements, or a transcript made of every personal interview is stated in Article 17, para. 1 of the Asylum Procedures Directive. Also, if the interview has been recorded, the asylum seeker must be given access to the transcript (Article 17(2)). In 2009 a provision was implemented in section 9(a), Aliens Regulation stipulating that a protocol should be conveyed during the oral process at the Migration Agency. The provision was changed in 2016 and it was added that the asylum seeker must be given the possibility to read and comment on the protocol after which the protocol cannot be changed. Also, if the interview has been recorded, the asylum seeker must be given access to the transcript. See also the instruction from the operation manager at the Migration Agency (VCI 6/2011, 2011-10-07) concerning communication and reading of protocols from oral hearing (*Verksamhetschefens instruktion om kommunicering och uppläsning av protokoll från muntlig handläggning*).

The analysis in the present section is connected to the sub-question in sections 4.4 and 4.5: *How, and to what extent, if at all, do the courts base their assessments on the quality of the asylum seeker's narrative?* and: *How, and to what extent, if at all, do the courts base their assessments on the asylum seeker's behaviour, actions or activities?* This section includes four sub-sections. Initially, the indicators for credibility that appear in the asylum adjudication discourse are analysed (section 7.2.1), while the relation between the asylum seeker's behaviour, actions or activities and the assessment of credibility is analysed in 7.2.2. Section 7.2.3 provides a close analysis of the judges' credibility assessments in four of the court cases included in the empirical study. In section 7.2.4 the analyses in section 7.2 are summarised.

7.2.1 Credibility indicators

As mentioned above, the part of the UNHCR Handbook concerning the procedure is regarded as a legal source in Swedish asylum law. It was further noted that the UNHCR emphasises that the assessment of whether statements relevant to protection need are credible, and, therefore, should form the basis for the risk assessment, need to include a rigorous examination.[949] According to the UNHCR, credibility assessments include a wide range of considerations. Firstly, it should be made in context of other external evidence such as country of origin information, facts about the asylum seeker, written evidence, witnesses, and medical reports.[950] Furthermore, an individual, impartial, and objective credibility assessment, according to the UNHCR, also entails taking a multi- and interdisciplinary approach which means that:

> … the assessment should be undertaken through the lens of various disciplines, including legal, cultural, psychological, anthropological, and sociological. A multi- and inter-disciplinary approach is required to ensure that the credibility assessment responds to the realities of testimony by applicants. It is, therefore, necessary that the credibility assessment, in all its aspects, is informed by the substantial body of relevant empirical evidence that exists in these fields.[951]

In its Handbook the UNHCR presents criteria to be applied in order to assess whether the asylum seeker's narrative is credible and whether

[949] See above, section 7.1.2.
[950] UNHCR 2013, *Beyond Proof*, p. 35.
[951] UNHCR 2013, *Beyond Proof*, p. 41.

she or he therefore should be given the benefit of the doubt. Para. 204 of the Handbook states: "The applicant's statements must be *coherent* and *plausible* and *must not run counter to generally known facts*".[952] The last phrase should be understood as not only addressing the situation in the country of origin but also other "…common knowledge or generally known facts…".[953] Generally known facts can include available knowledge on the situation in the country of origin in general, the situation for certain groups or knowledge about a specific area that the asylum seeker claims is her or his area of origin. The UNHCR emphasises the importance of using "general known facts" in an individual manner which also includes the asylum seeker's personal circumstances and experiences.[954] An example of when an assessment of credibility must be undertaken in an individual and sensitive manner is in LBGTI cases where comparing the asylum seeker's statements with the known laws in the country of origin is not enough.[955] It is also necessary to take into account the asylum seeker's personal experiences.[956]

The criteria put forward in the UNHCR Handbook have been reproduced, albeit slightly transformed, in the Qualification Directive where Article 4(5)(c) states that evidentiary alleviation is given if: "…the applicant's statements are found to be *coherent* and *plausible* and do not *run counter to available specific and general information relevant to the applicant's case*".[957] These criteria are not codified in Swedish law but it is stated in preparatory work that the narrative "…should be accepted if it is *credible and probable*".[958] Or, as stated in a later preparatory work, the narrative has to be "…*coherent and credible*".[959] In addition to coherence and plausibility, the Swedish migration courts have added further credibility indicators such as a requirement for clarity and sufficient detail. An overview of the case law from the Migration Court of Appeal shows that the Court uses credibility indicators as arguments for their

952 The author's italics.
953 UNHCR, Note on Burden and Standard of Proof in Refugee Claims, para. 11.
954 UNHCR 2013, *Beyond Proof*, p. 114.
955 Ibid.
956 Ibid.
957 The author's italics.
958 Prop. 1996/97:25, pp. 98, 102, and 294.
959 Prop. 2009/10:31, p. 131. The author's italics.

credibility assessment, including claims that the narrative is *vague*,[960] *coherent*,[961] *contradictory*,[962] that it *has changed or been unchanged* throughout the procedure.[963] Other indicators used by the Court include that the narrative is *general*,[964] *detailed* or *lacks details*,[965] is narrated *in a credible manner* or is perceived as *experienced*,[966] *probable or not probable*,[967] *implausible or seems strange*.[968] Also, the fact that the narrative includes *second-hand statements*,[969] that the asylum seeker seems to *lack knowledge*[970] about issues related to the claims and that the narrative *does not run counter to what is known about the country of origin*[971] are used by the court as a basis for its assessment of the asylum seeker's narrative. These kinds of arguments are also the main bases for the Swedish migration courts' reasoning, according to the results in the empirical study.[972] While the indicators "coherent" and "plausible" stem from the criteria set out in the Handbook, the basis for the other indicators applied by the Migration Court of Appeal is not accounted for in the rulings. However, some of them can be traced to the criteria used by the Swedish Supreme Court in criminal cases and to methods advocated in Swedish doctrine regarding statement analysis (*utsagesanalys*) which has its basis in forensic and witness psychology.[973] A set of "credibility criteria" are, according to this method, applied to move from an initial perception of the credibility of the narrative to an assessment of its reliability.[974] Diesen suggests that, at this stage, the focus should be on assessing individuality and connections to emotions.[975] Criteria such as *directness*, *personal comments*, *descriptions of emotional reactions*, and *self-*

[960] MIG 2007:12, MIG 2011:29, MIG 2013:25, and MIG 2014:1.
[961] MIG 2008:39, MIG 2011:6, MIG 2011:8, and MIG 2012:12.
[962] MIG 2006:1, MIG 2007:12, MIG 2011:6, MIG 2011:29, and MIG 2013:25.
[963] MIG 2008:39, MIG 2011:6, MIG 2011:8, MIG 2011:24, and MIG 2012:14.
[964] MIG 2011:29.
[965] MIG 2007:12.
[966] MIG 2008:39 and MIG 2011:8.
[967] MIG 2012: 12 and MIG 2011:8.
[968] MIG 2006:1 and MIG 2011:6.
[969] MIG 2007:37.
[970] MIG 2011:29 and MIÖD, UM 10483–10.
[971] MIG 2011:6 and MIG 2013:25.
[972] See above, section 4.4.
[973] See supra note 934.
[974] Diesen in Andersson et al. 2018, p. 270 f. and Sutorius 2014, p. 329. See more above, section 7.1.5, on the distinction between credibility and reliability.
[975] Diesen in Andersson et al. 2018, p. 270.

corrections should be seen as indications that what the person tells is self-experienced.[976] *Bareness*, *abstraction*, *conclusions instead of impressions*, *linearity*, *the need to think* are facts that, according to Diesen, indicate the contrary.[977] Also, the reliability criteria used by the Supreme Court, *long and detailed* and *consistent*, are suggested by Diesen to give structure and depth to the statement analysis but should be used with care and not as a checklist.[978] The list of credibility criteria is referred to without reference to any specific scientific or legal sources.[979] Diesen makes a legal argument by advocating that support is to be found in the "reliability criteria" advocated by the Swedish Supreme Court in criminal cases, although he claims that these criteria do not have any recognised scientific relevance.[980] Also, Andersson recognises the weak scientific basis for the criteria used by the Swedish Migration Court of Appeal but defends this use on the basis that "like cases will be treated alike".[981] In my opinion, this is a problematic stance as it appears to uphold a narrow view on legal certainty which is detached from an outcome that is correct in substance.[982]

The application of internal credibility indicators has been problematised and developed within the CREDO project with a multidisciplinary approach taking into account research in the fields of psychology, medicine, sociology, and anthropology. The criteria set out in the Handbook have been extended to include *sufficiency of details*, *specificity*, and *internal and external consistency*. Internal consistency is defined as the consistency of the oral statements and documentary or other evidence submitted by the applicant, while external consistency is defined as the consistency of the applicant's statements with available specific and general information, including country of origin

---

976 Ibid.
977 Ibid.
978 Diesen in Andersson et al. 2018, p. 270.
979 Compare Sutorius 2014, p. 325 f. who argues that the judges lack competence in analysing statements form children in sexual crime cases.
980 Ibid. See also on the critic of the lack of scientific basis for these criteria supra note 29.
981 Andersson in Andersson et al. 2018, p. 320 f.
982 See on "correct in substance", above, section 1.3.

information, relevant to the applicant's case.[983] The UNHCR provides a note of warning when applying these indicators:

> Decision-makers must be aware of the assumptions that underlie each indicator and understand the range of factors and circumstances that can render them inapplicable and/or unreliable in an individual case. As these factors span a range of fields, such as neurobiology, psychology, cultural and gender studies, anthropology, and sociology, the use of credibility indicators is most effective when informed by the substantial body of relevant empirical evidence that exists in these fields.[984]

Notably, the Hungarian Helsinki Committee rejects *plausibility* as an indicator since this is a culturally and personally determined concept.[985] Also, the International Association of Refugee Law Judges advocates that findings on "*internal/external consistency and impossibility*" should have more weight than those solely relying on "implausibility".[986] Additionally, the International Association of Refugee Law Judges emphasise the importance of making the credibility assessment "in the round", meaning that an overall credibility conclusion should not be made only on non-material, partially relevant or perhaps peripheral findings, but should be based on the totality of the evidence.[987]

Factors that have been identified as having an impact on the application of the internal credibility indicators, according to multi- and inter-disciplinary research, take into consideration not just those psychological, cultural, and social aspects that are significant for the asylum seeker, but also those that influence the adjudicator. The various factors that can have an impact on the asylum seeker's ability to provide a coherent and detailed narrative can be summarised as follows:[988]

---

[983] UNHCR 2013, *Beyond Proof*, Chapter 5.2–3. In addition to the indicators suggested by the UNHCR, the International Association of Refugee Law Judges suggests that even personal involvement and timeliness of the claim (i.e. late submission of statements and late presentation of evidence) may negatively affect general credibility, unless valid explanations are provided (2013, p. 34).
[984] UNHCR 2013, *Beyond Proof*, p. 191.
[985] Hungarian Helsinki Committee 2013, p. 33.
[986] International Association of Refugee Law Judges 2013, p. 33 f.
[987] International Association of Refugee Law Judges 2013, p. 33 f.
[988] See supra note 32 for a list of research in the field that mainly corresponds to what has also been the basis for the CREDO project.

Psychological factors:

- The constructive nature of autobiographical memory, i.e. the natural way of recalling an experienced event is that the memory changes when recalling. The narrative we tell will not be exactly the same over time. Repeated recollections tend to offer up more details.[989]
- Memory of temporal information is generally unreliable.[990] Memory is further affected by the way questions are posed (if they are open-ended or closed) and the way the interviewer behaves, what is perceived as an expected answer, as well as personal factors such as low self-esteem and stress.[991]
- Repeated events of the same kind may cause difficulties in separating one event from another, which has an impact on the number of details that can be recalled. The memory is creating a schema.[992]
- High level of emotions can impair the encoding.[993]
- The impact of trauma on memory and behaviour. Dissociation at the time of the traumatic event may hinder the encoding of the event. The result can be fragmentary and vague statements and the person may be perceived as distracted and detached.[994]
- Emotional numbing. The person might appear indifferent which may be perceived as a lack of fear.[995]
- Better recall of certain central details and reduced recall of peripheral details.[996]
- Fear and lack of trust which may result in an unwillingness to reveal details.[997]
- Stigma and shame may have an impact on the willingness or ability to reveal details about, for instance, sexual behaviour or rape.[998]

---

989 UNHCR 2013, *Beyond Proof*, p. 57.
990 Ibid., p. 58.
991 Ibid., p. 60.
992 Ibid., p. 58.
993 Ibid., p. 63 and Hungarian Helsinki Committee 2013, pp. 79 and 88.
994 Ibid., p. 62.
995 Ibid., p. 66.
996 Ibid., p. 69.
997 Ibid, p. 65 f. and Hungarian Helsinki Committee 2013, p. 99.
998 UNHCR 2013, *Beyond Proof*, p. 72 f. and Hungarian Helsinki Committee 2013, p. 57.

The evaluation of techniques on assessing the credibility of individual statements based on certain indicators have only been subject to minimal research and existing studies show that these techniques are not as reliable as their proponents claim.[999]

Cultural factors:

- Credibility is a cultural construct. The perception of what is true or perceived as credible differs in different cultures.[1000]
- People store and recall autobiographical memory in different ways. For instance, persons brought up in collective cultures are less capable of memorising events as individual experiences than persons brought up in more individualistic cultures.[1001]
- Concepts may have different meanings in different cultures. For instance, the exact dates and times of an event may not be important and are, therefore, not stored in the memory. Also, concepts such as brothers and sisters can mean belonging to the same ethnic group.[1002]
- People communicate in different ways which has an impact on, for instance, how they answer questions (direct or indirect), what is possible to speak about or what is perceived as necessary to speak about in order for the person listening to understand.[1003]
- Age, education, gender, sexual orientation, urban or rural background, profession, socio-economic status, and religion impact the way people speak.[1004]

---

[999] Granhag 2001, p. 144. See also the experiments and evaluations made by forensic psychologists in *The Detection of Deception in Forensic Contexts* (Granhag and Strömwall 2004) of different techniques for analysing statements in order to assess whether they are based on self-experienced events or not. See also Granhag et al. 2005 and Mellquist 2013.

[1000] Hungarian Helsinki Committee 2013, p. 115.

[1001] UNHCR 2013, *Beyond Proof*, p. 67.

[1002] Ibid., p. 66 f.

[1003] Ibid., p. 67 and Hungarian Helsinki Committee 2013, pp. 76 ff. and 116 f.

[1004] UNHCR 2013, *Beyond Proof*, p. 74.

All the above-mentioned factors may also impact on the asylum seeker's perception of subjective fear.[1005]

The various factors that can have an impact on the judge when assessing the credibility of a narrative can be summarised as follows:

- Deception detection. Human beings are generally poor at detecting deception. There are very few reliable behavioural indicators to prove that someone is lying.[1006]
- Gut-instinct, which means merely making an assessment based on one's own limited experiences.[1007]
- Confirmation bias. Decision-makers tend to believe the evidence that supports the initial conclusion. This can lead to a "halo effect", which means that either everything or nothing is believed. [1008]
- The quest of the human psyche to transform fragmented and complex information into a coherent and meaningful whole.[1009]

[1005] See Cameron 2008 who lists a number of factors that can impact on the asylum seeker's perception of fear such as familiarity, appeal, controllability, risk tolerance, optimism bias, outcome history, place attachment, lay knowledge, non-embodied risks (economic status, cultural identity etc.), passivity (perceived lack of agency), defiance, faith, and pace of decision-making. Cameron concludes that the drafters of the Convention never intended that "subjective fear" should have a place in credibility assessment: "Judgment on risk perception does not provide a solid basis for a life and death decision".

[1006] UNHCR 2013, *Beyond Proof*, p. 187. There is a wide range of research by forensic psychologists that has come to this conclusion. Professional experience is not a factor that increases this ability as they often lack feedback (Granhag et al. 2005). Granhag et al. concluded from their study that: "Learning can only properly happen with feedback on which decisions were correct, which incorrect, and on what grounds. Without such feedback, '*expert decision makers*' are likely to become increasingly reliant on stereotypes and incorrect beliefs".

[1007] UNHCR 2013, *Beyond Proof*, p. 75 and Hungarian Helsinki Committee 2013, p. 72. Compare the discussion in Swedish doctrine on the risk for prejudice when using general experiences of the judge (*allmänna erfarenhetssatser*) as a basis for judgments and the need for specific experience built on extra-legal knowledge (*särskilda erferenhetssatser)*, Sutorius 2014, p. 288 ff. and Kaldal 2010, p. 201.

[1008] UNHCR 2013, *Beyond Proof*, p. 76.

[1009] See psychological research on this matter, for instance, Ask and Granhag 2005 and Ask and Alison 2013, p. 37. Compare Arendt on excluding relevant facts to obtain logic as a component in a totalitarian language, below in section 8.3.

- Social facts, such as social background, professional culture, customs, gender, and societal norms, will inevitably affect what is perceived as plausible.[1010]
- Emotional factors, including, for instance, detachment and stress due to the repetitive nature of the task and due to a reluctance to take in terrifying stories.[1011]
- The impact of political, societal, and institutional aims other than asylum, such as, for instance, to prevent irregular immigration.[1012]

The multidisciplinary research shows the many factors in play when presenting a life narrative and when making assessments of the truthfulness or believability of a person's narrative. The research reveals the weakness of the advocated credibility indicators specifically as regards the indicators coupled to coherence and plausibility. There can be many reasons why a narrative is perceived as vague, lacking detail, unreasonable or changing during the process. Focusing too much on coherence and plausibility, not taking the above factors into account, will inevitably put the asylum seeker at risk.[1013] Also, this research reveals the strong relational element at play between the person who assesses and the person who is being assessed, as well as the difficulties of assessing the veracity of another person's life narrative. An assessment of another person's narrative on events in this person's life can hardly be an act of objectively "finding" credibility or "reviewing" the quality of the narrative; it is rather a relational act where the assessor and the assessed are mutually involved as subjects. It must be concluded that these kinds of indicators of credibility are extremely weak bases for assessing the risk of returning an asylum seeker to her or his country of origin. When they occur in the assessor's mind and are applied, they should be reflected on in light of the above-mentioned

---

1010 UNHCR 2013, *Beyond Proof*, p. 77.

1011 UNHCR 2013, *Beyond Proof*, pp. 40 and 79 and Hungarian Helsinki Committee 2013, p. 130.

1012 Hungarian Helsinki Committee 2013, p. 122. Compare Linna Martén's study from 2015 concerning Swedish lay judges in the migration courts about their tendency to vote in line with the political opinion of the political party they represent (see above, section 1.1).

1013 Compare the critique put forward by Sutorius 2014, p. 328 ff., regarding the use of these criteria when assessing the narratives presented by children in sexual crime cases.

knowledge and related to the risk. In recent years, the Swedish Migration Agency and the Migration Court of Appeal have been subject to criticism from both the UNHCR and Swedish legal scholars.[1014] In its report from 2011 the UNHCR criticised the Swedish Migration Agency for using speculative arguments on plausibility and traditions and circumstances in the country of origin without referring to any country reports.[1015]

7.2.2 The asylum seeker's behaviour, actions, or activities as indicators for credibility

The analysis in this section is connected to the sub-question: *How, and to what extent, if at all, do the courts base their assessments on the asylum seeker's behaviour, actions or activities?* (section 4.5). It was shown in the empirical study that arguments connected to how the asylum seeker had acted after having left her or his country of origin and during the asylum procedure are the basis for the courts' assessments of credibility in a majority of the cases.[1016] Such arguments include a lack of cooperativeness when it comes to, for instance, submitting documents, as well as late submissions.[1017] However, the main part of the behaviour arguments are closely connected to the quality of the asylum seeker's narrative, namely, whether or not the asylum seeker has been able to *explain, rebut* or *redress* statements that have been found not credible.[1018] This, in turn, is closely connected to the sub-question: *How, and to what extent, if at all, do the courts consider procedural deficiencies?* (section 4.9). This is so because the result showed that the asylum seeker in this category often claimed that there had been "misunderstandings" between them and the administrative official at the Migration Agency.[1019] The importance of giving the asylum seeker the opportunity to explain and/or rebut the adjudicator's negative credibility finding is put

---

[1014] UNHCR 2011, *Kvalitet I svensk asylprövning. En studie av Migrationsverkets utredning av och beslut om internationellt skydd*, p. 192 ff. Diesen and Andersson in Andersson et al. 2018, pp. 293 ff. and 320 ff.

[1015] UNHCR 2011, *Kvalitet I svensk asylprövning. En studie av Migrationsverkets utredning av och beslut om internationellt skydd*, p. 192 ff. See also Diesen and Andersson in Andersson et al. 2018, pp. 293 ff. and 320 ff.

[1016] See above, sections 4.1, and 4.5.

[1017] See above, section 4.5.

[1018] See above, section 4.5.

[1019] See above, section 4.9.

forward by UNHCR as well as by the International Association of Refugee Law Judges.[1020] This implies a duty for the adjudicator to clearly communicate her or his findings. Whether this is done during the Swedish migration court procedure is not possible to glean from the judgments in the empirical study.[1021] However, it is unlikely that the judges put forward their ambiguities as regards credibility issues during the oral hearing as this could interfere with the accusative legal principles which form the basis for Swedish court procedures.[1022] In the individual case it depends on how the judges interpret their role in the court procedure and the perception of how active the judge can be without interfering with an accusative objective stand in the procedure. The judge is allowed to ask questions in order to straighten out unclarities as a part of leading the procedure. However, there is also an implicit principle that this should be done with caution and not to the detriment of the asylum seeker.[1023]

In the UNHCR Handbook, the asylum seeker's behaviour and actions during the procedure are expressed in the context of "a shared burden".[1024] This means that the asylum seeker should tell the truth, assist the examiner to the full in establishing the facts of his case, make an effort to support his statements by any available evidence, give a satisfactory explanation for any lack of evidence, if necessary make an effort to procure additional evidence, and, finally, supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts.[1025] However, in a later report from UNHCR, this kind of behaviour, if used as part of an argument regarding credibility, should

---

[1020] UNHCR 2013, *Beyond Proof*, p. 44 and International Association of Refugee Law Judges 2013, p. 35. This is also emphasised as an important part of the credibility assessment in the legal position paper concerning how to carry out credibility assessment from the Swedish Migration Agency. (*Migrationsverkets, Rättsligt ställningstagande avseende metod för prövning av tillförlitlighet och trovärdighet 2013-06-10 RCI 09/2013*).

[1021] See section 5.2.2.2 on "the principle of official examination".

[1022] During my time as a clerk in the migration court I never experienced that this was done.

[1023] See above, section 5.2.2.2, on the scope of the management of the proceedings (*processledning*) and what can be done *ex officio* by the Swedish administrative judges.

[1024] See above, section 5.2.2.1.

[1025] The UNHCR Handbook, para. 205.

be used with caution.[1026] Furthermore, according to UNHCR, demeanour – in the meaning of manner, way of speaking, answering questions or non-verbal communication – is rejected as an unhelpful criterion since a certain demeanour can be caused by many different factors such as cultural norms or psychological factors.[1027] Also, individual circumstances should be considered when assessing whether or not it has been possible for the asylum seeker to obtain written documentation to substantiate statements.[1028]

In international case law, behaviour during the procedure – including examples such as failing to seek asylum immediately after arrival, not submitting identity documents or information on the travel route, using false identity or documents, failing to submit documents to support alleged events or medical issues, issuing new statements or evidence at a late stage of the asylum proceeding, failing to specify certain events or activities, and not explaining inconsistencies or late claims – have been viewed as capable of undermining the general credibility of the asylum seeker's alleged fear.[1029] However, this conditional approach to behaviour and actions, in relation to "benefit of the doubt" and "general credibility", has also been modified.[1030] Behaviour and actions such as "Undocumented entry, lack of cooperation during the investigation as to the travelling route etc. may have significance for the assessment of the applicant's credibility but does not necessarily mean that the 'benefit of the doubt' should not be applied given that the credibility of the alleged risk scenario is acceptable".[1031] In spite of the statement in Article 4(5)(d), an application for international protection must not be rejected or

---

1026 UNHCR 2013, *Beyond Proof*, p. 213 ff.
1027 UNHCR 2013, *Beyond Proof*, p. 185.
1028 UNHCR 2013, *Beyond Proof*, p. 95.
1029 See Reneman 2014, p. 214 ff., for an account of case law on the issue from ComAT, HRC, and ECtHR. See also Baldinger 2013, p. 132 (HRC), p. 149 ff. (ComAT), and p. 286 (ECtHR).
1030 Reneman 2014, p. 223 f.
1031 UNHCR 2011, *Kvalitet i svensk asylprövning*, p. 188. The UNHCR also warns of a Catch-22 situation when, if, on the one hand, evidentiary documents are submitted, they can be used to undermine credibility yet, on the other hand, if evidentiary documents are not submitted this can be used as an argument for unwillingness to cooperate. (UNHCR 2013, *Beyond Proof*, p. 94). See also Baldinger 2013, p. 166 for an account of cases from ComAt in relation to Sweden where medical reports concerning torture were decisive even though they were adduced at a late stage of the procedure.

excluded from examination on the sole ground that the application was not submitted as early as possible.[1032] Nor can the fact that the intention of "sur-place" activities is to get protection form the basis for a denial of protection.[1033] The important issue is whether such actions may have come to the notice of the authorities of the asylum seeker's country of origin and how they are likely to be viewed by said authorities.[1034] In addition, the national authorities must not base their assessments of credibility merely on the fact that the applicant did not rely on an important protection ground, such as sexual orientation or conversion, in the initial stage of the procedure.[1035]

In Swedish case law, the asylum seeker's behaviour, actions or activities during the asylum procedure have been basis for credibility assessment in a number of cases. In MIG 2007:12 the court stated that the fact that A had given false statements about his identity and submitted documents that were deemed to be forged were circumstances that reduced the credit of his statements. In spite of these circumstances, the Court made an assessment of the rest of his narrative, as the fact that he had given false statements and submitted forged documents was, according to the Court, not enough to reject an application for a residence permit.

The assessment of an asylum seeker's behaviour, actions, and activities should be connected to individual circumstances and what can be expected from the individual asylum seeker.[1036] The expectation for the asylum seeker to take action in order to obtain documents to substantiate the protection claims was subject to assessment in MIG 2011:7. The Court argued that a Russian judge could be expected to take further actions in order to obtain documents from the Russian authorities showing that she was wanted. The Court further stated that it was remarkable that she had not given a power of attorney to her relatives so that they could make a request from the public authorities. Making statements relevant for protection late in the procedure has been used, by the Court, as a basis for questioning the asylum seeker's

---

1032 Reneman 2014, p. 223, Prop 2009/10:31, p. 181, and Peers et al. 2015, p. 91.

1033 Goodwin-Gill 2000, Baldinger 2013, p. 345f. on Article 5(3) of the Qualification Directive and Hailbronner et al. 2010, p. 1034.

1034 The UNHCR Handbook, para. 96.

1035 CJEU: (C-148-50/13) *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, para. 72 and ECtHR: *Case F.G. v. Sweden*, para. 156.

1036 See above, section 6.1.1, on the content of an individual assessment.

credibility. In both MIG 2011:29 and MIG 2013:25, late information concerning, respectively, the asylum seeker's interest in Christianity and the asylum seeker's homosexuality was seen to reduce the credibility of the narrative. In MIG 2013:25, the late submission of the application also impacted negatively on the credibility of the asylum seeker's narrative. The asylum seeker, in this case, had submitted an application for asylum only when he was convicted of committing a crime in Sweden. According to the Court, it was remarkable that he had waited six months before applying for asylum.

Furthermore, the asylum seeker's behaviour or actions before leaving the country of origin have been coupled to the credibility concerning subjective fear and whether a sufficient state protection is available. The arguments in Swedish case law for state protection are based on assessments of reports on the general situation in the country of origin but also on the actions taken by the asylum seeker, i.e. whether she or he has made an effort to get protection by, for instance, reporting criminal actions by individuals to the police and to what extent it could be expected that she or he would avail her- or himself of the protection afforded.[1037] Actions to avoid ill-treatment that could be expected to be taken by the asylum seeker before leaving the country of origin have been considered. In MIG 2008:39 the asylum seeker had gone to the local police to report threats from her husband. The Court found that the asylum seeker had narrated "…in a credible manner…" the threats from her husband and how she went to the local police station to report the threats from her husband but that she was not given protection against her husband and his threats but instead was subjected to mockery by the local police who did not write a report. In MIG 2011:6 the Court considered the fact that the applicants were two minors together with the country of origin information.[1038] It could not be expected that these two minors should have reported to the police

[1037] MIG 2007 not 7, MIG 2008:39, MIG 2009:4, MIG 2011:6, and MIG 2011:8. See also cases from ECtHR: *Case S.A. v. Sweden* concerning available protection, *Case F.H. v. Sweden*, para. 97 (the Court held that the applicant could seek protection from the Iraqi authorities) and *Case A.A. v. Sweden*, paras. 78–79 (the Court held that the applicants were able to make a police report and go to the court). Compare the report *Kvalitet i svensk asylprövning* 2011, p. 164 f. where the UNHCR criticises the Swedish Migration Agency for placing a heavy burden on the asylum seeker to show that she or he has been making sufficient efforts to get state protection or other forms of protection in the country of origin.

[1038] See further on the case above, section 6.1.2.

about the honour crimes that they had been subjected to, considering the information about the situation in the country of origin.

Case law does not seem to exclude taking behaviour, action or activities into consideration when assessing the credibility of the asylum seeker's narrative. However, in the light of multidisciplinary knowledge, this should be used with caution and, most importantly, the negative findings should be communicated to enable for the asylum seeker to explain, rebut or redress these findings.

7.2.3 An analysis of four cases from the Swedish migration courts

This section offers a close analysis of four cases from the empirical material. The focus of the analysis is on the application of credibility assessments made by the Swedish migration courts and its consequences for the overall risk assessment. The examples are chosen to demonstrate the problems that the general picture in the study brings to light.

Example 1

The case concerns a young person, A, from Afghanistan. The judgment is mainly focused on his age and the court rules that he is at least 19 years old and, hence, an adult. This part of the judgment constitutes two pages and is based on a medical age determination taken together with contradictory statements during the process from the asylum seeker as regards his age. According to the court's and the Migration Agency's narrative, the alleged threat concerns an accident during some temporary work during a road construction, where A was blamed for a person's death. A holds that he cannot expect to get a fair adjudication of the case on account of widespread and severe corruption. This part of the judgment constitutes half a page. The court does not take a stand on whether the alleged threat could constitute such a risk upon return that would render a right for protection. With the exception of a general statement that there is a situation of severe conflict in the area of origin but that this does not render a need for protection, generally, for persons from this area, there are no references to specific country of origin information in the court's judgment. Such information is found in the decision from the Migration Agency consisting of a "legal

position paper" from the Agency's legal general counsel (*rättschef*) concerning the general security situation in Afghanistan.[1039]

There are no other external sources of information in the case. However, an oral witness from the Swedish school counselling service states that A suffers from post-traumatic stress syndrome and is suicidal. This witness is only assessed by the court in relation to whether the situation for A amounts to "particularly distressing circumstances" (Chapter 5, section 6 of the Aliens Act) and not in relation to a need for protection due to a risk for being subjected to serious harm upon return.[1040] Nor are the statements from the school counsellor considered in order to assess the credibility of A's statements or of the alleged misunderstandings concerning his age during the procedure at the Migration Agency. A claims that he has been confused and has difficulties to focus. The statements from the witness are dismissed on professional grounds, i.e. the school counsellor does not have any medical or other reliable education in order to assess A's health. No further investigation on this issue is initiated by the court. It is left, then, to assess the quality of A's narrative on the basis of internal credibility indicators:

> The Migration Court then proceeds to assess the stated reasons for protection. In this respect, A has provided a story that can generally be considered *vague and poor in detail*. The circumstances surrounding the alleged accident in the workplace appear to be relatively *unclear*. The stated threat *seems* to be based more *on speculation* than on him having received direct threats. It also *seems strange* that his boss at the bakery would have more or less immediately financed the trip from Afghanistan and also otherwise helped him on this point, when the alleged threat must have appeared unclear. (Case G10)[1041]

The narrative stands naked, stripped of any context. Neither facts about the situation in the country of origin nor facts about his mental health situation that could impact on his ability to present a coherent and detailed narrative are considered. The presumptions made by the court – that it seems strange that his boss helped him to flee the country as the threat was unclear – form a circular argumentation where the court bases this argument on its own assessment of the vagueness in the statements. Another presumption could work the other way

---

[1039] See the discussion on legal position papers and their function above, section 6.2.1.

[1040] See supra note 198 and section 6.1.2.

[1041] The author's translation and italics.

around: if the boss had helped him, maybe there was a reason for him to do so.

The court made a final conclusion on the need for protection and ruled that:

> In the light of the foregoing, A cannot be considered to have made the stated grounds of protection probable. He is therefore not to be regarded as in need of "subsidiary protection" according to Chapter 4, section 2 of the Aliens Act. Admittedly, there are ongoing, severe conflicts in his home province Y. However, the mere presence of severe conflicts is not sufficient for everyone to thereby be considered "otherwise in need of protection" according to Chapter 4, section 2(a) of the Aliens Act. As it has not emerged that A feels a well-founded fear of being subjected to serious abuses as a result of the severe internal conflicts, he cannot be granted a residence permit on this ground either. (Case G10)[1042]

Even though linkages are made to the severe conflict in the area of origin, the court does not make an independent analysis of the situation in the area in relation to the events stated by A or his personal circumstances. They are evaluated separately. Finally, the court rules on half a page that A cannot be granted a residence permit on account of "particularly distressing circumstances" based on the lack of evidence as regards his health problems.

Example 2

This case concerns a man, A, from Mogadishu in Somalia who claims that he was forced to join the terrorist network, Al Shabaab, and was assaulted when he did not show up to a meeting with them and that, therefore, he is at risk of being killed if he returns. There are no external sources of information to substantiate his need for protection other than a "legal position paper" from the Migration Agency concerning the situation in Mogadishu. The court does not undertake its own analysis of the situation in Mogadishu but agrees with the standpoint held by the Agency that there is an ongoing, severe conflict in the city but that the situation does not amount to an internal armed conflict and, therefore, not everybody from this area should be granted protection.[1043] Then the court proceeds to assess the credibility of A's statements:

[1042] The author's translation.

[1043] See above, section 5.1.2 for the difference in legal consequences between these two notions.

> The Migration Court considers that there is reason to remark on the credibility of the complainant's asylum report. A has stated that after the attack in the store he hid with acquaintances in Medina and that he stayed indoors all the time, and that he had some contact by phone with his wife. He further stated that in connection with this, Al Shabaab had arrested his younger brother, detained him and told him that he would not be released until he returned. *This information comes from the complainant's wife*, but how she found such information when her brother was detained or what contacts she had with Al Shabaab, or anyone else who had access to information about the brother, is *unclear*. During the asylum investigation at the Swedish Migration Agency, A stated *three different indications of time* as regards how much time had elapsed between the occasions when Al Shabaab had sought him out in his shop. He first said that it took a week, then two weeks, and then 20 days, which seems contradictory. The fact that A later said that these indications of time were approximate does not change the Migration Court's assessment in this part. During the asylum investigation at the Swedish Migration Agency, the complainant also stated on two occasions that the reason why Al Shabaab pursued him a second time was because he did not meet them on time. During the oral hearing in the case, he said instead that the reason was that he himself should call Al Shabaab and arrange such an appointment but that he failed to do so. This also *appears to be contradictory*.
>
> During the asylum investigation in the case, A further said that he had contact with his first wife by telephone even after he arrived in Ethiopia. However, later during the asylum investigation, he said that he had not had any contact with his first wife since he was in Medina. In the opinion of the Migration Court, *this is contradictory*. The Migration Court further questions that an acquaintance of the complainant, three and a half years after his home in Mogadishu was left empty, could go there, and pick up a piece of paper that had been left there in a box. The Migration Court does not in itself rule out that this could be the case, but at the same time considers that *without further evidence it is not possible to attach credence to the complainant's information in this part. Several of the shortcomings in the asylum story mentioned above alone are not of such a nature that they undermine the credibility of the asylum story, but the Migration Court considers in a forward-looking and overall assessment of all the circumstances in the case that the story has such credibility shortcomings that it cannot be used as a basis for the assessment in the case.* A has thus not been able to make it probable that on return to his home country he risks being subjected to protection-based treatment and he can therefore not be granted a residence permit on any of the grounds in Chapter 4, sections 1, 2 or 2(a) of the Aliens Act. He can therefore not be granted a status declaration either. (S 33)[1044]

No analysis is made of which statements are relevant for the need of protection, i.e. which statements would render a need of protection if they were found credible. Only the questionable statements are put forward. It can hardly be at the core of the protection needs exactly how much time had passed between Al Shabaab's visits or whether the reason why he was assaulted by Al Shabaab was because he did not show up to a meeting or because he should have called them. Moreover, there is no explanation as to what was in the paper that somebody picked up from a box and how this paper was important in

[1044] The author's translation and italics

order to assess the need for protection. Furthermore, it is not explained why it is at the core of the flight narrative whether he had contact with his wife only in Medina or also in Ethiopia. It would seem to be more central to the claim to investigate statements about the assault. In the decision there is a statement that A was shot in the leg when he tried to run away. Also, the statement that his brother was held hostage to make him return would be important. According to A's statement from the narrative in the decision from the Migration Agency, his brother had not only been detained but already killed by Al Shabaab, something the court does not mention. The fact that the information about his brother came from his wife is held against him and the question arises from where else he could have received this information. The statements about the assault and the brother's death are facts that reasonably should have been evaluated in relation to the ongoing severe conflict and the overall risk for him upon return. This shows how a rather detailed and seemingly logical reasoning becomes detached from reality by excluding important issues that do not fit into the inner logic of the court narrative.

Example 3

The case concerns a stateless Palestinian from Baghdad. A's narrative as presented in the judgment states that he is subject to sectarian violence directed at Palestinians. He is accused of being involved in a terrorist attack in Baghdad and he cannot expect to get a fair trial. His wife and three children have recently arrived in Sweden to apply for asylum. The court initially rules that, even though, according to the principle of the unity of the family, they should be adjudicated together, this does not prevent the court from deciding the case concerning A, as the alleged threats only concern A and his oldest son who is still in Turkey. The court's legal argumentation in this part is questionable but will not be further analysed here. For present purposes, the court's assessment in this part is interesting in line with the court's tendency to disconnect facts from each other. Adjudicating the family together would mean that considerations as to the consequences for his wife and children would be relevant for the father's reasons, and vice versa.

As to the legal grounds, the court does not make any statement on what the risk might be if the narrative should appear as credible enough and whether A's claims would fall under the refugee definition or

subsidiary protection. It appears from the country reports presented in the decision from the Migration Agency that Palestinians are a vulnerable minority in Iraq. The Migration Agency recognises this vulnerability and also states that there is an ongoing severe conflict in Baghdad. However, as A has not presented a credible narrative, he is not at risk for being subjected to persecution or other serious harm upon return. The court does not refer to any country of origin information and does not make an independent evaluation of the situation for Palestinians in Iraq but, in line with the Agency's stand, recognises that the situation for stateless Palestinians is difficult given the situation in Iraq. The court further states that this situation is not such as to render a protection need for all Palestinians in Iraq. The court continues by generally dismissing the external sources of information submitted by A (articles, recordings, and news) as, according to the court, they cannot be coupled to him personally. It is not possible to discern from either the Agency's decision or the court's ruling what these pieces of evidence contain.

After having established, in one sentence, that the adjudication must be individual and in one sentence dismissed the external sources of information, the court continues with an assessment of A's narrative:

> With regard to the oral narrative, the Migration Court finds that it is *strikingly vague in key parts* and that it is largely *characterised by his own assumptions* based *on secondary information*. This applies in particular to the information A has provided regarding the public authorities' suspicions against him. For example, he himself has not been in contact with any government representative but has heard about the suspicions from friends who, in turn, have found out about it through contacts within the public authorities. There are also *ambiguities* regarding the posters that according to A were intended for him and his son. During the investigation by the Swedish Migration Agency, he stated that his name was not mentioned on the posters, but that his nickname, which is a relatively common name, was. During the oral hearing in the migration court, *he added* that there were also photographs of him and his eldest son posted in the family's stairwell and at various checkpoints. However, he has not seen any photographs himself but *has heard about it from friends*. Overall, the Migration Court considers that the submitted narrative is so deficient as regards the threat from the public authorities that it cannot form the basis for the assessment of the invoked grounds of protection. (M 48)[1045]

Firstly, it is notable that essential parts of A's narrative, presented in the Agency's decision, are neither mentioned nor investigated by the Agency or by the court. According to these parts of the narrative, the

[1045] The author's translation and italics.

origin of the fear and the family's flight is that soldiers came to A's shop and forced his son to close it and assaulted him and the other sons for not doing so. The soldiers came and searched his house and took his wife with them. His wife was released with help from neighbours. His sons were afterwards falsely accused and wanted for having committed a terrorist attack. The narrative in this part, as presented in the Agency's decision, is quite detailed and coherent. There is no statement on whether the court perceives this part as credible and what significance it has for the assessment. The assessment is focused on a forward-looking risk based mainly on the fact that the statements concerning the threats originated from secondary sources but without integrating the significance of either past events or the situation for Palestinians in Iraq, at the time, a country marked by a high level of violence. Finally, the court rules on whether there is a practical impediment to execute an expulsion of A to Iraq, and that he, therefore, would be eligible for a residence permit on grounds of " particularly distressing circumstances". According to a document from the Iraqi embassy, at the time the embassy did not issue travel documents to Palestinians who had been outside Iraq for more than six months. The court rules that as an expulsion had not yet been tried and the document did not prove that this would be impossible for a long time, the applicant cannot receive a residence permit on this ground.

It can be concluded from the analysis of the case that the lack of an independent judgment from the court is evident in this case. The court, in principle, repeats what is already stated in the Agency's decision both as regards the situation in the country of origin, which facts should be considered, as well as on what bases the credibility assessment is made. Important statements and other facts and circumstances are not just disregarded but made invisible.

Example 4

While the cases above are focused on credibility indicators, in this last case the court decides, contrary to the Migration Agency, that credibility is not an issue but that the statements in the narrative are not such as could form the basis for protection. The case concerns a mother, A, with her three daughters C, D, and E from Iraq. A and her husband submitted a report to the police and were then threatened by

a high-ranking sheikh in the area where they lived. From the narrative in the Agency's decision and the court judgment, it appears that the oldest daughter, B, was kidnapped, murdered, and possibly raped in Iraq. This was, according to A, caused by the police report she and her husband made. They are now afraid that the other three daughters, as an act of revenge, will face the same fate as their sister, if they return. A also puts forward the fact that the family once belonged to the Ba'ath Party which makes them even more vulnerable to the fact that there are now persons in power who advocate honour culture where women are expected to dress and behave properly.

The Migration Agency questions the credibility of the asylum seeker's narrative mainly on account of external sources of information (a police report submitted by A) that are presumed false and also contradict statements in the narrative. However, the court finds the narrative "probable" without any further arguments and, therefore, bases the adjudication of the risk upon return on the narratives:

> Against the backdrop of what A has stated, the Migration Court observes that *the family has not been exposed to anything since B's death*. Sheikh Ali's men made threats against the daughters in connection with A's husband refusing to accept the money offered to him. In addition to this, the family has not been subjected to either threats, violence or any form of protective treatment. The Migration Court therefore considers that it has not been shown that there is such a concrete threat to the remaining family members that they cannot return to Iraq. Hence, the stated events are not sufficient to constitute a basis for a residence permit due to a need for protection. A, C, D, and E can therefore not be considered as refugees, in need of subsidiary protection or otherwise in need of protection within the meaning of the Aliens Act. (Case M 23)[1046]

The statements are not further investigated in relation to the situation in the area. No country reports are analysed or even referred to. Neither is the children's situation analysed or assessed specifically, even though there is a report from Swedish Children and Youth Psychiatry stating that one of the daughters suffers from mental health problems that were already present in Iraq. As in the above analysed case, this report was only mentioned in relation to whether or not the situation for the family would amount to "particularly distressing circumstances". Even in this case the narrative is naked and stripped of context. The court bases its assessment that there is no risk for the other daughters to return to Iraq solely on the argument that one threat is not enough.

[1046] The author's translation and italics.

The fact that one daughter has already been kidnapped and murdered taken together with the situation for women and girls in the area are not investigated or analysed. While in the above examples the court hides behind internal credibility indicators, in this case the court conceals the credibility issue by finding another, seemingly objective fact. However, it is still only the narrative that is assessed, and no other facts are investigated and assessed in relation to the asylum seeker's statements.

The four examples above show how the courts focus on credibility and hence shift the emphasis in the adjudication from facts and legal interpretation to mainly questions of credibility and furthermore internal credibility indicators. This shift of emphasis enables the judges to dismiss the narrative, as a whole, on account of a lack of coherence and details, unclarities or improbabilities, not necessarily based on statements directly relevant to the need of protection, but as indicators of the poor quality of the narrative and hence the untruthfulness of the claim for protection as such. In this way the Swedish migration courts succeed in using the subjective indicators for credibility and at the same time hide from the inevitable subjective element in the adjudication by applying these indicators in an instrumental manner.

7.2.4 Credibility indicators as the main basis for the assessment of the risk upon return – a risk factor

The attempts to design a method for carrying out credibility assessments in asylum cases, as described above, raise an important discussion about the difficult and complex elements of uncertainty in asylum adjudication. If taking the multidisciplinary research on the matter into consideration, credibility assessment is a human relational act between the narrator's ability and willingness to present parts of her or his life narrative and the assessor's perception of the narrative as (in)comprehensible and therefore (un)believable. From this point of departure, credibility can never be a characteristic that can be attributed to a person or her or his narrative. A narrative cannot be *found* to be credible or not credible; it can only be *perceived* as one or the other. Credibility is always created between the person narrating and the person listening to and assessing this narrative in a certain context. Credibility assessment is a form of communication where credibility is

created by all the parties involved in this communication and where much depends on how the person who states something is able to correspond to the adjudicator's perceptions and experiences of what would constitute a credible narrative. A statement can be proved as being in accordance with external facts. For instance, there may exist a law in the country of origin that forbids adultery in accordance with a statement made by the asylum seeker. Provided that this information is available and perceived as reliable, this is a fact that substantiates the statement and where a further credibility assessment is unnecessary for this particular statement. There is, of course, no clear-cut distinction between the factual and the credible since even establishing the factual includes analyses, interpretations, and choices, as was concluded in Chapter 6. However, entering into credibility assessments means entering into what has been chosen to be perceived as uncertainties, i.e. we leave what can be perceived as a possibility to establish facts. This does not mean that the assessment of the credibility of a person's narrative could not or should not be based on external facts and circumstances as these constitute the only possible way to understand and hence assess the statements in the narrative. If, being "generally credible" and "presenting a credible narrative/asylum claim" is, as expressed by Kagan, to a large extent "in the eye of the beholder"[1047] and the burden of presenting a credible claim is on the asylum seeker, the burden for the State in terms of why this claim is being questioned must necessarily be substantiated with rigorous facts and investigation.

To establish certain indicators such as "coherence" and "plausibility" as markers of credibility is problematic, even though, as is advocated by the authors in the field, they should be used with care and supported with contextual content, including external facts and reflections in light of factors impacting on the asylum seeker as well as on the assessor. To take into account all these factors would require not only an awareness of these factors' significance but also a skill in applying them.[1048] For instance, how should an adjudicator determine whether a fragmentary and vague narrative has its roots in a trauma, a lie or something else? If the adjudicator should consider all the above-mentioned factors that could undermine the criteria suggested, it is

[1047] Kagan 2003.
[1048] See the Hungarian Helsinki Committee manual, p. 60, which puts forward knowledge, skills, and attitude as important domains in respect of learning.

difficult to reach any other conclusion than that these criteria are extremely weak as indicators for assessing the asylum seeker's narrative in terms of being credible or not credible. This is if the assessment of credibility is meant to be connected to reality.[1049] Indicators such as consistency, plausibility, and the number of details in a statement can hardly be objectively measurable facts. Viewed in the light of the grave and irreversible consequences that may be the result of a wrongful rejected asylum application, the use of these internal credibility indicators seems even more dubious. Furthermore, by establishing these indicators and highlighting them as legally relevant, whether in guidelines, EU Asylum Directives or in case law, they tend to become, as we have seen in the Swedish practice, firm requisites that must be fulfilled. This is problematic provided the weak support they have as indicators for whether the statements in a narrative correspond to reality. It becomes even more problematic when the function of credibility assessment is shifted from being connected to the risk of sending an asylum seeker back to her or his country of origin to merely a condition for getting evidentiary alleviation in an admissibility process, as discussed above in section 7.1.3.

The Swedish migration courts' reasoning on credibility mainly concerns coherence, number of details/vagueness, and plausibility. The narrative is mostly dismissed, as a whole, on the basis of these indicators, which seem to be used as objective criteria for credibility. No reflections or ambiguities are visible as regards how to interpret deficiencies in the asylum seeker's narrative that could correspond to the multidisciplinary knowledge accounted for above. Additionally, allegations about procedural deficiencies, such as misunderstandings and bad communication that may be the cause of perceived deficiencies in the narrative, are mostly rejected or disregarded without reflection. While the indicator plausibility, has clear subjective connotations, such as the assessor's personal perception based on experience and knowledge, arguments such as vagueness and the number of details can be perceived as more "objectively" found. The arguments concerning coherence often identify contradictions which may, in a sense, be objectively observable either within the narrative or between the different interviews or between the interviews and the narrative

[1049] See, further, the discussion below in section 8.3 on judgment and reality in the light of Arendt's theory on the faculty of judging.

submitted at the oral hearing. However, as can be concluded from the multidisciplinary research, these seemingly "objective" findings of contradictions, vagueness or lack of details can have many explanations that do not necessarily imply untruthfulness. Disregarding these factors leads to assessments of credibility being no more than the assessor's perception of what can be generally expected to be a credible narrative. The lack of contextual knowledge and understanding of the assessments of the asylum seeker's narrative makes her or his statements become a free-floating particle, a "…tangible object…"[1050] related to the adjudicator's perception of how a narrative should be performed rather than one that is related to the personal and general situation surrounding the narrated life events. Thus, the indicators for credibility are used by the court as firm legal requisites instead of as evidentiary assessment tools. This is problematic considering the weak support these indicators have for assessing truthfulness. By failing to contextualise and interpret the seemingly objective findings coupled to coherence, the assessment becomes instrumental rather than objective. The credibility indicators, i.e. the quality of the narrative, becomes the legal basis for the outcome and leads to an internal circular reasoning that may give the impression of being internally coherent: as the narrative is perceived as lacking coherence, details, and plausibility, the narrative is not credible and therefore the asylum seeker has not made probable that she or he is in need of protection. However, the argumentation does not refer foremost to any legal or factual grounds, but to credibility as such. The assessment of the narrative is decontextualised and the narrative appears as an untethered particle in space without any relation to either the law or any facts and circumstances.

[1050] Johannesson 2017, p. 196.

7.3 The shift of emphasis from assessing the asylum seeker's narrative in context to assessing the quality of the narrative based on credibility indicators – Concluding reflections

In the present chapter, I have analysed the emphasis on credibility assessments found in the judgments of the Swedish migration courts. By giving the assessment of the credibility of the asylum seeker's narrative a separate and central function, the judges shift the asylum adjudication from an assessment of risk to an assessment of credibility (section 7.1). Furthermore, by emphasising indicators for credibility and applying these detached from other facts, the judges further shift the adjudication from assessing the asylum seeker's narrative in context to an assessment of the quality of the narrative based on credibility indicators. The credibility indicators become criteria that have to be fulfilled. Hence, the asylum adjudication shifts from assessing the risk upon return for the asylum seeker to an assessment of whether the asylum seeker has fulfilled these credibility criteria (section 7.2)

The focus on "credibility" in asylum adjudication is unfortunate whether we use the words credible, reliable, worthy of being believed or capable of being believed. It leads to a perception of the asylum adjudication as a question of believing or not believing. I would even venture that credibility is dysfunctional as a legal concept as it leads in the wrong direction. The main question in asylum adjudication can never be whether "to believe or not to believe". The main question is what risk this person would face upon return to her or his country of origin. A simple logic is, of course, to say that if I do not believe or, as expressed in the judgments, if the asylum seeker's narrative has not "been found credible" (or as in international asylum law, the asylum seeker's narrative is not capable of being believed) then there is no risk for her or him to return to her or his country of origin. However, as we have seen, credibility indicators are poor instruments to assess risk, especially given the grave consequences that would be the result of a wrongful rejection of an asylum application. Naturally, we cannot and should not ignore the subjective elements in the assessment of the asylum seeker's narrative – the inevitable choices over whether to accept certain facts or not. However, ignoring or dismissing facts and going straight to the subjective part of the assessment, treating

credibility indicators as objective findings as the Swedish migration courts have done, cannot be in line with the idea of legal certainty (in other senses than leading to illusionary foreseeability) and, more importantly, they do not allow for correctness in substance, i.e. not violating the principle of *non-refoulement*.

What happens if we move away from the notion of credibility and merely replace it with what is required in the process of asylum adjudication? Would turning away from the fact that the judge's personal perception of a narrative plays a role lead to ignoring and concealing the subjectivity that is always present in the assessment of a person's narrative? As we have seen, the Swedish migration courts succeed in using indicators for credibility (which can be useful only if taking their relational and subjective character into account) while at the same time overlooking the inevitable subjective element in the adjudication by applying these indicators in an instrumental manner. Treating these indicators as objective findings leads to the judge concealing the actual bases for her or his arguments. Formulating the assessment in terms of formal, seemingly objective facts detaches the judge from the responsibility of communicating what has actually been judged on as well as from the outcome and its consequences. To refrain from talking about and prioritising "credibility assessment" and to instead talk about the content and difficulties in the assessment would mean recognising that the subjective element is present throughout the procedure – through interpreting, making choices, and analysing the law, facts, circumstances, and statements.[1051] It would be more about shedding light on doubts, confusions, mistrust or questions, to seriously scrutinise the bases for these and reflect upon whether there is something that can or should be further investigated or considered.[1052] In this perspective, a perceived lack of credibility can be used as a communicative investigation tool to serve the assessment of

---

1051 Compare Svensson 2014 who advocates the use of the notion *la lege interpretata* to express a consciousness about the need to account for which sources, methods, and interpretations are made, based on the view that knowledge is contextually and socially constructed, and Lindroos-Hovenheimo 2012, p. 228 on the responsibility for the judge to make choices based on textual and situational dimensions within a legal system.

1052 See below, section 8.2, on the faculty of thinking as a safeguard against getting carried away by what everybody else does and as a way of bringing light to uncertainties and doubts.

the risk of *refoulement* rather than treating it as an independent requisite or as a yardstick for "burden or standard of proof". The assessment of the stated facts in the narrative must serve the aim of the asylum adjudication, whose main theme is to assess the risk upon return. If credibility (or reliability) should remain key notions in the asylum adjudication, I suggest that the main or at least one of the primary functions of perceived credibility deficiencies is a call for further investigation. When the investigation measures are exhausted (including the evaluation of external sources of information and individual circumstances taking into consideration how such factors may impact on the asylum seeker's ability to present a credible narrative), a judgment should be based on reflections about who should bear the remaining uncertainties considering the evidentiary alleviation principles. When dismissing statements that are relevant for a need of protection, this must be substantiated with more than an instrumental application of credibility indicators.

From the above perspective, credibility assessment in the asylum context is a highly risky activity that must always be secondary to the assessment of the risk of *refoulement*. As it happens, the Swedish migration courts' focus on assessing the credibility of an asylum seeker's narrative, makes the balance between the right of protection and the State's interest in regulating immigration becomes a question of credibility: a question of whether to believe or not to believe. One could argue that other facts and circumstances are as uncertain and difficult to assess – that including more uncertain facts and circumstances could increase the risks of judging asylum cases.[1053] However, I argue that the dilemma of using uncertain knowledge that enhances the discretionary space for judging highlights the responsibility to judge. The way we account for uncertainties matters and is at the core of what Arendt defines as "the faculty of judging". This theme is explored in the following, final part of the dissertation.

[1053] See above, Chapter 6 for an account of how to analyse facts and circumstances in asylum cases.

Part IV – "The faculty of judging" – a critical analysis of the Swedish migration courts' handling of the responsibility to judge in asylum cases in the light of the theories of Hannah Arendt

In this part, the third step of the research project is carried out where the aim of the dissertation – *to make visible and critically examine how Swedish migration judges, in their written judgments, handle the risk and responsibility for judging who does or does not need protection and, thus, who can or cannot be sent back to her or his country of origin* – is addressed from a theoretical perspective. The part includes two chapters (Chapters 8–9). Chapter 8 provides an analysis of the results and conclusions made in Parts II and III against the backdrop of Hannah Arendt's theories on "the faculty of judging". The final chapter (9) summarises the results and conclusions of the dissertation.

8 The faculty of judging and the responsibility to judge

The present chapter answers the third research question – *How can the Swedish migration judges' handling of the assessments of a risk under great uncertainty, where the life and freedom of the asylum seeker potentially are at stake, be understood in the light of the theories developed by Hannah Arendt on "the faculty of judging"?* The results and conclusions reached in Chapters 4–7 are analysed in the light of the philosopher and political theorist Hannah Arendt's theories on *the faculty of judging* and *the responsibility to judge*. The aim is to contribute to a theoretical understanding of what characterises the Swedish migration judges' handling of the responsibility and risk of judging in asylum cases.

In section 8.1, judging in asylum cases is linked to Arendt's theories on the responsibility to judge in high-stakes situations. In section 8.2, Arendt's theories of the faculty of thinking and the faculty of the will as prerequisites for the faculty of judging are explained and linked to legal judging. The relationship between judging and reality is developed in section 8.3, while, finally, section 8.4 contains concluding critical reflections on the Swedish migration judges' handling of judging in asylum cases in the light of Arendt's theories.

8.1 The responsibility to judge in exceptional and high-stakes situations

The present section commences with an account of Arendt's point of departure for her theories on the responsibility to judge in high-stakes situations. I continue by making arguments for using these theories in the context of judging in asylum cases before finally showing how these theories will be applied.

Arendt's theories as regards the faculty of judging mainly address emergency situations where the individual cannot rely solely on laws, regulations or orders in order to judge what is right or wrong. Her theories emanate from her experiences of the exceptional circumstances during the rule of the Nazi regime where government officials adhered to racist laws, took part in deporting groups of people to concentration camps, and hence contributed to the extermination of

millions of people. When Arendt, after the Second World War, was confronted with the horror of the Nazis' crimes, and that this horror seemed to "transcend all moral categories as it certainly exploded all juridical standards".[1054] She expressed it in moral terms, saying that: "this is something that never should have happened for men will be unable either to punish it or forgive it".[1055] Arendt does not speak of legal issues but of morality.[1056] Nevertheless, she approaches the legal issue as a way of dealing with the unthinkable, the "speechless horror".[1057] She distinguishes between this speechless horror – that should never have happened as we cannot learn anything from this except for what can be communicated as facts – and the possibility of judging on peoples conduct "... where the question of moral and ethics arises".[1058] This does not mean that Arendt disregards the importance of understanding how certain kinds of societies produce individuals who perceive themselves as "mere cogs",[1059] but rather that the law can never protect us from such horrible actions executed by human beings. Therefore, we cannot think away morality which has to do with how individuals act, even if the individual acts are situated in a system of laws and legal culture. According to Arendt, legal and moral issues are not the same but "they have in common that they deal with persons and not with systems and organizations".[1060] She sees the court room

---

1054 Arendt 2003, *Responsibility and Judgment*, p. 56. In this chapter, the references to the works of Hannah Arendt include the name of the work referred to, in order to make it easier for the reader to follow.

1055 Ibid.

1056 Arendt does not explicitly address modern law in the sense that she defines it as such. However, law is present in her works and often related to the difference between the perception of the function and limits of law in Ancient Greek and Rome (Arendt 2005, *The Promise of Politics*, p. 179). Furthermore, her book on the trial against Eichmann in Jerusalem has, in subsequent research, given rise to explorations on her relation to the law. See, for instance, Goldoni and McCorkindale 2012. As the focus in this section is on Arendt's theories on what the faculty of human judgment entails and not on her perception of what the law is, I do not go into this discussion here.

1057 Arendt 2003, *Responsibility and Judgment*, p. 56.

1058 Arendt 2003, *Responsibility and Judgment,* p. 57.

1059 Ibid., p. 58.

1060 Ibid., p. 57. However, in a later chapter in the book where she discusses the Frankfurt Trials ("Auschwitz on Trial"), she recognises the problem with the fact that individual responsibility does not solve the problem with this kind of bureaucratic mass murder (Arendt 2003, *Responsibility and Judgment,* p. 242 ff.). Bilsky 2012 criticises Arendt for not being consistent in her analysis as she understands the problem with bureaucracy

as a shift from mass society where "everybody is tempted to regard himself as a mere cog in some kind of machinery" to a room where the individual is judged based on her or his individual acts.[1061] When shifting from the society to the individual, the question shifts from how the system functions to "Why did the defendant become a functionary of this system?"[1062]

It may seem provocative to compare the daily asylum adjudication in the Swedish migration courts with the totalitarian situation in Nazi Germany. Nevertheless, I have a few arguments in support of making this connection. *First*, I connect Arendt's historical aspect of the judgment with the notion of an outcome that is "correct in substance". I argued in section 1.3 that the purpose of the asylum adjudication – to arrive at an outcome that is correct in substance (i.e. an outcome that will prevent the asylum seeker from being subjected to acts forbidden according to the principle of *non-refoulement*) – is both a fiction and not a fiction. On the one hand, it is a fiction in the sense that it is impossible to predict, with certainty, future consequences; on the other, it is not a fiction as the consequences from a historical viewpoint will reveal themselves to be utterly real and irreversible. The consequence of a judgment can only be visible in retrospect.

Second, Arendt's theory of the ability to think and the will as a precondition for the ability to judge is not only based on specific circumstances, but also deals generally with the meaning and content of these three human activities. Therefore, I find her theories useful in situations where judging is necessary. Her standpoint that the individual has a responsibility to judge as a part of an individual moral responsibility, I believe, is also relevant to the situation when something fundamental for the individual is at stake: the power relation between the person who judges and the person who is being judged is far from equal and the decision is based on a high degree of uncertainty.

---

involved in criminal mass acts where no one seems to be responsible and yet at the same time persists on the theme of individual responsibility. Bilsky identifies the deficiencies in modern criminal law of convicting individuals for bureaucratic mass acts (such as genocide and crimes against humanity). She advocates for turning away from focusing on individual responsibility and instead suggests basing the legal responsibility for such acts on the same means as bureaucracy itself is based on, namely focusing on classes instead of individuals.

[1061] Arendt 2003, *Responsibility and Judgment,* p. 57.

[1062] Ibid., p. 58.

This is a common situation in a court context but is particularly prominent in asylum adjudication where the asylum seeker's only power is her or his narrative when faced with the power of a State of which she or he is not a citizen and which has the power to reject a request for protection of life and freedom. A decisive difference is that the purpose is not to discriminate and send unwanted people to their deaths, as was the case in Nazi Germany. On the contrary, the asylum regulation is meant to give protection to those whose life and freedom are at risk. However, the fundamental and inherent injustice of migration laws – the power of the sovereign State to deport a non-citizen against her or his will while a citizen can never be deported, and the great vulnerability to which this exposes immigrants – makes the activity of distinguishing those who need protection from those who do not a highly risky activity.

The *third* argument is based on the results of recent research undertaken by the Norwegian legal scholar Hans Petter Graver, in his book *Judges Against Justice* where he shows that the courts choose to interpret oppressive laws extensively during the transformation from a democratic to a totalitarian state. This is so even though the courts legally had an independent position, as was the case in South Africa, Nazi Germany, as well as in Chile.[1063] Arendt also observes that the German courts complied with the Nazi regulations before and during the war even though these regulations were unlawful according to the Constitution that remained the same.[1064] Graver, like Arendt, raises the question whether a judge (and, in Arendt's case, any official) has a responsibility not only to apply the law, but also, in exceptional circumstances, to be morally prepared to refrain from applying unjust laws.[1065] Where Arendt speaks of every human being, Graver specifically addresses the judges.[1066] This highlights the meaning of the responsibility for the individual judge to judge within a legal system.

The elaboration in this chapter does not primarily focus on when to adhere to the law and when to refrain from doing so. This

[1063] Graver 2015, p. 59 f.

[1064] See Arendt on the Frankfurt trial where persons who had worked in Auschwitz were on trial for breaking ordinary German criminal laws, while the "unlawful" Nazi laws never were questioned (2003, *Responsibility and Judgment,* p. 244 ff.).

[1065] Graver 2015, p. 290.

[1066] Ibid.

preparedness is, of course, necessary in the daily work in order to be observant and is partly codified in the Swedish Constitutional Act as an obligation for both officials and judges to refrain from applying a certain provision when it would be in breach of a superior law.[1067] In the next section, I explore the faculty of judging in a politically as well as humanely sensitive legal area where the consequences might be irreversible. This not only raises questions as regards limits, i.e. when do I reach a limit that I cannot transgress? But it also raises ethical questions as to the scope of individual responsibility within a system – in this case, how the judges approach and interpret both the law and their own role as independent judges in the society and within the legal system.

8.2 The faculty of judging

The positive decision is what the unprotected asylum seeker wishes for: the decision that will include her or him in the warmth of a nation that protects. The asylum seeker's wish lies in the hands of public officials and the judges of the hosting nation state. The decision-maker and the judge have a clear aim: to reach a decision. Usually, the decision is a clear binary choice, i.e. to say yes or no to a claim. The decision-maker and the judge must be able to decide, to make up their mind, to say either x or y, this but not that, to choose. To make a decision requires a will to decide and the power to do so.[1068] However, in this section, I

[1067] The obligation of judicial review (*lagprövning*) in courts is stated in Chapter 11, section 14 of the Swedish Constitutional Act with the following wording: "If the court finds that a regulation is in violation of a provision in the constitution or in other superior law, the regulation must not be applied. The same applies if the statuary procedure in any essential respect has been infringed upon the adoption of the regulation. When examining a regulation in accordance with the first paragraph, particular consideration shall be given to the fact that the parliament is the main representative of the people and that the constitution precedes law". (The author's translation.)
The obligation of judicial review for public bodies is stipulated in Chapter 12, section 10 of the Swedish Constitutional Act with the same wording. At the time of the implementation of the provision, the Committee on the Constitution (*konstitutionsutskottet*) pointed out the value of expressing the principle of the sovereignty of the people and the conformity to the law in the provision. This would, according to the Committee, balance the fact that the "Riksdag" is the main interpreter of the constitution and at the same time that the political decision-makers are bound by certain limits (bet. 2009/10:KU19 s. 39).

[1068] Arendt 1978, The life of the mind/The Will, p. 88.

explore the act of judging as something that is distinguished from or more than taking a decision. The exploration is based on Arendt's theories on what she calls "the faculty of judging". The moral and political element in Arendt's theories on the faculty of judging are presented and connected to legal judging in court. As mentioned above, Arendt's discussions on judging do not specifically address legal matters. However, she connects moral and legal issues by holding that even though they are not the same, "they have a certain affinity with each other because they both presuppose the power of judgment".[1069] She is preoccupied with the question of how we can tell right from wrong, independent of knowledge of the law, and how we can judge without having been in the same situation.[1070] According to Arendt, the "faculty of thinking" and "the faculty of the will" are prerequisites for the faculty of judging. However, though emanating from these activities, the faculty of judging is something distinct from the faculties of thinking and the will.

In her books, *Responsibility and Judgment* and her last, unfinished book, *The Life of the Mind*, Arendt explores the interrelation between the faculty of thinking, the faculty of the will, and the faculty of judging as a basis for moral and political action.[1071] According to Arendt, the faculty of judging in exceptional circumstances is "the most political of men's mental abilities".[1072] What distinguishes the faculty of judging is that it deals with judging "*particulars* without subsuming them under … general rules which can be taught and learned until they grow into habits that can be replaced by other habits and rules".[1073] As jurists in a democratic society, we are used to exactly subsuming individual cases under unquestioned rules without making personal moral judgments.

[1069] Arendt 2003, *Responsibility and Judgment*, p. 22.
[1070] Arendt 2003, *Responsibility and Judgment*, p. 22.
[1071] According to Arendt, the moral is applicable only in singularity and under exceptional circumstances such as situations of emergency and crises. Morality never tells you what to do but only prevents you from certain actions even if everybody around you is acting in a certain way. This is Arendt's interpretation of the Socratic moral rule: "It is better to be at odds with the whole world than, being one, to be at odds with myself" (Arendt 2003, *Responsibility and Judgment*, p. 104 f. and p. 106). See also MacLachlan 2009 for an interpretation of Arendt's view that politics should remain distinct and autonomous from moral evaluation.
[1072] Arendt 2003, *Responsibility and Judgment*, p. 188 and 1978, p. 192.
[1073] Ibid. Arendt 2003, *Responsibility and Judgment,* p. 188 f. and 1978, *The life of the mind/Thinking*, p. 192.

This is seen as an outflow from laws created in a democratic order that should apply equally to all individuals subject to these laws. However, what Arendt seems to fear is that applying this approach can become more a question of behaviour than of judging right from wrong. She demands something more of a judgment than merely subsuming individual cases under unquestioned rules.[1074] It is too easy to exchange rules with other rules and thus change behaviour.

While the faculty of judging is the most political of a person's mental abilities, the faculty of thinking has a liberating effect on the faculty of judging and becomes in itself a political activity, for, as Arendt puts it, "whenever I transcend the limits of my own life span and begin to reflect on this past, judging it, and this future, forming the projects of the will, thinking ceases to be a politically marginal activity".[1075] However, while thinking "deals with the invisible, with representations of things that are absent; judging always concerns particulars and things close at hand".[1076] The two are interrelated in the same way as the consciousness and the conscience are:

> If thinking – the two-in-one of the soundless dialogue– actualizes the differences within our identities as given in consciousness and thereby results in conscience as its by-product, then judging, the by-product of the liberation effect of thinking, realizes thinking, makes it manifest in the world of appearances, where I am never alone and always too busy to be able to think. The manifestation of the wind of thought is not knowledge; it is the ability to tell right from wrong, beautiful from ugly. [1077]

Arendt emphasises the significance of this link between thinking and judging as a safeguard against being swept away by what everybody else does and believes amid political emergencies and to prevent catastrophes in "rare moments when the stakes are on the table, at least for the self".[1078] The fact that stakes are on the table not only for others but also for oneself highlights the connection between conscious thinking and the conscience. Consciousness is the prerequisite for thinking, as being aware of myself means that I can talk to myself in my solitude.[1079] I can ask questions and get answers and think matters

[1074] Compare Koskelo 2014 and Stendahl 2003, supra note 42.
[1075] Arendt 1978, *The life of the mind/Thinking,* p 192.
[1076] Ibid., p.193 and p. 199.
[1077] Arendt 1978, *The life of the mind/Thinking*, p. 193.
[1078] Ibid.
[1079] Arendt 2003, *Responsibility and Judgment*, p. 98 and 185.

through.[1080] This being aware of myself, talking to myself related to myself, means that I am two in one.[1081] This "consciousness" in the sense of "being aware of oneself" has the consequence that: "If I do wrong I am condemned to live together with a wrongdoer in an unbearable intimacy; I can't get rid of him".[1082] In this conscious thinking, the dialogue between me and myself, a space of freedom appears. A moral and political space which is the basis for making a judgment.

However, a conscious thinking will not make a judgment. For this the judge also needs the *will*. The judge must want to arrive at a decision. "The faculty of the will" is the second human faculty identified by Arendt as a prerequisite for the faculty of judging. She now considers human "action" as distinguished from human "activity" (thinking).[1083] While thinking is an activity related only to oneself, the will is the faculty that prompts a person into action where others are included. The conscious act needs the will. Arendt identifies the philosophers' puzzled approach to the dialectical character of the will, the conflicting issues: the I-will and the I-cannot as having simultaneously the function of the commander and the arbiter.[1084] She holds that this brokenness only becomes manifest if we have to perform, to act our will, and, therefore, the will and the I-can are not the same.[1085] Rather than understanding the will as dialectical and conflicting, which only "could lead to a complete paralysis of all forces", it should be understood as an "abundance of strength", which explains the source of spontaneity that prompts action.[1086] According to Arendt, the foundation for the will lies in the fact that the human being was created as a temporal creature and, thus, the will can only be founded in the notion of a *beginning*. The capacity of a beginning is rooted in *natality*, and by no means in creativity, i.e. not a gift but in the fact that human beings again and again appear in the world by virtue of

---

1080 Arendt distinguishes the Greek word *dianoeisthai* which means to *think* a matter through – to be in dialogue with oneself – from *dialegsthai* which means to *talk* things through (Arendt 2003, *Responsibility and Judgment*, p. 91).

1081 Ibid., p. 90 f.

1082 Ibid., p. 90. Arendt's basis is the moral principle expressed by Socrates (see supra note 1071).

1083 Ibid., p. 112 f.

1084 Ibid., p. 113 and p. 132 f.

1085 Ibid., p. 132 f.

1086 Arendt 2003, *Responsibility and Judgment*, p. 135 and p. 137.

birth. To be born is to begin something new and that is the prerequisite for the will to act.[1087] This way of understanding the will does not include specific goals of the act, but only includes the idea of a superfluity of strength.

In the search for the foundation of the will, Arendt partly turns away from the great philosophers as they are more interested in thinking and contemplating and have, therefore, always been more pleased with "necessity" than with freedom.[1088] She opposes the theory that all events in the world happen because there is a series of necessary causes that has led to a certain event.[1089] This can only be presented as a narrative in retrospect. The moment we start to act we must assume that we are free, no matter what the truth of the matter may be.[1090] The moment we stop acting and start considering what we have done, the matter becomes doubtful: "In retrospect, everything seems explicable by causes, by precedents or circumstances, so that we must admit the legitimacy of both hypotheses, each valid for its own field of experience".[1091] If there is always a necessity foregoing all events, there is no will or, rather, the will would be made invalid and there is no need to judge. Furthermore, and what is most important to Arendt, "behind the unwillingness to judge lurks the suspicion that no one is a free agent, and hence the doubt that anyone is responsible or could be expected to answer for what he has done".[1092]

What Arendt does here, unlike the philosophers before her, is relieve the will of the function as arbiter between "right and wrong, beautiful and ugly, true from untrue", and she identifies this part as a separate third faculty: the faculty of judgment.[1093] By separating the will from the judgment of what is right or wrong, it is possible to understand the will as free in the sense that "while reason reveals what is common to all men, and desire what is common to all living

---

1087 Arendt 1978, *The Life of the Mind/The Will*, p. 217. See also Arendt's rendition of Jasper's idea of freedom as not having the truth, i.e. freedom emerges out of not having the answer (ibid., p. 22).
1088 Arendt 1978, *The Life of the Mind/The Will*, p. 195.
1089 Arendt 2003, *Responsibility and Judgment,* p. 129.
1090 Ibid.
1091 Ibid.
1092 Ibid., p. 19.
1093 Ibid., p. 131 and p. 137.

organisms, only the will is entirely my own".[1094] Neither the faculty of thinking nor the will, in themselves, can distinguish right from wrong. Only the faculty of judgment can do this. However, conscious thinking and the free choice of the will have to be present in order to make a judgment.

What Arendt is after is mainly to define politics and freedom and the relation between them.[1095] Unlike the philosophers' understanding of events based on necessity, politicians need the idea of freedom as they want to change the world.[1096] Political freedom, unlike philosophical freedom, is based on the I-can rather than the I-will.[1097] Since it is possessed by citizens rather than by people in general, it can manifest itself only in communities where the many live together regulated by laws, customs, and habits.[1098] Hence, political freedom is possible only in the sphere of human plurality.[1099] However, this sphere is not simply an extension of the relation between the thinking dual activity I-and myself, to a plural, as this could never reach the "We", the true plural of action.[1100] The We can be constituted in many different ways but it rests on some form of consent. Obedience is the most common mode, just as disobedience is the most common and least harmful mode of dissent.[1101] Power and freedom in the sphere of human plurality are synonyms, which means that political power is always limited freedom.[1102]

In her reflections on the trial against Eichmann, the political element as limited freedom and its relation to the faculty of judging and the responsibility to judge in the public sphere come to the fore. According to Arendt, Eichmann's inability to talk was closely connected to an inability to think – to think from somebody else's

1094 Ibid., p. 114.
1095 The relation between politics and freedom is a consistent theme in Arendt's work. For her writings that focus specifically on this theme, see *On Revolution* (Arendt 2016 [1963]) and *The Promise of Politics* (Arendt 2005).
1096 Arendt 1978, *The Life of the Mind/The Will*, p. 198.
1097 Ibid., p. 200.
1098 Ibid.
1099 Ibid.
1100 Ibid.
1101 Ibid., p. 201.
1102 Ibid.

perspective.[1103] This inability to think made him isolated from other human beings' words and presence and, therefore, also from reality.[1104] The consequence was that he was not able to make judgments, to distinguish right from wrong, as the one-in-two process of thinking that our consciousness enables, as well as the will of choosing, is a prerequisite for making a judgment. Throughout the trial against him in Jerusalem, Eichmann insisted that he could not be held accountable for "criminal laws" since he had made his duty; "…he not only obeyed *orders*, he also obeyed the *law*."[1105] He referred to Kant's idea of going beyond the law and identifying the principle behind it. But while the basis for this view in Kant was practical reasoning and what could be made law for every human being, Eichmann's interpretation of going beyond the law was not only to obey the law but to identify himself with the Führer's will and, as such, he was not accountable in any other aspect than to identify himself with the will of the Führer, i.e. to act as if he were the founder/instigator of the law.[1106] From this follows a belief that one must go beyond the call of duty[1107] and transform the plurality in the act of judging to an act of erasing the borders between me ("the decision-maker") and this other person ("the law-maker") – in the case of Eichmann, this other was the Führer. This twisted interpretation of Kant upset Arendt as her understanding of the faculty of judging as including plurality is precisely not to erase borders, but to maintain a distance to the law-maker and the law. Each one becomes a law-maker the moment she or he commences an act.[1108] According to Arendt, this is the essence of judging and it is where the political element comes to light.

1103 Arendt 2022, *Eichmann in Jerusalem,* p. 47. Arendt's theories concerning Eichmann as being merely a bureaucrat who is unable to think has been contested as it has been shown later that he had consciously political intentions with his acts, (see for instance *Eichmann Before Jerusalem: The Unexamined Life of a Mass Murdere*r by Bettina Stangneth Knopf, 2014.

1104 Arendt 2022, *Eichmann in Jerusalem*, p. 47.

1105 Ibid., p. 133.

1106 Ibid., p. 134. Also, Hitler's personal lawyer and chief Governor-General of the general Government of Poland during the Nazi regime, Hans Frank, expressed the same interpretation of Kant's categorical imperative by stating that one should: "Act in such a way that the Führer, if he knew of your action, would approve it" (ibid.).

1107 Arendt 2022, *Eichmann in Jerusalem*, p. 134.

1108 Ibid.

While not referring to Arendt's theories, the Finnish legal scholar Lindroos-Hovinheimo, in her dissertation on the ethics of legal interpretation, expresses a stand similar to Arendt's. She puts forward "unknowingness" and "undecidability" as important elements in legal decision-making which make responsibility and ethics come into force.[1109] Like Arendt, Lindroos-Hovinheimo highlights the significance of experiencing limited but free will in legal decision-making as otherwise it would only be an application of a programme or a matrix.[1110] The free will is limited by the way the judge is structured by other legal actors and the legal culture.[1111] However, a legal decision "… functions as a rupture in the logic of the police…" as it is never completely guaranteed by the system and its rules.[1112] Hence, there is always a political dimension in legal judging based on this undecidability, impossibility, and the limited but free will.[1113] Ethics becomes a practice of freedom, i.e. the freedom to choose.[1114]

In this dissertation I have studied written court judgments in asylum cases. So, how can we understand these judgments made by the Swedish migration judges in the light of Arendt's theories on the faculty of judging? Arendt places the faculty of judging within the human activity she calls *action* as distinguished from *labour* (the process, the fundamental daily activities we do in order to keep alive, such as providing food, housing, etc.)[1115] and *work* (the production of useful objects whose fundamental condition is worldly).[1116] *Action* is the act where we show our self to the public world; it is what happens between people in a public space and its conditions are plural, including not the human but humans.[1117] This plurality is, according to Arendt, the condition for all political life. The function of the written court judgment in asylum cases is mainly two-fold. First, the court's final decision, the outcome (*domslutet*), is declarative in terms of protection status – the asylum seeker is determined (not) to be in need of

1109 Lindroos-Hovinheimo 2012, p. 226 f.
1110 Ibid.
1111 Ibid., p. 197 and p. 230.
1112 Ibid., p. 235 and p. 239.
1113 Ibid., p. 226.
1114 Ibid., p. 227.
1115 Arendt 1998, *The Human Condition*. p. 119 ff.
1116 Ibid., p. 173.
1117 Ibid., p. 237.

protection – as well as being an order to execute the outcome. Hence, the final decision can be seen as a product of "work" as its function is to be used in order to execute the outcome, issuing a residence permit or deportation. However, if we agree that legal judging includes the kind of action that Arendt put forward as the faculty of judging – an action performed in the public sphere where the one who judges shows her- or himself to the world by taking a stand on what is right and wrong in a particular situation – then the act of legal judging bears a political dimension. From this follows a responsibility to judge that goes beyond knowledge as well as beyond effectuating a political aim of the legal rules, which the reasoning in the written court judgment should mirror. Hence, the act of legal judging must be more than the creation of a useable product. Furthermore, the act of executing a deportation or issuing a residence permit also needs the faculty of judgment as, in the moment of executing a deportation, the space for judgment is always present.[1118]

The lacunas as to law, facts, and circumstances found in the judgments made by the Swedish migration judges can be seen as mere oversights. However, they also appear as an implicit demand on the reader that she or he will be satisfied by the fact that the judgment is made by a judge in a court and that this is the law; the judge *is* the law and does not have to judge but only to treat the law as a mathematical problem with a "necessary" solution. Here the distance to law as well as the openness to the different possibilities and meanings of law are absent.[1119] The judge becomes the law instead of an interpreter of the law. The scope and responsibility for the free will and plurality that characterise the faculty of judging are made invisible.[1120] The lack of context – the exclusion as to law and facts that marks the Swedish migration court's judgments – leads to a lack of plurality that would correspond to something real. When neglecting facts and circumstances, the adjudication becomes open to extreme arbitrariness and at the same time closed in a narrow mechanical scheme. Furthermore, since the risk aspects are downplayed in the judgments

---

[1118] In the case of deportation this renewed judgment is stipulated by law (see above, section 5.1.2).

[1119] See, Lindroos-Hovenheimo 2012 who holds that the openness to several possible judgments based on situational circumstances and lack of definite criteria in legal texts are a condition of possibility for justice (p. 240 and p. 249).

[1120] See Lindroos-Hovenheimo 2012, supra note 1051.

in favour of the internal quality of the asylum seeker's narrative, the consciousness of the potential risk of returning the asylum seeker to her or his country of origin in relation to the uncertainties, ambiguities, and doubts as to contextual facts and circumstance is made invisible. The reasoning in the judgments reveals little about the thought process in this sense. If knowledge gaps and doubts are not dealt with but rather swept away, the important safeguard in relation to *non-refoulement*, which is intended to give the asylum seeker evidentiary alleviation – the principle of *benefit of the doubt* – loses its meaning. The doubt that may arise in the thinking process must also be subject to, and visible in, the judgment as it is the space within which the principle can be applied.[1121] However, as we learnt above, according to Arendt, the faculty of judging is something other than knowledge. This may seem perplexing at first since knowledge could be seen as a prerequisite for judging on real life events. In the next section, I look further into the question of judgment in relation to knowledge and reality.

8.3 Judgment and reality

In line with my understanding of a judgment that is correct in substance as corresponding to a future reality, in the present section, I elaborate on the relation between making judgments and a lived reality. Above, I have described the basis for the theory on the faculty of judging as developed by Arendt. In this section I continue to elaborate on some of the important elements of this faculty put forward by Arendt that touches upon the problematic relation between what has to be judged in the legal context and what is unknown. I commence with a discussion of Arendt's distinction between knowledge and judgment, and continue with a discussion of the use of language and conceptualisation as a way of creating a totalitarian mechanism and as a way of detaching from reality. Finally, the possibility to judge on another person's experiences and fear is discussed in light of Arendt's ideas about remembrance and imagination as necessary elements of the faculty of judging.

The judgments from the Swedish migration courts studied here appear to have an internal logic, but at the same time show worrying

[1121] See above, sections 5.2.2.1 and 7.1.3 on the meaning of the principle.

gaps in terms of legal reasoning, facts, and circumstances. This seemingly internal logic – which excludes facts, choices, and interpretations that do not fit into this internal logic chain – gives the impression that the outcome is necessarily the only possible one.[1122] According to Arendt, the faculty of judging, the ability to tell right from wrong, is something other than knowledge.[1123] It may seem puzzling that Arendt's theory on the faculty of judging does not address knowledge. This exclusion of knowledge from the faculty of judging has also been criticised for invalidating the rational validation of political judgments, making it impossible to talk about uniform judgments and to recognise some people with more knowledge as better suited to judge.[1124] However, what Arendt is after is not the truth – as knowledge is endless – but rather meaning.[1125] In separating the intellect's thirst for knowledge from reason's need for meaning, Arendt wants to highlight that we can do more with our brain power than knowing and doing; that the freedom and, hence, the responsibility in being human lies in our ability to judge.[1126] As mentioned above, she is concerned with how we tend to transform the space of reason – that is, the space for thinking and judging – into the space of necessary causes, which would neglect the free will and the responsibility for our actions.[1127] This does not mean that there are no facts that should be considered. However, truth and meaning are not the same.[1128] The fact that knowledge about reality is always limited but at the same time also endless and therefore has to be chosen, reflected on, and contextualised was touched upon in section 1.3. Facts needs the faculty of judgment to become knowledge; nothing becomes knowledge before we have judged upon it. Knowledge is what we have as a tool for judging but it is at the same time treacherous as it is endless and thus impossible to

---

1122 Compare above, section 7.1.4 on the analysis of the method advocated by the Migration Court of Appeal in MIG 2007:12 and the analyses of the four cases included in the study in section 7.2.3.
1123 Arendt 1978, *The life of the mind/Thinking*, p. 193.
1124 See Zerelli 2005, on the critique of Arendt's insistence that political judgment cannot be the truth.
1125 Arendt 1971, 1977, 1978, The life of the mind/Thinking, p. 15 and 2003, Responsibility and Judgment, p. 163.
1126 Arendt 2003, *Responsibility and Judgment*, p. 163.
1127 Zerelli 2005.
1128 Arendt 1978, *The life of the mind/Thinking*, p. 15.

encompass.[1129] However, I believe that what Arendt aims at, by separating knowledge from judging, is not to say that knowledge is of no importance, but to be able to highlight, precisely, the space of freedom for judgment regardless of knowledge. Even if the premises and the procedure are agreed on, it does not mean that the conclusion is.

Like all abstractions, this is in one sense a fiction, since knowledge and judgments are connected in that there must be something I have knowledge of that can be judged, but they are not the same thing. Transposing Arendt's ideas to the context of legal judging, the free will in legal judging is limited by the laws and the legal culture. The rules, the law, and the facts about which a judge has to have knowledge are operating in the intellectual process of decision-making up to a certain point. However, by merely referring to them or practising a method for putting them together in a seemingly causal link does not make a judgment in Arendt's meaning.

What connects the faculty of judging to knowledge in Arendt's view is that it is an act performed in the public sphere which must include "others" to give meaning. Significant for giving meaning to a judgment is that it relates to reality, a reality that includes the plural. In line with her idea regarding power which can only occur with others (as distinguished from violence), the faculty of judging always includes the plurality and plurality only reveals itself if looked at in context, as differences can only be discovered in context:

> To take a mere thing out of its context with other things and to look on it only in its relation to itself (kath' hauto), that is in its identity, reveals no differences, no otherness; along with its relation to something it is not, it loses its reality and acquires a curious kind of eeriness.[1130]

The quest to create meaning in complex information, in the sense of comprehensibility, coherence, and logic, is natural for the human psyche.[1131] The inner logic that marks the judgments in the Swedish migration courts could be interpreted as a way of wanting to achieve

---

[1129] Compare Persson's theory on taking or running knowledge risks, supra note 517.
[1130] Ibid., p. 184. A similar approach is expressed by Lindroos-Hovinheimo 2012. She puts forward the significance of taking plurality into account, which includes both a distance and an openness to the text (p. 239).
[1131] See psychological research on this matter and how it can constitute a risk factor in decision-making, supra note 1009.

this kind of meaning. However, this human pursuit for coherence and logic does not necessarily correspond to a reality, as the reality is often fragmentary and pluralistic and lacks this clear inner logic.[1132] Arendt describes how logical procedures can lead away from reality and form the basis for a political totalitarianism mechanism. This mechanism includes: "The claim to the total explanation of the past, the total knowledge of the present, and the reliable prediction of the future", and "to emancipate thought from experience and reality".[1133] She further describes the totalitarian movement based on ideological thinking, as including the drive to "order facts into an absolutely logical procedure which starts from an axiomatically accepted premise, deducing everything else from it", which has little to do with reality.[1134]

In sections 5.2.1 and 6.1.1, I observed the lack of individual context that marks the court judgments studied. The emphasis of the Swedish migration judges – that the assessment must be individual, while at the same time the arguments have little basis in individual facts and circumstances – makes the court judgments seem marked by a kind of "eeriness" that arises, according to Arendt, when the context of plurality is lacking. The words in the judgments appear to lack contact with human beings and their earthly life. They become merely functions in a system.[1135] By making the relations between the judge, the law, the asylum seeker, and the individual facts and circumstances invisible, the court judgments appear totalitarian rather than as emanating from the exercise of power marked by plurality and the inclusion of others. Meaningfulness must also include the possibility for the reader to relate to a real lived world that does not necessarily fit into a closed, logical chain. If judging is an act in the public sphere where We, the society, are the object in this plurality of phenomena, facts, and individuals where laws, customs, and habits operate, a meaningful assessment must consider and assess this plurality.

In searching for reality in the written court judgments, we are exposed to written language. Language is always incomplete and can

---

1132 See above, section 7.2.1 on coherence as a weak indicator of credibility.

1133 Arendt 1968, *The Origins of Totalitarianism*, p. 470 f.

1134 Ibid., p. 471. Compare Bladini 2016 on the significance for the judge to reflect on her or his perceptions of what is taken for granted, and Björling on implicit or unspoken premises – *enthymemes* (2017, pp. 66 and 319 f.).

1135 Bladini 2016.

never reproduce what is experienced as there are always experiences that go beyond language. We do not know what actions and thought processes have preceded the written statements in the rulings. We have to rely on the written language used by the judges. Legal activity is about dealing with language. The judge is at the same time constructed by the law that she or he interprets and the language of the law, but also, as soon as she or he applies it, the constructer of law.[1136] Requisites, concepts, and principles are interpreted and arguments are formulated. The meaning and scope of some of these requisites, concepts, and principles, relevant in asylum law, were explored in Chapters 5–6 (such as: What is a refugee? What is the meaning of "owing to well-founded fear"? What is the threshold for the burden and standard of proof?). As shown in the empirical study, the Swedish migration judges often do little more to account for their interpretation of the legal concepts than merely reproduce or quote the exact wordings of legal sources or make a sweeping formulation on why the asylum seeker cannot be afforded refugee status or that the situation in the country of origin is not such that would render a need for protection.[1137] They seem to apply the legal concepts as if their meaning is given – frozen – and that they are not to be interpreted by the judge, but only referred to.[1138] The application of the requisites is often left without content. Based on the written court judgments, the reader will not understand the meaning and content of, for instance, "the best interest of the child" as the requisite is either neglected or touched upon with a sweeping formulation that "it has been considered".[1139] The reader learns nothing about the courts' assessments of the risk upon return for this particular child in this particular situation. The unspoken premises seem to be that the reader should take for granted that the judges know both the content of the law and that they have

---

[1136] Lindroos-Hovinheimo 2012, p. 197 and p. 230.

[1137] See above, sections 4.1 and 4.2. On the courts' way of referring to "applicable provisions", see Appendix 1, section 2.2.1.

[1138] See above supra note 73 on legal concepts as something meaningful if we talk about them but problematic if we take them as something real, as highlighted by Gustavsson.

[1139] See above, section 6.1.2.

considered the relevant facts.[1140] Hence, it is not necessary to reveal the eventual considerations and judgments made by the judges.[1141]

Language is connected to power. The language in the court judgment leads to real consequences. In Arendt's interpretation of *power*, the sheer negative implications that we often read into the concept – as one person oppressing somebody else – have been replaced with a more positive content where power is seen as possibility or potential, and not something measurable or unchangeable such as force or strength. No individual can *have* power, as power can only occur with others.[1142] Violence can only extinguish power, not replace it.[1143] According to Arendt, realised power is when words and acts are inseparable where words are not empty and the acts not mute acts of violence.[1144] The words must not be misused in order to conceal the intent but instead used in order to reveal real conditions, and acts and words must not be used in order to rape or destroy but to create new relations and thus a new reality.[1145] This idealistic view can be contradicted by the fact that if violence can extinguish power, violence becomes a power to do so.[1146] However, distinguishing between power as a possibility for action and violence as strength and force is useful as a way of thinking about how we use language. According to Arendt, to be able to judge, we must always "unfreeze" the concepts. When an adjective is turned into a noun, it is disconnected from the specific and turned into a general concept (the happy man becomes happiness, the courageous woman becomes courage, the just act becomes justice, the credible narrative becomes credibility).[1147] For Arendt, these words are

---

1140 Compare Bladini 2016 and Björling 2017, supra note 1134.

1141 See Stendahl 2003 who experienced similar problems in her research on court cases regarding sickness cash benefit. She asks for a more transparent and reflective communication in order to counteract a process of distrust and alienation as a way to provide legitimacy for the administrative courts. This includes "a transparent elaboration of the legal assessments made […] written in a format and language that is accessible and understandable to the ordinary complainant" (p. 397).

1142 Arendt 1998, *The Human Condition*, p. 201, and Arendt 1970, *On Violence,* p. 41 f. and p. 44.

1143 Arendt 1998, *The Human Condition*, p. 202 and Arendt 1970, *On Violence,* p. 53.

1144 Arendt 1998, *The Human Condition*, p. 202.

1145 Ibid., p. 200.

1146 Arendt admits that nothing is more common than the combination of violence and power and nothing is more rare than to find violence and power in their pure forms (1970, *On Violence,* p. 46).

1147 Arendt 2003, *Responsibility and Judgment*, p. 171.

used to group together seen and manifest qualities and occurrences, but nevertheless they relate to something unseen: "when we try to define them, they get slippery; when we talk about their meaning, nothing stays put anymore, everything begins to move".[1148] This is when we need the faculty of judging. Concepts are always *frozen* thoughts "*which thinking must unfreeze,* … whenever it wants to find out its original meaning".[1149] Adhering to conventional standardised codes of expression and conduct have the function of protecting us against reality.[1150] Arendt suggests thinking in examples as a basis for judgments, such as, for instance, determining a particular structure as an example of a house. Unlike a scheme, an example is supposed to give a difference in quality.[1151] The one who judges cannot be equated with the lawmaker, as Arendt pointed out in the Eichmann case, and the general must be "unfrozen" in relation to the plurality in front of the judge. Examples will thus constitute "the guideposts of all moral thought".[1152]

"Credibility" is a far more slippery concept than a house. Judging the credibility of the life experience and fear of another person places the focus on what we cannot know and, hence, highlights the ethics and the political elements inherent is these kinds of judgments. The relationship between legal judgments and reality is put at the forefront in cases that include judging the narrative of an unknown person. In section 7.3 I problematise the use of credibility as a legal concept in general and criticise the fact that the Swedish migration judges shift the emphasis in the asylum adjudication from a question of *refoulement* to a question of believing or not believing the asylum seeker's narrative. The Swedish migration judges base their judgments in asylum cases primarily on a credibility assessment of the asylum seeker's narrative, based on internal criteria that lack external context. As was concluded, the courts have turned credibility into the main requisite to be met,

---

1148 Ibid., p. 171.
1149 Ibid., p. 172 f.
1150 Arendt 1978, *The Life of the Mind/Thinking*, p. 4.
1151 Arendt 2003, *Responsibility and Judgment*, p. 143.
1152 Ibid., p. 144. The old Socratic moral rule – "It is better to suffer wrong than to do wrong" – is an example of moral conduct that has become an accepted rule. Arendt distinguishes between morality and ethics, and sees morality as connected to the Socratic individual stand, while ethics is more collective and connected to what is good for the world (ibid., p. 151 f).

even though credibility in itself is not a legal requisite that has to be met in order to get protection. However, judging in asylum cases inevitably includes starting from another person's narrative of lived experience and fear.

Whether a person is perceived as *credible* in a social context is a personal relationship built on experiences, images, intuitions in a context of social/cultural norms, on who we can trust in a certain situation. In the legal context the assessment of whether a person is credible or not has been "conceptualised" and compared to the general "noun" that will form the "concept" of credibility. As we learnt in section 7.2 several psychological, physiological, sociological, and cultural factors are at play between the person presenting her or his narrative and the person assessing this narrative. It was concluded that the research in this field shows the weakness in using "credibility indicators" as a basis for assessing the asylum seeker's narrative and, hence, for assessing the risk upon return. In section 7.2.4 I noted a problem with the way in which the Swedish migration courts tend to turn the asylum seeker's narrative into an object in a vacuum by disregarding the context of other facts and circumstances as well as being unreflective about the subjective factors at play when using "credibility indicators".

The experiences of the asylum seeker will never be present to the judge's senses. According to Arendt, remembering and imagination are mental activities that are necessary to be able to make judgments.[1153] The faculty of thinking is what makes it possible to remember the past and anticipate the future.[1154] When the mind actively and deliberately remembers, recollects, and selects, the mind learns how to deal with things that are absent and "prepares itself to 'go further', toward the understanding of things that are always absent, that cannot be remembered because they were never present to sense experience".[1155] In order to anticipate something, I have to use images, to be able to imagine something that is not present and has not yet been sensed.[1156] What the judge can sense with her or his own body is the asylum seeker facing them, presenting her or his account of what has taken place and

[1153] Arendt 1978, *The Life of the Mind/Thinking,* p. 76 f.
[1154] Ibid.
[1155] Ibid., p. 77.
[1156] Ibid., p. 85.

the fear of what will happen in the future if forced to return. What the judge can remember based on her or his own senses is what she or he heard, saw, and read during the procedure and, therefore, may recall. The judge cannot use her or his bodily senses but only imagine what happened and what may happen to the asylum seeker upon returning to her or his country of origin. The judge must both remember and imagine in order to be able to judge. This highlights the relational element in judging another person's lived experience. However, the fact that this relational act takes place in the public sphere makes it something more or something other than a personal relation.[1157] To establish a firm meaning of the word "credible", by conceptualising it, by dressing it in a schematic method, based on, in turn, "frozen" credibility indicators, runs the risk of disregarding the responsibility to judge another person's life narrative in a legal context as a responsibility to judge a relational act in the public sphere. Furthermore, and most important, to freeze the concept of "credibility" enhances the risk of detaching the asylum adjudication from an assessment of the real risk upon return for the asylum seeker. This space, inherent in the relational act, is where the political element of judging becomes inevitable if judging is to be more than rationalising and instrumentalising.[1158] The slipperiness cannot be met by a schematic application of the concept of "credibility". It does not make the concept clearer and the judgment more objective or foreseeable and has little to do with the "faculty of judgment" in Arendt's meaning. Drawing on an Arendtian understanding of the use of concepts, the faculty of judgment in the context of law inevitably has political implications as it is an activity that happens in a public sphere emanating from political actions and the result of these actions, the laws. Therefore, concepts cannot be applied in a completely frozen state but must always include an act of "defrosting" to be meaningful in the sense that they are comprehensible, possible to think about and interpret in relation to a lived reality.

[1157] See Hol 2005 who compares the law and the administrating of justice with the public sphere as defined by Arendt, that is, as a place where individuals can contribute by raising their voices through the laws governing the public space. He holds that the risk today is that the function of law as an intermediary is replaced by adjudications marked, on the one hand, by rationalising and instrumentalising, and, on the other, by personalising the role of the parties.

[1158] Ibid.

Imagination can be one link in taking responsibility for the real outcome. This is, of course, not to be understood as giving way to free fantasies or a mere subjective perception of a future reality. The ethical bridge between the law and facts on the one hand and the elements of unknowingness and undecidability on the other requires a plurality of considerations, interpretations, and choices. Imagining the real in this sense is meant to shift the mental focus from legal internal logic to the reality that the law is meant to correspond to and taking responsibility for the choices made. In that way, imagination can be one element in building a bridge between law, the facts, the unknown, the undecidable, and the reality. If the text in the rulings presents law as something narrow and mechanical, detached from reality, the question emerges as to what it does to our understanding, our listening, and our thinking. If the purpose of the asylum adjudication is understood as assessing credibility based on certain credibility indicators, our thinking and listening will be focused on these indicators. Alternatively, if the purpose is understood, as it should be, as judging on the risk of returning the asylum seeker to her or his country of origin, then the consequences, thinking, and listening should be more contextual and reflective to be able to imagine a future reality.

8.4 The responsibility to judge and the responsibility in judging – Concluding reflections

In this chapter, the Swedish court judgments in asylum cases have been analysed through the lens of Arendt's theory on the faculty of judging. Judging in asylum cases means judging on what might be the asylum seeker's future possibilities of life and freedom. Drawing on Arendt's theory, this situation where much is at stake demands the faculty of judging and a responsibility to judge. The faculty of judging is something other than learned behaviour and everyday repeated decisions, and constitutes a safeguard against making casual, unreflective decisions when much is at stake. The faculty of judging depends on the faculty of thinking – the faculty where uncertainties, doubts, ambiguities, and contradictions can be brought to light and discussed within the conscious, two-in-one, self – and the faculty of the will – the faculty that makes it possible to act. By separating the faculty of judging from the inner thinking process and the unlimited will,

Arendt places a responsibility on the individual in high-stakes situations to judge on what is right or wrong in the public sphere. The faculty of judging is an individual act in the sense that it is the individual that bears the responsibility to take a stand. However, the faculty of judging can only be understood as an action in plural terms, as a relational act in the sense that it has to include others and the plurality of the real world.

The written court judgments in the Swedish migration courts leave a lot to be desired in this regard. The closed logical chain that characterises the judges' reasoning has little connection to judgment in the Arendtian sense. The text in the court judgments forms a seemingly logical chain but excludes to a large extent considerations, evaluations, and assessments of both facts and law. Hence, it lacks the plural context necessary for the faculty of judging. The courts' most common way of showing that law is present in the judgments is to present it by a verbatim reproduction of the text of the law. The significant element in the faculty of judging, as put forward by Arendt –namely to "unfreeze" concepts – is absent. Both law and facts are treated like tacit knowledge, as if there is only one way of interpreting law, one way of choosing and analysing facts, one truth about law and facts that leads to the only possible and necessary outcome. As readers of the written court judgments, we are left "to believe or not to believe" that the judges know both the law and the facts. The thought process where knowledge gaps, uncertainties, and ambiguities can be dealt with is made invisible. If these doubts are not dealt with, the important safeguard in relation to *non-refoulement* established in asylum law, which can give the asylum seeker evidentiary alleviation – the principle of *benefit of the doubt* – is difficult to apply. Both the faculty of judging and asylum law demand that these doubts become part of the judgment. Uncertainties, doubts, and subjectivity cannot be eliminated by the use of mechanised methods that conceal doubts. They must also be dealt with within the faculty of judging.

The lacunas as to law and facts risk eroding the purpose of the courts: to be experts in interpreting the law and providers of justice.[1159] If the will to interpret the legal requisites in relation to facts, real life, to a life narrative is replaced by judging based on tacit meanings of general concepts and requisites, the law will lose its meaning for people

[1159] Stendahl 2003, p. 397 f.

living in the real world and the law will be perceived as existing only for its own sake. The judgments become devoid of meaning. The meaning gets lost in the lack of openness to choices made as one of several possible options, what Arendt would define as the political and moral element in the faculty of judging.

Through the closed logical chains, the rulings exclude the plurality that is crucial for democracy.[1160] In legal judging, "the general" is an important element to create justice in the sense that every person should be treated as an equal. However, in the pursuit of a unified application of law there lies a risk of a totalitarian approach to judging where a plurality of possible interpretations, choices, and individual consequences are concealed. Instead, the reasoning in the judgments resembles a totalitarian language where facts about the past and present and the law are established as the only truth and, therefore, accepted as premises that should be taken for granted and, hence, they need not be revealed. As the individual judgment is not visible, we know little about the actual foreseeability.[1161]

What is thought can never be refuted if not formulated in speech or writing. Although language is always incomplete, it can comprise more than mechanically reproduced formulas. It can reflect the thoughts and assessments of the author. This requires courage, as it exposes the one who expresses her- or himself to the public world and, hence, demands responsibility for what is expressed. Also, what is excluded or made invisible in public is a choice. If too many steps in the thought process are made invisible, a violent language is created that is incomprehensible and is thereby illegitimate.[1162] In its mechanical expression, rather than judgments, the court rulings become cogs in an institutional culture of copy-pasting language.

Through the lack of plurality, independence, and individuality, the written judgments lose their purpose as acts of judging, in Arendt's sense of the term, although they do not lose their potentially violent

---

[1160] Stendahl 2003, p. 398.

[1161] Compare Arendt 2003, *Responsibility and Judgment*, p. 250 where she highlights the absurd fact that Auschwitz was established for administrative massacre based on strict rules and regulations and was planned to function as a machine. However, what came out was the absolute opposite of predictability – a complete arbitrariness.

[1162] Arendt 1970, *On Violence,* p. 51 f. on the notion that power is in need of justification as it is inherent in the existence of political communities, while violence can be justified but never legitimate.

consequences. The shift of emphasis of the asylum adjudication from an assessment of the risk of *refoulement* to a decontextualised assessment of the credibility of the asylum seeker's narrative makes these violent consequences invisible. Hiding behind the closed logical chains, the judges refrain from showing themselves to the public.[1163] By choosing credibility as the central issue to be assessed, the judges detach themselves from the consequences of their judgments: the expulsion.[1164] What becomes the legal content in these judgments is the mechanised personal relation between the judge and the judged, the judge's perception of the asylum seeker's narrative as credible or not, or, in other words, whether "to believe or not to believe" another person's life narrative. The judges' perceptions of truth are transformed into legal requisites, but they are devoid of law, facts, and meaning. The written judgment becomes merely a "product" that can be used for deportation.

I do not believe that the Swedish migration judges do not think, in Arendt's meaning of the term, or that they believe that there is only one solution to an individual case. What the judges choose to put forward in their written judgments is not necessarily what corresponds to the thinking process – the considerations and doubts in the judge's head preceding the judgment – or to the discussions between the judges behind closed doors in the deliberation after the hearing. However, it is what the judges chose to show in their written judgments – the position on right and wrong that they chose to take in the public sphere – that, following Arendt, constitutes the faculty of judging.

[1163] Compare Bladini 2013, p. 295, who criticises the description of the criminal procedure by an "invisible voice" in Swedish criminal judgments, which makes the procedure appear as machine-like and mechanical.
[1164] Compare Svensson, supra note 51 on "the logic of detachment" in jurisprudence.

9 To believe or not to believe – is that the question?

The act of legal decision-making always operates with an element of risk: the risk of arriving at an outcome that is incorrect in substance; a risk that the outcome leads to unwanted legal as well as societal consequences. The fact that handling people fleeing from war, persecution, and other ill-treatment has moved from a strict political responsibility to a responsibility also for the courts was touched upon in the Introduction, section 1.1. Hence, the balance between the risk that society is prepared to take to uphold regulated and controlled immigration and the human rights on the part of the individual asylum seeker is mirrored in the construction and application of law. In this dissertation I have studied how judges in Swedish migration courts handle the responsibility to judge in an area where the potential consequences of an incorrect rejection for the asylum seeker may be irreparable, a threat recognised in asylum law through the principle of *non-refoulement*.

The purpose of this dissertation has been *to make visible and critically examine how Swedish migration judges, in their written judgments, handle the risk and responsibility for judging who does or does not need protection and, thus, who can or cannot be sent back to her or his country of origin*. It was argued in section 1.3 that reality, in the prospective assessment of the risk upon return, on the one hand, must be a fiction, but, on the other, in retrospect, becomes an utterly physical reality. The expectation of judges to arrive at an independent and impartial assessment, based on law and facts, which is correct in substance and communicated in an open and comprehensible manner, was presented as an important basis for the legitimacy of courts in a democratic society.

The first step of the dissertation (Chapters 2–4) undertook a quantitative study to answer research question 1: *How, and to what extent, if at all, do the Swedish migration judges substantiate their arguments regarding the assessment of the risk of sending the asylum seeker back to her or his country of origin?* and 2: *How, and to what extent, if at all, do the Swedish migration judges substantiate their arguments regarding the assessment of the credibility of the narrative presented by the asylum seeker?* The study was carried out to map what the judges choose to put forward in their written court judgments

in asylum cases. Cases where the credibility of the asylum seeker's narrative was perceived as a conflicting issue were selected to study the judges' argumentation on credibility in relation to the assessment of the risk upon return for the asylum seeker. The pattern that became visible showed that the emphasis in the argumentation is on the criteria used as indicators for assessing the credibility of the asylum seeker's narrative. Arguments regarding law, facts, circumstances, and bases for these arguments proved to be less frequent in the court judgments studied.

In the second step of the dissertation (Chapters 5–7), the first two research questions were further addressed by analysing the results of the empirical study in the light of the legal framework for asylum. The analyses showed a pattern where the assessment of the risk upon return consists of a shift of emphasis, on four different levels, from an assessment of the risk upon return to one of the quality of the asylum seeker's narrative. At the first level, the emphasis in the asylum adjudication is shifted from an assessment of the State's obligation according to the principle of *non-refoulement* to an assessment of the benefit for the asylum seeker to obtain protection status and a residence permit (section 5.1). At the second level, the emphasis shifts from an assessment of the need for protection to an assessment of the limitation of the adjudication and to principles regarding burden and standard of proof (section 5.2). At this level the burden for the asylum seeker is emphasised while the alleviation evidentiary rule for the asylum seeker – "benefit of the doubt" – and the duty for the State to investigate the case are downplayed. At the third level, the emphasis shifts from an assessment of facts and circumstances to an assessment of the credibility of the asylum seeker's narrative (Chapter 6). At the fourth and final level, there is a shift of emphasis from a contextual and holistic assessment of the asylum seeker's narrative to an assessment of the internal quality of the narrative based on indicators for credibility (Chapter 7). Through these shifts in emphasis the Swedish migration courts give credibility the status of a legal requisite detached from the principle of *non-refoulement*. Furthermore, by shifting the focus from being based on a contextual and holistic assessment of the asylum seeker's narrative to an assessment of the narrative's internal quality, the assessment of the risk upon return is narrowed down to whether

the asylum seeker has been able to present a coherent, detailed, plausible narrative that appears as self-experienced.

The third and final step of the dissertation answered the third research question: *How can the Swedish migration judges' handling of the assessments of a risk under great uncertainty, where the life and freedom of the asylum seeker potentially are at stake, be understood in the light of the theories developed by Hannah Arendt on "the faculty of judging"?* The choices made by the Swedish judges as to what to emphasise in their written judgments were analysed through the lens of the theory developed by Hannah Arendt on "the faculty of judging" and the responsibility to judge in high-stakes situations. The choice of theory was made to provide a theoretical understanding of the act of judging and of the written court judgments as presented by the Swedish migration judges. Arendt's theory on "the faculty of judging" is based and dependent on the faculty of thinking and the will. While the faculty of thinking is the silent discussion between me and myself, where uncertainties and doubts can be brought to light, the will is an abundance of strength that makes it possible to act. What separates the faculty of judging from the will is that a judgment is an action in the public sphere where the one who judges shows her- or himself to the world by taking a stand on what is right or wrong. This act includes others and is limited by the plurality of the world which needs the judgment to be made in context. By separating the will from the faculty of judging Arendt distances herself from the idea of the necessity of a judgment in a specific situation as being the only possible one. The faculty of judging includes a limited but free will. Hence, a judgment always bears a political and moral dimension. This can be transposed to legal judging as a judgment made in the public sphere limited by the law but with a discretionary space for interpretations, considerations, analyses, evaluations, and choices. It is what the judges chose to show in their written judgments – the position on right and wrong they chose to take in the public sphere – that, in Arendt's view, constitutes the faculty of judging and, hence, that includes moral and political elements.

By choosing to narrow down the legal question to a decontextualised assessment of the credibility of the asylum seeker's narrative, the core issue – the responsibility to judge on the risk upon return for the asylum seeker – falls into the background. What appears is a reluctance to judge on what is at stake in asylum cases – the

potential risk of *refoulement*. Since references to law and facts do not have the same prominent place in the judges' reasoning, the judgments are marked by a lack of plurality and context. As readers of the court judgments, we are left to believe or not believe that the judges have knowledge of both. Uncertainties, ambiguities, and doubts regarding external facts, the asylum seeker's individual circumstances, as well as statements in the asylum seeker's story are made invisible. The judgments appear as the only possible ones. This, in turn, leaves little room for the application of the principle of the "benefit of the doubt" – the evidentiary alleviation rule laid down in asylum law which should serve to ensure the maintenance of *non-refoulement*. The way the Swedish migration judges have chosen to handle the difficult task that is part of their profession risks eroding the purpose of the courts: to be experts in interpreting the law and providers of justice. In its narrow, decontextualised expression, the court rulings appear more like cogs in a bureaucratic institutional culture than individual, independent judgments.

Epilogue

> How can they send me back to Afghanistan when two of the judges believe that I will get killed there? (A question to me, in my role as legal adviser for asylum seekers, coming from a young boy from Afghanistan concerning his appeal that was rejected and where two lay judges held dissenting opinions.)

> I put myself at risk; how can I live with myself if I make the wrong decision, but I never know because I never get a receipt that I did the right thing? (A clerk in the migration court on the Swedish radio.)

In this dissertation I have studied the difficult task of judging in asylum cases. There is a remaining and disturbing question that has haunted me throughout this work and that has become even stronger in light of the enhanced political tensions related to migration. Even if the asylum adjudication has been carried out in accordance with due process – in the sense that the assessments have been made based on choices and interpretation of the substantial and procedural rules, the adjudicators have turned every possible stone and investigated every possible fact in the individual case, reflected on and accounted for knowledge lacunas, balances, and uncertainties, observed a precautionary principle and then formulated a judgment where choices and interpretations and balances are made visible in the judgment – this would still be a violent act of force that includes a great risk to the life and freedom of the asylum seeker. Is it ever possible to arrive at a judgment that is good or secure enough to provide legitimacy and justice and that would be morally and ethically sustainable? Given the uncertainties and risks involved, can we morally and ethically elaborate an "acceptable" risk in such cases? Is there a dignified way of assessing an asylum seeker's life narrative and the risk of returning her or him to the country from which she or he is seeking protection? Arendt believes that there are actions that we cannot do if we are to be able to live with ourselves. It is not about wanting or not wanting, but rather not being able to that emanates from the faculties of thinking and judging and the responsibility for every human being to judge in high-stakes situations. Which are these acts? A judge can hardly ever know whether an asylum seeker's life narrative is true, or what would happen upon return. Does this mean that these judgments should not be made? There are situations where the society has chosen that we must make decisions despite this lack of knowledge and certainty, where the risks are high

whatever decisions are taken as, for instance, in cases that concern the compulsory care of children. The question arises whether the opposite risk in asylum cases, i.e. the risk for the society of granting protection to everybody who says she or he needs it, is such as to compel our society to make these "impossible" assessments.

This is both a moral and political question to which I do not have an answer. All I will say is that I believe they are necessary reflections on judging in asylum cases and we should be aware of them on a daily basis. There is no legal ground in asylum law for considering the value of regulated immigration when assessing an asylum seeker's need for protection. However, the tension laid down in asylum law – between human rights and regulated immigration – is inevitably present. It is not far-fetched to imagine that political tendencies are likely to leak into the public authorities' decisions as well as into the court judgments. A potential safety valve could be provided by reflecting on the responsibility to judge in high-stakes situations, and to also be prepared to act when the tipping point is reached: when laws, case law, and practice have drifted towards breaching the content of a fundamental human right, in this case, the obligation of *non-refoulement*. To recall the example noted by Graver: an everyday practice of deciding on sending people to mental hospital also includes the consequence that these persons will be killed.[1165] Through handling "impossible" assessments as bureaucratic mass-production of decisions does not make the assessments more possible, but they exist. But what it does is obscure the responsibility to judge.

> …all who persist in it all/even though it is impossible. (From the poetry collection, *It*, by Inger Christensen).[1166]

[1165] See Graver 2015 on the resistance on the part of the German judge Lothat Kreyssig against applying the Nazi euthanasia programme targeting the mentally ill (p. 103 f.).
[1166] The quote is taken from the English translation by Susanna Nied (2006, p. 199).

Bibliography

Literature

Aeschylus (2005) [EBook #8714]. *The Suppliant Maidens* in The Suppliant Maidens and Other Plays.Translator: E.D.A. Morshead.

Allain, Jean (2001). The jus cogens Nature of non-refoulement. *International Journal of Refugee Law,* Volume 13, Issue 4, October 2001, Pages 533–558.

Andersson, Simon, Christian Diesen, Annika, Lagerqvist Veloz Roca, Madelaine Seidlitz and Alexandra Wilton Wharen, (2018). *Prövning av Migrationsärenden. Bevis 8*. Stockholm: Norstedts Juridik.

Andersson, Ulrika (2004) Hans (ord) eller hennes?: en könsteoretisk analys av straffrättsligt skydd mot sexuella övergrepp. Första upplagan. Lund: Bokbox förlag.

Arendt, Hannah [1958] (1998). *The Human Condition.* Chicago: The University of Chicago. At: https://monoskop.org/images/e/e2/Arendt_Hannah_The_Human_Condition_2nd_1998.pdf.

Arendt, Hannah [1963, 1964] (2022). *Eichmann in Jerusalem: A Report on the Banality of Evil*. Great Britain: Penguin Random House.

Arendt, Hannah (1970). *On Violence*. U.S: Hartcourt Publisher.

Arendt, Hannah [1971] (1977, 1978). *The Life of the Mind.* U.S: Hartcourt Publisher Ltd.

Arendt, Hannah [1976] (2004). *The Origin of Totalitarianism*. U.S.: Harcourt, Inc

Arendt, Hannah (2003). *Responsibility and Judgment.* New York: Schocken Books.

Arendt, Hannah (2005). *The Promise of Politics*. New York: Schocken Books.

Ask, Karl and Pär Anders Granhag (2005). Motivational Sources of Confirmation Bias in Criminal Investigation: The need for Cognitive Closure. *Journal of Investigative Psychology and Offender Profiling,* 2: 43 –63.

Baillet, Cecilia M (2015) National Case Law as a Generator of International Refugee Law: Rectifying an Imbalance within

UNHCR Guidelines on International Protection. *29 Emory* International *Law Review Recent Development.* 2059 at: https://scholarlycommons.law.emory.edu/eilr-recent-developments/26.

Baillot, Helen, Sharon Cowan and Vanessa E. Munro, (2013). Second-hand Emotion? Exploring

the Contagion and Impact of Trauma and Distress in the Asylum Law Context. *Journal of Law and Society*, Volume 40 No. 4, pp. 509–40.

Baldinger, Dana (2013). Rigorous Scrutiny versus Marginal Review. Standards on judicial scrutiny and evidence in international and European asylum law. Amsterdam: Wolf Legal Publisher.

Barnläkarföreningen (2014). *Medicinsk åldersbedömning av barn i övre tonåren – instruktioner för Barnläkarundersökning:* http://www.barnlakarforeningen.se/wp-content/uploads/2014/05/Instruktion_Barnmedicinsk-aldersbedomning-BLF_140116.pdf

Bergholtz, Gunnar (2007). Some thoughts on judges' decision-making in *Scandinavian studies in law*. Vol. 51, pp. 77 –88. Stockholm: Almqvist & Wiksell.

Bergius, My (2017). Trovärdhetens dimensioner. *Tidsskrift for Rettsvitenskap,* no. 1, pp. 3–27.

Bergström, Göran & Boréus, Kristina (2011). *Textens mening och makt.* Andra Upplagan. Malmö: Studentlitteratur AB

Bexelius, Maria (2008). *Asylrätt, kön och politik*. Andra upplagan. Visby: Books-on-demand.

Bilsky, Leora (2012). Hannah Arendt's judgment on bureaucracy in Goldoni, Marco and McCorkindale, Christopher, (ed.) (2012). *Hannah Arendt and the Law.* Oxford: Hart

Björling, Erik (2017). *Rättstillämpningens tystnad.* Dissertation Göteborg: Göteborgs universitet, juridiska institutionens skriftserie.

Bladini, Moa (2013). I objektivitetens sken – en kritisk granskning av objektivitesideal, objektivitetsanspråk och legitimeringsstrategier i diskurser om dömande i brottmål. Malmö: Makadam.

Bladini, Moa (2016). Objektivitet i dömandet — på gott och på ont? In Säfwe, David and David Claréus (ed.), *Svensk Juristtidning 100 år*, pp. 303–312. Stockholm: Jure.

Bruun, Niklas och Wihelmsson, Thomas (1983). Rätten, moralen och det juridiska paradigmet. *Svensk Juristtidnings,* vol. 1, pp. 701–713.

Brännström, Leila (2011). Förrättsligande genom konstitutionalisering och parlamentarismens slut. In *Rapporter och texter från juridiska institutionen vid Umeå universitet.* At: https://www.diva-portal.org/smash/get/diva2:467328/FULLTEXT01.pdf .

Brännström, Leila (2017). Juridik som politik och behovet av kritik. In Pelling, Lisa and Petrs Hall, *Rätten till rättvisa. Om utsatta människors rättigheter och tillgång till rättvisa.* Stockholm: Premiss förlag.

Brännström, Leila (2020). När juridiken är politikens fortsättning med andra medel. *Glänta* Vol. 3–4), pp. 4–11.

Bylander, Erik (2006) Muntlighetsprincipen: En rättsvetenskaplig studie av processuella handläggningsformer i svensk rätt. Uppsala: Iustus Förlag.

Bärtås, Anna, Anna-Karin Edstedt-Bonamy, Henry Ascher och Anders Hjern (2017). ”Till migrationsminister Heléne Fritzon och regeringen angående medicinska åldersbedömningar av asylsökande ungdomar”. At *https://www.diva-portal.org/smash/get/diva2:467328/FULLTEXT01.pdf*

Cameron, Hilary Evans (2008). Risk Theory and 'Subjective Fear': The Role of Risk Perception, Assessment, and Management in Refugee Status Determination. *International Journal of Refugee Law,* Vol. 20(4), pp. 567–568.

Cameron, Hilary Evans (2010). Refugee Status Determinations and the Limits of Memory. *International Journal of Refugee Law,* Vol. 22 (4) pp. 469–511.

Cegrell Karlander, Isa (2021). *Officialprincipen i migrationsprocessen. Domstolens utredningsansvar.* Uppsala: Department of law, Uppsala university.

Chetail, Vincent (2012). Are Refugee Rights Human rights? An Unorthodox Questioning of the Relations between Refugee Law and Human rights Law in *Human rights and Immigration*, pp. 19-72,

R. Rubio-Marin, ed., Oxford: Oxford University Press, 2014 at https://academic.oup.com/book/11474/chapter/160184799.

Crépeau, François and Delphine Nakche (2008). Critical Spaces in the Canadian Refugee Determination System: 1989-2002. *International Journal of Refugee Law* 20 (1) pp. 50–122.

Dembour, Marie-Bénédicte (2006). Cambridge: Cambridge University Press.

Diesen, Christian (ed.) (2015*). Bevisprövning i brottmål.* Andra upplagan. Stockholm; Nordstedts juridik

Diesen, Christian Diesen och Annika Lagerqvist Veloz Roca (2003). *Bevis 7. Bevisprövning i förvaltningsmål.* Fjärde upplagan. Stockholm: Nordstedts juridik.

Diesen, Christian, Annika Lagerqvist Veloz Roca, Karolina Lindholm Billing, Madelaine Seidlitz, och Alexandra Wharen (2012). *Prövning av Migrationsärenden. Bevis 8*. Tredje upplagan. Vällingby: Nordstedts Juridik.

Eckhoff, Torstein and Nils Kristian Sundby (1976). *Rettssystemer: systemteoretisk innføring i rettsfilosofien*. Oslo: Tano-Norli.

von Essen, Ulrik (2012). Förvaltningsdomstols utredningsansvar. *Förvaltningsrättslig tidskrift,* no. 1, pp. 29–62.

von Essen, Ulrik (2017). Förvaltningsprocesslagen m.m. En kommentar. Sjunde upplagan. Stockholm: Wolters Kluwer.

Ekelöf, Per Olof, Henrik Edelstam, Lars Heuman (2009). *Rättegång IV*. Sjunde upplagan. Göteborg: Nordstedts Juridik.

Ekelöf, Per Olof, Henrik Edelstam, Lars Heuman and Mikael Pauli (2016). *Rättegång I*. Niondeupplagan. Stockholm: Wolters Kluwer.

Esiasson, Peter, Mikael Gilljam, Henrik Oscarsson and Lena Wängnerud (2012). *Metodpraktikan. Konsten att studera samhälle, individ och marknad.* Fjärde upplagan. Stockholm: Nordsteds Juridik

Farmer, Alice. (2008). "Non-Refoulement and *Jus Cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection". *Georgetown Immigration Law Journal,* 2008, Vol. 23 (1), p.1.

Feijen, Liv (2014), Filling the Gaps? Subsidiary Protection and Non-EU Harmonized Protection Status(es) in the Nordic Countries. *International Journal of Refugee Law*, 2014, Vol. 26(2), pp. 173–197

Gadamer, Hans-Georg (1997). *Sanning och metod i urval av Arne Meldal.* Göteborg: Daidalos

Gammeltoft-Hansen (2009) *Acess to Asylum. International Refugee Law and the Offshoring and Outsourcing of Migration Control*. PhD Thesis, Aarhus University at: http://www.asyl.at/projekte/gammeltoft-hansen_access_to_asylum.pdf 2014-04-30

Gil-Bazo, María-Teresa (2006). Refugee status, subsidiary protection, and the right to be granted asylum under EC law. UNHCR. *New Issues in Refugee Research.* Research Paper No. 136. Refugee Studies Centre. Oxford University.

Gil-Bazo, María-Teresa (2008) The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law. *Refugee Survey Quarterly,* Vol. 27(3), pp. 33–52.

Goodwin-Gill, Guy (1983) *The Refugee in International Law*. Oxford: Clarendon Press.

Goodwin-Gill, Guy (2000), Damian v. Secretary of State for the Home Department Comment: Refugee Statues and Good Faith [case]. *International Journal of Refugee Law,* Vol. 12(4), pp. 663-671.

Goodwin-Gill, Guy (2013) The Dynamic of International Refugee Law, *International Journal Of Refugee Law*, vol. 25(4), pp. 651–666.

Goodwin-Gill, Guy and Jane McAdam (2011). *The Refugee in International Law.* Oxford: Oxford University Press.

Graahl-Madsen, Atle (1966) *The Status of Refugees in international Law.* Leiden: Sijthoff.

Granhag, Pär Anders (2001) *Vittnespsykologi.* Lund: Studentlitteratur.

Granhag, Pär Anders and Leif A. Strömwall(eds.) (2004). *The Detection of Deception in Forensic Contexts.* Cambridge: Cambridge University press.

Granhag, Pär Anders, Leif A. Ströömwall & Maria Hartwig (2005): Granting asylum or not? Migration Agency personnel's beliefs about deception. *Journal of Ethnic and Migration Studies,* Vol.31(1), pp. 29–50.

Graver, Han Petter (2015). Judges against Justice. On Judges When the Rule of Law is Under Attack. Berlin Heidelberg: Springer-Verlag.

Gräns, Minna (2006) ”Om interaktiv rättsdogmatik” in Gräns, Minna and Staffan Westerlund (eds.) *Interaktiv rättsvetenskap. En antologi.* Uppsala: Uppsala Universitet.

Gräns, Minna (2005). Some Aspects of Legal Decsision Making in the Light of Cognitive Consistency Theories in *Scandinavian Studies in Law Volume 48, Perspectives on Jurisprudence - Essays in Honor of Jes Bjarup,* pp. 99-22 at: https://scandinavianlaw.se/pdf/48-8.pdf.

Guild, Elisabeth and Sergio Carrera (2010). The European Union's Area of Freedom, Security, and Justice Ten Years on. In The European Union's Area of Freedom, Security and Justice Ten Years on: Success and Future Challanges Under the Stockholm Programme. Guild, Elisabeth, Sergio Carrera and Alejandro Eggenschwier (eds.) Brussels: Center for Euopean Policy Studies Brussels.

Gustavsson, Håkan (2002). Rättens polyvalens. En rättsvetenskaplig studie av sociala rättigheter och rättssäkerhet. Lund: Sociologiska institutionen, Lunds universitet.

Gustavsson, Håkan (2011). *Dissens- Om det rättsliga vetandet.* Göteborg: Juridiska institutionens skriftserie, Handelshögskolan vid Göteborgs universitet, skrift 9.

Hathaway, James C. (1991). *The law of Refugee Status.* Toronto: Butterworths.

Hathaway, James C. (2010). Leveraging Asylum. *Texas international law journal,* Vol.45 (3), p.503.

Hathaway, James C. [2005] (2011). *The Rights of Refugees under International law.* Cambridge: Cambridge University Press.

den Heijer, Maarten (2008). Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights. *European Journal of Migration and Law,* Vol.10(3), pp. 277–314.

Heilbronner, Kay (ed.) (2010). EU Immigration and Asylum Law: Commentary on EU regulations and directives. Oxford: Hart.

Heuman, Lars (2006). ”Hjälpvetenskapernas betydelse för rättstillämpningen och rättsvetenskapen”. *Juridisk Tidskrift*, no. 4, 2005/06, p. 768.

Herlihy, Jane, Peter Scragg and Stuart W. Turner (2002). 'Discrepancies in Autobiographical Memories – Implications for the Assessment of Asylum Seekers: Repeated Interview Studies'. *British Medical Journal Publishing Group,* Vol. 324 (7333), pp. 324–327.

Herlihy, Jane and Stuart W. Turner (2006). Should discrepant accounts given by asylum seekers be taken as proof of deceit? *Torture,* Vol 16(2), pp. 81–92.

Herlihy, Jane and Stuart W. Turner (2009). The Psychology of Seeking Protection. *International Journal of Refugee Law,* Vol. 21(2), pp. p.171–192.

Herlihy, Jane, K Gleeson and Stuart W. Turner (2010). 'What Assumptions about Human Behaviour'. *International Journal of Refugee Law*, Vol. 22,(3), pp. 351–66.

Herlihy, Jane, Laura Jobson and Stuart Turner (2012). Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum. *Applied Cognitive Psychology*, Vol. 26(5), pp. 661–676 (2012).

Hol, Antoine, M. (2005). Adjudication and the public realm. An analysis based on the work of

Hannah Arendt. *Utrecht Law Review*, Vol. 1(2), pp.40–55.

Jacobson, Monica and Lars Olsson (2009) "Hur brister i förståelsen av barns rättigheter hindrar en rättssäker prövning av barns asylskäl" in Fryklund, Björn och Anna Lundberg (eds.) *Asylsökande i Sverige – ett rättssäkert och värdigt mottagande för barn och vuxna?* Current themes in IMER, Research Number 9, Malmö University.

Johannesson, Livia (2017). *In Courts We Trust.* Administrative Justice in Swedish migration Courts. Stockholm: Department of Political Science, Stockholm University at: http://su.diva-portal.org/smash/get/diva2:1072557/FULLTEXT01.pdf.

Kagan, Michael (2003). "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination". *Georgetown immigration law journal*, Vol.17 (3), pp. 367-416.

Kagan, Michael (2010) Refugee credibility assessment and the "religious imposter" problem. A case study of Eritrean Pentecostal

claims in Egypt . *Vanderbilt journal of transnational law*, Vol.43 (5), pp.1179–2010.

Kaldal, Anna (2010). Paralella processer: en rättsvetenskaplig studie av riskbedömningar i vårdnads- och LVU-mål. Diss. Stockholm: Stockholms universitet.

Kaldal, Anna (2012) Standardiserade metoder för att bedöma risk i ärenden om vårdnad, boende och umgänge. *Juridisk Tidskrift,* no. 3, 2012/13, p. 540.

Kjærum, Morten(1987) Trovaerdighed, bevisproblemer og afhoringstema. *Nordic Journal of International law,* Vol. 56(2), pp. 129–333.

Kvist Geverts, Karin (2008). *Ett främmande element i nationen. Svensk flyktingpolitik och de judiska flyktingarna 1938–1944*. Diss. Uppsala: Uppsala universitet, Historiska institutionen & Programmet för studier kring Förintelsen och folkmord.

Koskelo, Pauline (2014). Domare, lagstiftare och professorer. *Svensk Juristtidning,* vol. 8, pp. 619–641.

Labman, Shauna, E (2009). *Looking Back, Moving Forward: The History and Future of Refugee Protection.* From the Selected works of Shauna E. Labman. Downloaded at: https://works.bepress.com/shauna_labman/

Lambert, Hélène (2006). 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law'. *International Comparative Law Quarterly*, Vol. 55(1), pp. 161–192.

Lambert, Hélène (2013). The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence. *International Journal of Refugee Law*, Vol. 25(2), pp. 207–234.

Latour, Bruno [2002] (2010). *The Making of Law.* Cambridge: Polity Press.

Lauterpacht, Elihu and Daniel Behtlehem (2001). *The Scope and Content of the Principel of Non-Refoulement. Opinion.* United Nations High Commissiner for Refugees At http://www.unhcr.org/protection/globalconsult/3b33574d1/scope-content-principle-non-refoulement-opinion.html.

Lauterpacht, Elihu and Daniel Behtlehem (2003). Non-refoulement (Article 33 of the 1951 Convention). In Feller, Erika, Volker Türk, Volker and Frances Nicholson (eds.) Refugee Protection in International Law. UNHCR's Global Consultations on International Protection. New York: Cambridge University Press.

Lerner, Thomas (28 February 2019). "Om mina domar styrdes av känslor skulle jag snabbt bli avslöjad". *Dagens Nyheter.*

Lindblom (2004) Domstolarnas växande samhällsroll och processens förändrade funktioner – floskler eller fakta? *Svensk Juristtidning,* vol. 3, pp. 229–262.

Lindell, Bengt (1987) Sakfrågor och rättsfrågor. En studie av gränser, skillnader och förhållanden mellan faktum och rätt. Uppsala: Iustus förlag.

Lindroos-Hovenheimo, Susanna (2012). Despairing Justice and the Ethics of Legal Interpretation. Oxon: Routledge.

Lundberg, Anna (2009). Barnets bästa i Principen om barnets bästa i asylprocessen – ett konstruktivt verktyg eller kejsarens nya kläder? Malmö: Malmö Institute for Studies of Migration, Diversity and Welfare

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,* Vol 3(1)s pp. 49–70.

Lundberg, Anna and Jakob Lind (2017) Technologies of Displacement and Children's Right to Asylum in Sweden. *Human Rights Review,* Vol. 18, pp. 189–208.

Macklin, Audrey (1998). Truth and consequences: Credibility Determination in the Refugee Context. *Association Internationale des Juges aux Affaires des Refugiès,* Conference.

Magalhães, Bruno (2016).The Politics of Credibility: Assembling Decisions on Asylum Applications in Brazil. *International Political Sociology*, Vol. 10(2), pp. 133–149.

Martén, Linna (2015), Political Bias in Court? Lay Judges and Asylum Appeals. *Working Paper 2015:2. Department of Economics, Uppsala University.*

McAdam, Jane (2005). The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime. *International Journal of Refugee.* Vol.17(3), pp. 461-516.

McAdam, Jane (2007). *Complementary Protection in International Refugee Law*. New York: Oxford University press.

McKinnon, Sara L. (2009). Citizenship and the Performance of Credibility Audiencing Gender-based Asylum Seekers in U.S Immigration Courts. *Text and Performance Qurtely,* Volume 29(3), pp. 205-221.

MacLachlan, Alice (2006) An Ethic of Plurality: Reconciling Politics and Morality in Hannah Arendt. History and Judgment. *IWM Junior Visiting Fellows Conference Proceedings Conference,* vol. 21.

Marcusson, Lena (2010). Förvaltningsrättens rättssäkerhetstänkande. *Förvaltningsrättslig Tidskrift*, no. 3, pp. 241–254.

Mellqvist, Mikael (2013). Om tro, tyckande och vetande Högsta domstolens Värdering av utsagor. *Svensk Juristtidning,* Vol. 8, pp. 753–778.

Millbank, Jenni (2002)."Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia". *Melbourne University Law Review*, Vol. 26(1), pp 144-177.

Millbank, Jenni (2009). From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom. *The International Journal of Human rights*, Vol. 13(2-3), pp. 391–414.

Millbank, Jenni (2009). 'The Ring of Truth': A Case Study of Credibility Assessment Particular Social Group Refugee Determinations. *International Journal of refugee Law,* Vol. 21(1), pp 1-33.

Millbank, Jenni and Cattherine Dauvergne (2003). Burdened by Proof: How the Australian Refugee Review Tribunal Failed Lesbian and Gay Asylum Seekers. *Federal Law Review*, Vol. 31(2), pp. 299–342.

Millbank, Jenni and Laurie Berg (2009). Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Seekers. *Journal of Refugee Studies,* Vol. 22 (2), pp. 195–223.

Mostad, Petter and Fredrik Tamsen (2018). Error rates for unvalidated medical age assessment procedures. *International Journal of Legal Medicine,* Vol.133 (2), pp.613 –623.

Noll, Gregor (2000) *Negotiating Asylum. The EU Acquis, Extraterritorial* Protection and the Common Market of Deflection. Hague: Kluwer Law International.

Noll, Gregor (2005) *Proof Evidentary and Credibility in Asylum Procedure* (ed.). Leiden: Martinus Nijhoff Pub

Noll, Gregor (2005). Evidentiary Assessment and the EU Qualification Directive. *European Public Law,* Vol. 12(2), pp. 295–317.

Noll, Gregor (2006). Asylum claims and the translation of culture into politics. *Texas International Law Journal,* Vol. 41(3), pp. 491–501.

Noll, Gregor (2010) "The 2007 Rejection of Anonymous Language Analysis by the Swedish Migration Court of Appeal: A Precedent?" In K. Zwaan, M. Verrips, & P. Muyskens (eds.), *Language and origin. The role of language in European asylum procedures: Linguistic and legal perspectives* (pp. 211–215). Wolf Legal Publishers.

Noll, Gregor (2015) 'Junk Sience? Four Arguments Against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum'. *International Journal of Refugee Law*, Vol.28(2), pp.234–250.

Noll, Gregor and Jennifer Beard (2009). Parrhesia and Credibility: The Sovereign of Refugee Status Determination. *Social & legal studies,* Vol.18 (4), pp.455 –477.

Noll, Gregor & Popovic, Alexandra (2005). Flyktingstatus en marginaliserad resurs i svensk asylrätt? *Juridisk Tidskrift* 2005/06, no. pp. 834–865.

Peczenik, Aleksander (1995). Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation. Stokholm: Fritzes förlag AB.

Peers, Steve (2012). Legislative Update 2011, EU Immigration and Asylum Law: Recast Qualification Directive. *European Journal of Migration and Law,* Vol 14(2), pp 199–221.

Peers, Steve, Tamara Hervey, Jeff Kenner, and Angela Ward (eds.) (2014). *The EU Charter of Fundamental Rights. A Commentary*. Oxford: Hart Pub Ltd.

Peers, Steve, Violeta Morena-Lax, Madeline Gralick and Elsbeth Guild (eds.) (2015). *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition.* Volume 3: EU Asylum Law. Lieden: Martinus Nijhoff.

Persson, Johannes (2007). *Risker i kunskapens mellanrum*. Riga: Nya Doxa.

Popovic, Alexandra (2005). Evidentiary assessment and Non-refoulement: insights from criminal procedure. In Noll, Gregor (ed.) *Proof, evidentary assessment and credibility in asylum procedures.* (pp. 27–53). Leiden: Martinus Nijhoff Pub.

Parusel, Bernd and Jan Schneider (2017). Reforming the Common European Asylum System. Responsibility-sharing and the harmonisation of asylum outcomes. Delmi, Report 2017:9.

Ragnemalm, Hans (2014*). Förvaltningsprocessrättens grunder.* Tionde upplagan. Stockholm: Jure Förlag AB.

Reneman, Marcelle (2014). EU Asylum Procedures and the Right to an Effective Remedy. Oxford: Hart Publishing

Rousseau, Cécile, François Crépeau, Patricia Foxen and France Houle (2002).The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Agency. *Journal of Refugee Studies*, Vol. 15(1), pp. 43–70.

Röhl, Katharina (2005). Fleeing violence and poverty: non-refoulement obligations under the European Convention of Human rights. *New Issues in Refugee Research*. Working paper no: 111. UNHCR, Evaluation and Policy Analysis Unit.

Sandgren, Claes (1999) Vad gör juristen och hur? Del I, *Juridisk Tidskrift* 1999/00 , no. 3, p. 591.

Sandgren, Claes (1999) Vad gör juristen och hur? Del II, *Juridisk Tidskrift* 1999/00 , no. 4 p. 867.

Sandgren, Claes (2008). God rättskipning – särskilt om rättskipningens oavhängighet som kvalitetskriterium. In *Festskrift till Johan Hirschfeldt*, p. 478. Uppsala: Iustus.

Schelin, Lena (2007). *Bevisvärdering av utsagor i brottmål*. Solna: Nordsteds Juridik.

Spijkerboer, Thomas (2002). Subsidiarity in asylum law. The personal scope of international protection. In D. Bouteillet-Paquet (Ed.), *Subsidiarity protection of refugees in the European Union: Complementing the Geneva Convention?* Brussel: Bruylant.

Spijkerboer, Thomas (2009). Subsidiarity and 'Arguability': the European Court of Human rights' Case Law on Judicial Review in Asylum Cases. *International Journal of Refugee Law,* 21(1), pp. 48–74.

Spijkerboer, Thomas (2013). (ed.) Fleeing Homophobia. Sexual orientation, gender identity and asylum. London & New York: Routledge.

Staffans, Ida (2012). *Evidence in European Asylum Procedure*. Leiden: Martinus Nijhoff Publishers.

Stangneth, Bettina (2014) Eichmann before Jerusalem: The Unexamined Life of a Mass Murderer. New York: Knopf.

Stendahl, Sara (2003). Communicating Justice Providing Legitimacy. The legal practices of Swedish administrative courts in cases regarding sickness cash benefit. Uppsala: Iustus förlag.

Stendahl, Sara (2009) Arbetsoförmåga i rättstillämpningen. Prövning av rätten till kompensation för inkomstförlust efter en trafikolycka – en empirisk jämförelse mellan rättstillämpningen i allmän domstol och förvaltningsdomstol. *Arbete och hälsa,* Vol. 43(8), pp. 1–86.

Stendahl, Sara (2013). De mobbade och rättvisan. När kränkande särbehandling blir en arbetsskada – en analys av domar från kammarrätten 2005-2012. *Nordisk Socialrättslig Tidskrift,* no. 7–8, pp. 8–132.

Stendahl, Sara and Torén, Kjell (2011). Sakkunniga och värdet av materiellt riktiga domar. In *Festskrift Till Lotta Vahlne Westerhäll*, pp. 337–356. Stockholm: Santérus Förlag.

Stern, Rebecca (2012). Hur bedöms ett skyddsbehov? Om gränsdragning, konsekvens och förutsägbarhet i svensk asylpraxis. *Svensk Juristtidning,* vol. 3, pp. 282–299.

Stern, Rebecca (2013) Country Guidance in Asylum Cases: Approaches in the UK and Sweden, *RLI Working Paper No. 9*

Stern, Rebecca (2014) "Our Refugee Policy is Generous": Reflections on the Importance of a State's Self-Image. *Refugee Survey Quarterly*, Vol. 33(1), pp. 25–43.

Storey; Hugo (2008). EU Refugee Qualification Directive: a Brave New World? *International Journal of Refugee Law*, Vol.20 (1), pp.1–49.

Strömblad, Daniel (2014). *Muntlig förhandling i svenska asylmål – en rättighet för asylsökande?* Examensarbete 30 hp. Juridiska institutionen Handelshögskolan, Göteborgs universitet.

Strömholm, Stig (1996). Rätt, rättskällor och rättstillämpning. En lärobok i allmän rättslära. Femte upplagan. Stockholm: Nordsteds juridik.

Ställvik, Olof (2009). *Domarrollen: rättsregler, yrkeskultur och ideal.* Diss. Uppsala: Uppsala universitet.

Sutorius Helena (2014) Bevisprövning vid sexualbrottsmål. Andra upplagan omarbetad och uppdaterad av Christian Diesen. Stockholm: Nordstedts juridik.

Svensson, Eva-Maria (1997). Genus och rätt. En problematisering av föreställningen om rätten. Uppsala: Iustus.

Svensson, Eva-Maria (2007) Boundary-Work. In Gunnarsson, Åsa, Eva-Maria Svensson and Margaret Davies (eds.) *Legal Scholarship in Exploiting the Limits of Law. Swedish Feminism and the Challenge to Pessimism*. pp. 17–49. Aldershot: Ashgate.

Svensson, Eva-Maria (2014) De lege interpretata–om behovet av metodologisk reflection. *Juridisk publikation,* pp. 21–226.

J A Sweeney (2009) 'Credibility, Proof and Refugee Law'. *International Journal of Refugee Law*, Vol. 21(4), pp. 700–726.

Thomas, Robert (2006). Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined. *European Journal of Migration and Law*, Vol. 8(1), pp. 79-96.

Thomas, Robert (2011) Administrative Justice and Asylum Appeal: A Study of Tribunal Adjudication. Oxford: Hart Publishing

Thorburn Stern, Rebecca and Wikström, Hanna (2016). Migrationsrätt. Skyddsbehov och trovärdighet – bedömning i asylärenden. Stockholm: Liber.

Whalberg, Lena (2010). Legal Questions and Scientific Answers: Ontological Differences and Epistemic Gaps in the Assessment of Causal Relations. Diss. Lund: Lund university.

Wejedal, Sebastian (2017). *Rätten till biträde.* Diss. Göteborg: Göteborgs universitet, Juridiska institutionens skriftserie.

Wennergren, Bertil (2005) *"Förvaltningsprocesslagen m.m. En kommentar"*, 5:e uppl. Vällingby: Norstedts Juridik.

Wennergren, B. och U. von Essen (2013): *Förvaltningsprocesslagen m.m. En kommentar*. Sjätte upplagan. Stockholm: Norstedts gula bibliotek.

Westerhäll, Lotta (2013) Goda beslut eller korrekta beslut vid psykiatrisk tvångsvård. In *Undring och erkjennelse*, *Festskrift till Jan Fridthjof Berndt, 70 år.* Rasmussen, Ørnulf, Schütz, Sigrid Eskeland, Søvig, Karl Harald (eds.). Bergen: Fagbokförlaget.

Wettergren, Åsa, (2010) "Managing unlawful feelings – the emotional regime of the Swedish Migration Agency". *International Journal of Work, Organization and Emotion,* Vol.3 (4), pp. 400–419.

Wettergren Åsa & Hanna Wikström (2013). Who Is a Refugee? Political Subjectivity and the Categorisation of Somali Asylum Seekers in Sweden. *Journal of Ethnic and Migration Studies*, Vol. 40(4), pp. 566–583.

Wettergren, Åsa and Bergman Blix, Stina (2016). Empathy and objectivity in the legal procedure: the case of Swedish prosecutors. *Journal of Scandinavian Studies in Criminology and Crime Prevention,* Vol. 17(1), pp.19 –35.

Wikrén, Gerhard and Håkan Sandesjö (2017). *Utlänningslagen med kommentarer.* Elfte upplagan. Stockholm: Wolters Kluwer.

Wikström, Hanna and Thomas Johansson (2013). Credibility Assessments as 'Normative Leakage': Asylum Applications, Gender and Class. *Social Inclusion,* Vol. 1(2), pp. 92–101.

Willén, Rebecca M. & Leif A. Strömwall (2012) Offenders' lies and truths: an valuation of the Supreme Court of Sweden's quality arguments for credibility assessment. *Psychology, Crime & Law*, Vol. 18(8), pp. 745–758.

Wouters, C.W. (2009). International Legal Standards for the Protection from Refoulement. Antwerp: Intersentia.

Zahle, Henrik (2005). Competing Patterns for Evidentiary Assessments. In Noll, Gregor (ed.). *Evidentary and Credibility in Asylum Procedure*. Leiden: Martinus Nijhoff Pub.

Zerilli, Linda (2005) "We feel our freedom": Imagination and judgment in the thought of Hannah Arendt. Political Theory, vol. 33(2), pp. 158–188.

Zimmerman, Andreas (2011)(ed. Assistent editors Jonas Dörschner and Felix Machts.) *The 1951 Convention Relating to the Status of refugees and its 1967 protocol. A Commentary*. New York: Oxford University Press.

Media

Sveriges Television: Uppdrag granskning, *Kodnamn EA20,* 12 november 2014.

Svenska Dagbladet: Professorer: Rättsläkarnas integritet är hotad. 2 december 2017. https://www.svd.se/a/vmQAKl/professorer-rattslakarnas-integritet-ar-hotad

Table of cases

The Swedish Migration Court of Appeal

MIG 2006:1
MIG 2006:7
MIG 2006:9
MIG 2007:9
MIG 2007 not 7
MIG 2007:12
MIG 2007:16
MIG 2007:20
MIG 29007:31
MIG 2007:33
MIG 2007:37
MIG 2007:58
MIG 2008:12
MIG 2008:20
MIG 2008:21
MIG 2008:32
MIG 2008:39
MIG 2008:42
MIG 2009:4
MIG 2009:7
MIG 2009:27
MIG 2009:30
MIG 2009:36
MIG 2009:39
MIG 2010:6
MIG 2010:10
MIG 2010:11
MIG 2010:16
MIG 2010:20
MIG 2010:23
MIG 2010:24
MIG 2011:4
MIG 2011:5
MIG 2011:6
MIG 2011:8
MIG 2011:11
MIG 2011:15
MIG 2011:21
MIG 2011:23
MIG 2011:24
MIG 2011:29
MIG 2012:1
MIG 2012:2
MIG 2012:3
MIG 2012:11
MIG 2012:12
MIG 2012:14
MIG 2012:18
MIG 2012:21
MIG 2013:6
MIG 2013:8
MIG 2013:15
MIG 2013:23
MIG 2013:25
MIG 2014:1
MIG 2014:20
MIG 2014:21
MIG 2014:22
MIG 2014:24
MIG 2014:25
MIG 2015:9
MIG 2015:14
MIG 2015:17
MIG 2015:18
MIG 2016:16
MIG 2016:17
MIG 2016:30
MIG 2017:6
MIG 2017:9
MIG 2017:12
MIG 2017:27
MIG 2018:6
MIG 2018:7
MIG 2018:8
MIG 2018:14
MIG 2019:1
MIG 2019:5
MIG 2019:9
MIG 2019:14

MIÖD
UM 20891–09
UM 8363–09
UM 105–10
UM 10483–10
UM 10509–10
UM 10483–10
UM 2926–10
UM 7850–10
UM 9002–12
UM 11222–12
UM 694–14

The Swedish migrations courts (code list)

The migration court in Stockholm, no. 1-100
The migration court in Gothenburg, no. 1-100
The migration court in Malmö, no. 1-100
The migration court in Luleå, no. 23

The Swedish Supreme Court

NJA 1980 s. 725
NJA 1996 s. 176
NJA 2010 s. 671
NJA 2015 s. 702
NJA 2017 s. 316

European Court for Human rights

Ireland v. the United Kingdom, no. 5310/71, 13 December 1977
Soering v. the United Kingdom, no.14038/88, 7 July 1989
Aksoy v. Turkey, no. 21987/93, 18 December 1996
Chahal v. United Kingdom, no. 22414/93, 15 November 1996
Selmouni v. France, no. 25803/94, 28 July 1999
Maaouia v. France, no. 39652/98, 5 October, 2000
N. v. Finland, no. 38885/02, 26 July 2005
Bader and Kanbor v. Sweden, no. 13284/04, 8 February 2006
Bello v. Sweden (Final decision), no. 32213/04, 17 January 2006
Salah Sheek v. The Netherlands, no. 1948/04 ,11 January 2007
Collins and Akaziebie v. Sweden, no. 23944/05, 8 March 2007 (Decision)
Saadi v. Italy, no. 37201/06, 28 February 2008
Ismoilov and Others v. Russia, no. 2947/0624 April 2008, Appl
NA v. the United Kingdom, no. 25904/07, 17 July 2008
Case F.H. v. Sweden, no. 32621/06, 20 January 2009
R.C v. Sweden, no. 41827/07, 9 June 2010
M.M.S v. Belgium and Greece, no. 30696/09, 21 January 2011

Sufi and Elmi v United Kingdom, no. 8319/07 and 11449/07, 28 June 2011

Othamn Abu Qatada v. the United Kingdom, no. 8139/09, 17 January 2012

Hirsi Jamaa and other v. Italy, no. 27765/09, 23 February 2012

A.A and others v. Sweden, no. 14499/09, 28 September 2012

S.A v. Sweden, no. 66523/10, 27 June 2013

F.N and others v. Sweden, no. 28774/09, 18 Mars 2013

I v. Sweden, no. 61204/09, 20 January 2014

F.G v. Sweden, no. 43611/11, 23 March 2016

J.K and others. v. Sweden, no. 59166/12, 23 August 2016

Collins and Akaziebie v. Sweden, no. 23944/05, 8 March 2007

Court of Justice of the European Union

C-465/07, Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie [2009] ECLI:EU:C:2009:94

C-175-179/08, Aydin Salahadin, Kamil Hasan Abdulla, Ahmed Adem, Hamrin Mosa Rashi and Dler Jamal v. Bundesrepublik Deutschland, [2010] ECLI:EU:C:2010:105

C-69/10, Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration [2011] ECLI:EU:C:2011:524

C-411/10, and C-493/10, N. S. v. Secretary of State for the Home Department and M. E. and others v. Minister for Justice, Equality and Law Reform [2011] ECLI:EU:C:2011:865

C-71/11, and C-99/11, Y and Z v. Bundesrepublik Deutschland [2012] ECLI:EU:C:2012:518

C-277/11, M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General, ECLI:EU:C:2012:744

C-364/11, Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal [2012] ECLI:EU:C:2012:82

C-199-201/12, X, Y and Z v. Minister voor Immigratie en Asiel [2013] ECLI:EU:C:2013:720

C-285/12, Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides. [2014] ECLI:EU:C:2014:39

C-604/12, H.N. v. Minister for Justice, Equality and Law Reform and Others [2014] ECLI:EU:C:2014:302

C-148-50/13, A, B and C v. Staatssecretaris van Veiligheid en Justitie [2014] ECLI:EU:C:2014:2406

United Kingdom

Asylum and Immigration Tribunal CG [2006] UKAIT 00048 [2014] UKSC (Supreme Court of the United Kingdom) 30 *Judgment Secretary of State for Home Department (Appellant) v. MN and KY* (Respondent) (Scotland)

Decisions

Sweden

Decision from the Aliens Board

UN 03/19271

UN 04/9463

Decisions from Justitieombudsmannen (JO)

2011-12-09, Dnr. 6051–2010

2012-03-26, Dnr. 258–2011

2012-11-23, Dnr. 4620–2011

2013-06-20, Dnr. 3804 –2012

2013/14:JO1, Dnr. 5420–2011

United Nations

Committee against Torture

A. A. v. Sweden, /C/72/D/918/2019 No. 918/2019, (2021)

Tala v. Sweden, CAT/C/17/D/43/1996 (1996)

Convention on Elimination of All Forms of Discrimination against Women

M. E. N. v. Denmark, no. 35, 2011, 8–26 July 2013

Convention on the Rights of the Child

K.Y.M. v. Denmark, no 3/2016, 8 March 2018

Official Documents – Sweden

The Government

Propositions

Prop. 1942:5 *Kungl. Maj.ts proposition till riksdagen med förslag till rättegångsbalk*

NJA II 1943, s.444 Nytt juridiskt arkiv avd. II. Tidskrift för lagstiftning m.m. Sextioåttonde årgången Stockholm: P.A Nordstedt & Söners förlag

Prop. 1971:30 *Kungl. Maj:ts proposition till riksdagen med förslag till lag om allmänna förvaltningsdomstolar, m.m.*

Prop. 1975/76:18 *Regeringens proposition om ändring i utlänningslagen (1954:193) m.m.*

Prop. 1979/80:96 *Regeringens proposition med förslag till ny utlänningslag, m. m.*

Prop. 1988/89:86 *Regeringens proposition med förslag till utlänningslag m.m.*

Prop. 1983/84:144 *Regeringens proposition om invandrings- och flyktingpolitiken*

Prop. 1995/96:22 *Tvåpartsprocess m.m. i de allmänna förvaltningsdomstolarna*

Prop. 1996/97:25 *Svensk migrationspolitik i globalt perspektiv*

Prop. 2004/05:170 *Ny instans- och processordning i utlännings- och medborgarskapsärenden*

Prop. 2005/06:6 *Flyktingskap och förföljelse på grund av kön eller sexuell läggning*

Prop. 2005/06:180 *Ett stärkt nämndemannainstitut*

Prop. 2009/10:31 *Genomförande av skyddsgrundsdirektivet och Asylprocedurdirektivet*

Prop. 2011/12:60 *Genomförande av återvändandedirektivet*

Prop. 2012/13:45 *En mer ändamålsenlig förvaltningsprocess*

Prop. 2013/14:248 *Genomförande av det omarbetade skyddsgrundsdirektivet*

Prop. 2015/16:174 *Tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige*

Prop. 2016/17:121 *Åldersbedömning tidigare i asylprocessen*

Government Official Reports

SOU 1926:32	*Processkommissionens betänkande angående rättegångsväsendets ombildning*
SOU 1994:54	*Utvärdering av praxis i asylärenden*
SOU 2001:103	*En modernare rättegång*
SOU 2003:25	*Verkställighet vid oklar identitet m.m.*
SOU 2003:102	*En öppen domarrekrytering*
SOU 2004:74	*Utlänningslagstiftningen i ett domstolsperspektiv. Betänkande av Kommittén för översyn av utlännings-lagstiftningen*
SOU 2006:6	*Skyddsgrundsdirektivet och svensk rätt. En anpassning av svensklagstiftning till EG-direktiv 2004/83/EG angående flyktingar och andra skyddsbehövande*
SOU 2008:106	*Ökat förtroende för domstolarna – strategier och förslag*
SOU 2009:56	*Den nya migrationsprocessen*
SOU 2010:29	*En ny förvaltningslag*
SOU 2013:37	*Begripliga beslut på migrationsområdet*
SOU 2014:76	*Fortsatt utveckling av förvaltningsprocessen och specialisering för skattemål*

The Counsel on legislation (Lagrådet)

Utdrag ur protokoll vid sammanträde 2002-10-09), 2002, at: https://www.lagradet.se/wp-content/uploads/lagradet-attachments/Ny%20utlanningslag.pdfprop

The Migration Agency

Legal position papers

RCI 09/2013. Rättsligt ställningstagande avseende metod för prövning av tillförlitlighet och trovärdighet

RCI 14/2013. Rättsligt ställningstagande angående säkerhetssituationen i Syrien

RCI 16/2013. Rättsligt ställningstagande angående prövningen av skyddsskäl mot Eritrea

Statistics

Inkomna ansökningar om asyl. http://www.migrationsverket.se/Om-Migrationsverket/Statistik/Oversikter-och-statistik-fran-tidigare-ar/2014.html

Other documents

Granhag, Pär Anders, Sara Landström och Andreas Nordin (2017). *Beslutsstöd för migrationsverket, Värdering av muntliga utsagor, Ett vetenskapligt baserat beslutsstöd för migrationsärenden*.

Heckscher, Sten (2015). *"Granskning av Migrationsverkets användning av språkanalyser"*.

The Swedish National Courts Administration (Domstolsverket)

(2017). *Handläggare i migrationsdomstolen, Domstolsverkets handbok*. http://www.dvhandbok.domstol.se/migration

(2011). *God domarsed - om etik och ansvarstagande*. https://domareforbundet.se/files/pages/550/god_domarsed-om_etik_och_ansvarstagande_webb.pdf

(2013–2017). Statistics at https://www.domstol.se/om-sveriges-domstolar/statistik-styrning-och-utveckling/statistik/officiell-domstolsstatistik/

Internal guidelines in the administrative court of Gothenburg

Att arbeta med skyddsmål, PM 2014-12-03 Föredragandens roll och arbetsuppgifter, 2007-12-11

European Union – legal acts, documents, and instruments

European Council

(2010) The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01)

(2007) Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02)

Legal acts

Charter of Fundamental Rights of the European Union (2000/C 364/01) (EU-Charter)

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (*Family Reunification Directive)*

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (*Qualification Directive*)

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (*Reception Conditions Directive*)

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (*Asylum Procedures Directive*)

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (*Dublin regulation*)

Regulation (EU) No 439/2010 of the European Parliament and the Council of 19 May 2010 establishing a European Asylum Support Office

European Union Agency for Asylum (EASO)

(2008) Common EU Guidelines for processing Country of Origin Information (COI) (replaced 2019 by EASO Country of Origin Information (COI) Report Methodology)

(2013) Age assessment practice in Europe

(2018) Practical guide on age assessment, Second edition

(2018) Evidence and credibility assessment in the context of the Common European Asylum System

(2019) Country of Origin Information (COI) Report Methodology

International legal acts and instruments

Conventions and declarations

Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

The Geneva Conventions of 1949 and their Additional Protocols

European Convention on Human rights and Fundamental Freedoms (ECHR) (adopted 1950, entry into force 1953) UNTS 221

UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S.137, entry into force 22 April 1954

UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S.137, entry into force 22 April 1954

European Convention on Human rights and Fundamental Freedoms (ECHR) (adopted 1950, entry into force 1954) 213 UNTS 221

International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (adopted 10 December 1984, entry into force 26 June 1987) 1465 UNTS 85

Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with Article 49

United Nations High Commissioner for Refugees (UNHCR)

Reports, observations, and conclusions

(1997) Executive Committee Conclusion NO. 82 on Safeguarding Asylum, 48th session. Contained in United Nations General Assembly Document No. 12A (A/52/12/Add.1) (1997)

(2001) Observations on the European Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection' 4109/01 ASILE 54

(2004) Country of Origin Information: Towards Enhanced International Cooperation

(2007) Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR

(2007) Asylum in the European Union. A study of the implementation of the Qualification Directive

(2010) Asylum Systems Quality Assurance and Evaluation Mechanism Project in the Central and Eastern Europe sub-region, ASQAEM Final Regional Project

(2010) Improving Asylum procedures: Comparative Analysis and Recommendations for Law and practice. Detailed Research on Key Asylum Procedures Directive Provisions

(2010) Comments on the European Commission's Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of

International Protection and the Content of the Protection Granted (COM (2009)551, 21 October 2009)

(2011) Kvalitet i svensk asylprövning, En studie av Migrationsverkets utredning av och beslut om internationellt skydd

(2013) Beyond Proof, Credibility assessment in EU Asylum Systems

(2015) International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update IV November 2015 HCR/PC/SYR/01

(2016) Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the draft law proposal on restrictions of the possibility to obtain a residence permit in Sweden ("Begränsningar av möjligheten att få uppehållstillstånd i Sverige – utkast till lagrådsremiss")

Guidelines on international protection – handbooks, guidelines, and statements

(1992) Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979. (Reissued 2019)

(1998) Note on Burden and Standard of Proof in Refugee Claims

(2002) Guidelines on International Protection No. 2: "Membership of a particular group" within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 14, U.N. Doc. HCR/GIP/02/02

(2002) Agenda for Protection Addendum A/AC.96/965/Add.1

(2003) Guidelines on Protection: Application of the Exclusion Clauses: Article1F of the1951Convention relating to the Status of Refugees (HCR/GIP/03/05,4 Sept. 2003)

(2004) Guidelines on International Protection No.6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees HCR/GIP/04/06 28 April 2004

(2008) UNHCR Handbook for the Protection of Women and Girls

(2009) Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees

(2010) Comments on the European Commission's Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted (COM (2009)551, 21 October 2009)

(2012) Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/12/09

(2016) Guidelines on International Protection No.12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions

United Nations - Human Right Committees

The Committee against Torture

(1997) General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications) A/53/44, annex IX)

(2018) General Comment No.4 (2017) on the implementation of article 3 of the Convention in the context of article 22 para. 47, CAT/C/GC/4

The Human rights Committee

(2004) General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004 (2187th meeting)

Non-Governmental Organisations

Austrian Centre for Country of Origin and Asylum Research (ACCORD) (2013) Researching Country of origin information. Training manual. https://www.coi-training.net/site/assets/files/1021/researching-country-of-origin-information-2013-edition-accord-coi-training-manual.pdf

European Council on Refugees and Exiles (ECRE) (2011) Information European Council on Refugees and Exiles Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

Hungarian Helsinki Committee (2011) *Country Information in Asylum Procedures– Quality as a Legal Requirement in the EU*. Written by Gyulai, Gábor

Hungarian Helsinki Committee (2013) Gyulay, Gábor (ed). *Credibility Assessment in Asylum Procedures – a multidisciplinary Training Manual*. Volume 1

Justice First: Ramos, Catherine (2011) *Unsafe Return. Refoulement of Congolese Asylum Seekers.* Justice First. http://justicefirst.org.uk

Amnesty International (2010) *Public Statement*: *European states must stop forced returns to Iraq*. AI Index EUR 01/028/2010. https://www.ft.dk/samling/20101/almdel/UUI/bilag/49/924793.pdf

Amnesty International (2011) Appeal: *Urgent Action: Sweden and Denmark forcibly return 26 Iraqis,* EUR 42/002/2011. https://www.amnesty.org/en/documents/eur42/002/2011/en/

Asylum Aid (2011) *Unsustainable: The Quality of Initial Decision-making in Women's Asylum Claims.* https://www.asylumaid.org.uk/sites/default/files/2021-08/asylum-aid-unsustainable.pdf

Save the Children (Rädda Barnen) (2008) Nytt system gamla brister? Barns egna asylskäl efter ett år med den nya instans-och processordningen

Save the Children (Rädda Barnen) (2016) Barns egna asylskäl – Rätten att bli sedd som individ

Other organisations

International Association of Refugee Law Judges (2006) *Judicial Criteria for Assessing Country of Origin Information (COI)*: *A Checklist*. Paper for 7th Biennial IARLJ World Conference, Mexico City. https://www.iarmj.org/images/stories/working_parties/guidelines/udicial_Criteria_a_checklist_COI_2006.pdf

International Association of Refugee Law Judges (IARLJ) (2013) *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive. Judicial quality arguments and standards.* https://www.iarmj.org/images/stories/AbstractCredoPaper23Apr2013.pdf

Appendix 1

To Believe or Not to Believe – Is That the Question?

A critical study of how the Swedish migration courts handle their responsibility to judge in asylum cases

Code Book
Pilot studies, explanations of the chosen categories, and list of variables

Content

Appendix 1 .... **1**

1 The pilot studies and the design of categories **4**

2 The categories and explanations **8**

2.1 Formal data (Chapter 3) **9**
2.1.1 Data related to the court 9
2.1.2 Personal data related to the asylum seekers 10

2.2 The content categories (Chapter 4) **10**
2.2.1 Legal sources (section 4.2) 10
2.2.2 External sources of information (section 4.3) 14
2.2.2.1 A. The situation in the country of origin 15
2.2.2.2 B. Written documents 17
2.2.2.3 C. Witnesses 18
2.2.2.4 D. Experts 19
2.2.3 The quality of the asylum seeker's narrative (section 4.4) 20
2.2.4 The asylum seeker's behaviour, actions or activities (section 4.5) 22
2.2.5 Co-applicants (section 4.6) 26
2.2.6 Individual facts and circumstances (section 4.7) 26
2.2.7 General risk considerations (section 4.8) 27
2.2.8 Procedural deficiencies (section 4.9) 30

3 Formal variables (Chapter 3) **31**

3.1 The court and the procedure **31**

3.2 The asylum seeker– Personal data **31**

4 Content variables (Chapter 4) **32**

4.1 Bases for the courts' assessments of the risk upon return **32**
4.1.1 Category 1: Legal sources 32
4.1.2 Category 2: External sources of information 37
4.1.3 Category 3: The quality of the asylum seeker's narrative 41
4.1.4 Category 4: The asylum seeker's behaviour, actions or activities 42

4.1.5 Category 5: Co-applicants ... 42
4.1.6 Category 6: Individual and personal facts and circumstances ... 43
4.1.7 Category 7: General risk considerations ... 43
4.1.8 Category 8: Procedural deficiencies ... 45

4.2 Bases for the courts' assessments of the credibility of the asylum seeker's narrative ... 45
4.2.1 Category 1: Legal sources ... 45
4.2.2 Category 2: External sources of information ... 46
4.2.3 Category 3 The quality of the asylum seeker's narrative ... 48
4.2.4 Category 4: The asylum seeker's behaviour, actions or activities ... 51
4.2.5 Category 5: Co-applicants ... 53
4.2.6 Category 6: Individual facts and circumstances ... 53
4.2.7 Category 7: General risk assessments ... 53
4.2.8 Category 8: Procedural deficiencies ... 54

1 The pilot studies and the design of categories

The first pilot study was carried out in 2012–2013.[1] The purpose of this study was to find out how to select the cases and what material should constitute the unit of analysis. A stratified random sampling was made from the population of "asylum cases" including 30 rulings in asylum cases, ten from each of the three migration courts and limited to cases from two different countries of origin.[2,3] Also, in this first study, cases including an age determination or language analysis were excluded.

It turned out that the obtainable material differed between the courts. While all the cases in the sample comprised the court ruling, the cases from Stockholm and Malmö also included the decision from the Migration Agency as an appendix to the ruling, while the court in Gothenburg chose to summon the decision in the ruling.[4] Therefore, the material it was possible to obtain from the written court judgments in the database was unequal in terms of the amount of information. Even though the study focuses on the part of the ruling where the courts' argumentation is found (*domskäl*), relevant data could be found in the Migration Agency decision. Also, naturally, classified material was not obtainable from the database. There might be a risk that an exclusion of cases including classified material could distort the result as these cases may, to a larger extent, concern certain countries of origin. Therefore, I decided to require the Migration Agency decisions as well as classified material if such would occur in selecting cases for the main study.

It further turned out that many of the cases in the sample did not include assessments of the credibility of the asylum seeker's narrative. A rough overview in the database at the time of the pilot study showed that an oral hearing had been held in approximately 25% of the asylum

---

[1] In preparing for the study, I was advised by the political scientist Professor Yitchak Haberfeld, Department of Labour Studies, Tel Aviv University and Visiting Professor at the School of Business, Economics and Law, University of Gothenburg, Sweden.

[22] Esiasson et al. 2012, p. 176 ff. A stratified sample means that the selection of units of analyses is made from different groups.

[3] At the time of the pilot studies there were three migration courts. A fourth court opened in Luleå in October 2013.

[4] See Appendix 3 for an example of how the decisions from the Migration Agency and the court rulings are presented.

cases. This is an interesting issue as it indicates that the courts perceive that, in a majority of the cases, the assessment of the risk upon return does not include an assessment of credibility of the asylum seeker's narrative. However, in order to closely study the court's bases for assessing credibility, it proved necessary to limit the focus to cases where an oral hearing had been held. Therefore, the main study will be limited to cases where credibility has been an explicit issue and where an oral hearing has been held. This means that the cases where credibility may have been an issue, latent or manifest, but where the court has decided that an oral hearing is unnecessary will be excluded in the main study.

Furthermore, the result showed that the limitation of the sample to two countries was too narrow to say anything general about the courts' assessments of risk and credibility and could distort the results. For this reason, I made the decision to make no limitations as to countries of origin. Also, excluding cases including a medical age determination or language analysis distorted the result as these assessments often form an important part of the basis for the courts' assessment of both risk upon return and credibility.

The rough overview of the number of asylum cases showed that the population differed between the courts, both as to the total number of asylum cases and as to the number of cases where an oral hearing had been held. The number of oral hearings also seemed to differ relatively to the total number of asylum cases. The reason for this is not clear but it indicates that the courts make different assessments as to whether credibility is an issue in the case.[5] As I wanted a reasonably large number from each court but at the same time a total number of cases that would be manageable in order to make a more complex analysis I chose to make a stratified *disproportional sample*, i.e. to select an equal number of cases from each court.[6]

[5] Oral hearings are not mandatory at the migration court in asylum cases but should be held mainly if credibility is an issue in the case (see section 2.1). The fact that the numbers of oral hearings differ between the courts may have several reasons and is an interesting question. However, it is outside the scope of the present study to go deeper into this issue.

[6] A disproportional stratified sample means that the sample is made from different groups and by selecting an equal number of cases regardless of the total number of the population in each group. Esiasson et al. 2012, p. 178 f.

In the second pilot study the stratified random sample was limited to a population including asylum cases where an oral hearing had been held.[7] The sample included ten cases randomly selected from this population from each migration court, starting from 1 September 2012 and forward in time order. Cases included in the population were excluded if: a credibility assessment had not been an issue, but a hearing had been held for other purposes, the case had been remanded to the Migration Agency (as this is often due to procedural rules that might have to do with credibility assessments) or the case contained classified material (these cases were excluded in the pilot study due to time constraints). The main purpose of the second pilot study was to construct specific variables and to collect them in different categories relevant to the aim of the main study. I searched for data that could identify which sources of information had been considered by the courts when assessing the risk upon return and the credibility of the asylum seeker's narrative. The aim was to design a set of variables that could be used to explore the courts' argumentation in terms of, on the one hand, the assessments of risks upon return and, on the other, the assessments of credibility.

To collect the data, I designed a number of variables divided into three main groups. The first group of variables comprised formal data referring to quite easily identified facts such as the name of the court, procedural facts (outcome, dissenting opinions), and personal data as regards the asylum seekers. The function of this group of data was primarily to serve as background data and add to the understanding of the material as a whole, and secondly, to enable to identify correlations between these data and the content data. The two subsequent groups of variables comprised data on the content of the sources of information that the courts take into consideration when assessing *the overall risk upon return* as well as *the asylum seeker's narrative*.

It turned out to be difficult to always separate the argument as such from the source of information that the argument was based on. This was especially the case when it was impossible to discern who or where a certain statement came from. As I wanted to include as many components of the reasoning as possible, I made the choice that while

---

7 The key word template used was: "FörvR Stockholm" AND "flykting" OR "alternativt skyddsbehövande" OR "skyddsbehövande i övrigt" AND "har hållit muntlig förhandling".

focusing on the *sources of information* that based the arguments, I would add certain arguments where this seemed necessary to get a more complete picture. Furthermore, the result showed that some of the arguments that could be understood as a risk or credibility argument were only discussed in relation to humanitarian grounds and were not coupled to international protection or the principle of *non-refoulement*. This seemed to be the case particularly in relation to cases where children and women were the main asylum seekers. In line with the focus in this dissertation on international protection, arguments coupled only to humanitarian grounds are excluded. However, attention is given to these arguments separately as it is an interesting component of where the courts place the assessments of risk.

The variables used to search for the courts' arguments and the sources of these arguments regarding both risk and credibility assessments are based on what I found in the court rulings, what I, from my experience of reading a lot of rulings, could expect to find, as well as what could be expected from what could be found in different legal sources. Hence, the choice of variables is based on my pre-understanding that is descriptive as well as normative.

A reliability test of the pilot study was carried out.[8] In spite of the same code scheme, the comparison between the two results exhibited some differences. While some of the variables proved to be easy to quantify (such as the number of country reports referred to in the judgment), other variables were more open to interpretation (as, for instance, what constitutes an argument based on the judges' assumption about what is plausible in the asylum seeker's narrative). The differences were mainly related to a lack of clear instructions as to how to evaluate the more interpretative variables. While the student based his reading on latent legal understanding of what is probably the basis for the courts' reasoning, what legal sources or other facts the courts, probably, had based their reasoning on from what he could understand from his legal knowledge and specific knowledge on asylum law my interest is the manifest content, i.e. describing what the judges have actually chosen to put down in writing. In the pursuit of a consistent and transparent evaluation of the arguments, I found it necessary to further explain and clarify the variables. An explanation of the chosen categories is provided below.

---

[8] Esiasson et al. 2012, p. 207 f. and Bergström and Boréus 2011, p. 36.

2 The categories and explanations

In the main study, the following categories and subcategories are included. Below they are presented and explained.

Formal variables:

1. The court and the court procedure[9]
2. Personal data concerning the asylum seekers[10]

Content variables:

1. Legal sources[11]
2. External sources of information[12]
   A. Country of origin information
   B. Written documents
   C. Witnesses
   D. Experts
3. The quality of the asylum seeker's narrative. (The "quality" refers to when the court uses indicators for credibility to assess the narrative without basing them on any external sources.)[13]
4. The asylum seeker's behaviour, actions or activities[14]
   A. during the procedure
   B. in the country of origin
5. Co-applicants[15]
6. Individual facts and circumstances[16]
7. General risk considerations[17]
8. Procedural deficiencies[18]

---

[9] Appendix 1, section 2.1.1.
[10] Appendix 1, section 2.1.2.
[11] Appendix 1, section 2.2.1.
[12] Appendix 1, section 2.2.2.
[13] Appendix 1, section 2.2.3.
[14] Appendix 1, section 2.2.4.
[15] Appendix 1, section 2.2.5.
[16] Appendix 1, section 2.2.6.
[17] Appendix 1, section 2.2.7.
[18] Appendix 1, section 2.2.8.

2.1 Formal data (Chapter 3)

2.1.1 Data related to the court

The name of the court

Question: *Which migration court has ruled the case?*

Outcome

Question: *How often do the courts change decision from the Migration Agency in favour of the asylum seeker?*

The main purpose of this question is to use the results to explore patterns as to what extent the outcome has an impact on the courts' use of different sources of information/arguments (section 4.10).

Ground for granting a residence permit

Question: *What is the ground for granting a residence permit?*

The question constitutes a background factor for analysing if and how the courts use sources of information differently depending on the ground for granting a residence permit.

Dissenting opinions

Question: *Are there any patterns linked to the fact that one or two judges hold a dissenting opinion?*

This question is based on the assumption that a dissenting assessment of the risk upon return, as well as who is dissenting, points out a risk issue. The question below aims at answering the frequency of cases including dissenting opinions as well as whether a pattern could be seen in connection to the outcome as well as to who is dissenting (the lay judges or the jurist judge):

The courts' point of departure on the potential risk upon return and the parties' stand

Question: *Are there any patterns linked to whether the courts give an account of the parties' standpoints?*

Additionally, two questions concerning the courts' point of departure for their assessments are placed in this category. The category aims at exploring to what extent the courts explicitly meet the parties' claims. Two questions aim at answering whether it is possible to understand from the courts' reasoning, on the one hand, how the courts perceive the asylum seeker's alleged risk upon return, and, on the other, if the court agrees or disagrees with different standpoints in the Migration Agency decision:

- *Do the courts explicitly agree/disagree with the standpoints made by the Migration Agency?*
- *Do the courts explicitly identify the potential risk upon return?*

2.1.2 Personal data related to the asylum seekers

Question: *What is the general pattern, among the asylum seekers in the study, as regards personal data?*

The second category includes personal data concerning the asylum seekers. The category serves as a background for analysing the content categories but also to give a general picture of the material and to compare the correspondence of the results with statistics as to the whole population during the chosen period. It includes the following five subcategories:

- *Co-applicants*
- *Age*
- *Gender*
- *Family constellation*
- *Country of origin*

2.2 The content categories (Chapter 4)

2.2.1 Legal sources (section 4.2)

Assumption: *The courts base their arguments on legal sources.*

Question: *How, and to what extent, if at all, do the courts base their assessments on legal sources?*

To be able to study what kind of legal sources the courts emphasise, this category is divided in three subcategories:

Legal sources – *Non-refoulement* [19]

- *How, and to what extent, if at all, do the courts base their assessment regarding the principle of non-refoulement on legal sources?*

The subcategory includes legal references on the principle of *non-refoulement* as well as references on impediment to enforce expulsion (*verkställighetshinder*).

Legal sources – *Status determination*

- *How, and to what extent, if at all, do the courts base their assessment as regard status determination on legal sources?*

The subcategory includes legal references regarding the different status determinations.

Legal sources – *Assessment principles*

- *How, and to what extent, if at all, do the courts base their judgment on assessment principles?*

The subcategory is meant to cover the courts' arguments and legal references connected to: the scope of the adjudication (the expressions that the adjudication must be individual and forward-looking), how to divide the risk and responsibility between the parties and the court (burden and standard of proof and the duty to investigate), as well as how to carry out and assess certain issues (such as the credibility of the asylum seeker's narrative, language analyses or medical age determination).

In line with my approach to the material as presented in section 1.4.1, in the empirical study I refrain from taking a normative stand on what should be regarded as a legal source. I include all the sources that the courts have referred to in order to support the interpretation of both the scope and content of the requisites in the protection provisions as well as how the adjudication and the evidentiary assessment should be

[19] Practical impediments to enforce expulsion are excluded here.

carried out. However, it turned out that it was not always clear from the material what could be seen as a reference to a "legal source" used to support an assessment of risk upon return and what was only a frame for the argumentation. The courts have different ways of presenting the relevant law. In the cases from Stockholm and Malmö, the decision from the Migration Agency is attached as an appendix to the ruling. The courts have, in some of these cases, explicitly referred to the "applicable provisions" in the decision from the Migration Agency with no closer specification,[20] while sometimes no reference to applicable provisions was found. The rulings from Gothenburg include a section called "applicable provisions" which usually only contains the provisions concerning the protection statues. In the decisions from the Migration Agency, the provisions concerning "refusal-of-entry" or "expulsion" are presented on the first page together with the provisions concerning protection statuses.[21] However, in most of the court rulings only the provisions concerning the protection statuses are referred to. Hence, the provisions concerning the actual expulsion are seldom visible in the court rulings.

It is not clear whether the references to the decision from the Migration Agency as regards "applicable provisions" also refer to assessment principles. These principles were not found on the first page together with the account of "applicable provisions" but in the part of the decision with the heading "reasoning" (*domskäl)* (sometimes with a sub-heading named *the point of departure for the assessment ("utgångspunkt för bedömningen").*[22] Also, in the courts' reasoning, these principles were mostly found under the heading "reasoning" but sometimes under the section "applicable provisions". Given my interest in the reasoning made by the judges and the above-mentioned lack of transparency as to what provisions are included in "applicable

[20] Example of wording: "The relevant provisions regarding the need for protection are set out in the appealed decision" (S 73 among others). The author's translation: "Tillämpliga bestämmelser i fråga om skyddsbehov framgår av det överklagade beslutet."
[21] See Appendix 1 for an example.
[22] The decisions from the Migration Agency are divided into different parts. The first part concerns the application for: a residence permit, an international protection status, and travelling documents. The second part concerns the consequences, expulsion, and to which country the applicant should be expelled as well as the time within which the applicant has to leave the country and the consequences if she or he does not leave the country in due time (entry ban). See Appendix 3 for an example.

provisions", I made the choice to only consider references to "legal sources" as regards the courts' interpretation of the content and scope of the different codified ill-treatments made under the headline in the ruling named "reasoning" (*domskäl*) and excluding the references formally made to "applicable provisions". Furthermore, given that the study focuses on "*sources*" of knowledge I have chosen to make a note only when this argumentation is supported by explicit references to "legal sources".

As regards the subcategory of assessment principles, I made the choice to consider all references to these principles regardless of where they are placed in the ruling. This is because the courts differ as to which principles they choose to refer to and where to place these references. Also, as I am interested in studying what the judges choose to put forward in their judgments, I have chosen to consider all references to the assessment principles per se as well as the courts' references to specific legal sources to support the use of these principles. This subcategory is further divided into the following subcategories:

Principles as regards burden and standard of proof and the duty to investigate:

- *How, and to what extent, if at all, do the courts base their assessments on principles as regards burden and standard of proof and the duty to investigate?*

  This subcategory includes, on the one hand, principles that lay a burden on the asylum seeker expressed as, for instance: "the asylum seeker has to make her or his need for international protection probable" or "it is the duty for the applicant to substantiate her or his claims", and, on the other hand, principles that give the asylum seeker an evidentiary alleviation such as the duty for the State to investigate or other evidentiary alleviation principles such as "benefit of the doubt".[23] Additionally, the category includes the courts' use of certain words/wordings coupled to risk upon return

[23] See about the concept in section 5.2.1 and 7.1.3.

or standard of proof (*probable*, *well-founded fear*, *substantial ground for believing*, *return*, *risk*).[24]

Assessment principles concerning specific issues:

– *How, and to what extent, if at all, do the courts base their assessments on principles concerning specific issues?*

This subcategory includes assessment principles concerning specific issues, such as credibility, the possibility of internal flight, how to assess language analyses and medical age determinations or assessments related to sexual orientation or conversion.

Other general assessment principles:

– *How, and to what extent, if at all, do the courts base their assessments on other general principles on how to carry out the adjudication?*

This subcategory includes other, general adjudication principles commonly used by the courts such as "the assessment should be forward-looking", "the assessment should be individual".

To further explore how the courts place the risk upon return and the responsibility for the risk, I identified the use of certain words or wordings that can be traced to the concept of *standard of proof* either as stated in Swedish case law (*probable*) or as stated in the protection provisions.

2.2.2 External sources of information (section 4.3)

Assumption: *The courts base their arguments on external sources of information.*

Question: *How, and to what extent, if at all, do the courts base their assessments on external sources of information?*

External sources of information were meant to include all the arguments referred to by the courts other than statements in the asylum seeker's narrative. Subcategories relevant to study both arguments on the risk upon return and credibility arguments are accounted for in the following four sections. Thus, this category is based on the general

[24] See on the requisites in the different protection provision in relation to standard of proof in section 5.2.

assumption that *the courts base their assessments on sources of information other than statements in the asylum seeker's narrative*. The category includes four subcategories based on four assumptions presented below:

A. The situation in the country of origin

- *How, and to what extent, if at all, do the courts base their assessments on sources of information as regards the situation in the country of origin?*

B. Written documents

- *How, and to what extent, if at all, do the courts base their assessments on written documents?*

C. Witnesses

- *How, and to what extent, if at all, do the courts base their assessments on witnesses?*

D. Experts

- *How, and to what extent, if at all, do the courts base their assessments on statements from experts?*

2.2.2.1 A. The situation in the country of origin

Assumption: *The courts base their assessments on sources of information as regards the situation in the country of origin.*

Question: *How, and to what extent, if at all, do the courts base their assessments on sources of information as regards the situation in the country of origin?*

The results from the pilot study showed that the courts' arguments based on the situation in the country of origin were not always supported by references to specific sources of information (such as specific country reports). The arguments found were related to the risk upon return as such or specifically related to the courts' assessments of credibility. They could be of a general character concerning the overall situation as well as related more specifically to the asylum seeker's particular situation and be supported or not supported by references to

specific country information. Given these findings, while the subcategories were designed with a focus on the sources of information, the arguments as such were also included to get a more complete picture of the court narrative.

The results from the pilot study further showed that even though sources of information concerning the situation in the country of origin were not found in the court's reasoning, they could be mentioned in the initial part of the ruling or in the decision from the Migration Agency. Given the fact that the assessment of the situation in the country of origin is a fundamental part of the assessment of the risk upon return, I decided to add a number of variables that could show the occurrence, as such, of specific country information mentioned somewhere in the material in order to add to the picture of how country information is used in the asylum adjudication. Also, data coupled to the reliability of these sources such as the origin of the sources, publishing date and time between the Migration Agency decision and the court judgment, and who submits the sources of information, were collected. The results from the pilot studies indicated that sources emanating from the Migration Agency were the most frequently used. I also undertook a small test which showed that the sources used were not the latest ones. However, as it would have been too time-consuming to check all the country reports to see if any later ones were available, the publishing date will be accounted for but not further analysed in relation to what could have been obtained.

The variables concerning credibility related to country of origin information only include when the courts have explicitly used arguments or sources of information related to the country of origin to support their assessment of credibility. The following two subcategories will answer four questions:

References to the situation in the country of origin without references to specific sources:

- *How, and to what extent, if at all, do the courts base their assessments on arguments as regards the general situation in the country of origin, but without references to specific country of origin information?*
- *How, and to what extent, if at all, do the courts base their assessments on arguments as regards specific issues related to the asylum seeker's claims and*

situation, by referring to the situation in the country of origin but without references to specific country of origin information?

References to the situation in the country of origin substantiated with specific sources:

- *How, and to what extent, if at all, do the courts base their assessments, as regards the general situation in the country of origin, on specific country of origin information?*
- *How, and to what extent, if at all, do the courts base their assessments, as regards specific issues related to the asylum seeker's claims and situation, on specific country of origin information?*

2.2.2.2 B. Written documents

Assumption: *The courts base their arguments on written documents.*

Question: *How, and to what extent, if at all, do the courts base their assessments on written documents?*

The results from the pilot study showed that it was not always clear whether the written documents had been a basis for the assessments. The documents could be presented only in the decision from the Migration Agency or in the ruling but not evaluated, or be evaluated in the ruling but not explicitly expressed in relation to an argument in the reasoning. I made the choice that when the court explicitly ascribes an evidential value to a certain document, to treat it as if the document had been a basis for the court's arguments concerning the risk upon return. Therefore, this category focuses on whether the court has attributed evidential value to a certain document, while the occurrence of submitted written documents as such will be studied as background data. Written documents related to the assessment of credibility are included only if a certain document has been explicitly referred to in the courts' reasoning to substantiate their assessment of credibility.

The written documents are divided into two groups: documents submitted to prove identity and domicile; and documents submitted to substantiate the claims concerning the need for protection. Although the question of identity and domicile is an important part of the assessment of the risk upon return, I found it valuable to separate them in two subcategories, as the assessment of identity and domicile is often

an initial point of departure for the assessments whereas the specific circumstances that could constitute grounds for protection are based on other types of arguments.

The question of who has submitted the written document is not separately studied, as this is not always easy to read out from the rulings. However, while it is almost always clear that it is the asylum seeker who submits the written documents, attention will be paid to when it is explicit from the ruling or the Migration Agency decision that a document is clearly claimed by the Migration Agency (or the court). The following two subcategories are studied:

Identity documents:

– *How, and to what extent, if at all, do the courts base their assessments on identity documents?*

Other written documents:

– *How, and to what extent, if at all, do the courts base their assessments on other written documents?*

2.2.2.3 C. Witnesses

Assumption: *The courts base their arguments on witnesses.*

Question: *How, and to what extent, if at all, do the courts base their assessments on witnesses?*

The category is meant to include oral statements from witnesses claimed by either party. This category will focus on studying whether the witness has been ascribed with evidential value and thus forms a basis for the courts' assessment of risk. Statements from witnesses related to the courts' credibility assessment are included only if a statement from a witness has been explicitly referred to in the courts' reasoning to substantiate their assessment of credibility.

2.2.2.4 D. Experts

Assumption: *The courts base their arguments on statements from experts.*

Question: *How, and to what extent, if at all, do the courts base their assessments on experts?*

This category includes statements from experts claimed by either party. My pre-understanding together with what I found in the pilot studies showed that statements from language analysts, medical reports concerning age determination, and medical reports concerning mental or physical health could be expected to be found in the rulings and in the courts' reasoning, although there is no impediment for the parties or the court to call other kinds of expert witnesses.[25] Hence, this category includes these three subcategories and with an additional fourth subcategory in case other kinds of experts would appear in the material:

Language analysis:

- *How, and to what extent, if at all, do the courts base their assessment on language analysis?*

Medical age determination:

- *How, and to what extent, if at all, do the courts base their assessment on a medical age determination?*

Medical experts:

- *How, and to what extent, if at all, do the courts base their assessment on medical experts?*

  (Although medical reports will be included in the group "written evidence", they are also analysed in this section as the courts may consider them as expert evidence.)

Other experts:

- *How, and to what extent, if at all, do the courts base their assessment on other experts?*

[25] Section 25 of the Administrative Procedural Act.

As with the previous external categories of sources, the focus is on studying how the court has evaluated the statements and if the court has used the expert as a basis for their arguments concerning risk upon return and credibility, respectively, while the occurrence of an expert as such will serve as background data. It was not clear from the material if it had been the Migration Agency or the asylum seeker that initiated the language analyses or medical age determinations, which is why this data will be excluded from the study.

2.2.3 The quality of the asylum seeker's narrative (section 4.4)

Assumption: *The courts base their arguments on assessments of the quality of the asylum seeker's narrative.*

Question: *How, and to what extent, if at all, do the courts base their assessments on the quality of the asylum seeker's narratives?*

The results from the pilot studies showed that a large part of the reasoning included arguments concerning the credibility of the asylum seeker's narrative not based on any other source of information than the narrative itself. The arguments included what I have chosen to call "quality arguments" related to *coherence*, *consistency*, *robustness*, and *plausibility* as well as how the narrative was presented. Given my interest in the relation between the assessment of risk upon return and the assessment of credibility and my focus on which sources of information the courts use to support their arguments, I expected that this would be one of the core issues to study. Therefore, the arguments used by the courts based on these quality arguments will form a category called the "quality" of the asylum seeker's narrative. Thus, the meaning of the word *quality* has been narrowed down to focus on the courts' assessment of the narrative itself without taking into consideration any external information. While the category used when studying arguments related to the risk upon return only answers the question whether the courts' assessment is based on an assessment of the quality of the account, the variables in the section concerning assessments of credibility were designed to specifically study the different quality arguments used. This category is divided in six subcategories and answer the following questions:

Details:

– *How, and to what extent, if at all, do the courts base their assessments of credibility on the number of details in the asylum seeker's narrative?*

This variable includes arguments such as that the account lacks detail, is vague or scarce. The category could be used both to assess the quality or the veracity of the narrative, i.e. as an indicator of credibility, but also as an argument concerning robustness, i.e. the account does or does not contain enough facts to base a decision on.

Coherence:

– *How, and to what extent, if at all, do the courts base their assessment of credibility on the coherence of the asylum seeker's narrative?*

This variable includes arguments related to consistency such as whether the asylum seeker's narrative includes contradictions, inconsistencies, has changed or escalated during the procedure.

How the account is presented:

– *How, and to what extent, if at all, do the courts base their assessment of credibility on how the narrative is presented?*

The variable includes arguments related to how the court generally perceives or experiences the asylum seeker's narrative as, for example, that it was perceived as actually experienced by the applicant, rehearsed, general, clear.

The origin of a statement:

– *How, and to what extent, if at all, do the courts base their assessment of credibility on the origin of the asylum seeker's statements?*

This variable addresses issues related to the conditions under which the account or a certain statement has emerged such as, for instance, if a statement originates from a second-hand source.

Plausibility:

– *How, and to what extent, if at all, do the courts base their assessment of credibility on whether the asylum seeker's narrative seems plausible?*

The variable contains arguments where the court makes statements about the plausibility of facts in the asylum seeker's narrative without referring to any facts outside the narrative. These arguments can be merely statements without any further explanation or based on logical conclusions from analysing different facts in the narrative in relation to each other. Expressions such as the account or a statement seem/is or does not seem/is implausible, remarkable, strange, are included.

Not questioned:

– *How, and to what extent, if at all, do the courts base their assessment of credibility by not questioning the narrative?*

This variable is a plain positive statement by the court as regards the asylum seeker's narrative but without any further explanation.

2.2.4 The asylum seeker's behaviour, actions or activities (section 4.5)

Assumption: *The courts base their assessments on the asylum seeker's behaviour, actions or activities.*

Question: *How, and to what extent, if at all, do the courts base their assessments on the asylum seeker's behaviour, actions or activities*

The category includes the following subcategories:

A. The asylum seeker's behaviour or actions during the procedure:

– *How, and to what extent, if at all, do the courts base their assessments on the asylum seeker's behaviour or actions during the procedure?*

This subcategory has in turn been divided into the following subcategories:

Redress:

- *How, and to what extent, if at all, do the courts base their assessments on whether or not the asylum seekers have been able to redress negative credibility findings?*

The category addresses whether the asylum seeker has been able to redress, rebut or explain earlier incompleteness, lack of coherence or implausibility in the account.

Cooperativeness:

- *How, and to what extent, if at all, do the courts base their assessments of credibility on whether the asylum seekers are cooperative?*

The category can be connected to redress arguments but has been placed in a separate category, in order to separate what is actually a redress of a former statement from what is generally assessed by the court as non-cooperativeness (for instance, arguments that the asylum seekers have not presented certain documents even though, according to the court, they should have been able to or have said they would, have lied about her or his identity or lied about dates or about her or his need for protection).

The time when the application is made:

- *How, and to what extent, if at all, do the courts base their assessments on whether the asylum seekers have filed an application as soon as possible?*

This category includes arguments as regards the fact that the asylum seeker has not filed an application for asylum at the earliest possible time, primarily filed an application in another EU country or been in another EU country before without filing an application (Dublin cases).

Body language:

- *How, and to what extent, if at all, do the courts base their assessments on the asylum seeker's body language?*

The category includes arguments related to the asylum seeker's physical expressions.

B. The asylum seeker's action or activities in the country of origin (including sur-place)

– *How, and to what extent, if at all, do the courts base their assessments of credibility on the asylum seeker's action or activities in the country of origin?*

This subcategory includes the following subcategories and will answer the following questions:

Protection from the public authorities:

– *How, and to what extent, if at all, do the courts base their assessments on whether the asylum seeker has sought protection from the public authorities in the country of origin?*

The possibility to leave the country of origin:

– *How, and to what extent, if at all, do the courts base their assessments on whether the asylum seeker has/has not been able to leave the country of origin legally?*

The risk issue here is whether it is possible to leave the country "legally" and, therefore, whether the authorities have an interest in the person. This category of actions may be coupled only to the asylum seeker's narrative. However, the subcategory "legally" left her or his country of origin might rely not only on the asylum seeker's statements but also on, for instance, the occurrence of a passport. Counter arguments from the asylum seeker may be, for instance, that it is possible to bribe officials or personnel at the airport or that the control in the airport is not coupled to the security service.

The possibility to perform activities in the country of origin:

– *How, and to what extent, if at all, do the courts base their assessments on whether the asylum seeker has/has not been able to continue her or his activities in while still in the country of origin?*

"Activities" in this category relate to activities that may be a factor of risk such as religious or political activities.

Level of activity:

– *How, and to what extent, if at all, do the courts base their assessments on the level of the activities performed by the asylum seeker while still in the country of origin?*

The public authorities/or individuals in the country of origin have/have not an interest in the asylum seeker due to the asylum seeker's level of political work/religious/sexual activity or openness.

Other actions or activities:

– *How, and to what extent, if at all, do the courts base their assessments on other types of action or activities?*

This subcategory includes arguments such as that the asylum seeker has been able to obtain a passport, has been able to return or stay in the country of origin for a long time before deciding to leave or has continued her or his activities after having left the country of origin and that this has/has not come to the public authorities' attention in the country of origin (*sur-place*). The arguments in this category are mainly related to the asylum seeker's behaviour or action in the country of origin. The *sur-place* argument is the only one in this category that concerns the asylum seeker's action or behaviour of return after having left the country of origin.

The pilot study showed that the arguments related to the behaviour, actions or activities *during the procedure* were clearly coupled to credibility arguments, while the arguments coupled to the behaviour, actions or activities *in the country of origin* were not directly coupled to either risk or credibility. As it turned out to be difficult to make a division between what is a risk argument and what is a credibility argument in this category, I chose to include the same arguments in both the assessment of the risk upon return and the assessment of credibility. It turned out that the arguments in this category did not always have an identifiable origin, i.e. it was not possible to read out from the material whether the information came from the asylum seeker's statements or from other sources (such as passports, applications, etc.). Hence, this category includes the arguments as such but says nothing about the sources of these arguments.

2.2.5 Co-applicants (section 4.6)

Assumptions: *The courts include co-applicants in their assessment.*

Question: *How, and to what extent, if at all, do the courts include the co-applicants in their assessments?*

This category is used for studying the courts' argument concerning the risk upon return is based on the facts that the risk may vary between individuals in the same case even if they belong to the same family. For instance, children or women may face other risks that men do not face. Therefore, the question of whether the risk upon return for all applicants has been considered in the courts' reasoning is studied as a risk factor. The courts' assessments of credibility, in this category, aims at studying whether the courts have based their credibility assessments on statements from co-applicants.

2.2.6 Individual facts and circumstances (section 4.7)

Assumption: *The courts' assessments include considerations of individual facts and circumstances.*

Question: *How, and to what extent, if at all, do the courts base their assessments on individual facts and circumstances?*

Individual facts and circumstances such as age, gender, health, social or cultural aspects are presumed to be considered by the courts as a risk factor per se as well as a basis for specific consideration as to the ability to present a credible narrative. The results from the pilot studies showed that it was not clear from the courts' reasoning, concerning the individual risks, whether the arguments were based on a certain requisite in a certain provision (such as persecution due to belonging to one of the groups enumerated in the refugee provision) or if it was general considerations related to the asylum seeker's vulnerability based on personal facts and circumstances. For instance, when the courts referred to being a woman as a risk factor, it was not clear whether this was based on the requisite "gender" in the refugee provision or only a general personal consideration. Therefore, the category, as designed in relation to risk assessments, includes arguments related to the fact that the asylum seeker would be specifically exposed to certain risks if returned to the country of origin due to mental or other health problems, age, gender or cultural circumstances, regardless of whether

the argument is explicitly connected to one of the protection grounds (such as affiliation to one of the groups listed in the refugee provision). The same category used in relation to the courts' assessment of credibility is designed to study to what extent the courts use these types of arguments as a factor that may affect the asylum seeker's behaviour or ability to narrate. Similarly to the behaviour/action category, the information in this category may origin from different sources such as medical reports, age determinations, and the asylum seeker's statements, and it is not always possible to understand where the information originated. The category includes two subcategories and the courts' considerations concerning minors have been studied separately. Two questions are posed:

A. Individual facts and circumstances *(excluding being a minor)*:

- *How, and to what extent, if at all, do the courts base their assessments on individual facts and circumstances?*

B. Consequences for children

- *How, and to what extent, if at all, do the courts base their assessments on considerations as regards specific consequences for children?*

2.2.7 General risk considerations (section 4.8)

Assumption: *The courts' assessments include arguments related to the general risk issues.*

Question: *How, and to what extent, if at all, do the courts base their assessments on arguments connected to general risk considerations?*

This category aims to capture some of the general assessments on risk that can be found in the courts' reasoning and that link facts to legal requisites. The category also includes some other risk issues that were found but hard to place anywhere else such as, for instance, the argument that the alleged event happened a long time ago. These arguments are divided into two subcategories. The first subcategory includes arguments that can be connected to the requisites in the protection provisions in the Aliens Act and answers the following questions:

A. Arguments connected to the requisites in the protection provisions and the situation in the country of origin:

Ongoing armed conflict and indiscriminate violence in the country of origin:

- *How, and to what extent, if at all, do the courts base their assessments on whether there is an ongoing armed conflict and indiscriminate violence in the country of origin?*

    - *Is the assessment on whether there is an ongoing armed conflict and indiscriminate violence in the country of origin based on references to legal sources?*

    - *Is the assessment on whether there is an ongoing armed conflict and indiscriminate violence in the country of origin based on references to country reports?*

Severe conflicts in the country of origin:

- *How, and to what extent, if at all, do the courts base their assessments on whether there is a severe conflict in the country of origin?*

    - *Is the assessment on whether there is a severe conflict in the country of origin based on references to legal sources?*

    - *Is the assessment on whether there is a severe conflict in in the country of origin based on references to country reports?*

Protection from the public authorities in the country of origin:

- *How, and to what extent, if at all, do the courts base their assessment on whether there is a possibility to get protection from the public authorities in the country of origin?*

    - *Is the assessment on whether there is a possibility to get protection from the public authorities in the country of origin based on references to legal sources?*

    - *Is the assessment on whether there is a possibility to get protection from the public authorities in the country of origin based on references to country reports?*

Internal flight:

- *How, and to what extent, if at all, do the courts base their assessment on whether there is a possibility of internal flight?*

    - *Is the assessment on whether there is a possibility of internal flight based on references to legal sources?*

    - *Is the assessment on whether there is a possibility of internal flight based on references to country reports?*

B. Sufficiency arguments

The second subcategory encompasses other types of general arguments coupled to "sufficiency", i.e. the alleged risk claims are not, according to the courts, sufficient for rendering international protection. The following questions are answered:

- *How, and to what extent, if at all, do the courts base their assessment on the time of the alleged events causing the risk?*

    - *Is the assessment on the time of the alleged events causing the risk based on references to legal sources?*

    - *Is the assessment on the time of the alleged events causing the risk based on references to country reports?*

- *How, and to what extent, if at all, do the courts base their assessments on other arguments coupled to "sufficiency"?*

    - *Is the assessment on "sufficiency" arguments based on references to legal sources?*

– *Is the assessment on "sufficiency" arguments based on references to country reports?*

These types of arguments address when the alleged claims, according to the courts, are not sufficient due to, for instance, the intensity or severity of the alleged events, the public authorities' interest in and knowledge about the asylum seeker's activities or the risk upon return after having applied for asylum.

2.2.8 Procedural deficiencies (section 4.9)

Assumption: *The courts' assessments include considerations related to deficiencies in the procedure.*

Question: *How, and to what extent, if at all, do the courts base their assessments on procedural deficiencies?*

The category includes the courts' considerations as regards deficiencies during the procedure that may have had an impact on the asylum seeker's ability to present a credible narrative in the court such as communication problems with the interpreter or the legal counsel. Procedural deficiencies could be seen as a general risk issue (as, for instance, flaws concerning investigation measures). However, the result from the pilot study showed that claims related to procedural deficiencies during the asylum procedure were presented mainly to rebut the Migration Agency's assessment of the narrative as not credible. As it turned out to be difficult to make a division between what was a risk argument and what was a credibility argument in this category, I chose to include the same arguments in both the assessment of the risk upon return and the assessment of credibility. The study further showed that the courts either did not consider these claims, rejected the claims as such or accepted the claim and assessed it in favour, or to the disadvantage, of the asylum seeker. The results in Table 1 focus on whether the courts accept the claims as regards procedural deficiencies and, hence, use them as a basis for their assessment. A more differentiated analysis of the result, comprising the courts' considerations, is provided in section 2.7.

3 Formal variables (Chapter 3)

3.1 The court and the procedure

VAR1	*Court:*
	Stockholm
	Gothenburg
	Malmö
VAR2	*Outcome:*
	Granted
	Rejected
VAR3	*Ground for granted residence permit:*
	Refugee
	Subsidiary protection
	Need of protection otherwise
	Exceptionally distressing circumstances (Humanitarian grounds)
VAR4	*Dissenting judge:*
	Yes
	No
VAR5	*Who is dissenting?*
	Jurist judge
	One lay judge
	Two lay judges
VAR6	*The court explicitly agrees with the MB's decision regarding general risk assessment.*
	Yes
	No
	Partly
	No data
VAR7	*Does the court explicitly identify the potential risk upon return?*
	Yes
	No
	Partly

3.2 The asylum seeker– Personal data

VAR8	*Expulsion country/countries*
VAR9	*Number of complainants:*
	1
	2
	3

	4
	More than 4
VAR10	*Family constellation:*
	Adult, single
	Unaccompanied minor
	Couple
	Couple with child/children
	Mother and child/children
	Father and child/children
	Other
	Unclear
VAR11	*Sex – complainant 1–6*
	Female
	Male
	Unclear
VAR12	*Age – complainant*
	1–6
	0–12
	13–17
	18–25
	26–45
	46–65
	65–
	Unclear

4 Content variables (Chapter 4)

4.1 Bases for the courts' assessments of the risk upon return

4.1.1 Category 1: *Legal sources*

A. Expulsion:

VAR13	*Does the court use the word "non-refoulement"?*
	Yes
	No
VAR14	*Does the court explicitly discuss the principle of "non-refoulement"?*
	Yes
	No

VAR15	*Does the court explicitly discuss any other impediment to enforce an expulsion?*
	Yes
	No
VAR16	*Does the court base its assessment of the risk of refoulement or any other impediment to enforce an expulsion on legal sources?*
	Yes
	No

Types of legal sources:

VAR17	*Criteria in the protection provisions in the Swedish Aliens Act*
	Yes
	No
VAR18	*Swedish case law*
	Yes
	No
VAR19	*Swedish preparatory work*
	Yes
	No
VAR20	*ECHR/ECtHR*
	Yes
	No
VAR21	*EU law/ECJ*
	Yes
	No
VAR22	*International law*
	Yes
	No
VAR23	*Other*
	Yes
	No
VAR24	*Total sum*

B. Status determination

VAR25	*Does the court explicitly discuss the content of the different statuses?*
	Yes
	No
VAR26	*Does the court base its assessment of status determination on legal sources?*
	Yes

No

Types of legal sources:

VAR27 *Criteria in the protection provisions in the Swedish Aliens Act*
Yes
No

VAR28 *Swedish case law*
Yes
No

VAR29 *Swedish preparatory work*
Yes
No

VAR30 *ECHR/ECtHR*
Yes
No

VAR31 *EU law/ECJ*
Yes
No

VAR32 *International law*
Yes
No

VAR33 *Other*
Yes
No

VAR34 *Total sum*

C. Assessment principles

Burden and standard of proof

VAR35 *Does the court refer to general principles regarding burden and standard of proof?*
Yes
No

Word or wordings linked to risk/standard of proof

VAR36 *How often does the court use the word "probable" to indicate the standard of proof?*
0
1
2
3
4
More than 4

VAR37 *How often does the word "risk" appear in the judgment?*
0
1
2
3
4
More than 4

VAR38 *How often does the wording "well-founded fear" appear in the judgment?*
0
1
2
3
4
More than 4

VAR39 *How often does the word "return" appear in the judgment?*
0
1
2
3
4
More than 4

Alleviation principles

VAR40 *Does the court refer to the principle "benefit of the doubt"?*
Yes
No

VAR41 *Does the court refer to other evidentiary alleviation principles?*
Yes
No

The duty to investigate

VAR42 *Does the court refer to principles linked to the duty to investigate?*
Yes
No

Other assessment principles

VAR43 *Does the court refer to the possibility of internal flight?*
Yes
No

VAR44 *Does the court state that the assessment must be "forward-looking"?*
Yes

No

VAR45 *Does the court state that the assessment must be "individual"?*
Yes
No

VAR46 *Does the court refer to any other evidentiary or assessment principles?*
Yes
No

VAR47 *Does the court refer to any legal sources as regards evidentiary and assessment principles?*
Yes
No

Types of legal sources

VAR48 *Swedish case law*
Yes
No

VAR49 *Swedish preparatory work*
Yes
No

VAR50 *ECHR/ECtHR*
Yes
No

VAR51 *EU law/ECJ*
Yes
No

VAR52 *International law*
Yes
No

VAR53 *The UNHCR Handbook*
Yes
No

VAR54 *Other*
Yes
No

VAR55 *Total sum*

4.1.2 Category 2: External sources of information

The situation in the Country of Origin

Background data concerning the sources of information

VAR56 *Are any country reports or other country of origin information mentioned in the court's ruling?*
Yes
No

VAR57 *Number of reports or other country of origin information mentioned in the ruling*
1
2
3
4
More than 4

VAR58 *If not mentioned in the ruling – mentioned in the MA's decision?*
Yes
No

VAR59 *Number of reports or other country of origin information mentioned in the MA's decision*
1
2
3
4
More than 4

VAR60 *Time between the MA's decision and the court's ruling*
4 months or less
4–8 months
8–12 months
More than 12 months

Data about the reports

Who submitted the report?

VAR61-64

Report no 1–4
The MA
The complainant
The court
No data

Origin of the reports

VAR65-68

Report no 1–4

The Swedish Migration authorities
The Swedish Foreign Department
Migration authorities or foreign departments in other states
Non-Governmental Organisations (NGOs)
UN Reports
Other
No data

Publishing year

VAR69-72

Report 1–4

2008 or earlier
2009
2010
2011
2012
No data

A. Country of origin information

VAR73 *Does the court base its assessment of the risk upon return on arguments linked to the general situation in the country of origin without reference to specific country of origin information?*

Yes
No
Partly

VAR74 *Does the court base its assessment of the risk upon return on arguments as regards issues related to the asylum seeker's specific claims and situation, by referring to the situation in the country of origin but without reference to specific country of origin information?*

Yes
No
Partly

VAR75 *Does the court base its assessment of the risk upon return on arguments linked to the general situation in the country of origin substantiated by references to specific country of origin information?*

Yes
No
Partly

VAR76 *Does the court base its assessment of the risk upon return on arguments as regards issues related to the asylum seeker's specific claims and situation, by referring to the situation in the country of origin substantiated with reference to specific country of origin information?*
Yes
No
Partly

B. Written documents

Identity

VAR77 *Identity documents have been submitted*
Yes
No
Unclear
No data

VAR78 *The court's evaluation*
No or low value
Some value
Not questioned
No data

Written documents (excluding identity documents)

VAR79 *Written evidence has been submitted in the case*
Yes
No
Unclear
No data

VAR80 *Authenticity test has been carried out*
Yes
No
Unclear
No data

VAR81 *The court's evaluation*
No or low value
Some value
Not questioned
No data

VAR82 *The written documents are valued separately*
Yes
No

Document 1-4

VAR83-86 *Evidentiary value*
No or low value
Some value
Not questioned
No data

VAR87 *The evaluation of written documents is coupled to identity*
Yes
No
Partly
Unclear

C. Witnesses

VAR88 *Witness/witnesses has/have been present in the case*
Yes
No

Witness 1-3

VAR89-92 *The court's evaluation*
No or low value
Some value
Not questioned
No data

D. Experts

VAR93 *A medical age determination has been carried out*
Yes
No

VAR94 *Does the court base its assessment of the risk upon return on a medical age determination?*
Yes
No

VAR95 *A language analysis has been carried out*
Yes
No

VAR96 *Does the court base its assessments of the risk upon return on a language analysis?*
Yes
No

VAR97 *Medical report/s have been submitted*
Yes
No

VAR98 *Does the court base its assessment of the risk upon return on medical report/s?*
Yes
No

VAR99 *Statements from other experts have been submitted*
Yes
No

VAR100 *Does the court base its assessment of the risk upon return on other expert/s?*
Yes
No

4.1.3 Category 3: The quality of the asylum seeker's narrative

VAR101 *Does the court question the asylum seeker's general credibility?*
Yes
No
No data

VAR102 *Does the court question the quality of the asylum seeker's narrative?*
Yes
No
Partly
Unclear
No data

VAR103 *Does the court question the asylum seeker's identity?*
Yes
No
Unclear
No data

VAR104 *Does the court question the asylum seeker's domicile?*
Yes
No
Unclear
No data

4.1.4 Category 4: The asylum seeker's behaviour, actions or activities

A. Arguments linked to the asylum seeker's behaviour, actions or activities *during* the procedure (see below, under the courts' assessment of credibility)

B. The asylum seeker's behaviour, actions or activities *in the country of origin*

VAR105 *Does the court argue that the asylum seeker has(not) sought protection from the public authorities?*
Yes
No
No data

VAR106 *Does the court argue that the asylum seeker has (not) been able to legally leave the country of origin?*
Yes
No
No data

VAR107 *Does the court argue that the asylum seeker has (not) been able to continue her or his activities?*
Yes
No
No data

VAR108 *Does the court argue that the public authorities or individuals in the country of origin (do not) have an interest in the asylum seeker due to the asylum seeker's level of political work/religious/sexual activity or openness?*
Yes
No
No data

VAR109 *Does the court use any other arguments linked to the asylum seeker's behaviour, actions or activities before leaving her or his country of origin?*
Yes
No
No data

4.1.5 Category 5: Co-applicants

VAR110 *Does the court consider the risk upon return for co-applicants separately?*
Yes

No

VAR111 *Does the court consider the risk upon return for minor co-applicants separately?*
Yes
No

4.1.6 Category 6: Individual and personal facts and circumstances

VAR112 *Does the court base its assessment of risk upon return on considerations as to personal data, health, social or cultural circumstances?*
Yes
No

VAR113 *Types of circumstances*
Health (includes issues such as physical or mental health)
Age (includes issues related to being old or having recently been a minor)
The consequences for the child
The best interests of the child
The consequences for a woman
Other (includes issues related to education, minority groups, sexual orientation, statelessness

4.1.7 Category 7: General risk considerations

VAR114 *Does the court consider whether there is an ongoing armed conflict in the country of origin?*
Yes
No
No data

VAR115 *Does the court refer to any legal source/s to substantiate its stand?*
Yes
No

VAR116 *Does the court refer to any country of origin information to substantiate its stand?*
Yes
No

VAR117 *Does the court consider whether there is a severe conflict in the country of origin?*
Yes
No

VAR118 *Does the court refer to any legal source/s to substantiate its stand?*
Yes
No
VAR119 *Does the court refer to any country of origin information to substantiate its stand?*
Yes
No
VAR120 *Does the court consider whether the asylum seeker can get protection from the public authorities in the country of origin?*
Yes
No
No data
VAR121 *Does the court refer to any legal source/s to substantiate its stand?*
Yes
No
VAR122 *Does the court refer to any country of origin information to substantiate its stand?*
Yes
No
VAR123 *Does the court consider whether the asylum seeker can return to another area of the country of origin (internal flight)?*
Yes
No
No data
VAR124 *Does the court refer to any legal source/s to substantiate its stand?*
Yes
No
VAR125 *Does the court refer to any country of origin information to substantiate its stand?*
Yes
No
VAR126 *Does the court argue that the alleged event happened a long time ago?*
Yes
No
No data

VAR127 *Does the court consider other general risk issues? (including sufficiency arguments, i.e. the alleged claims are not sufficient to constitute a need for protection concerning, for instance, the intensity or severity of the alleged events or the public authorities' interest in and knowledge about the asylum seeker's activities and the risk upon return after having applied for asylum)*
Yes

No
No data

4.1.8 Category 8: *Procedural deficiencies*

See below under the courts' assessment of credibility

4.2 Bases for the courts' assessments of the credibility of the asylum seeker's narrative

Generally

VAR128 *Does the court explicitly agree with the MA's credibility assessment?*
Yes
No
Partly
No data

4.2.1 Category 1: *Legal sources* (how to carry out a credibility assessment)

VAR129 *Does the court make any general references to principles as regards credibility assessment?*
Yes
No

VAR130 *Does the court refer to any legal sources as regards credibility assessment?*
Yes
No

Types of legal sources:

VAR131 *Swedish case law*
Yes
No

VAR132 *Swedish preparatory work*
Yes
No

VAR133 *ECHR/ECtHR*
Yes
No

VAR134 *EU law/ECJ*
Yes
No
VAR135 *International law*
Yes
No
VAR136 *Other*
Yes
No
VAR137 *Total number of legal references*

4.2.2 Category 2: External sources of information

A. Country of origin information

VAR138 *Does the court base its assessment of the credibility of the asylum seeker's narrative on arguments linked to the general situation in the country of origin without references to specific country of origin information?*
Yes
No

VAR139 *Does the court base its assessment of the credibility of the asylum seeker's narrative on arguments as regards issues related to the asylum seeker's specific claims and situation, by referring to the situation in the country of origin but without references to specific sources?*
Yes
No
Partly

VAR140 *Does the court base its assessment of the credibility of the asylum seeker's narrative on arguments linked to the general situation in the country of origin and with references to specific country of origin information?*
Yes
No
Partly

VAR141 *Does the court base its assessment of the credibility of the asylum seeker's narrative as regards issues related to the asylum seeker's specific claims and situation on specific country of origin information?*

Yes

No
Partly

VAR142 *Total number of arguments linked to credibility assessment based on references to specific sources of information concerning the situation in country of origin*

B. Written evidence

VAR143 *Does the court base its credibility assessment on written evidence?*
Yes
No

VAR144 *Attached value (as some of the documents have been a basis for the assessment despite the fact that the court attached no or low value to the document)*
Not questioned
Some value
No or low value
No data

C. Witnesses

VAR145 *Does the court base its credibility assessment on statements from witnesses?*
Yes
No

D. Experts

VAR146 *Does the court base its credibility assessment on statements from experts?*
Yes
No

VAR147 *What types of experts?*
Medical age determination
Language analyses
Medical reports
Other

VAR148 *Total number of external sources*

4.2.3 Category 3 The quality of the asylum seeker's narrative

VAR149 *Total number of quality arguments*

Types of arguments, negative

VAR150 *How many times does the court use robustness arguments to substantiate the assessment that the narrative is not credible? (Example: vague/lack of details/scarce/general)*
0
1
2
3
4
5
More than 5

VAR151 *How many times does the court use arguments linked to how the account is presented to substantiate the assessment that the narrative is not credible? (Example: not self-experienced, rehearsed)*
0
1
2
3
4
5
More than 5

VAR152 *How many times does the court use coherence arguments to substantiate the assessment that the narrative is not credible? (Example: contradictory, inconsistent, changed over time, escalation of account)*
0
1
2
3
4
5
More than 5

VAR153 *How many times does the court use plausibility arguments to substantiate the assessment that the narrative is not credible? (Example: speak for, not plausible, indicates, speculations)*
0
1
2
3
4
5
More than 5

VAR154 *Total number of quality arguments to substantiate the assessment that the narrative is not credible*

Types of argument, positive

VAR155 *How many times does the court use robustness arguments to substantiate the assessment that the narrative is credible? (Example: detailed)*

0
1
2
3
4
5
More than 5

VAR156 *How many times does the court use arguments linked to how the account is presented to substantiate the assessment that the narrative is credible? (Example: self-experienced, clear)*

0
1
2
3
4
5
More than 5

VAR157 *How many times does the court use coherence arguments to substantiate the assessment that the narrative is credible? (Example: coherent, consistent, not changed during the procedure)*

0
1
2
3
4
5
More than 5

VAR158 *How many times does the court use plausibility arguments to substantiate the assessment that the narrative is credible? (Example: speak for, plausible, indicates that)*

0
1
2
3
4

5
More than 5

VAR159 *Total number of quality arguments to substantiate the assessment that the narrative is credible*

4.2.4 Category 4: The asylum seeker's behaviour, actions or activities

A. The asylum seeker's behaviour, actions, or activities *during* the procedure

Negative credibility findings

VAR160 *How many times does the court use redress arguments to substantiate the assessment that the narrative is not credible? (Example: has not explained, not been able to answer, not given a plausible explanation)*

0
1
2
3
4
5
More than 5

VAR161 *How many times does the court use cooperative arguments to substantiate the assessment that the narrative is not credible? (Example: not answered questions not presented necessary documents)*

0
1
2
3
4
5
More than 5

VAR162 *How many times does the court use arguments linked to body language to substantiate the assessment that the narrative is not credible? (Example: nervous, roamed with the eyes)*

0
1
2
3
4
5

More than 5

VAR163 *Does the court argue that the asylum seeker has not filed a complaint as soon as possible?*

Yes
No
No data

Positive credibility findings

VAR164 *How many times does the court use redress arguments to substantiate the assessment that the narrative is credible? (Example: has explained, has cooperated, has answered questions)*

0
1
2
3
4
5
More than 5

VAR165 *How many times does the court use cooperative arguments to substantiate the assessment that the narrative is credible? (Example: answered questions, presented necessary documents)*

0
1
2
3
4
5
More than 5

VAR166 *How many times does the court use arguments linked to body language to substantiate the assessment that the narrative is credible?*

0
1
2
3
4
5
More than 5

VAR167 *Does the court argue that the asylum seeker has (not) filed a complaint as soon as possible?*

Yes
No
No data

VAR 168 *Not questioned*

0
1
2
3
4
5
More than 5

B. The asylum seeker's behaviour, actions or activities *in the country of origin*) (see category 4 above under the assessment of the risk upon return**)**

4.2.5 Category 5: *Co-applicants*

VAR169 *Does the court base its credibility assessment on statements from co-applicants?*

Yes
No
Unclear

4.2.6 Category 6: Individual facts and circumstances

VAR170a *The court has based its assessment of credibility on health, social or cultural considerations (Example: traumatisation, health problems, age)*

Yes
No
Unclear

VAR170b *Types of circumstances*

Health (includes issues such as physical or mental health)
Age (includes issues related to being old or having recently been a minor)
The consequences for the child
The best interests of the child
The consequences for a woman
Other (includes issues related to education, minority groups, sexual orientation, statelessness)

4.2.7 Category 7: *General risk assessments*

See above under assessments on the risk upon return.

4.2.8 Category 8: Procedural deficiencies

VAR171 *Procedural deficiencies have been claimed by the asylum seeker as an explanation for the assessment that the narrative is not credible*
Yes
No

Types of procedural deficiencies claimed

VAR172 *Interpreter*
Yes
No

VAR173 *Public counsel*
Yes
No

VAR174 *Communication with the MB*
Yes
No

VAR175 *Other*
Yes
No

VAR176 *Procedural problem is part of the court's argumentation*
Yes
No
Unclear

VAR177 *The claim has been considered by the court*
Yes
No

VAR178 *The claim has been considered and rejected*
Yes
No

VAR179 *The claim has been considered and accepted*
Yes
No

Types of procedural deficiencies that the courts have considered

VAR180 *Interpreter*
Yes
No

VAR181 *Public counsel*
Yes
No

VAR182 *Communication with the MB*
Yes
No

VAR183	*Other*
	Yes
	No

Appendix 2

To Believe or Not to Believe – Is That the Question?

A critical study of how the Swedish migration courts handle their responsibility to judge in asylum cases

The results of the Empirical Study

Content

Appendix 2 .... **1**

1 Formal data – Results **6**

1.1 Formal data: The courts – procedural data **6**

1.1.1 Outcome: *How often do the courts change the Migration Agency's decision in favour of the asylum seeker?* 6

1.1.2 Dissenting opinions: *Are there any patterns linked to when one or two judges hold a dissenting opinion*? 7

1.1.3 The parties' standpoints: *Are there any patterns linked to whether the courts give an account of the parties' standpoints in the reasoning?* 7

1.2 Formal data: The asylum seeker – personal data **8**

1.2.1 Personal data: *What is the general pattern, among the asylum seekers in the study, as regards personal data?* 8

2 The bases for assessing the risk upon return with specific focus on the credibility of the asylum seeker's narrative as presented by the Swedish migration courts **11**

2.1 Legal sources: *How and to what extent, if at all, do the courts base their assessments on legal sources?* (Category 1) **11**

2.1.1 Legal sources: Aggregated results 11

2.1.2 Non-refoulement/Expulsion: *How and to what extent, if at all, do the courts base their assessments concerning the principle of non-refoulement on legal sources?* 12

2.1.3 Status determination: *How and to what extent, if at all, do the courts base their assessments concerning status determination on legal sources?* 12

2.1.4 Assessment principles: *How, and to what extent, if at all, do the courts base their assessments on assessment principles?* . 13

2.2 External sources: *How, and to what extent, if at all, do the courts base their assessments on external sources of information?* (Category 2) **15**

2.2.1 The situation in the country of origin: *How, and to what extent, if at all, do the courts base the assessments on return on information as regards the situation in the country of origin?* (Category 2A) 15

2.2.2 Written documents: *How, and to what extent, if at all, do the courts base the assessment of the risk on return on written documents?* (Category 2B) ... 19
2.2.3 Witnesses: *How, and to what extent, if at all, do the courts base the assessment of the risk on return on witnesses?* (Category 2C) ... 20
2.2.4 Experts: *How, and to what extent, if at all, do the courts base their assessments on experts?* (Category 2D) ... 21
2.2.5 External sources: Aggregated results ... 23

2.3 The quality of the asylum seeker's narrative: *How, and to what extent, if at all, do the courts base their assessments of on the quality of the asylum seeker's narrative?* (Category 3) ... 24

2.4 Behaviour, actions and activities: *How, and to what extent, if at all, do the courts base their assessments on the asylum seeker's behaviour, actions or activities?* (Category 4) ... 26

2.5 Co-applicants: *How, and to what extent, if at all, do the courts include the co-applicants in their assessments?* (Category 5) ... 28

2.6 Individual facts and circumstances: *How, and to what extent, if at all, do the courts base their assessments on individual facts and circumstances?* (Category 6) ... 29

2.7 General risk considerations: *How, and to what extent, if at all, do the courts base the assessments on arguments connected to general risk consideration* (Category 7) ... 32

2.8 Procedural deficiencies: *How, and to what extent, if at all, do the courts base their assessments on procedural deficiencies?* (Category 8) ... 33

2.9 Aggregated result ... 34

2.10 Outcome: Correlations between the results in the different categories and the outcome of the cases ... 35
2.10.1 Outcome: Legal sources ... 35
2.10.2 Outcome: External sources of information ... 36
2.10.2.1 Outcome: Country of origin information ... 36
2.10.2.2 Outcome: Written documents ... 36
2.10.2.3 Outcome: Witnesses ... 37
2.10.2.4 Outcome: Experts ... 38
2.10.3 Outcome: The quality of the asylum seeker's narrative ... 38
2.10.4 Outcome: The asylum seeker's behaviour, actions, and activities ... 39

2.10.5 Outcome: Co-applicants ... 39
2.10.6 Outcome: Individual facts and circumstances ... 40
2.10.7 Outcome: General risk considerations ... 41
2.10.8 dOutcome: Procedural deficiencies ... 41

1 Formal data – Results

1.1 Formal data: The courts – procedural data

Table 1. Number of asylum cases during the period 1 May 2013 to 30 April 2014 – appeals – oral hearings[1192]

Number and percentage of granted appeals in all asylum cases during the period and number and percentage of granted appeals in cases where an oral hearing has been held

Court	Asylum cases	Granted	Oral hearing	Granted
Stockholm	3,819 54%	221 6%	778 20%	120 15%
Gothenburg	1,892 27%	231 12%	630 33%	128 20%
Malmö	1,324 19%	118 9%	416 31%	69 17%
Total	**7,035** **100%**	570 **8%**	1,824 **26%**	317 **17%**

1.1.1 Outcome: *How often do the courts change the Migration Agency's decision in favour of the asylum seeker?*

Table 2. Granting rate and granting grounds

Number and percentage of all cases (300)/(Percentage of cases where protection is granted)

Court	Refugee	Subsidiary protection	Otherwise in need of protection*	Particularly distressing circumstances **	Total
Stockholm	4	8	0	3	15
Gothenburg	9	5	0	2	16
Malmö	5	7	0	3	15
Total	**18** **6% (40%)**	**20** **7% (43%)**	**0** **0% (0%)**	**8** **2% (17%)**	**46** **15% (100%)**

* Declaration status as a person "otherwise in need of protection" was a ground for protection in Chapter 4, section 2(a) of the Swedish Aliens Act, not covered by international or EU protection. ** This category does not fall under the international protection statuses but corresponds to what is usually called humanitarian ground for granting a residence permit (Chapter 5, section 6 of the Aliens Act).

[1192] The statistics are based on information from the courts and compiled by the Swedish National Courts Administration (Domstolsverket). The statistics were obtained from Åsa Saltin, 27 November 2014, Controller at the Swedish National Courts Administration, and compiled by the author.

1.1.2 Dissenting opinions: *Are there any patterns linked to when one or two judges hold a dissenting opinion*?

Table 3. Dissenting judge/judges

Number and percentage of all cases (300)

Dissenting judge	The jurist judge is dissenting	One lay judge is dissenting	Two lay judges are dissenting	Dissenting judge/s
Total	**14** **5%**	**27** **9%**	**21** **7%**	**62** **21%**

Table 4. Dissenting judge/s – granted/rejected appeals

Number and percentage of all granted/rejected appeals

Outcome	Granted		Rejected		**Total**
Dissenting judge	Yes	No	Yes	No	
Total	**19*** **41%**	**27** **59%**	**75**** **30%**	**179** **70%**	**300**
	46		**254**		

* In 14 of the cases the jurist judge voted against. ** Only lay judges.

1.1.3 The parties' standpoints: *Are there any patterns linked to whether the courts give an account of the parties' standpoints in the reasoning?*

Table 5. Do the courts explicitly agree/disagree with the Migration Board's assessments?

Number and percentage of all cases (300)

Agree/ Disagree	Agree	Partly agree	Disagree	No data
Total	**26** **9%**	**105** **35%**	**9** **3%**	**172** **57%**

Table 6. Do the courts explicitly identify the potential risk upon return?

Number and percentage of all cases (300)

Yes/No	Yes	No	Total
Total	**161** **54%**	**139** **46%**	**300** **100%**

Table 7. Do the courts explicitly identify the potential risk upon return? – Granted/rejected appeals

Number and percentage of all granted and rejected appeals

Outcome	Granted		Rejected		**Total**
Identifying the potential risk upon return	Yes	No	Yes	No	
Total	**34** **74%**	**12** **26%**	**127** **50%**	**127** **50%**	**300**
	46		**254**		

* In 14 of the cases the jurist judge voted against.

1.2 Formal data: The asylum seeker – personal data

1.2.1 Personal data: *What is the general pattern, among the asylum seekers in the study, as regards personal data?*

Table 8. Family constellation

Number and percentage of all the cases (300)

Court	Single adult, *male*	Single adult, *female*	Unac-companied minor	Couple	Couple with child/children	Mother with child/children	Father with child /children	Other	Total
S	54	18	10	1	7*	9	1	0	100
G	63	13	4	1	6	12	0	1	100
M	67	12	5*	1	7	5	1	2	100
Total	**184** **61%**	**43** **14%**	**19** **6%**	**3** **1%**	**20** **7%**	**26** **9%**	**2** **1%**	**3** **1%**	**300** **100%**

* Two minors in the same case.

Table 9. Family constellation correlated to *granted appeals*

Number of all the granted appeals (46) in relation to the number and percentage of cases in each family constellation

Family constellation	Single adult (227)	More than one individual (54)	Unaccompanied minors (19)
Total	**32** **14%**	**13** **24%**	**3** **16%**

* Single man 15%, single woman 12%.

Table 10. Number of individuals, adults/minors, and male/female

Number and percentage of all individuals

Gender /minor /adult	Adult *male*	Adult *female*	Accompanied minors	Unaccompanied minor, *male*	Unaccompanied minor, *female*	Total number of individuals
Total	**232** **54%**	**89** **21%**	**92** **21%**	**17** **4%**	**3** **< 1%**	**433** **100%**

Table 11. Age

Number and percentage of all individuals

Age	0-12	13-17	18-25	26-45	46-65	65-	No data	Total
Total	**72*** **17%**	**44** **10%**	**100** **23%**	**182** **42%**	**30** **7%**	**2** **< 1%**	**3** **1%**	**433**** **100%**

* One of these is unaccompanied. ** One of the cases includes two minors, (M 87).

Table 12. Country of origin

Number and percentage of the total number of countries of origin

Court / Country of origin	Stockholm	Gothenburg	Malmö	**Total**
Somalia	20	31	18	**69** **22%**
Afghanistan	23	14	28	**65** **21%**
Iraq	6	11	11	**28** **9%**
Palestine	7	4	7	**18** **6%**
Asia	14	19	18	**51** **16%**
Africa*	20	14	11	**45** **15%**
East Europe	10	12	9	**31** **10%**
South America	3	0	0	**3** **1%**
Total	103	105	102	**310**** **100%**

* Somalia is excluded. ** More than one country of origin was found in ten cases.

Table 13. Country of origin – *granted appeals*

Number and percentage of the total number of granted appeals

Court / Country of origin	Stockholm	Gothenburg	Malmö	**Total**
Afghanistan	3	1	8	**12**
Somalia	3	4	1	**8**
Asia	6	6	4	**16***
Africa	3	3	2	**8**
East Europe	0	2	0	**2**
Total	15	16	15	**46**

* Iran 5, Iraq 3, Palestine 3

2 The bases for assessing the risk upon return with specific focus on the credibility of the asylum seeker's narrative as presented by the Swedish migration courts

2.1 Legal sources: *How and to what extent, if at all, do the courts base their assessments on legal sources?* (Category 1)

2.1.1 Legal sources: Aggregated results

Table 14. References to legal sources – Do the court refer to legal sources?

Number and percentage of all cases

Yes/No	Yes	No	Total
Total	**93** **31%**	**207** **69%**	**300** **100%**

Table 15. References to specific legal sources – *subcategories*

Number and percentage of all cases (300)

Non-refoulement/ expulsion	Status determination	Assessment principles
12 **< 4%**	**51** **17%**	**75** **25%**

Table 16. Number of references to legal sources – *subcategories*

Number and percentage of all references in this category

Legal ground	*Non-refoulement*/ Expulsion	Status determination	Assessment principles	**Total**
Total	**15** **6%**	**93** **37%**	**140** **57%**	**248** **100%**

Table 17. References to specific sources – *types of sources*

Number and percentage of all references in this category

Swedish provisions	Swedish case law	Swedish preparatory works	ECHR	EU law	UNHCR Handbook	Other international sources	Other	Total
31 **12%**	**110*** **44%**	**31** **12%**	**14** **6%**	**18** **7%**	**31**** **12%**	**10** **4%**	**4** **2%**	**249** **100%**

** Half of these are references to the same case; MIG 2007:12. ** Nearly half of these references concern* credibility

2.1.2 Non-refoulement/Expulsion: *How and to what extent, if at all, do the courts base their assessments concerning the principle of non-refoulement on legal sources?*[1193]

Table 18. Non-refoulement/Expulsion – Do the court refer to one or more references to legal sources related to non-refoulement/expulsion?

Number and percentage of all cases (300)

Yes/No	Yes*	No	Total
Total	**12** **4%**	**288** **96%**	**300** **100%**

*More than one references is found in one case.

Table 19. Non-refoulement/Expulsion – *types of legal sources*

Number and percentage of all references in this category

Swedish provisions	Swedish case law	Swedish prepara tory works	ECHR	EU law	UNHCR Hand-book	Other internati-onal sources	Other	Total
8 **53%**	**1** **7%**	**0** **0%**	**4** **27%**	**0** **0%**	**0** **0%**	**2** **13%**	**0** **0%**	**15** **100%**

2.1.3 Status determination: *How and to what extent, if at all, do the courts base their assessments concerning status determination on legal sources?*

Table 20. Status determination – Do the court refer to one or more references to legal sources related to status determination?

Number and percentage of all cases

Yes/No	Yes	No	Total
Total	**51** **17%**	**249** **83%**	**300** **100%**

Table 21. Status determination – *one or more references to legal sources*

Number and percentage of all cases

References	One reference	More than one reference	No references	Total
Total	**29** **10%**	**22** **7%**	**249** **83%**	**300** **100%**

[1193] Practical impediments to execute an expulsion is excluded.

Table 22. Status determination – *types of legal sources*

Number and percentage of all references in this category

Swedish provision s	Swedish case law	Swedish preparatory work	ECHR	EU law	UNHCR Handbook	Other international sources	Other	Total
23 **25%**	**21** **23%**	**16** **17%**	**7** **8%**	**13** **14%**	**5** **5%**	**5** **5%**	**3** **3%**	**93** **100%**

2.1.4 Assessment principles: *How, and to what extent, if at all, do the courts base their assessments on assessment principles?*

Table 23. Assessment principles with or without references to legal sources

Number and percentage of all cases (300)

No references to assessment principles	References to assessment principles	Substantiated with references to legal sources	Not substantiated with references to legal sources
70 **23%**	**230** **77%**	**75** **25%**	**155** **52%**

Table 24. Assessment principles with or without references to legal sources

Number and percentage of all references in this category

Not substantiated with references to legal sources	Substantiated with references to legal sources	Total
444 **75%**	**140** **25%**	**584** **100%**

Table 25. Assessment principles – principles connected to the requisites in the protection provisions – with or without references to legal sources

Number and percentage of all references in this category (584)

The assessment should be forward-looking	The assessment should be individual	Total
66 **11%**	**165** **28%**	**231** **39%**

Table 26. Assessment principles – principles connected to the burden and standard of proof – with or without references to legal sources

Number and percentage of all references in this category (584)

The applicant has to make her or his need for international protection probable	The duty for the asylum seeker to substantiate her or his claims	Total
180 **31%**	**23** **4%**	**203** **35%**

Table 27. Assessment principles – alleviation principles for the asylum seeker – with or without references to legal sources

Number and percentage of all references in this category (584)

Evidentiary alleviation principles	The duty for the state to investigate	Total
28 **5%**	**5** **< 1%**	**33** **6%**

Table 28. Use of worlds/wordings connected to the risk upon return and/or the standard of proof – *number of cases*

Number and percentage of all cases (300)

Probable	Risk	Return	Well-founded fear	Substantial grounds for believing
290 **97%**	**203** **68%**	**193** **64%**	**60** **20%**	**55** **18%**

Table 29. Use of worlds/wordings connected to the risk upon return and/or the standard of proof – *number of references*

Number and percentage of total number of words/wordings

Probable	Risk	Return	Well-founded fear	Substantial grounds for believing	Total
1,387 **60%**	**426** **19%**	**321** **14%**	**85** **4%**	**59** **3%**	**2 278** **100%**

Table 30. Assessment principles – specific issues – with or without references to legal sources

Number and percentage of all references all references in this category (584)

Internal flight	Language analysis	Age analysis	Credibility	Other issues*	Total
18 **3%**	**6** **1%**	**5** **<1%**	**62** **11%**	**26** **4%**	**117** **20%**

* The variable includes principles on how to carry out an assessment regarding issues such as conversion, sexual identity, family unit, and the fact that there may be more than one possible country of origin.

Table 31. Assessment principles – *types of legal sources*

Number and percentage of total number of references supported by legal sources

Swedish provisions	Swedish case law	Swedish preparatory works	ECHR	EU law	UNHCR	Other international sources	Total
0 **0%**	**88** **63%***	**15** **11%**	**3** **2%**	**5** **3,5%**	**26** **18,5%**	**3** **2%**	**140** **100%**

* Half of these are references to the same case; MIG 2007:12.

Table 32. Assessment principles with and without references to legal sources – *principles connected to the assessment of the credibility of the asylum seeker's narrative*

Number and percentage of all cases (300)

Assessment principles/cred.	Credibility assessment principles are referred to in the courts' reasoning	Substantiated with references to legal sources
Total	**61** **20%**	**37** **12%**

Table 33. Assessment principles – *principles connected to the assessment of the credibility of the asylum seeker's narrative* – *types of legal sources*

Number and percentage of all references supported by legal sources

Swedish case law	Preparatory works	ECHR	EU	UNHCR Handbook	Other international sources	Total
26 **57%***	**3** **7%**	**0** **0%**	**0** **0%**	**16** **35%**	**1** **< 1%**	**46** **100%**

* All the references to Swedish case law except for two are references to MIG 2007:12.

2.2 External sources: *How, and to what extent, if at all, do the courts base their assessments on external sources of information?* (Category 2)

2.2.1 The situation in the country of origin: *How, and to what extent, if at all, do the courts base the assessments on return on information as regards the situation in the country of origin?* (Category 2A)

Table 34. References to the situation in the country of origin – *supported or unsupported by specific country of origin information*

Number and percentage of all cases (300)

References to the situation/ References to COI	References to the situation in the country of origin	References to specific country of origin information
Total	**244** **81%**	**63** **21%**

Table 35. References to country of origin information

Number and percentage of all cases (300)

One reference	More than one reference	Total
44 **15%**	**19** **6%**	**63** **21%**

Table 36. Sources of information concerning the situation in the country of origin mentioned in the ruling or in the Migration Agency's decision

Number and percentage of all cases

Mentioned/Not mentioned	Mentioned in the ruling	Only mentioned in the MB's decision	No sources mentioned either in the ruling or in the MA's decision	Total
Total	**94*** **31%**	**162** **54%**	**44** **15%**	**300** **100%**

* In 13 of these cases reference is made to a country report, but it is not possible to trace which one.

Table 37. References to country of origin information – supported or unsupported by general country of origin information or related to the asylum seeker's individual situation

Number and percentage of all cases (300)

References to the general situation – *unsupported by country of origin information*	References to the general situation – *supported by country of origin information*	References to the asylum seeker's individual situation –*unsupported by country of origin information*	References to the asylum seeker's individual situation –*unsupported by country of origin information*
203 **68%**	**120** **40%**	**35** **12%**	**38** **13%**

Table 38. Country reports mentioned in the ruling/ Country reports referred to in the reasoning

Number of reports mentioned in the ruling / Number and percentage of all references

Mentioned in the ruling/Used to substantiate the reasoning	Total number of reports mentioned in the ruling	Total number of reports used to substantiate the courts' reasoning
Total	**168**	**123**

Table 39. Country of origin information: Do the courts base the assessments of credibility of the asylum seeker's narrative by referring to country of origin information?

Number and percentage of all cases

Yes/No	Yes	No	Total
Total	**25** **8%**	**275** **92%**	**300** **100%**

Table 40. References to country of origin information to substantiate the assessment of the *credibility* of the asylum seeker's narrative

Number of references

Number of references
32

Table 41. References to country of origin information to substantiate the assessment of the *credibility* of the asylum seeker's narrative

Number and percentage of all cases (300)

References to country of origin information concerning the general situation	References to country of origin information concerning the asylum seeker's specific claims and circumstances	Total
17 **6%**	**8** **3%**	**25** **8%**

Table 42. References to the situation in the country of origin to substantiate the assessment of the *credibility* of the asylum seeker's narrative supported or unsupported by country of origin information

Number and percentage of all references in this category

References to the general situation – *unsupported by country of origin information*	References to the general situation – *supported by country of origin information*	References to the asylum seeker's specific situation – *unsupported by country of origin information*	References to the asylum seeker's specific situation – *supported by country of origin information*	Total
46 **30%**	**8** **5%**	**75** **49%**	**24** **16%**	**153** **100%**

Table 43. Number of references to the situation in the country of origin (supported or unsupported by country of origin information) in relation to the assessment of the asylum seeker's narrative – *Credible/Not credible.*

Number and percentage of all references in this category

Credible	Not credible	Total
84 **55%**	**69** **45%**	**153** **100%**

Table 44. Who submitted the country information?

Number and percentage of all reports

Who submitted?	The MA	The asylum seeker	Both the asylum seeker and the MA	The court	No data	Total
Total	**92** **55%**	**25** **15%**	**4** **2%**	**1** **<1%**	**46** **28%**	**168** **100%**

Table 45. Publishing date

Number and percentage of all reports

Year	2009	2010	2011	2012	2013	2014	No data	Total
Total	**5** **3%**	**23** **14%**	**18** **11%**	**63** **38%**	**36** **21%**	**11** **6%**	**12** **7%**	**168** **100%**

Table 46. Time between the Migration Agency's decision and the court judgments

Number and percentage of all cases

Number of month	4 months or less	4-8 months	9-12 months	More than 12 months	No data	Total
Total	**87** **29%**	**192** **64%**	**16** **5%**	**3** **1%**	**2** **1%**	**300** **100%**

Table 47. The origin of the sources as regards the situation in the country of origin referred to in the courts' *reasoning*

Number and percentage of all references in this category

Origin of sources	Legal position paper (MA*)	Legal comment ary (MA)	MA	SFD **	PAOS***	NGO* ***	UN*****	Other	**Total**
Total	**34** **28%**	**6** **5%**	**13** **10%**	**13** **10%**	**44** **36%**	**8** **7%**	**2** **2%**	**3** **2%**	**123** **100%**

* The Migration Agency. ** The Swedish Foreign Department. *** Public Authorities in other countries.
**** Non-Governmental Organisations.
***** United Nations organs.

Table 48. The origin of the sources referred to concerning the situation in the country of origin, when *only one source* is referred to

Number and percentage of the references

Origin of sources	Legal position paper (MA)	Legal commentary (MA)	MA	SFD	PAOS	NGO	UN	Other	Total
Total	**23** **52%**	**0** **0%**	**5** **11%**	**2** **5%**	**9** **21%**	**4** **9%**	**1** **2%**	**0** **0%**	**44** **100%**

2.2.2 Written documents: *How, and to what extent, if at all, do the courts base the assessment of the risk on return on written documents?* (Category 2B)

Table 49. Written documents – submitted in the case

Number and percentage of all cases (300)

Identity documents	Other written documents	Identity documents *or* other written documents	Identity documents *and* other written documents	No written documents
194 **65%**	**175** **58%**	**225** **75%**	**67** **22%**	**75** **25%**

Table 50. Written documents (including identity documents) – *the courts' evaluation*

Number and percentage of all written documents

Not questioned	Some value	No or low value	No data	Total
109 **24%**	**69** **16%**	**197** **45%**	**67** **15%**	**442** **100%**

Table 51. Written documents (including identity documents) — *number of cases where the courts have evaluated the written documents*

Number and percentage of all cases (300)

Only identity document	Only other pieces of written evidence	Total
82 **27%**	**35** **12%**	**117*** **39%**

* There are no cases where both identity documents and other documents are attached with some value or not questioned.

Table 52. Written documents other than identity documents – *the courts' evaluation*

Number and percentage of all written documents other than identity documents

Not questioned	Some value	No or low value	No data	Total
19 **7%**	**52** **21%**	**138*** **56%**	**39** **16%**	**248** **100%**

* In nine of the cases the evaluation of written evidence is coupled to the argument that the asylum seeker has not made her or his identity probable.

Table 53. Identity documents – *the courts' evaluation*

Number and percentage of all identity documents

Not questioned	Some value	No or low value	No data	Total
90 **46%**	**17** **9%**	**59** **30%**	**28** **15%**	**194** **100%**

Table 54. Written documents – the courts' evaluation

Number and percentage of all documents

The courts' evaluation	Identity document	Other pieces of written evidence	Total
Some value or not questioned	107 55%	71 28%	**178** **40%**
Low or no value or not mentioned	87 45%	177 72%	**264** **60%**
Total	194 100%	248 100%	**442** **100%**

Table 55. Written documents to substantiate the assessment of the *credibility of the asylum seeker's narrative*

Number and percentage of all cases (300)/documents (442)

Number and percentage of all cases	Number of documents referred to/percentage of all submitted documents
81 **27%**	**88*** **20%**

* Nine of these are submitted by the Migration Agency.

Table 56. Written documents to substantiate the assessment of the *credibility of the asylum seeker's narrative – the courts' evaluation* (including identity documents)

Number and percentage of total number of evaluated written documents

Not questioned	Some value	No or low value	No data	Total
14* **16%**	**21** **24%**	**38** **43%**	**15** **17%**	**88** **100%**

* Three of these are protocols from the Migration Board.

2.2.3 Witnesses: *How, and to what extent, if at all, do the courts base the assessment of the risk on return on witnesses?* (Category 2C)

Table 57. Witness/es have been heard during the oral hearing

Number and percentage of all cases

Witness/es have been heard	Yes	No	**Total**
Total	**20** **7%**	**280** **93%**	**300** **100%**

Table 58. Witnesses – *the courts' evaluation*

Number and percentage of all cases (300)

Some value	Not questioned	No or low value	No data
3 **>1%**	**4** **>1%**	**9** **3%**	**4** **>1%**

Table 59. Witnesses – *the courts' evaluation*

Number of witnesses

Some value	Not questioned	No or low value	No data	Total
3	**4**	**12**	**5**	**24**

Table 60. Witnesses: Do the courts base their assessment of the credibility of the asylum seeker's narrative on witnesses?

Number and percentage of all cases

Yes/No	Yes	No	Total
Total	**11** **4%**	**289** **96%**	**300** **100%**

Table 61. Witnesses as a basis for assessing the *credibility* of the asylum seeker's narrative – *(not) credible*

Number of witnesses

Credible	Not credible	Unclear	Total
7	**5**	**1**	**13**

2.2.4 Experts: *How, and to what extent, if at all, do the courts base their assessments on experts?* (Category 2D)

Table 62. Statements from experts – *types of experts*

Number and percentage of cases (300) where statements from experts occur/total number of statements from experts

Medical age determination	Language analysis	Medical reports	Medical age determination and language analysis	Total number of statements from experts/ Total number of cases with statements from experts/percentage of cases
18* **6%**	**29** **10%**	**30** **10%**	**6** **2%**	**77/71** **24%**

* Nine non-medical age assessments are not included.

Table 63. Statements from experts as a basis for the courts' assessment of the risk upon return

Number and percentage of all cases (300)

Medical age determination	Language analysis	Medical age determination and language analysis	Medical reports	Total number of cases where one or more experts has been basis for the assessment.
13 **4%**	**20** **7%**	**4** **1%**	**1** **< 1%**	**30*** **10%**

* The total number of statements is 34.

Table 64. Medical age determination – *the courts' assessment*

Number and percentage of all cases where a medical age determination has been carried out

Total	Uncontested	The court takes a stand contrary to the asylum seeker's statements	The court takes a stand contrary to the medical age determination
18 **100%**	**5** **28%**	**11** **61%**	**2** **11%**

Table 65. Language analyses – *the courts' assessment*

Number and percentage of all cases where a language analysis has been carried out

Total	Uncontested	The court takes a stand contrary to the asylum seeker's statements	The court takes a stand contrary to the result of the analysis
29 **100%**	**9** **31%**	**20** **69%**	**0** **0%**

Table 66. Medical reports – *types of issues*

Number and percentage of all medical reports

Mental health	Torture	Physical health	Total
18 **60%**	**8** **27%**	**4** **13%**	**30** **100%**

Table 67. Medical reports – *the courts' assessments*

Number and percentage of all medical reports

Considered in relation to humanitarian grounds	Considered in relation to credibility	Not sufficient/ Does not indicate torture	Not questioned	No data	Total
8* **27%**	**6** **20%**	**4** **13%**	**1** **3%**	**11** **37%**	**30** **100%**

Table 68. Experts – Do the courts base their assessment of the credibility of the asylum seeker's narrative on experts?

Number and percentage of all cases

Yes	No	Total
31 **10%**	**269** **90%**	**300** **100%**

Table 69. Statements from experts as a basis for the courts' assessment of credibility – types of experts

Number and percentage of all references in this category)

Medical age determination	Language analyses	Medical reports	Total number of statements
7 **21%**	**20** **61%**	**6** **18%**	**33*** **100%**

* Two cases include two experts.

2.2.5 External sources: Aggregated results

Table 70. External sources of information: ***How, and to what extent, if at all, do the courts base the assessment of risk upon return on external sources of information?***

Number and percentage of all cases

Yes/No	Yes	No	Total
Total	**183 *** **61%**	**117** **39%**	**300** **100%**

* 58 of these cases only include ID documents (19% of all cases).

Table 71. External sources of information: ***How, and to what extent, if at all, do the courts base the assessment of risk upon return on external sources of information?*** **– subcategories**

Number and percentage of all cases (300)

Subcategory	Country information	Written evidence	Witnesses	Experts
Total	**63** **21%**	**117*** **39%**	**7** **2%**	**30 **** **10%**

* 82 of these are cases where only identity documents have been part of the basis for the courts' assessment of risk on return (27% of all cases).

Table 72. External sources of information: ***How, and to what extent, if at all, do the courts base the assessment of risk upon return on external sources of information?*** **– subcategories**

Number and percentage of all references in this category

Subcategory	Country of origin information	Written evidence	Witnesses	Experts	**Total**
Total	**123** **36%**	**178** **52%**	**7** **2%**	**34** **10%**	**342** **100%**

Table 73. External sources of information: ***How, and to what extent, if at all, do the courts base their assessments of the credibility of the asylum seeker's narrative on external sources of information?***

Number and percentage of all cases

Yes/No	Yes	No	**Total**
Total	**117** **39%**	**183** **61%**	**300** **100%**

Table 74. External sources of information: *How, and to what extent, if at all, do the courts base the assessment of the credibility of the asylum seeker's narrative on external sources of information?* – subcategories

Number and percentage of all cases (300)

Subcategory	Country information	Written evidence	Witnesses	Experts
Total	**25** **8%**	**81** **27%**	**11** **4%**	**31** **10%**

Table 75. External sources of information: *How, and to what extent, if at all, do the courts base the assessment of the assessment of the credibility of the asylum seeker's narrative on external sources of information?* – subcategories

Number and percentage of all references in this category

Subcategory	Country information	Written evidence	Witnesses	Experts	**Total**
Total	**32** **19%**	**88** **53%**	**13** **8%**	**33** **20%**	**166** **100%**

2.3 The quality of the asylum seeker's narrative: *How, and to what extent, if at all, do the courts base their assessments of on the quality of the asylum seeker's narrative?* (Category 3)

Table 76. The quality of the asylum seeker's narrative: Do the courts base the assessments of credibility on arguments related to the quality of the asylum seeker's narrative?

Number and percentage of all cases

Yes/No	Yes	No	Total
Total	**293** **98%**	**7** **2%**	**300** **100%**

Table 77. The quality of the asylum seeker's narrative – *one or more references*

Number and percentage of all cases

One/ more than one/no references	One reference	More than one reference	No references	Total
Total	**22** **8%**	**271** **90%**	**7** **2%**	**300** **100%**

Table 78. The quality of the asylum seeker's narrative – (*Not) credible – number of cases*

Number and percentage of all cases (300)

Credible/ not credible	Credible	Not credible	Credible *and* not credible	**Total**
Total	**17** **6%**	**209** **70%**	**67** **22%**	**293** **98%**

Table 79. The quality of the asylum seeker's narrative –– (*not) credible – number of references*

Number and percentage of all references in this category

Credible/ not credible	Credible	Not credible	**Total**
Total	**222** **13%**	**1 428** **87%**	**1 650** **100%**

Table 80. Types of quality arguments – (*not) credible*

Number and percentage of all cases (300)

Credible/ not credible	How the narrative is presented	Number of details	Coherence	Origin of the statement	Plausibility	Not questioned
Not credible	61 66%	185 90%	179 76%	74 99%	158 90%	0 0%
Credible	27 30%	6 3%	43 18%	1 1%	14 8%	30 100%
Credible *and* not credible	4 4%	15 7%	13 6%	0 0%	4 2%	0 0%
Total	**92** **31%**	**206** **69%**	**235** **78%**	**75** **25%**	**176** **59%**	**30** **10%**

Table 81. Types of quality arguments – (*not) credible*

Number and percentage of all references in this category

Credible/ not credible	How the narrative is presented	Number of details	Coherence	Origin of the statement	Plausibility	Not questioned	**Total**
Not credible	86	453	489	82	318	0	**1 428** **87%**
Credible	43	36	69	1	28	45	**222** **13%**
Total	**129** **8%**	**489** **29%**	**558** **34%**	**83** **5%**	**346** **21%**	**45** **3%**	**1 650** **100%**

2.4 Behaviour, actions and activities: *How, and to what extent, if at all, do the courts base their assessments on the asylum seeker's behaviour, actions or activities?* (Category 4)

Table 82. The asylum seeker's behaviour, actions or activities – Do the courts base their assessments on the asylum seeker's behaviour, actions or activities?

Number and percentage of all cases

Yes/No	Yes	No	Total number of cases
Total	**221** **74%**	**79** **26%**	**300** **100%**

Table 83. The asylum seeker's behaviour, actions or activities as a basis for assessments of the risk upon return – *number of cases*

Number and percentage of all cases (300)

Subcategory	In the country of origin	During the procedure
Total	**118** **39%**	**198** **66%**

Table 84. The asylum seeker's behaviour, actions or activities as a basis for assessments of the risk upon return – *number of references*

Number and percentage of all references in this category

Subcategory	In the country of origin	During the procedure	**Total**
Total	**153** **31%**	**348** **69%**	**501** **100%**

Table 85. The asylum seeker's behaviour, actions or activities, *before leaving the country of origin*, as a basis for assessments of the risk upon return – *more than one reference*

Number and percentage of all cases

Subcategory	In the country of origin	During the procedure	Total
Total	**32** **11%**	**99** **33%**	**300**

Table 86. The asylum seeker's behaviour, actions or activities – *(not) credible*

Number and percentage of all cases (300)

Credible/Not credible	Total
Activities or action in the country of origin	
Not credible	95 32%
Credible	21 7%
Not credible *and* credible	2 < 1%
Total	**118** **39%**
Behaviour/action during the procedure	
Not credible	178 59%
Credible	14 5%
Not credible *and* credible	6 2%
Total	**198** **66%**

Table 87. The asylum seeker's behaviour, actions or activities *during the procedure* – *types of arguments*

Number and percentage of all cases (300)

Type of argument	Redress	Cooperativeness	Has (not) filed an application as soon as possible	Body language
Total	**158** **53%**	**64** **21%**	**12** **4%**	**0** **0%**

Table 88. The asylum seeker's behaviour, actions or activities *during the procedure* as a basis for assessments of credibility – *types of arguments*

Number and percentage of all references in this category

Credible/ Not credible	Redress	Cooperativeness	Has (not) filed an application as soon as possible	Body language	**Total**
Not credible	226	72	18	0	**316** **91%**
Credible	27	2	3	0	**32** **9%**
Total	**253** **73%**	**74** **21%**	**21** **6%**	**0** **0%**	**348** **100%**

Table 89. The asylum seeker's action *before leaving* the country of origin – *types of arguments*

Number and percentage of all cases (300)

Has (not) sought protection from the public authorities	Has (not) been able to leave the country of origin legally	Has (not) been able to continue her or his activities	Level of activity	Other
21 **7%**	**12** **4%**	**37** **12%**	**67** **22%**	**16** **5%**

Table 90. The asylum seeker's behaviour, actions or activities *before leaving* the country of origin as a basis for assessments of credibility – *types of arguments*

Number and percentage of all references in this category

Credible/ Not credible	Has (not) sought protection from the public authorities	Has (not) been able to leave the country of origin legally	Has (not) been able to continue her or his activities	Level of activity	Other	**Total**
Not credible	17	12	36	46	16	**127** **83%**
Credible	4	0	1	21	0	**26** **17%**
Total	**21** **14%**	**12** **8%**	**37** **24%**	**67** **44%**	**16** **10%**	**153** **100%**

2.5 Co-applicants: *How, and to what extent, if at all, do the courts include the co-applicants in their assessments?* (Category 5)

Table 91. Co-applicants – Do the courts assess the risk upon return for co-applicants?

Number and percentage of all cases in which co-applicants are included

Yes/No	Yes	No	**Total**
Total	**19** **35%**	**35** **65%**	**54** **100%***

*18% of all cases

Table 92. Co-applicants – Do the courts assess the risk upon return for adult co-applicants?

Number and percentage of all cases in which adult co-applicants are included

Yes/No	Yes	No	Total
Total	**10** **36%**	**18** **64%**	**28** **100%***

* 9% of all cases.

Table 93. Co-applicants – Do the courts assess the risk upon return for minor co-applicants?

Number and percentage of all cases in which minor co-applicants are included

Yes/No	Yes	No	Total
Total	**7** **15%**	**41** **85%**	**48** **100%***

* 16% of all cases.

Table 94. Co-applicants – Do the courts base their assessments of credibility on statements from co-applicants?

Number and percentage of all cases (300)/Percentage of all cases in which co-applicants are included

Yes/No	Yes	No	Total
Total	**14** **26%**	**40** **74%**	**54** **100%**

Table 95. Co-applicants –To what extent do the courts base the assessments of credibility on statements from adult/minor co-applicants?

Number of references

Adults	Minors	Total
34	**0**	**34**

2.6 Individual facts and circumstances: *How, and to what extent, if at all, do the courts base their assessments on individual facts and circumstances?* (Category 6)

Table 96. Individual facts and circumstances (minors are not included): Do the courts base their assessments of the risk upon return on individual facts and circumstances?

Number and percentage of all cases

Yes/No	Yes	No	Total
Total	**31*** **10%**	**269** **90%**	**300** **100%**

* In two of the cases the courts also consider the consequences of the child.

Table 97. Individual facts and circumstances as a basis for assessing the risk upon return (minors are not included) – *types of circumstances, considered in the courts' reasoning/ identified in the material but not considered in the courts' reasoning*

Number of all references

Claims	**Total**
Considered by the courts	
Woman	21* 68%
Other**	10 32%
Total	**31** 100%
Claimed or otherwise identified in the material but not considered by the court	
Woman	30 30%
Health	31 30%
Age***	17 17%
Other****	23 23%
Total	**101***** 100%

*14 cases where health, social or cultural circumstances are considered by the courts only in relation to "especially/particularly distressing circumstances" are not included. ** Includes issues related to torture, social issues, belonging to a minority group or being stateless. *** Includes issues related to being old or having recently been a minor. **** Includes issues related to education, minority groups, sexual orientation or being stateless. ***** Four cases include more than one argument.

Table 98. Individual facts and circumstances as a basis for assessing the risk upon return – the best interests of the child: *Do the courts refer to "the best interests of the child"?*

Number and percentage of all cases in which one or more minors are included

Yes/No	Yes	No	Total
Total	**14*** **20%**	**53** **80%**	**67** **100%**

* Nine cases where the best interests of the child are only mentioned in relation to humanitarian grounds are not included.

Table 99. Individual facts and circumstances as a basis for assessing the risk upon return: *Do the courts consider the specific consequences for the child/children upon return?*

Number and percentage of all cases in which one or more minors are included

Yes/No	Yes	No	Total
Total	**2*** **3%**	**65** **97%**	**67** **100%**

* 15 cases where the consequences for the child have only been considered in relation to humanitarian grounds are not included.

Table 100. Individual facts and circumstances as a basis for assessing the *risk upon return*: *Do the courts consider the specific consequences for the child/children upon return*? – Considerations coupled to humanitarian grounds are included)

Number and percentage of all cases in which one or more minors are included

Yes/No	Yes	No	Total
Total	**17** **25%**	**50** **75%**	**67** **100%**

Table 101. Individual facts and circumstances as a basis for assessing the credibility of the asylum seeker's narrative: *Do the courts base their assessments on individual facts and circumstances when assessing the credibility of the asylum seeker's narrative?*

Number and percentage of cases and of all references

Yes/No	Yes	No	Total
Total	**27** **9%**	**273** **91%**	**300** **100%**

* The numbers of cases are the same as the numbers of references since only one reference is made in each case.

Table 102. Individual facts and circumstances as a basis for assessing the *credibility* of the asylum seeker's narrative – *types of facts or circumstances*

Number and percentage of all cases/references (300)

Types of fact and circumstances	Traumatisation on account of torture	Other mental health problems	Cultural aspects	Child	Illiteracy	Total
Identified	7 2%	36 12%	11 4%	20 7%	7 2%	81 27%
Considered	**3** **1%**	**8** **3%**	**6** **2%**	**6** **2%**	**4** **1%**	**27** **9%**

Table 103. Individual facts and circumstances as a basis for assessing the *credibility* of the asylum seeker's narrative – (*Not) credible*

Number and percentage of all cases (300)

Credible/ Not credible	Not credible	Credible	Total
Total	**22** **7%**	**5** **2%**	**27** **9%**

2.7 General risk considerations: *How, and to what extent, if at all, do the courts base the assessments on arguments connected to general risk consideration* (Category 7)

Table 104. General risk arguments: *Do the courts base the assessment of the risk on return on general risk considerations?* (With or without references to legal country of origin information)

Number and percentage of all cases

Yes/No	Yes	No	Total
Total	**182** **61%**	**118** **39%**	300 100%

Table 105. General risk arguments – substantiated with or without references to legal sources or country of origin information

Number and percentage of all cases (300)

General risk arguments Based on legal sources/ Based on COI	One or more general risk arguments	Substantiated with references to legal sources	Substantiated with references to country of origin information
Total	**182** **61%**	**15** **5%**	**54** **18%**

Table 106. General risk arguments – with or without references to legal sources or country of origin information– *subcategories.* [1194]

Number and percentage of all cases (300)/Number of references

Cases/References / ref. to legal sources/ ref. to COI Type of argument	Number and percentage of all cases (300) / Number of references*	Based on references to legal sources	Based on references to country reports
Subcategory A *Arguments linked to the security situation in the country of origin*			
Armed conflict	9 **3%**	0	3
No armed conflict	39 **13%**	1	19
Severe conflict	60 **20%**	3	24
No severe conflict	7 **2%**	0	4
The asylum seeker can get protection from the public authorities	34	0	7

[1194] Appendix 2, Table 106.

	11%		
The asylum seeker cannot get protection from the public authorities	27 **9%**	0	14
Internal flight is possible	13 **4%**	7	2
Internal flight is not possible	27 **9%**	8	12
Subcategory B *Arguments connected to "sufficiency"*			
The claimed event happened long ago	50 **17%**	1	10
Other	26 **9%**	9	5

* The number of cases and number of references are the same as the courts only use each of these arguments once in the same ruling.

Table 107. General risk arguments – with or without references to legal sources or country of origin information

Number of all references in this category

References to legal sources/COI	General risk arguments	Based on references to legal sources	Based on references to country of origin information
Total	**292** **100%**	**29** **10%**	**96** **33%**

2.8 Procedural deficiencies: *How, and to what extent, if at all, do the courts base their assessments on procedural deficiencies?* (Category 8)

Table 108. Procedural deficiencies – identified/considered/accepted claims

Number and percentage of all cases (300)

Identified claims	Considered by the court	Accepted by the court
109 **36%**	**67** **22%**	**12** **4%**

Table 109. Types of procedural deficiencies claimed by the asylum seekers – identified/accepted
Number and percentage of all identified claims

Identified/ Accepted	Interpreter	Public council	Misunder-standings*	Investigation measures**	Health***	Other****	Total
Identified	**18** **15%**	**1** **< 1%**	**54** **45%**	**25** **21%**	**10** **8%**	**13** **11%**	**121** **100%**
Accepted	**1**	**0**	**7**	**2**	**0**	**2**	**12** **10%**

*Communication problems between the asylum seeker and the migration board due to language or culture. **Problems with age or language analysis (9) or rejected claims concerning: age and language analysis (5), authenticity checks of written documents (4), witnesses or other evidence (3), torture investigation (4). ***This variable includes claims related to health problems. This issue also occurs above in section 2.6, but in this section it is related only to the proceedings during the asylum investigation. ****Includes factors such as inability to read and write that may have had an impact on the procedure

2.9 Aggregated result

Table 110. The courts' bases for assessing the risk on return and the asylum seeker's narrative – *all categories*

Number and percentage of all cases (300)/ number and percentage of all references (3,095/2,728)

The risk upon return/ Credibility **Categories**	**The risk upon return** *Number of cases (300)*	**The risk upon return** *Number of references (3 095)*	**Credibility** *Number of cases (300)*	**Credibility** *Number of references (2 728)*
Legal sources (Category 1)	93 **31%**	248 **8%**	37 **12%**	46 **2%**
External sources of information (Category 2)	183[a] **61%**	342[a] **11%**	117 **39%**	166 **6%**
Country of origin information	63 **21%**	123 **4%**	25 **8%**	32 **1%**
Written documents	117[b] 39%	178[c] 6%	81 27%	88 3%
Witnesses	7[d] 2%	7 <1%	11 4%	13 <1%
Experts	30[e] 10%	34 1%	31 10%	33 1%
The quality of the asylum seeker's narrative (Category 3)	293 **98%**	1 650 **53%**	293 **98%**	1 650 **60%**
The asylum seeker's actions/activities/behaviour (Category 4)	221 **74%**	501 **16%**	221 **74%**	501 **18 %**
During the procedure	198 66%	348 11%	198 66%	348 13%
In the country of origin	118 39%	153 %	118 39%	153 6%

Co-applicants (Category 5)	19[f] **6%**	19 **<1%**	14 **5%**	34 **1%**
Individual facts and circumstances (Category 6)	31 **10%**	31 **1%**	27 **9%**	27 **1%**
General risk considerations (Category 7)	182 **61%**	292 **9%**	182 **61%**	292 **11%**
Substantiated by references to legal sources	15[g] 5%	29[g] 1%	15[g] 5%	29[g] 1%
Substantiated by references to country of origin information	54[h] 18%	96[h] 3%	54[h] 18%	96[h] 4%
Procedural deficiencies (Category 8)	12 **4%**	12 **<1%**	12 **4%**	12 **<1%**

[a] 58 of these cases only include references to ID documents (19% of all cases) and 107 of the references are to ID documents, [b] 82 of these cases only include references to ID documents, [c] 107 are references to ID documents, [d] The material includes 11 witnesses altogether, [e] 20 of these are statements from language analyses, [f] 35% of the cases where one or more co-applicants are included, [g] These numbers are also included in the numbers under the category *legal sources,* [h] These numbers are also included in the subcategory *country of origin information* under the category *external sources.*

2.10 Outcome: Correlations between the results in the different categories and the outcome of the cases

2.10.1 Outcome: Legal sources

Table 111. Outcome – References to legal sources – granted/rejected

Number and percentage of all the granted/rejected appeals

Outcome	Granted		Rejected		Total
The courts refer to legal sources	Yes	No	Yes	No	
Total	**10** **22%**	**36** **78%**	**28** **11%**	**226** **89%**	300
Total	46		254		

2.10.2 Outcome: External sources of information

2.10.2.1 Outcome: Country of origin information

Table 112. Outcome – Country of origin information as a basis for assessing the risk upon return – granted/rejected

Number and percentage of all granted/rejected appeals

Outcome	Granted		Rejected		Total
The courts refer to COI	Yes	No	Yes	No	
Total	**22** **48%**	**24** **54%**	**41** **16%**	**213** **84%**	300
Total	46		254		

Table 113. Outcome – Country of origin information as a basis for assessing the *credibility* of the asylum seeker's narrative – granted/rejected

Percentage of all granted/rejected appeals

Outcome	Granted		Rejected		Total
The courts refer to COI	Yes	No	Yes	No	
Total	**10** **22%**	**36** **78%**	**15** **6%**	**239** **94%**	300
Total	46		254		

2.10.2.2 Outcome: Written documents

Table 114. Outcome – Written documents as a basis for assessing the risk upon return – granted/rejected

Number and percentage of granted/rejected appeals

Outcome	Granted		Rejected		Total
Written documents form a basis for the courts' assessments	Yes	No	Yes	No	
Total	**24** **52%**	**22** **48%**	**93** **37%**	**161** **63%**	300
Total	46		254		

Table 115. Outcome – Written documents (including identity documents) as a basis for assessing the *credibility* of the asylum seeker's narrative – granted/rejected

Number and percentage of all granted/rejected appeals

Outcome	Granted		Rejected		Total
Written documents form a basis for the courts' assessments	Yes	No	Yes	No	
Total	**21** **46%**	**25** **54%**	**60** **24%**	**194** **76%**	300
Total	46		254		

2.10.2.3 *Outcome: Witnesses*

Table 116. Outcome – Witnesses as a basis for assessing the risk upon return – granted/rejected

Number and percentage of all granted/rejected appeals

Outcome	Granted		Rejected		Total
Witnesses form a basis for the courts' assessments	Yes	No	Yes	No	
Total	**5** **11%**	**41** **89%**	**16** **6%**	**238** **94%**	300
Total	46		254		

Table 117. Outcome – Witnesses as a basis for assessing the *credibility* of the asylum seeker's narrative – granted/rejected

Number and percentage of all granted/rejected appeals

Outcome	Granted		Rejected		Total
Witnesses form the basis for the courts' assessments.	Yes	No	Yes	No	
Total	**4** **9%**	**42** **91%**	**7** **3%**	**247** **97%**	300
Total	46		254		

2.10.2.4 Outcome: Experts

Table 118. Outcome – Experts as a basis for assessing the risk upon return – granted/rejected

Number and percentage of all granted/rejected appeals

Outcome	Granted		Rejected		Total
Experts form a basis for the courts' assessments	Yes	No	Yes	No	
Total	**5*** **10%**	**41** **90%**	**25**** **10%**	**229** **90%**	300
Total	46		254		

*Two medical age determinations, one language analysis, and two medical reports. **Five medical age determination, 19 language analyses, and one medical report.

2.10.3 Outcome: The quality of the asylum seeker's narrative

Table 119. Outcome – The quality of the asylum seeker's narrative as a basis for assessing *the credibility* of the asylum seeker's narrative – granted/rejected

Number and percentage of all granted/rejected appeals

Outcome	Granted		Rejected		Total
The quality of the narrative form a basis for the courts' assessments	Yes	No	Yes	No	
Total	**44** **96%**	**2** **4%**	**247** **97%**	**7** **3%**	300
Total	46		254		

Table 120. Outcome – The quality of the asylum seeker's narrative as a basis for assessing *the credibility* of the asylum seeker's narrative – granted/rejected

Number of references in granted/rejected cases

Granted/Rejected	Granted	Rejected
Total number of references	170	1 480
Average number of references	**3.7**	**5.8**

2.10.4 Outcome: The asylum seeker's behaviour, actions, and activities

Table 121. Outcome – The asylum seeker's behaviour, actions, and activities *during the procedure* as a basis for the courts' assessments of *the risk upon return/ the credibility* of the asylum seeker's narrative – granted/rejected

Number and percentage of all rejected appeals

Outcome	Granted		Rejected		Total
The asylum seeker's behaviour, actions, and activities *during the procedure* form a basis for the courts' assessments	Yes	No	Yes	No	
Total	**23** **50%**	**23** **50%**	**176** **79%**	**78** **31%**	300
Total	46		254		

Table 122. Outcome – The asylum seeker's actions or activities, *before leaving the country of origin* as a basis for the courts' assessments of *the risk upon return/ the credibility* of the asylum seeker's narrative – granted/rejected

Number and percentage of granted/rejected appeals

Outcome	Granted		Rejected		Total
The asylum seeker's behaviour, actions, and activities *before leaving the country of origin* form a basis for the courts' assessments	Yes	No	Yes	No	
Total	**19** **41%**	**27** **59%**	**99** **39%**	**155** **61%**	300
Total	46		254		

2.10.5 Outcome: Co-applicants

Table 123. Outcome – Co-applicants are included in the courts' assessments of *the risk upon return* – granted/rejected

Number and percentage of all granted/rejected appeals in which co-applicants are included

Outcome	Granted		Rejected		Total
Co-applicants are included in the courts' assessments	Yes	No	Yes	No	
Total	**4** **57%**	**3** **43%**	**15** **31%**	**6** **69%**	55
Total	7		48		

Table 124. Outcome – Co-applicants are included in the courts' assessments of *the credibility* of the asylum seeker's narrative – granted/rejected

Number and percentage of all granted/rejected appeals containing co-applicants

Outcome	Granted		Rejected		Total
Co-applicants are included in the courts' assessments	Yes	No	Yes	No	
Total	**5** **71%**	**2** **29%**	**13** **36%**	**35** **64%**	55
Total	7		48		

2.10.6 Outcome: Individual facts and circumstances

Table 125. Outcome – Individual facts and circumstances as a basis for the courts' assessments of the risk upon return – granted/rejected

Number and percentage of all granted/rejected appeals

Outcome	Granted		Rejected		Total
Individual facts and circumstances form a basis for the courts' assessments	Yes	No	Yes	No	
Total	**9** **20%**	**37** **80%**	**22** **9%**	**232** **91%**	300
Total	46		254		

Table 126. Individual facts and circumstances as a basis for the courts' assessments of the credibility of the asylum seeker's narrative – granted/rejected

Number and percentage of all granted/rejected appeals

Outcome	Granted		Rejected		Total
Individual facts and circumstances form a basis for the courts' assessments	Yes	No	Yes	No	
Total	**3** **7%**	**43** **93%**	**24** **9%**	**230** **91%**	300
Total	46		254		

2.10.7 Outcome: General risk considerations

Table 127. General risk arguments – with or without references to legal sources or country of origin information as a basis for assessing the risk upon return – granted and rejected

Number and percentage of all granted/rejected appeals

Outcome	Granted		Rejected		Total
General risk arguments form a basis for the courts' assessments	Yes	No	Yes	No	
Total	**40** **87%**	**6** **13%**	**142** **56%**	**112** **44%**	300
Total	46		254		

2.10.8 Outcome: Procedural deficiencies

Table 128. Procedural deficiencies as a basis for assessing the credibility of the asylum seeker's narrative – granted/rejected

Number and percentage of all granted/rejected appeals

Outcome	Granted		Rejected		Total
Procedural deficiencies form a basis for the courts' assessments	Yes	No	Yes	No	
Total	**7** **15%**	**39** **85%**	**5** **2%**	**199** **78%**	300
Total	46		254		

Appendix 3

To Believe or Not to Believe – Is That the Question?

A critical study of how the Swedish migration courts handle their responsibility to judge in asylum cases

Example of a first page of the Migration Agency's decision

Example of a template in the migration court in Gothenburg

Example of a first page of the Migration Agency’s decision

Ärende om uppehållstillstånd m.m.

(Matter on residence permit and more)

Sökande

(Applicant)

A, född xxxx, medborgare, i X

(A, born xxxx, citizen in X)

Adress: xxx

(Address: xxx)

Offentligt biträde: B

(Public counsel: B)

Beslut

(Decision)

Migrationsverket beslutar att

(The Migration Agency decides to)

– avslå din ansökan om uppehålls- och arbetstillstånd

(– reject your application for residence and work permit)

– inte bevilja dig flyktingstatusförklaring, alternativ skyddsstatusförklaring eller övrig skyddsstatusförklaring

(– not grant you a refugee status declaration, alternative protection status declaration or other protection status declaration)

– avslå din ansökan om resedokument

(– reject your application for travel document)

– utvisa dig, med stöd av 8 kap. 7 § utlänningslagen (2005:716)

(– expel you, under Chapter 8, section 7 of the Aliens Act)

– utvisningen ska verkställas genom att du reser till X, om du inte visar att något annat land kan ta emot dig

(– the deportation shall be fulfilled by you travelling to X, unless you show that another country can receive you)

– förbjuda dig att återvända till Sverige utan tillstånd av Migrationsverket under en tid av X år från detta beslut, med stöd av 8 kap. 19 § utlänningslagen. (Återreseförbudet börjar gälla när ärendet vinner laga kraft).

(– prohibit you from returning to Sweden without permission from the Migration Agency for a period of X years from this decision, under Chapter 8, section 19 of the Aliens Act. [The re-entry ban comes into effect when the case becomes final]).

– bevilja det offentliga biträdet B x kronor i ersättning

(– grant the public counsel B x kronor in compensation)

An example of a template in the migration court in Gothenburg

SAKEN

Uppehållstillstånd m.m. enligt utlänningslagen (2005:716), förkortad UtlL

(*THE MATTER*

Residence permit, etc. according to the Aliens Act (2005:716), abbreviated UtlL) ____________________

MIGRATIONSDOMSTOLENS AVGÖRANDE

(THE JUDGEMENT OF THE MIGRATION COURT)

//Migrationsdomstolen avslår överklagandet.//

(//The migration court reject the appeal//)

//Migrationsdomstolen upphäver Migrationsverkets beslut i fråga om utvisning och beviljar yy flyktingstatusförklaring/alternativ skyddsstatusförklaring/övrig skyddsstatusförklaring samt permanent uppehållstillstånd.//

(//The Migration Court annuls the Migration Agency's decision regarding expulsion and grants yy refugee status declaration/subsidiary protection status declaration/ need of protection otherwise protection status declaration and permanent residence permit.//)

Migrationsdomstolen beslutar att ersättning ska betalas till zz med x kr, varav x kr avser arbete, x kr tidsspillan, x kr utlägg och x kr mervärdesskatt.

(The Migration Court rules that compensation must be paid to zz with SEK x, of which SEK x refers to work, SEK x wasted time, SEK x expenses and SEK x value added tax.)

[…]

BAKGRUND

(BACKGROUND)

yy ansökte den xxx om uppehålls- och arbetstillstånd i Sverige. yy anförde i huvudsak följande. xxx

(yy applied on xxx for a residence and work permit in Sweden. yy essentially stated the following).

Migrationsverket avslog ansökan om uppehålls- och arbetstillstånd och beslutade att avvisa/utvisa yy i första hand till xxx. Beslutet motiverades i huvudsak enligt följande. xxx

(The Swedish Migration Agency rejected the application for a residence and work permit and decided to refuse entrance/expell yy in the first instance to xxx. The decision was mainly motivated as follows. xxx)

YRKANDEN M.M.

(CLAIMS)

yy yrkar att migrationsdomstolen ändrar Migrationsverkets beslut och beviljar honom/henne uppehålls- och arbetstillstånd. yy anför //i huvudsak//bl.a.// följande. xxx

(yy demands that the migration court change the Migration Agency's decision and grant him/her a residence and work permit. yy states //mainly//among other things// the following. xxx)

Migrationsverket anser att överklagandet ska avslås och anför //i huvudsak//bl.a.// följande. xxx

(The Swedish Migration Agency deems that the appeal should be rejected and states //mainly//among other things// the following. xxx)

Migrationsdomstolen har hållit muntlig förhandling i målet.

SKÄLEN FÖR MIGRATIONSDOMSTOLENS AVGÖRANDE

(REASONS FOR THE MIGRATION COURT'S DECISION)

Tillämpliga bestämmelser

(Applicable provisions)

I fall som rör ett barn ska särskilt beaktas vad hänsynen till barnets hälsa och utveckling samt barnets bästa i övrigt kräver (1 kap. 10 §UtlL).

(In cases involving a child, particular consideration must be given to what the consideration of the child's health and development as well as the child's best interest in general requires (Chapter 1, section 10 of the Aliens Act).)

Flyktingar, alternativt skyddsbehövande och övriga skyddsbehövande som befinner sig i Sverige har rätt till uppehållstillstånd (5 kap. 1 §första stycket UtlL).

(Refugees, persons in need of subsidiary protection or those in need of protection otherwise who are in Sweden have the right to a residence permit (Chapter 5, section 1, first paragraph of the Aliens Act).)

Med flykting avses en utlänning som
- befinner sig utanför det land som utlänningen är medborgare i, därför att han eller hon känner välgrundad fruktan för förföljelse på grund av ras, nationalitet, religiös eller politisk uppfattning eller på grund av kön, sexuell läggning eller annan tillhörighet till en viss samhällsgrupp, och

- inte kan, eller på grund av sin fruktan inte vill, begagna sig av detta lands skydd (4 kap. 1 §första stycket UtlL).

Detta gäller oberoende av om det är landets myndigheter som är ansvariga för att utlänningen riskerar att utsättas för förföljelse eller om utlänningen riskerar att utsättas för förföljelse från enskilda och inte kan antas bli erbjuden ett effektivt skydd som inte är av tillfällig natur. Vid bedömningen av om skydd erbjuds beaktas endast skydd som ges av staten eller av parter eller organisationer som kontrollerar hela eller en betydande del av statens territorium (4 kap. 1 §andra stycket UtlL).

(Refugee means a foreigner who

- is outside the country of which the foreign national is a citizen, because he or she has a well-founded fear of persecution due to race, nationality, religious or political opinion or due to gender, sexual orientation or other belonging to a certain social group, and

- cannot, or because of their fear, does not want to avail themselves of this country's protection (Chapter 4, section 1, first paragraph of the Aliens Act).

This applies regardless of whether it is the country's authorities that are responsible for the foreigner being at risk of persecution or whether the foreigner is at risk of being persecuted by individuals and cannot be assumed to be offered effective protection that is not of a temporary nature. When assessing whether protection is offered, only protection provided by the State or by parties or organisations that control all or a significant part of the State's territory is taken into account (Chapter 4, section 1, second paragraph of the Aliens Act).)

Med alternativt skyddsbehövande avses en utlänning som inte är flykting och som befinner sig utanför det land som utlänningen är medborgare i, därför att
- det finns grundad anledning att anta att utlänningen om han eller hon återvänder till hemlandet skulle löpa risk att straffas med döden eller att utsättas för kroppsstraff, tortyr eller annan omänsklig eller förnedrande behandling eller bestraffning, eller som civilperson löpa en allvarlig och personlig risk att skadas på grund av urskillningslöst våld med anledning av en yttre eller inre väpnad konflikt, och

- utlänningen inte kan, eller på grund av sådan risk som framgår ovan inte vill, begagna sig av hemlandets skydd (4 kap. 2 §första stycket UtlL).
Detta gäller oberoende av om det är landets myndigheter som är ansvariga för att utlänningen löper denna risk eller om utlänningen löper sådan risk genom handlingar från enskilda och inte kan antas bli erbjuden ett effektivt skydd som inte är av tillfällig natur. Vid bedömningen av om skydd erbjuds beaktas endast skydd som ges av staten eller av parter eller organisationer som kontrollerar hela eller en betydande del av statens territorium (4 kap. 2 §andra stycket UtlL).

(By alternative protection is meant a foreigner who is not a refugee and who is outside the country of which the foreigner is a citizen, because

- there are reasonable grounds for assuming that the alien, if he or she returns to the home country, would run the risk of being punished with death or of being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, or as a civilian run a serious and personal risk of being harmed due to indiscriminate violence arising from an external or internal armed conflict, and

- the foreigner cannot, or because of such risk as stated above does not want to, use the protection of the home country (Chapter 4, section 2, first paragraph of the Aliens Act).

This applies regardless of whether it is the country's authorities that are responsible for the foreigner running this risk or whether the foreigner runs such a risk through actions by individuals and cannot be assumed to be offered effective protection that is not of a temporary nature. When assessing whether protection is offered, only protection provided by the State or by parties or organisations that control all or a significant part of the State's territory is taken into account (chapter 4, section 2, second paragraph, UtlL)).

Med övrig skyddsbehövande avses en utlänning som inte är flykting eller alternativt skyddsbehövande och som befinner sig utanför det land som utlänningen är medborgare i, därför att han eller hon behöver skydd på grund av en yttre eller inre väpnad konflikt eller på grund av andra svåra motsättningar i hemlandet känner välgrundad fruktan att utsättas för allvarliga övergrepp (4 kap. 2 a §första stycket 1 UtlL).

Detta gäller oberoende av om det är landets myndigheter som är ansvariga för att utlänningen löper denna risk eller om utlänningen löper sådan risk genom handlingar från enskilda och inte kan antas bli erbjuden ett effektivt skydd som inte är av tillfällig natur. Vid bedömningen av om skydd erbjuds beaktas endast skydd som ges av staten eller av parter eller organisationer som kontrollerar hela eller en betydande del av statens territorium (4 kap. 2 a § andra stycket UtlL).

(Otherwise in need of protection refers to a foreigner who is not a refugee or in need of subsidiary protection and who is outside the country of which the foreigner is a citizen, because he or she needs

protection due to an external or internal armed conflict or due to other severe conflicts in the home country has a well-founded fear of being exposed to serious abuse (Chapter 4, section 2 a, first paragraph of the Aliens Act).

This applies regardless of whether it is the country's authorities that are responsible for the foreigner running this risk or whether the foreigner runs such a risk through actions by individuals and cannot be assumed to be offered effective protection that is not of a temporary nature. When assessing whether protection is offered, only protection provided by the State or by parties or organisations that control all or a significant part of the State's territory is taken into account (Chapter 4, section 2 a, second paragraph of the Aliens Act).)

En utlänning ska förklaras vara flykting om han eller hon omfattas av definitionen om vem som ska anses vara flykting – flyktingstatusförklaring (4 kap. 3 §första stycket UtlL).

En utlänning ska förklaras vara alternativt skyddsbehövande om han eller hon omfattas av definitionen om vem som ska anses vara alternativt skyddsbehövande – alternativ skyddsstatusförklaring (4 kap. 3 a § första stycket UtlL).

En utlänning ska förklaras vara övrig skyddsbehövande om han eller hon omfattas av definitionen om vem som ska anses vara övrig skyddsbehövande – övrig skyddsstatusförklaring (4 kap. 3 a §andra stycket UtlL).

För en flykting eller statslös får utfärdas en särskild passhandling för resor utanför Sverige – resedokument (4 kap. 4 §UtlL).

(A foreigner must be declared a refugee if he or she is covered by the definition of who is to be considered a refugee – refugee status declaration (Chapter 4, section 3, first paragraph of the Aliens Act).

An alien must be declared to be in need of subsidiary protection if he or she is covered by the definition of who is to be considered to be in need of alternative protection – alternative protection status declaration (Chapter 4, section 3a, first paragraph of the Aliens Act).

A foreigner must be declared to be otherwise in need of protection if he or she is covered by the definition of who is to be considered to be otherwise in need of protection – otherwise protection status declaration (Chapter, section, 3a, second paragraph of the Aliens Act).)

Om uppehållstillstånd inte kan ges på annan grund får tillstånd beviljas en utlänning om det vid en samlad bedömning av utlänningens situation föreligger sådana synnerligen ömmande omständigheter att han eller hon bör tillåtas stanna i Sverige. Vid bedömningen ska utlänningens hälsotillstånd, anpassning till Sverige och situation i hemlandet särskilt beaktas (5 kap. 6 §första stycket UtlL).

(If a residence permit cannot be granted on other grounds, a permit may be granted to a foreigner if, in an overall assessment of the foreigner's situation, there are such particularly distressing circumstances that he or she should be allowed to stay in Sweden. During the assessment, the foreigner's state of health, adaptation to Sweden and situation in the home country must be particularly taken into account (Chapter 5, section 6, first paragraph of the Aliens Act).)

För barn får uppehållstillstånd enligt första stycket beviljas om omständigheterna är särskilt ömmande (5 kap. 6 §andra stycket UtlL).

(For children, a residence permit according to the first paragraph may be granted if the circumstances are especially distressing (Chapter 5, section 6, second paragraph of the Aliens Act). [This paragraph was implemented in 2014 – The author's remark])

Migrationsdomstolens bedömning

xxx

(The migration court's assessment)

xxx

HUR MAN ÖVERKLAGAR, se bilaga 1 (DV 3110)

(HOW TO APPEAL, see appendix 1(DV 3110))

XX

Titel
I avgörandet har även nämndemännen aa, bb och cc deltagit.
Föredragande i målet har varit föredragande
juristen/förvaltningsrättsnotarien ee

(Title

The judges aa, bb and cc also participated in the decision.

The reporting clerk in the case has been the clerk/administrative law clerk ee)