

# 8. Vulnerability and Discrimination: The State's Responsibility towards Asylum-Seeking Children's Right to Health and Care to Prevent Discrimination against Children

Fredrikke Fjellberg Moldenæs

**Abstract** Reports show that many unaccompanied asylum-seeking children above 15 years of age struggle and are vulnerable. This chapter investigates whether caregiving for these children in Norway constitutes discrimination against them. Further, I ask whether the understanding of children's unique vulnerability is reflected in the legislation concerning unaccompanied asylum-seeking children 15–18 years of age – or whether the state is rather creating a vulnerable situation for them.<sup>1</sup>

**Keywords** unaccompanied asylum-seeking children | health | discrimination | caregiving | vulnerability

## 8.1 INTRODUCTION

### 8.1.1 Starting Point

In 2023, 504 unaccompanied children sought asylum in Norway on the basis of protection<sup>2</sup>; cf. the Norwegian Immigration Act sec. 28.<sup>3</sup> While waiting for an

1 This chapter is based on my ongoing PhD project about children's right to health and care at UiT The Arctic University of Norway.

2 UDI, Asylsøknader fra enslige mindreårige etter søknadsmåned og statsborgerskap (2023). See <https://www.udi.no/statistikk-og-analyse/statistikk/asylsoknader-fra-enslige-mindrearige-etter-soknadsmaned-og-statsborgerskap-2023/> (accessed March 7, 2024).

3 Act 15 May 2008 no. 35 om utlendingers adgang til riket og deres opphold [The Norwegian Immigration Act].

answer to whether or not the child is qualified for protection as a refugee, the child has a right to care from the state; see Arts. 3 and 22(2) CRC.<sup>4</sup> Children who are not accompanied by their caregivers are often considered to be the most vulnerable among refugees.<sup>5</sup> In this chapter, I intend to highlight the connection between the Norwegian Immigration Act's regulation of caregiving for unaccompanied children above 15 years of age and the state's responsibility for securing all children's right to care, development and health, in accordance with, among others, Art. 24, Art. 22(2), Art. 20, Art. 6, Art. 3, Art. 2 CRC and the Norwegian Constitution.<sup>6</sup> UDI<sup>7</sup> is responsible for the daily care of unaccompanied children living in asylum centres (see the Norwegian Immigration Act sec. 95 (2)), not, as is the case for other children under the care of the state, the Child Welfare Authority. For over 20 years, questions have been raised about whether the regulation of care for asylum-seeking children above 15 years of age in Norway represents discrimination against these children's right to care.<sup>8</sup> Over the years, the CRC Committee<sup>9</sup> has, in its concluding observations to Norway's periodical reports, expressed concern about the situation of unaccompanied asylum-seeking children<sup>10</sup> in Norway,

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4 United Nations Convention on the Rights of the Child of 20 November 1989 (hereinafter CRC).

5 See, among others, Ilse Derluyn, Valesca Lippens, Tony Verachtert, Willy Bruggeman, Eric Broekaert, "Minors Travelling Alone: A Risk Group for Human Trafficking?" *International Migration*, vol. 48(4) (2010): 164–185; Tammy Bean, Ilse Derluyn, Elisabeth Eurelings-Bontekoe, Eric Broekaert and Philip Spinhoven, "Comparing Psychological Distress, Traumatic Stress Reactions, and Experiences of Unaccompanied Refugee Minors with Experiences of Adolescents Accompanied by Parents," *The Journal of Nervous and Mental Disease*, vol. 195(4) (2007): 288–297. Also, The European Court of Human Rights, sitting as a Grand Chamber 4 November 2014, *Tarakhel v. Switzerland* sec. 119, and *Popov v. France*, 19 January 2012 sec. 91.

6 Kongeriket Norges Grunnlov 17 May 1814 [The Norwegian Constitution].

7 The Norwegian Directorate of Immigration (hereinafter UDI).

8 See Recommendation from the Parliamentary Committee no. 92 (2002–2003) Innstilling til Odelstinget fra justiskomiteen om lov om endring i menneskerettsloven mv. (innarbeiding av Barnekonvensjonen i norsk lov), 13. From recent years, see among others: Silje Sønsterudbråten, Guri Tyldum and Magne Raundalen, "Et trygt sted å vente Omsorgspraksiser på asylmottak for enslige mindreårige," Fafo-report 2018:5; Norges nasjonale institusjon for menneskerettigheter, *Omsorg for enslige mindreårige asylsøkere*, Temarapport NIM-R-2016-003, 2016; Malin Namdal, "Utsettes enslige asylbarn på mottak for diskriminering i strid med FN's barnekonvensjon?," *Lov og Rett*, vol. 54(2) (2015): 87–105.

9 The UN Committee on the Rights of the Child (hereinafter CRC Committee).

10 Hereinafter unaccompanied children.

including that children 15 years of age and older may not receive the same quality of care as those under 15 years of age.<sup>11</sup>

### 8.1.2 Research Questions

The main question in this chapter is whether the Norwegian Immigration Act sec. 95(2) represents a breach of the child's right to not be discriminated against following Art. 2 and 22(2) CRC.

To answer this question, I ask what constitutes the differences in care and why Norwegian legislation distinguishes between children under and over 15 years of age and between unaccompanied children and other children. Setting aside residence status, what is the difference between an unaccompanied asylum-seeking child and a child in need of help from a child welfare institution? Further, I ask how these differences are justified by the state and whether the justification is proportionate.

Another question is whether the understanding of children's unique vulnerability is reflected in the legislation concerning unaccompanied children 15–18 years of age. Bringing vulnerability into the legal discussion could be a way of securing equality and justice by achieving a more realistic view of the legal subject and those responsible for ensuring equality. Is the state meeting the child's unique vulnerability, or is it rather creating a vulnerable situation for asylum-seeking children above 15 years of age?

### 8.1.3 Structure

In Section 8.2 I will give an account of the legal and theoretical framework forming the basis for the discussions in Section 8.3, focusing on the right to health, care, and protection against discrimination. I will highlight the connection between human rights for children and the concept of vulnerability, including how the child is seen as a vulnerable subject and how this is reflected in both national and international legislations concerning children's rights. Further, I look briefly into vulnerability as a theoretical framework for working towards better conditions for

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11 UN Committee on the Rights of the Child: *Concluding Observations on the Fifth and Sixth Periodic Reports of Norway*, CRC/C/NOR/CO/5-6 (July 8, 2018), paragraphs 31 and 32, 4 July 2018. Other committees have expressed similar concerns; see Recommendation from the Parliamentary Committee no. 344 L (2020–2021) *Innstilling fra kommunal- og forvaltningsskomiteen om Endringer i utlendingsloven (lovfesting av omsorgsansvaret for enslige mindreårige som bor i asylmottak)*, 9.

children without stigmatising them. In Section 8.3 there follows an explanation of the national regulation regarding care for asylum-seeking children above 15 years of age in Norway and the legislation's impact on children's well-being. Lastly, I will discuss whether the national law discriminates against asylum-seeking children above 15 years of age, followed by a conclusion in Section 8.4.

## 8.2 LEGAL AND THEORETICAL FRAMEWORK

### 8.2.1 The Right to Health and Care

The state is obligated to secure the child's right to health and care. In Norway, the child's right to health and care can be interpreted from both sec. 104 of the Constitution and various binding conventions to which the Norwegian state is a signatory, most importantly Art. 24, Art. 22(2), Art. 20, Art. 6, Art. 3, Art. 2 CRC and Art. 12 ICESCR.<sup>12</sup> According to the Constitution sec. 104(2), the child's well-being shall be the fundamental consideration in any act or decision affecting the child. In accordance with sec. 104(3) the state shall pave the way for the child's development, preferably within their own family. The duty to secure the child's economic, social, and health-related safety is stated in connection with the state's responsibility for the child's development; see sec. 104(3).

Every child has a right to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health, often described as the right to health; see Art. 24 CRC. Health is understood as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."<sup>13</sup> Even though the state's obligations to ensure the child's health are determined by the state's resources, the state is obligated to secure the right to care and health equally for every child within the state's jurisdiction; see Art. 24(1), 4 and Art. 2(1) CRC.

The right to health is understood by the UN Committee on Economic, Social and Cultural Rights and the CRC Committee as including a wide range of

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12 The International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (hereinafter ICESCR).

13 Among others, the "Preamble to the Constitution of the World Health Organization" as adopted by the International Health Conference, New York, 19–22 July, 1946, signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, 100), entry into force 7 April 1948. "Health" in Art. 24 CRC is to be understood likewise, see UN Committee on the Rights of the Child, *General Comment no. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)*, CRC/C/GC/15, (April 17, 2013), para. 3 and 4.

socio-economic factors that promote conditions leading to a healthy life.<sup>14</sup> The CRC Committee interprets children's right to health as including:

a right to grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health through the implementation of programs that address the underlying determinants of health.<sup>15</sup>

This implies that the child's right to health is closely connected to the child's right to caregiving, including how the child's vulnerability is affected by its surroundings. Seen from a different point of view, caregiving is important for ensuring the child's right to survival and development as stated in Art. 6(2) CRC. The child's right to caregiving follows from several articles in the CRC – most notably the state's obligation to secure the child's right to protection and caregiving necessary for the child's well-being, in accordance with Art. 3(2). The fulfilment of the child's right to well-being depends on the institutions around the child, including the presence of caring adults.

Children temporarily or permanently deprived of their family environment, as unaccompanied children are, shall be entitled to special protection and assistance provided by the state, and alternative care for such a child shall be provided; see Art. 20 CRC. Further, the state shall take appropriate measures to ensure that a child who is seeking refugee status or considered a refugee receives appropriate protection and humanitarian assistance in the enjoyment of rights set forth in the CRC or in other human rights or humanitarian instruments; see Art. 22(1) CRC. Art. 22(2) establishes that in cases where no parents can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of their family environment for any reason, such as other children under the care of the state.

### 8.2.2 Children's Special Protection Against Discrimination

According to sec. 98 of the Constitution, all are equal before the law, and no human shall be exposed to arbitrary or disproportionately unequal treatment. The principles of equality before the law and non-discrimination are central human rights

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14 UN Committee on Economic, Social and Cultural Rights, *General Comment no. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4 (August 11, 2000), para. 4, and CRC/C/GC/15, para. 4 and 5.

15 CRC/C/GC/15, para. 2.

principles representing a fundamental claim for equality, justice, and respect for human dignity.<sup>16</sup>

The central assessment for deciding whether a treatment is discrimination under sec. 98 is whether the treatment is unequal and, if so, whether such unequal treatment is either arbitrary or disproportionate.<sup>17</sup> In other words, sec. 98 protects against any arbitrary or disproportionately unequal treatment of anyone within the state's jurisdiction and not merely discrimination affecting specific people, or the rights given by the Constitution.

As a State Party, Norway is also responsible for respecting and ensuring every right set forth in the CRC for each child within its jurisdiction without discrimination of any kind; see Art. 2(1) CRC. According to Art. 2(1) CRC, the differential treatment of children must not be based on the grounds of, among others, race, national, ethnic, or social origin, birth, or other status. Further, it must not impair the enjoyment of the child's rights; see Art. 2(1) CRC.<sup>18</sup> The CRC Committee has expressed that

... [a]ny differential treatment of migrants shall be lawful and proportionate, in pursuit of a legitimate aim and in line with the child's best interests and international human rights norms and standards. Similarly, States parties should ensure that migrant children and their families are integrated into receiving societies through the effective realization of their human rights and access to services in an equal manner with nationals.<sup>19</sup>

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16 Doc. 16, Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven, avgitt 19 Desember 2011 page 143. Children are entitled to respect for their human dignity, see sec. 104 (1) (1), and as UDHR states, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world", see the Universal Declaration of Human Rights (1948) Preamble. Much has been written about the concept of human dignity, among others, Henriette Sinding Aasen and Mette Harlev, "Human Rights Principles and Patient Rights," in *Health and Human Rights*, 2<sup>nd</sup> edition, *Global and European Perspectives*, eds. Brigit Toebes, Mette Harlev, Aart Hendriks, Katharina Ó Cathaoir, Janne Rothmar Herrmann and Henriette Sinding Aasen (Intersentia, 2022), 53–57.

17 Doc. 16 (2011) page 150.

18 See, among others, Bruce Abramson, *A Commentary on the United Nations Convention on the Rights of the Child. Article 2. The Right of Non-Discrimination* (Leiden: Brill Nijhoff, 2008), 19.

19 United Nations, *Joint General Comment no. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and no. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration*, CMW/C/GC/73-CRC/C/GC/22 (November 16, 2017), para. 22.

The Human Rights Committee has stated that if the criteria for the differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate under the Covenant, then the differentiation is not considered discrimination.<sup>20</sup> At the same time, the Committee emphasises that “any distinction, exclusion, restriction or preference which is based on any ground” mentioned in the Convention and “which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms” is considered discrimination in the eyes of the Committee.<sup>21</sup> From this, one could argue that not all unequal treatment is considered discrimination, but the differential treatment must at least be legitimate and proportionate.<sup>22</sup>

Art. 2 of the CRC is similar to other non-discrimination acts in international law.<sup>23</sup> This similarity could be interpreted as the CRC giving the same amount of protection against discrimination as the other conventions. On the other hand, the CRC could also be interpreted as giving children special protection against discrimination, implying that some specific actions could be seen as discrimination against children even if the same acts might not be seen as discrimination against adults. The preface to the CRC states “that childhood is entitled to special care and assistance”, and “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection”.

Further, the state must sometimes take special actions to ensure that every child receives the same opportunities. As the CRC preamble highlights, the States Parties signing the Convention are *recognising* that “in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration”. This could apply to children coming alone to Norway as refugees.

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20 UN Human Rights Committee, *General Comment no. 18: Non-discrimination* (November 10, 1989), para. 13.

21 UN Human Rights Committee, *General Comment no. 18: Non-discrimination* (November 10, 1989), para. 7.

22 See also, among others, Kirsten Sandberg, “Barnekonvensjonens vern mot sammensatt diskriminering,” in *Like rettigheter – ulike liv. Rettslig kompleksitet i kvinne-, barne- og innvandringsperspektiv*, eds. Anne Hellum and Julia Köhler-Olsen (Oslo: Gyldendal, 2014), 69–149, 69.

23 Such as the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) Art. 14, International Covenant on Civil and Political rights (1966) Art. 2(1), and International Covenant on Economic, Social and Cultural Rights (1966) Art. 2(2). All of them protect against discrimination of any kind on the basis of listed statuses, but also other statuses, affecting the rights set forth in the Convention.

To summarise, the CRC is built on the idea that children need protection, and this could be an argument for giving children special protection against harmful acts such as discrimination. Bearing in mind the importance of care for the child's development and health, and the special situation of being a child, different treatment of unaccompanied children and other children in Norway might have more severe consequences than different treatment of adults. Discrimination of children could occur on different levels, including between children and adults, between children and youths, and between children and children.<sup>24</sup> Moreover, discrimination is not only a result of an act against an individual; it can also result from underlying structures in society.<sup>25</sup> All legislative measures affecting refugee children should in my opinion therefore focus more on the subjects' status as children rather than on their status as refugees.

Further, the principles of the Convention shall be viewed in connection with each other. Each child's right not to be discriminated against is one of the four general principles of the Convention.<sup>26</sup> As stated in Art. 6, States Parties shall ensure to the maximum extent possible the development of the child, and, as stated in Art. 3(1), in all actions concerning the child, the best interests of the child shall be a primary consideration. It could be argued that unequal treatment of children affecting their rights in the CRC is unlikely to be in the best interests of the child and, in many cases, will likely not be good for the child's development. The CRC Committee has also stated that "discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child".<sup>27</sup>

### 8.2.3 Children's Unique Vulnerability

There are certain pitfalls of labelling people as vulnerable, including, among others, the risk of stigma and paternalism.<sup>28</sup> When labelling individuals or a group

24 Samantha Besson, "The Principle of Non-Discrimination in the Convention on the Rights of the Child," *The International Journal of Children's Rights*, vol. 13 (2005): 433–461, 445.

25 Frøydis Heyerdahl, "Retten til ikke-diskriminering," in *Barnekonvensjonen, Barns rettigheter i Norge 4 utgave*, eds. Njål Høstmælingen, Eli Saga Kjørholt and Kirsten Sandberg (Universitetsforlaget, 2020), 34–53.

26 UN Committee on the Rights of the Child, *General Comment no. 1 (2001) on the Aims of Education*, CRC/GC/2001/1, (April 17, 2001), para. 6.

27 CRC/GC/2001/1, para. 10.

28 Pointed out by, among others, Alexandra Timmer and Lourdes Peroni, "Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law," *International Journal of Constitutional Law*, vol. 11(4) (2013): 1056–1085, 1057.



of people as vulnerable, one might ask who is defining the other's vulnerabilities. Asylum-seeking children are labelled as part of a vulnerable group, but do they consider themselves vulnerable? Despite these pitfalls, I use the concept of vulnerability because the use of the word *vulnerability* in different settings has grown in recent years, including in connection with human rights, and is therefore of interest.<sup>29</sup> Further, as I will explain in the following, it could be in the child's best interest that the state acknowledge their vulnerability.

One way to potentially avoid applying the concept of vulnerability in a stigmatising way would be to consider every human as vulnerable and dependent. This view is based on the vulnerability theory presented by Martha A. Fineman. Fineman understands vulnerability as "a universal, inevitable, enduring aspect of the human condition".<sup>30</sup> According to Fineman, we are all vulnerable.<sup>31</sup> Being vulnerable is a part of being human, and human vulnerability arises in the first place from "our embodiment".<sup>32</sup> Moreover, in addition to the universal, biological, and constant nature of human vulnerability, vulnerability is also to be understood as complex, particular, varied, and unique at the individual level.<sup>33</sup>

In other words, we are all differently situated, and the theory calls attention to the fact that differences arise from the individual's experiences within societal institutions and relationships over the life course, which are "embedded" in webs of social and political structures.<sup>34</sup> As Jonathan Herring writes, all people are vulnerable and dependent on each other, and health is found in our relationships, not our selves.<sup>35</sup> In addition, the state must be responsive to its own central role in contributing to or maintaining vulnerability at the individual level. This theory has been developed over many years, in numerous articles by Fineman and others,

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29 See, among others, Timmer and Peroni, "Vulnerable Groups," 1056–1085, or Daniel Bedford and Jonathan Herring, eds., *Embracing Vulnerability: The Challenges and Implications for Law* (Routledge, 2020).

30 Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law & Feminism*, vol. 20(1) (2008): 8.

31 In agreement with, among others, Jonathan Herring, "Are Children More Vulnerable Than Adults?," in *Vulnerability, Childhood and the Law*, ed. Jonathan Herring (Springer Cham, 2018): 27–46, 27.

32 Martha Albertson Fineman, "Equality, Autonomy, and the Vulnerable Subject in Law and Politics," in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, eds. Martha Albertson Fineman and Anna Gear (London: Routledge, 2013), 13–28, 20.

33 Fineman, "Equality, Autonomy," 13–28, 21.

34 Fineman, "Equality, Autonomy," 13–28, 22.

35 Jonathan Herring, "Health as Vulnerability; Interdependence and Relationality," *The New Bioethics*, vol. 22 (2016): 18–32, 21.

and the theory in its entirety is beyond the scope of this chapter.<sup>36</sup> For the purposes of this chapter, the most important elements of the theory are the views that all humans have in common the conditions of vulnerability and dependency and that the state has a responsibility to address this vulnerability.

However, while every human is vulnerable, children are vulnerable in a unique way, as they are dependent on care from adults to survive and develop in a healthy way.<sup>37</sup> Human rights can be seen as a protection of every human's vulnerability; at the same time, some people are seen as in need of special care and protection; see Art. 25 UDHR.<sup>38</sup> Children are often considered vulnerable and in need of protection, and legal measures have been taken to protect children as vulnerable subjects.<sup>39</sup> Children's unique vulnerability is used as an argument for the presence of a separate section in the Constitution safeguarding children's rights; see sec. 104.<sup>40</sup> As Lucinda Ferguson states, "children are not just more vulnerable, but uniquely vulnerable in their relationships within their families and society more generally".<sup>41</sup>

36 The list of scholars using vulnerability theory in connection with or as an alternative to a human rights approach is long. Here are some of them: Aysel Küçüksu, "Fineman in Luxembourg: Empirical Lessons in Asylum Seeker Vulnerability from the CJEU," *iCourts Working Paper Series* no. 286 (2022), 6; or Francesca Ippolito, *Understanding Vulnerability in International Human Rights Law* (Edition Scientifica, 2020); Daniel Bedford and Jonathan Herring, eds., *Embracing Vulnerability: The Challenges and Implications for Law* (Routledge, 2020); Alexandra Timmer, "A Quiet Revolution: Vulnerability in the European Court of Human Rights," in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, eds. Martha Albertson Fineman and Anna Grear (London: Routledge, 2013), 147–170; Alexandra Timmer, Moritz Baumgärtel, Louis Kotzé and Lienneke Slingenberg have also pointed towards the potential and pitfalls of the vulnerability concept in Alexandra Timmer, Moritz Baumgärtel, Louis Kotzé and Lienneke Slingenberg, "The Potential and Pitfalls of the Vulnerability Concept for Human Rights," *Netherlands Quarterly of Human Rights*, vol. 39(3) 2021; Alexandra Timmer and Lourdes Peroni have also examined the concept of vulnerable groups while approaching the case law of ECtHR; see Timmer and Peroni, "Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law," *International Journal of Constitutional Law*, vol. 11(4) (2013): 1056–1085. Further, Mikaela Heikkilä, Hisayo Katsui and Maija Mustaniemi-Laakso have, in an article about disability and vulnerability, studied vulnerability as a tool within human rights with a comparative approach to the vulnerability theory by Fineman; see Mikaela Heikkilä, Hisayo Katsui and Maija Mustaniemi-Laakso, "Disability and Vulnerability: A Human Rights Reading of the Responsive State," *The International Journal of Human Rights*, vol. 24(8) (2020): 1180–1200.

37 See, among others, Lucinda Ferguson, "An Argument for Treating Children as a 'Special Case,'" in *Philosophical Foundations of Children's and Family Law*, eds. Elisabeth Brake and Lucinda Ferguson (Oxford University Press, 2018).

38 The Universal Declaration of Human Rights 10 December 1948 (hereinafter UDHR).

39 See, among others, The Preamble to the CRC.

40 Doc. 16 (2011), 186.

41 Ferguson, "An Argument for Treating Children as a 'Special Case,'" 23.

Even though all humans are vulnerable and children are not necessarily more vulnerable than others, one might still use this idea of children's unique vulnerability. As Ferguson mentions, treating children as a special case could be a way of implementing equal consideration.<sup>42</sup>

Herring has proposed three unifying elements which capture a core notion of vulnerability. This could be of help in acknowledging that while all humans are vulnerable and face similar risks, people are differently situated, resulting in different opportunities and responses to risk.<sup>43</sup> According to his definition, P is vulnerable if P (1) "faces a risk of harm", (2) "does not have the resource to be able to avoid the risk of harm materializing", and (3) "would not be able to adequately respond to the harm if the risk materialized".<sup>44</sup> Using this definition on asylum-seeking children could demonstrate why they are in need of more follow-up from the country they arrive in as refugees.

Unaccompanied children face a risk of harm because they are without caretakers; they may be seeking to escape war, poverty, or other hardships and/or facing uncertainty; and they are all young humans in their early years.<sup>45</sup> These children do not necessarily have the resources to be able to avoid the risk of harm materialising due to a variety of reasons, two of them being lack of social support from adults in the host country and their natural transition from childhood to adulthood.<sup>46</sup> Further, they would not necessarily be able to adequately respond to the harm if the risk materialised, because they are waiting for residence in a foreign country without their primary caregivers.<sup>47</sup> As an example, NIM<sup>48</sup> points towards research showing that unaccompanied children living in asylum centres seem to be in need of a great amount of care and continuous observations while their asylum case is under evaluation.<sup>49</sup>

42 Ferguson, "An Argument for Treating Children as a 'Special Case,'" 41.

43 Jonathan Herring, "What Is Vulnerability?," in *Vulnerability, Childhood and the Law*, ed. Jonathan Herring (Springer Cham, 2018), chapter 2.6 Proposed Definition.

44 Jonathan Herring "What Is Vulnerability?," chapter 2.6 Proposed Definition.

45 See, among others, Tine K. Jensen, Ane-Marthe Solheim Skar, Elin Sofia Andersson and Marianne Skogbrott Birkeland, "Long-Term Mental Health in Unaccompanied Refugee Minors: Pre- and Post-Flight Predictors," *European Child and Adolescent Psychiatry*, vol. 28 (2019): 1671–1682, 1672.

46 Jensen, Solheim, Andersson and Birkeland, "Long-Term Mental Health," 1671–1682, 1672 with further references.

47 Norges nasjonale institusjon for menneskerettigheter, *Omsorg for enslige mindreårige asylsøkere*, Temarapport 2016, NIM-R-2016-003, 4.

48 The Norwegian National Human Rights Institution (Norges nasjonale institusjon for menneskerettigheter) (hereinafter NIM).

49 NIM-R-2016-003, 29.

However, a core notion of vulnerability would be more precisely used in an individual child's situation, as Herring implies. For asylum-seeking children, differences might occur not only based on age, gender, background, and capabilities but also based on the different types of residence status given to them in Norway and whether they are accompanied or alone.<sup>50</sup> An intersectional approach to the child's situation is necessary if we are to find out which specific risks of harm the particular child is facing, in order to reduce those risks.<sup>51</sup> For instance, several studies indicate that girls are more at risk for developing PTSD than boys.<sup>52</sup> Research also indicates that high rates of resilience are reported among unaccompanied refugee minors, and not all of them develop mental health or somatic problems.<sup>53</sup> Despite differences, when an unaccompanied asylum-seeking child arrives in Norway, the Norwegian state is responsible for the child's well-being. The child is labelled as vulnerable and has likely suffered traumatic experiences.<sup>54</sup> It could be argued that this vulnerability comes from the child's situation, including how the child is treated by the responsible state.<sup>55</sup>

### 8.3 THE NATIONAL REGULATION OF THE CARE TO ASYLUM-SEEKING CHILDREN ABOVE 15 YEARS OF AGE

#### 8.3.1 How Care for Asylum-Seeking Children in Norway Is Regulated

The Norwegian Child Welfare Act<sup>56</sup> applies to all children living in Norway, including refugees (see sec. 1-2(2)). This means that the Child Welfare Service is responsible for ensuring that all children living under conditions that could harm their health and development receive timely help, caregiving, and protection

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50 See, among others, Jensen, Solheim, Andersson and Birkeland, "Long-Term Mental," 1671–1682, 1672.

51 For intersectional theory, see, among others, Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color," *Stanford Law Review*, vol. 43(6) (1991): 1241–1299.

52 Jensen, Solheim, Andersson and Birkeland, "Long-Term Mental Health," 1671–1682, 1672 with further references.

53 Jensen, Solheim, Andersson and Birkeland, "Long-Term Mental Health," 1671–1682, 1672 with further references.

54 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 1.

55 This is also highlighted in decisions from the European Court of Human Rights, as mentioned in Alexandra Timmer and Lourdes Peroni, "Vulnerable Groups," 1056–1085.

56 Act 18 June 2021 no. 97 om barnevern (barnevernsloven, bvl., hereinafter the Norwegian Child Welfare Act).

(see the Child Welfare Act as mentioned in sec. 1-1). Children have a right to necessary measures in accordance with sec. 1-6.

UDI is responsible for the caregiving of all unaccompanied children living in asylum centres in Norway.<sup>57</sup> The asylum centres exercise that caregiving for those over 15 years of age (see the Norwegian Immigration Act sec. 95(2)). Bufetat<sup>58</sup> is responsible for the caregiving of unaccompanied asylum-seeking children, children with refugee status, and children given provisional collective protection, if they are below the age of 15 (see the Norwegian Child Welfare Act sec. 11-1). This has been the case since 2008, when the responsibility for unaccompanied children below the age of 15 was transferred from the immigration authority to the Child Welfare Authority.<sup>59</sup>

In principle, UDI is mainly responsible for children between 15–18 years of age, and these are therefore the only children in Norway without anyone with parental responsibility whose care is not the responsibility of the Child Welfare Authority.<sup>60</sup> Still, the Child Welfare Act is meant as a safety net for those above 15 years of age as well. In practice, this is not necessarily the case, as the Child Welfare Service is experiencing a lack of resources.

According to the Child Welfare Act, the child welfare institution shall give the child staying at an institution justifiable care and necessary treatment (see sec. 11-2(2) and sec. 10-1). The caregiving centres for unaccompanied children below 15 years of age are obligated to give the same level of care and rights to unaccompanied children as to other children living in other child welfare institutions (see sec. 11-5).

The regulation of the care given to those under UDI's responsibility is called *Omsorgsforskriften*.<sup>61</sup> It follows from this regulation that the care given to children living in asylum centres should be justifiable (see *Omsorgsforskriften* sec. 1). In other words, it is the same wording as for those living in caregiving centres, except that treatment and therapy are not included in the responsibility for care at asylum centres.<sup>62</sup>

57 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 2.

58 Barne-, ungdoms- og familieetaten (the Office for Children, Youth and Family Affairs, hereinafter Bufetat).

59 Draft Resolution no. 28 (2007–2008) Om lov om endringer i lov 17. juli 1992 nr. 100 om barneverntjenester mv. (Omsorgen for enslige mindreårige asylsøkere inntil bosetting eller retur).

60 Recommendation from the Parliamentary Committee no. 344 L (2020–2021), 4.

61 FOR-2021-05-12-1520. om omsorgen for enslige mindreårige som bor i asylmottak (hereinafter *Omsorgsforskriften*).

62 Draft resolution no. 82 (2020–2021) Endringer i utlendingsloven (lovfesting av omsorgsansvaret for enslige mindreårige som bor i asylmottak, 7.

According to the Ministry of Justice and Public Security, justifiable care at asylum centres means providing a simple but acceptable offering.<sup>63</sup> Stays in asylum centres are marked by temporality and are only intended to last for a limited period of time, which can affect the care provided at the centres.<sup>64</sup> This is also one of the arguments behind why there could be some differences in the care provided to those in asylum centres compared to other children living in institutions.<sup>65</sup> It is following settlement in municipalities that the most important follow-up of the children must take place.<sup>66</sup> The asylum centres must still ensure that the children receive necessary follow-up and are given good care and a child-friendly environment during their stay at the asylum centres.<sup>67</sup> Justifiable care includes meeting basic needs such as food, clothing, and housing; ensuring safety; setting boundaries; and providing fellowship and activities.<sup>68</sup> Further, other requirements for asylum centres, such as their physical design, staffing, individual follow-up, input from the children, activities, etc., are intended to ensure that proper care is provided.<sup>69</sup>

One might ask whether different regulations of “justifiable care” in, respectively, the Child Welfare Act and Omsorgsforakrften lead to different understandings of “justifiable care” within the child welfare institutions and asylum centres. The law does not necessarily state that there should be a different understanding, but the different systems have the potential to lead to differences in practice. For the scope of this chapter, I will not look further into the understanding of “justifiable care” and whether the different regulations of the concept lead to different understandings of the content of the term.

### 8.3.2 Differences in the Care Provided and Vulnerability

In this part, I will look further into some of the differences in care for asylum-seeking children above 15 years of age compared to those under 15 and other children under the state’s care. What constitutes the differences in care? Is the state meeting the child’s unique vulnerability, or is the state rather creating a vulnerable situation for asylum-seeking children above 15 years of age? To find out what constitutes the differences in care, I will point out some findings from two inspections at asylum centres in Norway from the last two years. The findings

63 Draft resolution no. 82 (2020–2021), 18.

64 See Recommendation from the Parliamentary Committee no. 344 (2020–2021), 7–8.

65 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 7–8.

66 Draft resolution no. 82 (2020–2021), 7.

67 Draft resolution no. 82 (2020–2021), 7.

68 Draft resolution no. 82 (2020–2021), 7.

69 Draft resolution no. 82 (2020–2021), 18.

support the criticism of Norway from, among others, the CRC Committee, which has expressed concern about what it claims are “(s)ignificant variations among reception centers in terms of living conditions, such as access to adequate food and nutrition.”<sup>70</sup> Further, the CRC Committee is concerned about reports of children in reception centres being frequently absent from school and often suffering from mental health issues resulting in self-harm.<sup>71</sup> Other reports from Norway indicate similar observations of children’s health and well-being at the asylum centres.<sup>72</sup> Their situation seems to be characterised by temporality, precariousness, and lack of caregiving.<sup>73</sup>

According to the Immigration Act sec. 95(3), the County Governor shall supervise that the care provided to unaccompanied minors living in reception centres is exercised in accordance with the Immigration Act and associated regulations. Inspections at the centres and institutions are important for figuring out whether the care that is provided meets the standards given by the law and the needs of children. As of February 2024, there have only been two inspections by the County Governor at asylum centres where unaccompanied children live. Independent inspections by the County Governor became a legal obligation in 2022.<sup>74</sup> Therefore, it is difficult to interpret certain practices based solely on inspections. It is remarkable that there has been no legal basis for conducting inspections at asylum centres until recently, as it is an important guarantee for the legal protection of children who live at the centres.

In contrast, inspections at child welfare institutions and care centres have been conducted by the County Governors for many years (see the Child Welfare Act sec. 16-7(a) and sec. 17(3)(2)).<sup>75</sup> Thus, in child welfare institutions there is a good level of standardisation for concluding whether the caregiving is justifiable or not.

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70 CRC/C/NOR/CO/5-6, para. 31d.

71 CRC/C/NOR/CO/5-6, para. 31e.

72 See, among others, Berit Berg and Kristian Rose Tronstad, eds., *Levekår for barn i asylsøkerfasen* (Trondheim: NTNU Samfunnsforskning, 2015); Sønsterudbråten, Tyldum and Raundalen, “Et trygt sted å vente”; NOAS, Redd Barna and Norsk Folkehjelp, “Hvert år må jeg søke på nytt: Enslige mindreårige som får begrenset oppholdstillatelse fordi de ikke kan legge frem pass som dokumentasjon på identitet” (Oslo: NOAS 2020), chapter 7.

73 Among others, Namdal “Utsettes enslige asylbarn.”; NIM-R-2016-003; Sønsterudbråten, Tyldum and Raundalen, “Et trygt sted å vente”; NOAS, Redd Barna and Norsk Folkehjelp “Hvert år må jeg søke på nytt.”

74 See FOR-2022-06-26-1193. Regulation om tilsyn med omsorgen for enslige mindreårige som bor i asylmottak.

75 See FOR-2022-12-16-2272. Regulation om tilsyn ved tjenester og tiltak til barn i barnevernsinstitusjoner m.m. (tilsynsforskriften). Previously FOR-2003-12-11-1564. Regulation om tilsyn ved barn i barnevernsinstitusjoner for omsorg og behandling (repealed).

The latest report concerning the situation at child welfare institutions in Norway is based on more than 2,000 institutional inspections in 2020 and 2021.<sup>76</sup> The general assessment of the County Governors is that many children receive good care and that the institutions try to facilitate safe and caring measures.<sup>77</sup> Nevertheless, there are also aspects of concern, such as more children and young people perceiving the institution as unsafe.<sup>78</sup> Further, some County Governors consider that the institutions face challenges in providing children and young people with sufficient security.<sup>79</sup>

The two inspections at the asylum centres led to the conclusion that the centres did not provide justifiable care to the children living there.<sup>80</sup> Neither of the centres had enough staff with sufficient expertise to provide proper care for the children, which is a violation of Omsorgsforskriften sec. 7 and sec. 2. According to the County Governor, none of the children at Kongsvinger asylum centre had their own contact person whom they knew, in accordance with Omsorgsforskriften sec. 7 (3).<sup>81</sup> Also, at Toten asylum centre, several young people said that they neither knew the name of their representative nor knew who their special contact at the centre was.<sup>82</sup>

Further, the County Governor believed one of the asylum centres did not treat the unaccompanied minors considerately and with respect for the children's integrity; see Omsorgsforskriften sec. 3 and sec. 2.<sup>83</sup> Among other things, the young people described a fear of being expelled from the country if they did not do as expected and a fear of consequences if they complained about staff.<sup>84</sup> The County

76 Helsetilsynet, *Oppsummering av statsforvalters tilsyn med barnevernsinstitusjoner i 2020 og 2021 (2023)* chapter 8, [https://www.helsetilsynet.no/publikasjoner/rapport-fra-helsetilsynet/2023/oppsummering-av-tilsyn-med-barnevernsinstitusjoner-et-tilstandsbilde/8avsluttende-oppsummering-og-forslag-til-utvikling?b=toc\\_785836#toc\\_785836](https://www.helsetilsynet.no/publikasjoner/rapport-fra-helsetilsynet/2023/oppsummering-av-tilsyn-med-barnevernsinstitusjoner-et-tilstandsbilde/8avsluttende-oppsummering-og-forslag-til-utvikling?b=toc_785836#toc_785836) (last accessed March 7, 2024).

77 Helsetilsynet, *Oppsummering av statsforvalters tilsyn*, chapter 8.

78 Helsetilsynet, *Oppsummering av statsforvalters tilsyn*, chapter 8.

79 Helsetilsynet, *Oppsummering av statsforvalters tilsyn*, chapter 8.

80 See Statsforvalteren i Oslo og Viken, *Rapport fra tilsyn ved Toten asylmottak, avdeling EMA 17.12.2022*. <https://www.helsetilsynet.no/tilsyn/tilsynsrapporter/oslo-og-viken/2022/toten-asylmottak-avdeling-ema-tilsyn-med-omsorgen-for-enslige-mindreaarige-2022/> (last accessed November 13, 2023) and Statsforvalteren i Oslo og Viken, *Rapport fra tilsyn ved Kongsvinger mottak 14.02, 15.02 og 17.02.2023*. <https://www.helsetilsynet.no/tilsyn/tilsynsrapporter/oslo-og-viken/2023/kongsvinger-mottak-tilsyn-2023/> (last accessed November 13, 2023).

81 Statsforvalteren i Oslo og Viken, *Rapport fra tilsyn ved Kongsvinger mottak 14.02, 15.02 og 17.02.2023*, chapter 5.

82 Statsforvalteren i Oslo og Viken, *Rapport fra tilsyn ved Toten asylmottak, avdeling EMA 17.12.2022*, chapter 3.

83 Ibid., chapter 4 and chapter 5.

84 Ibid., chapter 4.



Governor points out that many young people reported living with insecurities that would be stressful to live with over time.<sup>85</sup> The inspection report states that the young people are in a particularly vulnerable life situation and have a great need to be met by caring and warm adults who treat them with respect. Therefore, being met with what the County Governor believes to be aggression, threats of eviction, and verbal abuse can inflict further trauma on them and contribute to a deterioration of an already very challenging life situation.<sup>86</sup>

An important part of ensuring the care of the children living at asylum centres is to ensure that the adults who work there are competent to provide the care to which the children are entitled. The law does not provide further information about what the competence of the adults working at asylum centres should be, and more detailed requirements for employees at asylum centres for unaccompanied minors are managed by UDI.<sup>87</sup> UDI has stricter requirements for staffing and follow-up of those living in asylum centres for unaccompanied minors than in ordinary asylum centres.<sup>88</sup> In comparison, the professionals working in the child welfare institution need to have at least a relevant bachelor's degree, regulated by law (see the Child Welfare Act sec. 10-16(21) and sec. 11-5). Research shows that the regulation of institutions through the Child Welfare Act and through the Immigration Act forms the basis for different perspectives on the follow-up of young people.<sup>89</sup> According to Berit Berg and others, the gap in availability of adults at asylum centres compared to other institutions under Bufetat means that children over the age of 15 do not have their care needs considered as well as other children under the state's care.<sup>90</sup>

There are also some cases in the media that reflect the current care situation for asylum-seeking children. NRK's investigations show that the National Police

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85 Ibid., chapter 4.

86 Ibid., chapter 4. Findings from this inspection also received some attention in media; see Astrid Gerds, Kari N. Tvilde, Stine Bækkeli, Silje Rognsvåg, and Maja M. Aarbakke, "Varslar om alvorlege funn på mottak for mindreårige asylsøkarar," NRK, January 18, 2023, <https://www.nrk.no/norge/statsforvaltaren-varslar-om-alvorlege-funn-etter-tilsyn-pa-asylmottak-1.16261918> (last accessed November 17, 2023).

87 Justis- og beredskapsdepartementet, *Rundskriv nr. GI-05/2023 (15/4259) – Instruks til Utlendingsdirektoratet om innkvartering av asylsøkere*, 2022. See Utlendingsdirektoratet, *Krav til drift av plasser for enslige mindreårige*, June 2023, 7, and Utlendingsdirektoratet, *Krav til drift av plasser for enslige mindreårige*, March 2022, 7.

88 UDI, *Asylmottak Regelverk for ulike typer asylmottak: Mottak og avdelinger for enslige mindreårige asylsøkere*. See *Asylmottak: Regelverk for ulike typer asylmottak – UDI* (last accessed December 15, 2023).

89 Berg and Tronstad, *Levekår for barn i asylsøkerfasen*, 135. This will also apply today, despite Norway adopting a new Child Welfare Act after this report.

90 Berg and Tronstad, *Levekår for barn i asylsøkerfasen*, 137–138.

Immigration Service notified almost 50 local child welfare services about more than 70 children and young people moving to private individuals when they arrived in Norway in 2023, and 18 of them were of particular concern.<sup>91</sup> UDI notified about 13 young people between the ages of 15 and 18 moving from asylum centres to private individuals in 2023, and in addition, Bufdir<sup>92</sup> notified about four children moving from caregiving centres in 2022 and 2023.<sup>93</sup> In the summer of 2023, a working group consisting of the Police Directorate, UDI, and Bufdir concluded that no one takes responsibility for providing care to asylum-seeking children who arrive alone and choose to live privately.<sup>94</sup>

This indicates that there are many unaccompanied minors in Norway who are without anyone with care responsibilities and that the regulations do not adequately safeguard the children's right to protection, despite them being in a particularly vulnerable position. This could be seen as the state creating a vulnerable situation for asylum-seeking children above 15 years of age.

### 8.3.3 Pro and Cons

In the preparatory work, it is stated that the differential treatment of unaccompanied minors under and over the age of 15, as well as those over the age of 15 and other children under the child welfare services, is reasonable and based on a legitimate purpose.<sup>95</sup> At the same time, it is stated that unaccompanied children above 15 years of age receive limited care and attention compared to both unaccompanied children below 15 and other children living in child welfare institutions.<sup>96</sup> The two reasons mentioned for providing less care to unaccompanied children from 15–18 years of age are that different age groups require different care needs and that the asylum centres have been designed to meet the needs of unaccompanied asylum-seeking children.<sup>97</sup> From the preparatory work it follows that the requirement for mapping and individual follow-up, including the right to participation, ensures that the individual needs of asylum-seeking children are secured at the

91 Eline Johnsen Helledal, Maja M. Aarbakke, Silje Rognsvåg, Ronald H. Fossåskaret and Anders Nøkling, "Politiet varslet: Jente skulle bo hos 'truende' mann med våpen," *NRK*, December 13, 2023, <https://www.nrk.no/vestland/80-asylbarn-har-flyttet-privat-uten-foreldre.-redd-barnafrykter-overgrep-og-menneskehandel-1.16603998> (last accessed January 11, 2024).

92 Barne-, ungdoms- og – familiedirektoratet (The Norwegian Directorate for Children, Youth and Family Affairs; hereinafter Bufdir).

93 Helledal, Aarbakke, Rognsvåg, Fossåskaret, Nøkling, "Politiet varslet."

94 Helledal, Aarbakke, Rognsvåg, Fossåskaret, Nøkling, "Politiet varslet."

95 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 5.

96 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 5.

97 Draft resolution no. 82 (2020–2021), 22–23.

asylum centres.<sup>98</sup> In the following I will look further into the arguments behind the differential treatment of asylum-seeking children above 15 years of age and other children under the state's care responsibility. The main questions are how the differences are justified by the state and whether the justification is proportionate.

One argument pointing towards UDI being the right institution to take care of refugee children is that UDI has years of experience of developing and operating reception systems specially adapted to unaccompanied minor asylum seekers.<sup>99</sup> Therefore, they are seen by the Ministry of Justice and Public Security and the Standing Committee on Local Government and Public Administration as the right institution to meet the needs of these children.<sup>100</sup>

Seen from a different point of view, one might ask what specific needs an unaccompanied asylum-seeking child might have that a child welfare institution cannot meet. The asylum centre shall only provide justifiable and necessary care and safety, not tender treatment or therapy. Bufdir has more experience in offering and following up on care for children living in institutions than UDI does. Perhaps the preparatory work is referring to the special situation for asylum-seeking children. One of the main differences between asylum-seeking children and other children in Norway is that asylum-seeking children are in a special situation because of the basis for their residence in the country. Could it be that the adults working at the asylum centres know more about the asylum system and rules related to the residence permits that apply to these children and can thus be a resource for the children in a special legal situation? Findings from one of the previously mentioned inspections suggest otherwise, at least at the asylum centre in question. According to the County Governor, several of the staff at Toten asylum centre had little or no knowledge of the asylum process, and as a result, the children did not receive sufficient information and guidance.<sup>101</sup>

Further, UDI has developed a reception system with detailed requirements for asylum centres related to staffing, competence among the staff, and providing justifiable care to the children, adapted to their needs.<sup>102</sup> According to the preparatory works, these requirements have improved the situation for asylum-seeking children living in asylum centres.<sup>103</sup> This argument implies that asylum-seeking children are

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98 Draft resolution no. 82 (2020–2021), 22.

99 As pointed out in Recommendation from the Parliamentary Committee no. 344 (2020–2021), 7.

100 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 6.

101 Statsforvalteren i Oslo og Viken, *Rapport fra tilsyn ved Toten asylmottak, avdeling EMA 17.12.2022*, chapter 4.

102 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 11.

103 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 11.

an exceptional group of children, with special and differential care needs than other children under the care of the state. In general, one might argue that children seeking asylum have different care needs than others living in the child welfare institutions. At the same time, they are not necessarily in need of less care, as stated. It should be specified in the preparatory works which dissimilar needs the Ministry of Justice and Public Security are referring to, as the right to care also applies to asylum-seeking children, and children unable to receive caregiving from their own family are considered particularly vulnerable.<sup>104</sup> It is rather clear that limited care and attention are not the same as differential care and attention.

Age is another argument for different treatment of children. Regarding the differential treatment between unaccompanied minors under and over the age of 15, it is assumed in the preparatory work that older children need less attention and continuous follow-up from adults than younger children do.<sup>105</sup> The preparatory work also mentions that older children need more time for themselves than younger children do, so that they can be better prepared for life as adults.<sup>106</sup>

It is not necessarily a breach of the state's obligations under the CRC to offer differential treatment based on different care needs, including age.<sup>107</sup> Research shows that care needs are different for those over the age of 15 than for those under the age of 15.<sup>108</sup> However, several of the consultative bodies pointed to research and experience indicating that young people have just as great a need for care and follow-up as younger children, and this includes asylum-seeking children over the age of 15.<sup>109</sup>

As an example, one consultation letter from an asylum centre for unaccompanied minors referred to their almost 30 years of experience working with unaccompanied minors, stating that most of the children aged 15–18 had experienced many traumatic events before, during, and after their escape to Norway.<sup>110</sup> Therefore,

104 As previously mentioned. See also Official Norwegian Reports 2016: 16 Ny barnevernsløst – Sikring av barnets rett til omsorg og beskyttelse attachment 4, 331.

105 Draft resolution no. 82 (2020–2021), 22.

106 Draft resolution no. 82 (2020–2021), 22.

107 See, among others, UN Committee on the Rights of the Child, *General Comment no. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6 (September 1, 2005), para. 18.

108 Sønsterudbråten, Tyldum and Raundalen “Et trygt sted å vente,” 55.

109 Draft resolution no. 82 (2020–2021), 19.

110 Consultation letter from Salangen municipality, *Sjøvegan asylmottak enslige mindreårige avdeling*, 05.03.2020. See <https://www.regjeringen.no/no/dokumenter/horing---forslag-til-endringer-i-utlendingsloven-og-forskriften-om-omsorgsansvaret-for-enslige-mindrearige-asylsokere-mellom-15-og-18-ar-i-mottak-mv/id2681080/?uid=4219ae3e-515e-40d5-815d-2a98fa56624e> (last accessed March 8, 2024).

the asylum centre believed it to be very important that employees had the competence to be able to uncover the needs of the individual child.<sup>111</sup> Their experience indicated that the centres need more adults, especially in the evening and on weekends.<sup>112</sup> Furthermore, they write in the consultation letter that the vast majority of children have challenges with their mental health, which is especially evident when they do not participate in activities, in the evening and at night.<sup>113</sup>

According to a report from Fafo<sup>114</sup>, young people in general have difficulties with their judgement, planning, self-awareness, abstraction, impulse control, and risk assessment, especially those who are subjected to severe pressure, stress, and the absence of a safe environment.<sup>115</sup> In order to make informed choices, they have a greater need to be looked after and for guidance than adults do.<sup>116</sup> A survey from 2015 showed that only 50% of young people in the asylum centres stated that they felt safe where they live, while over 90% of young people in the caregiving centres felt safe.<sup>117</sup> Furthermore, the survey shows that employees at asylum centres are concerned about lack of staffing and follow-up of unaccompanied minors and believe that these young people need a lot of follow-up to cope with their new everyday lives.<sup>118</sup> During the inspection at Toten asylum centre, the children themselves said that they want care and love, and many of them felt as if they did not have adults to talk to when they were sad and scared.<sup>119</sup>

From this, one might argue that young people above 15 years of age also have a great need for care from adults while living in the asylum centres. As Herring puts it, they face a risk of harm, they need the resources to be able to avoid that risk of harm materialising, and they would not be able to adequately respond to the harm if the risk materialised.<sup>120</sup> In other words, they need adults to talk to and a safe environment. This is not really reflected upon in the preparatory work, as

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111 Consultation letter from Salangen municipality, *Sjøvegan asylmottak enslige mindreårige avdeling*, 05.03.2020.

112 Consultation letter from Salangen municipality, *Sjøvegan asylmottak enslige mindreårige avdeling*, 05.03.2020.

113 Consultation letter from Salangen municipality, *Sjøvegan asylmottak enslige mindreårige avdeling*, 05.03.2020.

114 Fafo Research Foundation (Fafo).

115 Sønsterudbråten, Tyldum and Raundalen, "Et trygt sted å vente," 59.

116 Sønsterudbråten, Tyldum and Raundalen, "Et trygt sted å vente," 59.

117 Berg and Tronstad, *Levekår for barn i asylsøkerfasen*, 137.

118 Berg and Tronstad, *Levekår for barn i asylsøkerfasen*, 137.

119 Statsforvalteren i Oslo og Viken, *Rapport fra tilsyn ved Toten asylmottak, avdeling EMA 17.12.2022*, chapter 3.

120 Herring "What Is vulnerability?," chapter 2.6 Proposed Definition.

it only briefly refers to the fact that older children do not have as great a need for follow-up as those under the age of 15.

Another argument not specifically mentioned in the same context as UDI's capability to provide justifiable care and differential needs based on age is financial. Finances could be a reason behind the two different systems concerning the care of asylum-seeking children. A report from NIM states that they found no other publicly stated justification for the differential treatment other than budgetary reasons.<sup>121</sup> NIM's assumption that there were financial reasons why the responsibility for this group of children had not been transferred to the child welfare services is supported by statements made by former Minister of Immigration and Integration Per Sandberg to the Norwegian Parliament in 2017.<sup>122</sup> He pointed out that any decision to transfer responsibility for the care of unaccompanied minor asylum seekers 15–18 years of age to the child welfare services is assumed to have significant financial and administrative consequences that would not improve the situation in the asylum centres in the short term.<sup>123</sup> In the preparatory work, some of the members of the Standing Committee on Local Government and Public Administration also mention that transferring this responsibility to the Child Welfare Authority could trigger significant financial costs if more asylum-seeking children above 15 years of age were to come to Norway.<sup>124</sup>

However, budgetary considerations alone are not legitimate reasons for differential treatment of children under and over the age of 15. If such a consideration is behind the differential treatment, it is striking that it is not mentioned in the preparatory work alongside the other reasons.

## 8.4 CONCLUSION

One could argue that the preparatory work of the Act lacks thorough assessment and argumentation for why unequal treatment of unaccompanied minors 15–18 years of age does not constitute discrimination based on age and/or residence permit in the country. In the preparatory work, few references are given to research in the field of children and no references to conversations with

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121 NIM-R-2016-003, 26.

122 Letter from former Minister of Immigration and Integration Sandberg to the Standing Committee on Local Government and Public Administration 11. mai 2017, Recommendation from the Parliamentary Committee no. 474 (2016–2017) *Innstilling fra kommunal- og forvaltningskomiteen om representantforslag om bedre vilkår for enslige mindreårige asylsøkere*.

123 Letter from former Minister of Immigration and Integration Sandberg to the Standing Committee on Local Government and Public Administration (2017).

124 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 8.

unaccompanied minors consulting their opinion about their situation, in accordance with Art. 12 CRC. The lack of references to the situation for children living in asylum centres undermines the main reason that has been put forward for the unequal treatment of children, namely, that the services are adapted to meet the needs of this group. It does not appear to be legitimate because the evidence is not there. It is problematic that the state is not meeting the ongoing criticism from the CRC Committee and others concerning the situation for asylum-seeking children living in asylum centres with evidence to prove this criticism wrong.

In addition, there is other research showing that the provision of care as it is today does not support the well-being of the child, creating a vulnerable situation for the children living there. The findings from the two inspections at asylum centres for children 15–18 years of age support the findings from previous reports and surveys at asylum centres for unaccompanied minors.

To fulfil the state's national and international obligations, the institutions within the state must live up to the obligations provided by the Constitution, the CRC, and other human rights conventions. This implies that the state must meet the child's needs when the child is within the state's jurisdiction. The reasons given for the differential treatment of children within Norwegian jurisdiction as mentioned in this chapter could be viewed as illegitimate reasons for providing less care to some children than to others who are in need of care from the state, especially when all children are entitled to caregiving in an environment that is good for their health and development.

Therefore, I conclude that, following 22(2) and Art. 2 CRC, the state is discriminating against unaccompanied children 15–18 years of age. This does not necessarily imply that Bufdir should be responsible for caregiving to all children under the state's responsibility of care. Differential care systems could be in accordance with the state's obligations if that differential treatment is lawful and proportionate, is in pursuit of a legitimate aim, and is in line with the child's best interests and international human rights norms and standards, as the CRC Committee stated in 2017.<sup>125</sup> Today, this is not the case.

Further, the vulnerability approach implies that neither children nor humans in general shall be divided into groups but seen as vulnerable and dependent persons with different needs that the state shall meet. From this, one might extrapolate the idea not to focus on asylum-seeking children as a special group of children, but rather to look at them as young humans who need special protection and care. The welfare system, combined with human rights, could be an effective way of doing so, by meeting different needs rising from human vulnerability throughout the

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125 As previously mentioned, see CMW/C/GC73-CRC/C/GC/22, para. 22.

lifetime, for instance, by offering almost free healthcare and education. This idea of equality is rather clear; children have for many years been given special protection in Norway in an attempt to ensure them equal opportunities. Perhaps that is why the gap between what is provided to most children compared to what the asylum-seeking-children above 15 years of age receive appears unethical.

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